

**TRAFFICKING IN PERSONS AND THE CANADIAN RESPONSE:
*LOOKING FOR A "VICTIM"***

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ABSTRACT

This dissertation looks at the concept of “trafficking in persons” and how it has been created, interpreted and utilized in the international sphere and in Canada. Using the approach of Critical Legal Pluralism (CLP), it examines the legal regulation of trafficking as being created through a bi-directional constitutive process, with paradigmatic conceptions of trafficking having a hand in creating regulation as well as being influenced by it. Through a review of data retrieved using a variety of qualitative methods as well as classic legal analysis, this dissertation explores the operation of various social actors and their effect on the determination of what trafficking *is*, and who is worthy of protection from it.

In Part One the international framework is outlined through a discussion of the creation of the dominant paradigm of trafficking and implementations of it. Chapter One traces the history of the anti-trafficking movement by looking at the development of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons*, and by examining the creation of dominant discourses around trafficking. Chapter 2 uses CLP to examine the influences of a variety of actors on the creation of these discourses and the repercussions the discourses have had on the implementation of anti-trafficking policies.

Part Two then turns to the Canadian context. In Chapter Three, classical legal methodologies are employed to discuss Canada’s obligations under international law with respect to trafficking, as well as the creation of definitions of trafficking in the Canadian legal regulatory context. Chapter Four then reviews data from Canada to discuss the ways in which various actors have been involved in the creation and operation of the dominant paradigm and how it in turn affects the operation of trafficking-related legal constructs. Ultimately, it is found that due to the influence of the dominant paradigm and the motivations that aid in its operation, programs and policies framed under the rubric of “trafficking” necessarily fail to achieve meaningful redress for the groups they purport to benefit.

On this basis, an alternative approach is suggested to address phenomena currently being dealt with through anti-trafficking frameworks. A move is suggested away from a focus on “trafficking” to a sectoral approach, accounting for the complexities and histories of individuals subject to exploitative circumstances.

LIST OF ABBREVIATIONS

CATW	Coalition Against Trafficking in Women
CCRF	Canadian Charter of Rights and Freedoms
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CIC	Citizenship and Immigration Canada
CISC	Criminal Intelligence Service of Canada
CLP	Critical Legal Pluralism
CoE	Council of Europe
Convention	United Nations Convention Against Transnational Organized Crime
CRC	Convention on the Rights of the Child
DOJ	Department of Justice
EU	European Union
FGD	Focus Group Discussion
GAATW	Global Alliance Against Trafficking in Women
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IGOs	Intergovernmental Organizations
IHRLG	International Human Rights Law Group
ILO	International Labour Organization
IRPA	Immigration and Refugee Protection Act
NGOs	Non-Governmental Organizations
OSCE	Organization for Security and Cooperation in Europe
Protocol	Protocol to Prevent, Suppress and Punish Trafficking in Persons

RCMP	Royal Canadian Mounted Police
TiP Report	Trafficking in Persons Report
TRP	Temporary Residency Permit
TVPA	Trafficking Victims Protection Act
UDHR	Universal Declaration on Human Rights
UNGIFT	United Nations Global Initiative to Fight Human Trafficking
UNESCO	United Nations Education, Scientific, and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
USDOS	United States Department of State

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PROLOGUE

I came to this work after having spent nearly four years in Bosnia & Herzegovina and Kosovo, working with the United Nations and the Organization for Security and Cooperation in Europe on issues relating to gender-based violence and trafficking in persons. Upon my return to Canada in 2006, it seemed as though I was reliving those Kosovo years watching the anti-trafficking community here try to find its feet, as we had done several years before in the Balkans. What I witnessed was what I can only describe as a combination of reinventing the wheel and not learning from one's mistakes all rolled up into one.

Flattering as it was, the nearly wholesale importation into Canada of anti-trafficking methods we had developed in the Balkans seemed unlikely to work, given the vastly different geographical and political landscapes. And it spurred me to ask why we weren't accounting for these differences, hoping that this would explain why we still seemed to not be *getting anywhere* in combatting trafficking here, or so we kept getting told. So I set about on this research quest, as many others in Canada have done, to identify *how* we can best identify and help victims of trafficking in Canada. But what I heard through traveling across the country talking to people who had migrated, worked with migrants, worked as sex workers, provided assistance to sex workers, and many who did any combination or all of the above, was that the methods were perhaps not the problem. Maybe we were the problem. The challenge we needed to overcome to provide support to those who needed it, some told me, was the whole anti-trafficking project itself.

It is this question that spurred the study in this thesis. It grew out of concerns related to the framework within which anti-trafficking work is taking place and the utility of that framework in relation to its stated goals. It is hoped that this thesis provides a systematic review of what we've been doing in the anti-trafficking movement and why, while also suggesting alternative means for moving forward.

INTRODUCTION

For the past decade, reports detailing the plight of trafficked persons have become a regular occurrence in the international and Canadian media.^{1 2} Particularly in the context of migration, there are also a myriad of stories recounted by academics,³ non-governmental organizations (NGOs)⁴ and inter-governmental organizations (IGOs)⁵ drawing attention to the dangers and difficulties individuals can face when attempting to leave their home countries and work abroad. Most prominently featured are those stories detailing abuse within the context of migration and prostitution, where women and girls are lured or kidnapped and sexually exploited or had agreed to migrate to engage in sex work but were then confined, exploited and sexually abused.⁶

Exploitation in the course of other types of migrant labour has also captured media attention to some degree, beginning with the outrage and controversy surrounding the plight of 21 Chinese cockle pickers who drowned in Morecombe Bay in Lancashire in 2004.⁷ In the United Arab Emirates, journalists and migrant-worker advocates have brought to the world's attention the plight of construction workers from India, forced to relinquish their passports to employers while earning little or no money over and above their debt

¹ Each chapter begins with footnote numbers beginning at "1".

² See for example: Adrian Morrow, "Bringing Down Canada's Massive Human Trafficking Ring", *The Globe and Mail* (April 6, 2012) online: <http://www.theglobeandmail.com/news/national/how-canadas-massive-human-trafficking-ring-was-brought-down/article4098695/?page=all> and Adrian Morrow, "More Arrests Made in Massive Human Trafficking Ring", *The Globe and Mail* (July 13, 2012) online: <http://www.theglobeandmail.com/news/national/more-arrests-made-in-massive-human-trafficking-ring/article4415931/>.

³ Jayashri Srikantiah, "Perfect Victims and Real Survivors" (2007) 28 *Immigr. & Nat'lity L. Rev.* 741 at 742.

⁴ See for example: Amnesty International, "South Korea: Migrant workers treated as 'disposable labour'", online: <http://www.amnesty.org/en/for-media/press-releases/south-korea-migrant-workers-treated-%E2%80%98disposable-labour%E2%80%99-20091021>.

⁵ Rohit Malpani, *Legal Aspects of Trafficking for Forced Labour purposes in Europe*, online: International Labour Organization: http://www.ilo.org/sapfl/Informationresources/ILOPublications/WCMS_082021/lang-en/index.htm > at 6.

⁶ See for example an excerpt from International Organization for Migration, *Natalia's Story: Preventing Trafficking and Protecting Victims from Moldova*, online: <http://www.iom.int/jahia/jahia/activities/by-theme/regulating-migration/preventing-trafficking-and-protecting-victims-moldova/>:

Natalia, 33, was offered domestic work in a private house in Turkey by a friend of her partner. In May 2006, she flew to Istanbul where she was met at the airport by two men who took her to a village and forced her to provide sexual services. She was eventually discovered during a police raid and was arrested.

⁷ The Guardian, The Lessons of Morecombe Bay have not been learned, *The Guardian* (Feb 3, 2014) online: <http://www.theguardian.com/commentisfree/2014/feb/03/morecambe-bay-cockle-pickers-tragedy>.

payments.⁸ In Canada, our attention has been recently drawn to the exploitation of 19 Hungarian construction workers in Hamilton, Ontario who reported being forced to work long days with little or no pay, living in unsafe and unsanitary conditions in employer-provided housing, sometimes with little sustenance, and being required to file refugee claims and request social assistance benefits which were then taken by the employers.⁹ And recently a human trafficking conviction in Canada raised issues surrounding the exploitation of domestic labour in Canada and the difficulties faced therein.¹⁰ However, the focus still largely remains women being forced into prostitution and narratives of the gory details of their stories.¹¹

These stories often call for action, ostensibly to seek justice for those who have suffered exploitation in the context of migration and to prevent such atrocities from happening. However, the particular stories that are recounted in the media draw attention to the most extreme forms of exploitation and often focus on sexual exploitation of youth. This focus does little to assist in determining the best ways to address what is in fact an extremely complex and multi-faceted issue. The ways in which individuals migrate, the different sectors of work in which they become employed and their various histories and relationships with employers and third parties potentially impact the ways in which their needs can be adequately addressed. They may involve the assertion of numerous intersecting rights at international law, reliance on administrative measures related to work including occupational health and safety protections, access to collective bargaining, workers' compensation or other mechanisms, or the regularization of their immigration status in

⁸Migrant Forum in Asia, *The Plight of Migrant Workers in UAE*, online:

<http://www.mfasia.org/index.php?option=com_content&view=article&id=87:the-plight-of-indian-migrant-workers-in-uae&catid=4:india&Itemid=11>.

⁹ Adam McDowell and Mary Vallis – National Post, “Hungarians Treated Like Slaves: RCMP”, online: Immigration Watch <<http://www.immigrationwatchcanada.org/2010/10/09/hungarians-treated-like-slaves-rcmp/>>.

¹⁰ See Andrea Woo, “Trafficking conviction in Nanny’s case hailed as precedent-setting”, online: Globe and Mail : <<http://www.theglobeandmail.com/news/british-columbia/human-trafficking-conviction-in-nannys-case-hailed-as-precedent-setting/article12881196/>>.

¹¹ See for example the Underground Railroad: *Inspiration Series part 7*, online: <<http://www.theundergroundrailroad.ca/oneabolitionist/2010/05/the-inspiration-series-part-7-timea-nagy.html>>:

Nearly 11 years ago, Timea was brought over to Canada from her native Hungary seeking work. Met at the airport by 1 Canadian and 2 Hungarians, she was forced to work as an exotic dancer in a strip club. She was also forced to perform sexual services to clients, earning her captors exorbitant amounts of cash. Thoughts of escape were met with threats of her own death and/or the death of her mother. She escaped back to her home country, but was arrested for having a false passport. While in the custody of Hungarian law enforcement, Timea was raped for 8 hours. Those whom should have protected her simply carried on the cycle of slavery.

Canada. These complexities are rarely highlighted in discussions on how to provide redress for exploited migrants in Canada.

As a result of this media attention, various states including Canada have enacted anti-trafficking legislation and have been working to prevent trafficking, to prosecute traffickers and to rescue and/or repatriate trafficked persons. A significant mobilization of efforts has taken place around the issue of trafficking both internationally and domestically, and an enormous body of literature has emerged discussing definitions, approaches and the implementation of protections for trafficked persons. It is this mobilization and the legal activities designed to combat trafficking in persons in Canada around which this dissertation is centered. The overall goal is to interrogate the ways in which the Canadian legal system deems to protect particular groups of people who migrate in precarious ways¹² and to inquire into the effect of the use of dominant paradigms of “trafficking in persons” on determining the scope and extent of those protections.

As background to the forthcoming work, this introduction begins with a brief summary of the different kinds of academic literature generated on the phenomenon of trafficking in persons. It loosely categorizes the different approaches to writing about trafficking and the goals of the different bodies of literature. These categories include analysis of international and domestic legal protections of “trafficked” persons, empirical research on the nature and scope of trafficking in different regions, and discussions and critiques of the methods of anti-trafficking programming. In addition, there are some authors who have critiqued the use of the term “trafficking” itself. These authors point to ideological and political agendas behind anti-trafficking work and the negative consequences such work has had on various marginalized groups. It is within this last body of literature that this dissertation is situated. By investigating the international and Canadian contexts with respect to the use of the term “trafficking”, it uncovers the motivations behind much anti-trafficking work and some of the detrimental consequences that result. It responds, as do other works critiquing anti-

¹² For the purposes of this dissertation “precarious immigration status” is defined as any status that denies the individual the permanent right to remain in Canada or whose status depends on a third party such as a spouse or employer – taken from Anette Sikka, Katherine Lippel and Jill Hanley, “Access to Health Care and Workers’ Compensation for Precarious Migrants in Québec, Ontario and New Brunswick” (2012) 4(3) *McGill Journal of Law and Health* 203 at 207.

trafficking efforts, to the existing bodies of literature that seek to understand and address the phenomenon of trafficking or to document its existence.

As such, this introduction begins with a general review of the different types of literature and their approaches. It then turns to an outline of the project itself and its theoretical framework, including a review of Critical Legal Pluralism, the primary approach through which the data is analyzed. After this critical framework is discussed, we move to an overview of the methods used to gather the data supporting this work and the different sources used to generate that data. And lastly, it turns to an overview of the structure and general design of the dissertation as a whole.

A. SUMMARY OF LITERATURE

There has been a copious amount of writing on the issue of trafficking within the past decade, ranging from carefully crafted academic pieces to field reports by IGOs and NGOs to internet blogs written by concerned citizens and faith-based groups. While much of what can be found in mainstream public fora are simple “calls to action” to end trafficking in persons, which will be discussed below, the scholarly writing on trafficking can be loosely divided into three categories: works undertaking historical and legal analyses of trafficking-related texts and providing recommendations based on that analysis, those that aim to document the problem of trafficking through empirical research and provide both policy and further research recommendations based on their findings, and those that provide critical analyses of various types of anti-trafficking programming and activities.

i. Analysis of Legal Protections

The majority of analyses performed in relation to legal protections for “trafficked” persons, particularly within the past decade, have focused on the creation, implementation and drawbacks of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons*¹³ (Protocol). While other international documents that focus on gender, labour or migrant rights do

¹³ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, Nov. 15, 2000, GA Res. 55/25, Annex II, UN GAOR, 55th Sess, Supp. No. 49, at 53,, UN doc. A/45/49 (Vol. I)(2001), entered into force Dec. 25, 2003 (Protocol).

feature in the literature, the Protocol provides a focal point in most legal scholarship on trafficking. Thus the following section groups the literature on legal protections into distinct categories: ones that discuss the history of the Protocol, those performing more classical textual analyses of the Protocol itself, and those that discuss other forms of legal protection suitable for anti-trafficking work.

a. History of the Protocol

In the immediate aftermath of the Protocol's signing in 2000, a number of scholars wrote on the negotiations that took place to determine its language and the history that led to the creation of the document. Much of the scholarship in this area provides critical feminist analyses of the decisions made regarding the Protocol's language, with a particular focus on the two major sides of the debate over the Protocol's definition of "trafficking in persons".¹⁴ The debates hinge primarily on actors having different conceptions of prostitution: those who promote the wholesale abolition of prostitution through use of the Protocol¹⁵ (prohibitionists) and those who work to defend the rights of sex workers to safely engage in their trade¹⁶ (sex worker rights advocates).

American scholar and sex-worker rights activist Jo Doezema wrote several pieces on the groups of interested parties present at the negotiations to the Protocol and the political implications of their lobbying,¹⁷ as did legal scholars Gabrielle Simm,¹⁸ Barbara Sullivan from

¹⁴ Kate Sutherland, "Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade" 2004 (42) *Osgoode Hall Law Journal* 139 at 140.

¹⁵ See e.g., Kathleen Barry, *The Network Defines Its Issues: Theory, Evidence and Analysis of Female Sexual Slavery*, in *International Feminism: Networking Against Female Sexual Slavery* 32 (Kathleen Barry et al. eds., 1984) at 41; and Catharine A. MacKinnon, "Pornography as Trafficking, Speech at the Captive Daughters and the International Human Rights Institute of DePaul University Conference: Pornography: Driving the Demand in International Sex Trafficking" (2005) 26 *Mich. J. Int'l L.* 993.

¹⁶ See e.g. Jo Doezema, "Now You See Her, Now You Don't: Sex Workers at the UN Trafficking Protocol Negotiation" (2005) 14(1) *Social & Legal Studies* 61 and Kamla Kempadoo, "Introduction" in Kempadoo, Sanghera and Pattanaik, *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (Boulder: Paradigm Publishers, 2005).

¹⁷ Jo Doezema, *Now You See Her*, *ibid* and Jo Doezema "Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy" in Kamala Kempadoo and Jo Doezema, *Global Sex Workers: Rights, Resistance, and Redefinition* (New York: Routledge, 1998).

¹⁸ Gabrielle Simm, "Negotiating the UN Trafficking Protocol: Feminist Debates" (2004) 23 *Australian Yearbook of International Law* 135.

Australia,¹⁹ and Melissa Ditmore from the United States²⁰. Canadian authors Annalee Lepp²¹ and Kate Sutherland²² also outline the history of the anti-trafficking movement and the competing human rights discourses that played roles in the Protocol's negotiation. These various authors outline the history of the concept of trafficking, from its origins in the moral panic over the "white slave trade"²³ to its inclusion in international documents created prior to the Protocol²⁴ and the different types of concerns levied by various organizations and state parties.²⁵ Several of the authors are critical of the ways in which the negotiations took place, with underlying issues including the lack of obvious and legitimized participation of sex workers in the process²⁶ and the overall focus on crime control and border security over the protection of the rights of trafficked persons.²⁷

b. Positivist Approaches to Interpreting the Protocol

Another category of legal literature that emerged shortly after the drafting of the *Protocol* strives to describe the problem of trafficking, and explain and interpret the sometimes vague language and provisions of the *Protocol*. Legislators, government agencies, academics and service providers at this time needed guidance on the provisions of the *Protocol* themselves, and several legal scholars endeavoured to explain how they could be interpreted and used to address the phenomenon of trafficking in persons. Anne Gallagher²⁸ from Australia has played a significant role in this type of analysis by documenting the history of the *Protocol*,²⁹ but doing so primarily in order to parse the various elements in the definition,³⁰ provide

¹⁹ Barbara Sullivan, "Trafficking in Women" (2003) 5(1) *International Feminist Journal of Politics* 67.

²⁰ Melissa Ditmore, "Trafficking in Lives: How Ideology Shapes Policy" in Kempadoo et. al, *Trafficking and Prostitution Reconsidered*, *supra* note 16, 107-27.

²¹ Annalee Lepp, "Trafficking Women and the Feminization of Migration: The Canadian Case" (2002) 22(3/4) *Canadian Woman Studies* 90.

²² Sutherland, *supra* note 14.

²³ Jo Doezema, "Loose Women or Lost Women? The re-emergence of the myth of White Slavery in Contemporary Discourses of Trafficking in Women" (2000) 18(1) *Gender Issues* 23 at 24.

²⁴ Simm, *supra* note 18 at 143.

²⁵ Simm, *supra* note 18 at 148.

²⁶ Doezema, *Now You See Her*, *supra* note 16.

²⁷ Lepp, *Feminization of Migration*, *supra* note 21 at 93.

²⁸ See e.g. Anne Gallagher, "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis" (2001) 23(4) *Human Rights Quarterly* 975 and Elizabeth Defeis, "Women's Human Rights Violations and Sex Trafficking, Protocol to Prevent, Suppress and Punish Trafficking in Persons - A New Approach" (2004) 1 *ILSA J. Int'l & Comp. L* 485.

²⁹ See e.g. Gallagher, *Human Rights and the New UN Protocols*, *ibid* and Defeis, *ibid*.

³⁰ See e.g. Cynthia Shepherd Torg, "Human Trafficking Enforcement" (2006) 14 *Tul. J. Int'l & Comp. L* 503 and Defeis, *supra* note 28.

interpretive devices for legislative frameworks,³¹ or to offer guidance for domestic implementation of the new document.³² Gallagher and others performing this kind of analysis sometimes criticize the Protocol for not containing strong enough provisions for criminal prosecution³³ or victim assistance measures.³⁴ However, the anti-trafficking project overall is assumed to be a positive measure in addressing migrant exploitation.

c. Implementation Activities/Approaches

A third category of legal literature discusses the *Protocol* in terms of its implementation in domestic legal systems. This includes work by legal scholars who focus on the history of the anti-trafficking movement in order to discuss the different approaches currently being undertaken to address the problem. Three main approaches to implementing the Protocol are regularly identified in this category of legal literature: the law enforcement approach, the human rights approach and the labour approach.³⁵ These approaches are not mutually exclusive and may overlap considerably,³⁶ with other concerns such as migration and globalization also playing a role in determining implementation measures.³⁷ Authors of writings in this category also incorporate documents other than the Protocol, including instruments related to the protection of gender rights, labour rights and migrant rights among others.

1. Law Enforcement

Given that the Protocol was created as an adjunct to an international convention related to organized crime, and given that law enforcement measures in the Protocol are mandatory, whereas victim assistance and other measures are not, the law enforcement approach has generally been identified as the primary means of implementation.³⁸ Several authors have addressed best practices in using this approach, highlighting methods of prosecution and

³¹ See Anne Gallagher, *The International Law of Human Trafficking* (New York: Cambridge University Press, 2010).

³² See e.g. M Mattar, "Incorporating the Five Basic Elements of a Model Anti-trafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention" (2006) 14 *Tul. J. Int'l & Comp. L* 357.

³³ Defies, *supra* note 28 at 491.

³⁴ Kelly Hyland, "The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children" (2001) 8(2) *Human Rights Brief* 30.

³⁵ See for example Elizabeth Brunch, "Models Wanted: The Search for an Effective Response to Human Trafficking" (2004) 40 *Stan. J. Int'l L.* 1 at 4.

³⁶ *Ibid.*

³⁷ See for example Brunch, *supra* note 35 at 39.

³⁸ See for example Brunch, *supra* note 35 at 15.

potential legislative provisions. Many governmental and inter-governmental organizations such as the UN Office on Drugs and Crime (UNODC),³⁹ the Criminal Intelligence Service of Canada (CISC)⁴⁰ and the United States Department of State⁴¹ have also created documents that speak to methods of enforcement and prosecution of people traffickers. However, within legal academic scholarship, the manner in which such methods have been carried out has been consistently critiqued,⁴² as has the focus on law enforcement measures to the exclusion of human rights concerns.⁴³ While ostensibly upholding the need for law enforcement and prosecutorial responses to trafficking, those authors note the negative consequences that such measures can have when not applied in a manner that considers the rights of migrants or those engaged in sex work.⁴⁴

2. Human Rights

Other legal and non-legal academics advocate either jettisoning the law enforcement framework altogether, or fusing it with other approaches in order to ensure that the human rights of victims are made paramount in anti-trafficking activities. Some posit that the implementation of the law enforcement approach is, in practice, detrimental to upholding the human rights of victims of the crime. These authors, including Claudia Aradau⁴⁵ in Europe, and Elizabeth Brunch,⁴⁶ Diana Haynes⁴⁷ and Jayashri Srikantiah⁴⁸ in the U.S., critique the law enforcement focus on identifying victims who fit particular models of innocence,

³⁹ UN Office on Drugs and Crime (UNODC), *Toolkit to Combat Trafficking in Persons*, October 2008, 2nd edition, online: UNODC <http://www.unodc.org/documents/human-trafficking/HT_Toolkit08_English.pdf>.

⁴⁰ Criminal Intelligence Service Canada, *Organized Crime and Domestic Trafficking*, online: CSIC <http://www.cisc.gc.ca/products_services/products_services_e.html>. See also Yvon Dandurand, *Human Trafficking: Reference Guide for Canadian Law Enforcement* (University College of the Fraser Valley Press, Abbotsford, 2005) available online: dspace <<http://dspace.cigilibrary.org/jspui/bitstream/123456789/25529/1/Human%20Trafficking%20-%20Reference%20Guide%20for%20Canadian%20Law%20Enforcement.pdf?1>>.

⁴¹ See United States Department of State, *Trafficking in Persons Reports*, online: State.gov <<http://www.state.gov/g/tip/rls/tiprpt/>>.

⁴² See e.g. M.V. McCreight, "Smuggling of Migrants, Trafficking in Human Beings and Irregular Migration on a Comparative Perspective" (2006) 12 *European Law Journal* 106 and Anne Gallagher, "Developing an Effective Criminal Justice Response to Human Trafficking, Lessons from the Front Line" (2008) 18(3) *International Criminal Justice Review* 318.

⁴³ See e.g. Bernadette McSherry, "The Criminal Justice Response to Trafficking in Persons: Practical Problems with Enforcement in the Asia-Pacific Region" (2007) 19(3) *Global Change, Peace & Security* 205.

⁴⁴ *ibid.*

⁴⁵ Claudia Aradau, "Trafficking in Women – human rights or human risks" (2003) 22(3/4) *Canadian Woman Studies* 55 and Claudia Aradau, *Rethinking Trafficking in Women: Politics out of Security* (Palgrave MacMillan: NY, 2008).

⁴⁶ See Brunch, *supra* note 35.

⁴⁷ Dina Francesca Haynes, "(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act" (2007) 21 *Georgetown Immigration Law Journal* 337.

⁴⁸ Srikantiah, *supra* note 3.

while ignoring perhaps less sympathetic individuals or those not involved in the sex industry. This focus, they assert, has negative consequences for those who do not fit the paradigm of the pure and innocent woman driven by force into sexual slavery. Other authors within this group focus on accentuating the protection provisions in the *Protocol* and critiquing various law enforcement methods that place prosecution before protection of victims' rights. Audrey Macklin from Canada vehemently critiques the Canadian immigration practices and border enforcement practices for complicity in exploitative employment practices such as those perpetrated against exotic dancers,⁴⁹ and along with scholars such as Bernadette McSherry⁵⁰ from Australia and Kara Abramson⁵¹ and Janie Chuang⁵² in the U.S. strongly advocate the shifting of focus away from a law enforcement framework to one that promotes methods upholding the rights of trafficked persons.

3. Labour

Other authors such as Rohit Malpani with the International Labour Organization⁵³ (ILO), Lin Chew⁵⁴ from the Global Alliance Against Trafficking in Women (GAATW) and Jane Larson⁵⁵ and Shelley Case Inglis⁵⁶ from the U.S., as well as many non-legal scholars,⁵⁷ have worked to promote the labour framework as a primary means of addressing trafficking. They advocate a labour orientation towards anti-trafficking work by arguing for the inclusion of sex work in the discussion of labour rights⁵⁸ and by promoting the inclusion of non-sexual forms of exploitative labour in discussions around trafficking.⁵⁹ While technically all forms of exploitative labour are included in the definition of trafficking in the Protocol, these authors

⁴⁹ Audrey Macklin "Dancing Across Borders: 'Exotic Dancers,' Trafficking, and Canadian Immigration Policy" (2003) 37 *International Migration Review* 464.

⁵⁰ Bernadette McSherry and S.Kneebone "Trafficking in Women and Forced Migration: Moving Victims across the Border of Crime into the Domain of Human Rights" (2008) 12 *International Journal of Human Rights* 67.

⁵¹ Kara Abramson, "Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol" (2003) 44(2) *Harvard International Law Journal* 473.

⁵² Janie Chuang, "Beyond a Snapshot: Human Trafficking and the Politics of Labor Migration in a Globalized Economy" (2006) 13 *Ind. J. Global Leg. Stud.* 137.

⁵³ Malpani, *supra* note 5.

⁵⁴ Lin Chew, "Reflections by an Anti-Trafficking Activist" in Kempadoo et al, *Trafficking and Prostitution Reconsidered*, *supra* note 16.

⁵⁵ Jane Larson, "Prostitution, Labor and Human Rights"(2004) 27 *University of California Davis Law Review* 673.

⁵⁶ Shelly Case Inglis, "Expanding International and National Protections against Trafficking for Forced Labour using a Human Rights Framework" (2001) 7 *Buffalo Human Rights Law Review* 55.

⁵⁷ See for example Kathy Richards, "The Trafficking of Migrant Workers: What Are the Links Between Labour Trafficking and Corruption?"(2004) 42 *Int'l Migration* 147.

⁵⁸ Larson, *supra* note 55.

⁵⁹ Malpani, *supra* note 5.

contend that states generally focus on prostitution as the primary context of trafficking, and that states' have not sufficiently addressed the use of a labour framework as a potential strategy.

Additionally, within the labour approach to dealing with trafficking, a significant amount of scholarship has drawn attention to the links between trafficking and slavery, given the overwhelming association of the two in the worldwide media.⁶⁰ Kevin Bales writes extensively on slavery both in its historical and modern day context and focuses in particular on the relationship between concepts of “modern day slavery” and trafficking. Bales identifies cases and trends that could be considered manifestations of current day slavery, forced labour and debt bondage and discusses the potential use of anti-slavery documents in combating the problem.⁶¹ However, he and others such as Yasmin Rassam⁶² and Bridget Anderson⁶³ also interrogate the ways in which concepts of ownership and sale so commonly associated with the transatlantic slave trade may need to be retooled to adequately address the realities of trafficking in persons today.

d. Fusing Approaches

Ultimately, threading through most of these discussions of anti-trafficking frameworks is an acknowledgement that the current approaches are generally not working, and that a focus on law enforcement and criminalization to the exclusion of other issues has not sufficiently decreased trafficking worldwide. Among others, Elizabeth Brunch⁶⁴ and Grace Chan⁶⁵ explicitly advocate for the combining of all of the existing approaches into an integrated framework that includes the prosecution of offenders, protection of the rights of victims and

⁶⁰ See e.g. Nicholas D. Kristof, *A Woman. A Prostitute. A Slave.*, online: The New York Times <http://www.nytimes.com/2010/11/28/opinion/28kristof.html?_r=1&ref=human_trafficking>; Stephanie Holmes Trafficking: A very modern slavery, online: BBC News <<http://news.bbc.co.uk/2/hi/europe/7243612.stm>>.

⁶¹ See e.g. Kevin Bales, *Disposable People: New Slavery in the Global Economy* (UC Press: Berkeley, 1999) and Kevin Bales & Ron Soodalter, *The Slave Next Door: Human Trafficking and Slavery in America Today* (UC Press: Berkeley, 2009).

⁶² A. Yasmine Rassam, “International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach” (2005) 23 Penn St. Int'l L. Rev 809.

⁶³ Bridget Anderson, *Motherhood, apple pie and slavery: reflections on trafficking debates*, (2007)

COMPAS working paper WP-07-48, available online: COMPAS

<https://www.compas.ox.ac.uk/fileadmin/files/Publications/working_papers/WP_2007/Bridget%20Anderson%20WP0748.pdf>.

⁶⁴ Brunch, *supra* note 35.

⁶⁵ Grace Chang and Kathleen Kim, “Reconceptualizing Human Trafficking: New Directions and Perspectives from the Field” (2007) 3 Stanford Journal of Civil Rights and Civil Liberties 317.

strategies that ensure that migratory and labour rights are fully considered in the development of any anti-trafficking program.⁶⁶

ii. *Empirical Studies – Documenting the Problem*

Another significant body of literature on trafficking in persons reflects efforts by governmental, non-governmental and inter-governmental organizations to empirically document the scope and nature of trafficking in various regions. Because of the heavy involvement of service providers with individuals identified as trafficked, it is primarily these non-governmental and inter-governmental organizations that record data on types and scope of trafficking worldwide.

The Organization for Security and Cooperation in Europe (OSCE) has played a significant role in identifying and documenting cases of and legislation relating to trafficking in persons in Europe.⁶⁷ The International Organization for Migration (IOM) researches the topic through its *IOM Migration Research Series*, providing information from field studies, conferences and reports directly from individuals assisted through its trafficking programmes.⁶⁸ As mentioned above, the ILO also publishes extensively on trafficking for the purposes of forced labour, including sexual labour, documenting cases and trends worldwide.⁶⁹ However, the most widely recognized and quoted report documenting trafficking is the United States Department of State *Trafficking in Persons Report* (TiP Report), which it produces yearly.⁷⁰ This report compiles information on most countries of the world and rates the success of

⁶⁶ Helga Konrad, "The fight against trafficking in human beings from the European perspective" in Sally Cameron and Edward Newman eds, *Trafficking in Human\$: Social, Cultural and Political Dimensions* (NY: UN University Press, 2008).

⁶⁷ See OSCE, *Trafficking in Human Beings in Southeastern Europe*, online: OSCE <<http://polis.osce.org/library/f/3274/2220/OSCE-SRB-RPT-3274-EN-2220>> and OSCE *Human Trafficking for Forced Labour*, online: OSCE <<http://www.osce.org/cthb/31923>>.

⁶⁸ See e.g. IOM, *Migration Research Series No. 23: Migration, Human Smuggling and Trafficking from Nigeria to Europe*, online:

<http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/serial_publications/MRS_23.pdf>, IOM, *Migration Research Series No 29: Trafficking in Human Beings and the 2006 World Cup in Germany*, online:

IOM <http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/serial_publications/mrs_29.pdf> and IOM *Handbook on Direct Assistance to Victims of Trafficking in persons*, online: IOM

<http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/CT%20handbook.pdf>.

⁶⁹ Malpani, *supra* note 5 and *The Cost of Coercion, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Organization, 98th Session, Report I(B), 2009, online: ILO

<http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_106230.pdf>.

⁷⁰ USDOS, *TiP Reports*, *supra* note 41.

their anti-trafficking initiatives on a yearly basis. The statement from the 2004 report that annually “an estimated 600,000 to 800,000 men, women and children are trafficked across international borders”⁷¹ became a mainstay in introductions in anti-trafficking literature⁷² and is frequently quoted in media covering the issue of trafficking.⁷³

In Canada there have been several attempts to document cases and trends, from anti-trafficking NGOs providing regional information,⁷⁴ to large-scale independent academic projects such as Benjamin Perrin’s *Invisible Chains*.⁷⁵ The federal government has also initiated and funded a number of inquiries and studies into trafficking in Canada. The Standing Committee on the Status of Women prepared its own report to Parliament in 2007 on trafficking for the purposes of sexual exploitation,⁷⁶ and Status of Women Canada has supported academic research on trafficking of live-in caregivers and mail-order brides through the funding of Louise Langevin and Marie-Claire Belleau’s study,⁷⁷ and recently through support to the International Centre for Criminal Law Reform on documenting best practices in addressing trafficking⁷⁸. The Royal Canadian Mounted Police (RCMP) has also conducted studies assessing trafficking activities as related to organized crime and law enforcement challenges⁷⁹ and on potential connections between trafficking in persons and

⁷¹ United States Department of State, *Trafficking in Persons Report 2004*, online: State.gov <<http://www.state.gov/g/tip/rls/tiprpt/2004/34021.htm>>.

⁷² See e.g. Newman and Cameron, “Introduction”, in *Newman and Cameron, supra* note 66 at 5, Ellen L. Buckwalter et al., “Modern Day Slavery in Our Own Backyard” (2006) 12 *Wm. & Mary J. Women & L.* 403 at 403 and Rassam, *supra* note 62 at 811.

⁷³ See for example: Wikipedia, *Slavery*, online: <<http://en.wikipedia.org/wiki/Slavery>>, Sinn Fein, *Between 600,000 and 800,000 people trafficked every year – de Brun*, online: Sinn Fein <<http://www.sinnfein.ie/contents/5803?> January 2006>, and Covenant House: *Human Trafficking and Child Slavery Hurts Homeless Kids*, online: Covenant House <<http://www.covenanthouse.org/homeless-teen-issues/human-trafficking>>.

⁷⁴ See for example Toronto Network against Trafficking in Women, *Trafficking in Women including Thai Migrant Sex Workers in Canada*, (2002) Prepared for Status of Women Canada, online: MHSO <http://www.mhso.ca/mhso/Trafficking_women.pdf> and Latin American Coalition to End Violence Against Women and Children, “Coming to Dance, Striving to Survive: A Study on Latin American Migrant Exotic Dancers” online: LACEV <<http://www.muje.ca/wp-content/uploads/2013/09/ExoticDancers.pdf>>.

⁷⁵ Benjamin Perrin, *Invisible Chains: Canada’s Underground World of Human Trafficking* (Viking Canada, 2010).

⁷⁶ “Turning Outrage into Action to Address Trafficking for the Purpose of Sexual Exploitation in Canada” Report of the Standing Committee on the Status of Women, February 2007, 39th Parliament, 1st Session, Canada.

⁷⁷ L. Langevin, & M.-C. Belleau, *Trafficking in women: A critical analysis of the legal framework for the hiring of live-in immigrant domestic workers and the practice of mail-order marriage* (Ottawa: Status of Women Canada, 2000) online: Parliament.gc <<http://publications.gc.ca/collections/Collection/SW21-83-2001E.pdf>>.

⁷⁸ Nicole Barrett, *An Exploration of Promising Practices in Response to Human trafficking in Canada*, (2010) prepared for International Centre for Criminal Law Reform and Criminal Justice Policy, online: ICCLR <<http://www.icclr.law.ubc.ca/files/2010/An%20Exploration%20of%20Promising%20Practices%20in%20Response%20to%20Human%20Trafficking%20in%20Canada.pdf>> at 42.

⁷⁹ RCMP Criminal Intelligence, *Human Trafficking in Canada: A Threat Assessment*, (2010) executive summary online: <<http://www.rcmp-grc.gc.ca/pubs/ht-tp/htta-tpem-eng.htm>>.

runaway or missing children.⁸⁰ It has also supported independent research by Christine Bruckert and Colette Parent on perceptions of organized criminal involvement in trafficking.⁸¹ The Department of Justice Canada also provided support for and published Oxman-Martinez, Lacroix and Hanley's *Perspectives from the Canadian Community Sector*,⁸² detailing cases and perceptions of trafficking across Canada from the perspective of service providers. Public Safety and Emergency Preparedness Canada has supported research around trafficking for forced labour, completed by this author,⁸³ and has gone on to develop projects aimed at documenting trafficking of Aboriginal women and girls in Canada.⁸⁴

Each of the studies above acknowledges the difficulty in determining the accuracy of the numbers of incidents of trafficking in persons for a variety of reasons, including the clandestine nature of the activity,⁸⁵ victims' reticence to come forward due to fear of reprisal from traffickers,⁸⁶ and differences in what constitutes an incident of trafficking⁸⁷. However, the problem with the determination of numbers has itself been the source of analysis by a number of authors. Most predominantly, Frank Laczko and Elzbieta Gozdziaik edited a volume of IOM's journal *International Migration* that compiled several articles discussing the difficulties in conducting empirical research on trafficking. The difficulty of accessing first-hand information is a key issue for several of the authors in the volume, thus highlighting the further problem of having research findings based on a relatively small sample of trafficked persons.⁸⁸ They also highlight the short amount of time often allocated to collect data for studies on trafficking,⁸⁹ an assumed focus on trafficking for the purposes of sexual

⁸⁰ Marlene Dalley, *Hidden Abuse Hidden Crime*, prepared for Royal Canadian Mounted Police National Missing Children Service, online: CPC <<http://cpc.phippinc.com/cplib/pdf/74192.pdf>>.

⁸¹ Christine Bruckert and Colette Parent, *Trafficking In Human Beings and Organized Crime: A Literature Review*, prepared for: Research and Evaluation Branch, Community, Contract and Aboriginal Policing Services Directorate, Royal Canadian Mounted Police, online: RCMP < <http://www.rcmp-grc.gc.ca/pubs/ccaps-spcca/pdf/traffick-eng.pdf>>.

⁸² Jacqueline Oxman-Martinez, Marie Lacroix and Jill Hanley, *Victims of trafficking in persons: perspectives from the Canadian community sector*, (Ottawa: Department of Justice Canada, 2005), online: Department of Justice Canada <http://www.justice.gc.ca/eng/rp-pr/cj-jp/tp/rr06_3/rr06_3.pdf>.

⁸³ Anette Sikka, *Labour Trafficking in Canada: Indicators, Stakeholders, and Investigative Methods*, prepared for Public Safety and Emergency Preparedness Canada, online: Public Safety Canada <<http://www.publicsafety.gc.ca/lbrr/archives/cn63310954-eng.pdf>>.

⁸⁴ Don Butler, "Public Safety to study Aboriginal sex trade" online: Star Phoenix <<http://www2.canada.com/saskatoonstarphoenix/news/story.html?id=1b806ecd-2041-4a01-bf5b-d16e427e000b>>.

⁸⁵ Status of Women, *Outrage*, *supra* note 76 at 23.

⁸⁶ Barrett, *supra* note 78, at 10.

⁸⁷ Christine Bruckert and Colette Parent, *Literature Review*, *supra* note 81.

⁸⁸ Frank Laczko, "Introduction, in Data and Research on Human Trafficking"(2005) 43 (1/2) *International Migration* 5, at 8.

⁸⁹ *Ibid*, at 9.

exploitation,⁹⁰ and a lack of consensus on what should be studied under the rubric of trafficking⁹¹ as key difficulties in acquiring quality research on the topic.

iii. Critiques of the “Trafficking” paradigm

While several of the authors identified question the dominant approaches to the implementation of anti-trafficking initiatives and the research methods used to collect data on trafficking, they do, for the most part, assume that addressing the phenomenon of “trafficking in persons” is a worthwhile pursuit.⁹² However, a significant body of work has emerged that questions the entire trafficking paradigm and posits that the rhetoric of trafficking itself negatively affects the rights of all migrants.

In Canada, a number of scholars have critiqued the use of the term “trafficking”, its effect on migrants and the ways in which it interacts with agendas around sex and prostitution. James Hathaway and Sharryn Aiken feature prominently within this discourse, drawing attention to anti-trafficking work as being, in many ways, antithetical to upholding rights that should be accorded to migrants. They both contend that the trafficking paradigm has been used as a means to enhance border security measures and criminalize those involved in the migratory process, particularly those who are most vulnerable due to political or economic conditions.⁹³ Hathaway also speaks to the use of trafficking work as a way for states to carve out protections for specific groups of individuals who fit their current political agendas.⁹⁴ This privileging works to the detriment of the majority of migrants who are exploited in a variety of ways. Catherine Dauvergne echoes these arguments and speaks to the focus on trafficking as being a manifestation of the moral panic around illegal migration, and both she and Hathaway, among others, recommend removing the trafficking/smuggling distinction as

⁹⁰ Laczko, *supra* note 88, at 9.

⁹¹ Laczko, *supra* note 88, at 10.

⁹² See Anne Gallagher’s response to James Hathaway’s critique of anti-trafficking work: Anne T. Gallagher. “Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway” (2009) 49(4) *Virginia Journal of International Law* 789.

⁹³ James C. Hathaway “The Human Rights Quagmire of ‘Human Trafficking’” (2008) 49(1) *Va. J. Int’l L.* 1. and Sharryn Aiken, “Manufacturing ‘Terrorists’: Refugees, National Security, and Canadian Law” (2001) 19(3) *Refuge* 54.

⁹⁴ Hathaway, *Quagmire, ibid.*

a false binary that privileges certain individuals who fit the appropriate model of victimhood.⁹⁵

Nandita Sharma and Sunera Thobani, both Canadian scholars outside of the legal field, also speak to the destructive effects that anti-trafficking rhetoric has had on Canadian immigration.⁹⁶ Sharma focuses on the use of anti-trafficking paradigms to support the criminalization of migration as a regulating force, and the detrimental impact this framework (criminalization) has on migrants to Canada. Thobani, in a similar vein, views anti-trafficking work as being instrumental in upholding the sexism and racism inherent in Canadian immigration policies and solidifying them within the noble cause of combating trafficking in persons. Leslie Ann Jeffrey echoes Thobani's and Sharma's concerns with respect to the trafficking paradigm upholding traditional gender and racial identities, particularly with respect to migrant women in sex work,⁹⁷ as does Kamla Kempadoo in her recent compilation of critical essays on the issue, *Trafficking and Prostitution Reconsidered*⁹⁸, and Annalee Lepp both individually⁹⁹ and through her work with GAATW Canada.

While not specifically Canadian, GAATW has been instrumental in drawing attention to the negative effects that anti-trafficking initiatives have had on migrants and sex workers across the globe through its publication *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World*.¹⁰⁰ Jo Doezema,¹⁰¹ Penelope Saunders¹⁰² and Laura Agustin¹⁰³ from the U.S. have also been major figures championing critical views on anti-trafficking activities. They all speak to the disparity between what is perceived as trafficking within sex work and what sex workers themselves report and how those disparities serve to

⁹⁵ Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press: Cambridge, 2008).

⁹⁶ Nandita Sharma, "Anti-Trafficking Rhetoric and the Making of a Global Apartheid" (2005) 17(5) *NWSA Journal* 88 and 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" (2001) 19(4) *Refuge* 24.

⁹⁷ Leslie-Ann Jeffrey, "Canada and migrant sex-work: Challenging the 'foreign' in foreign policy" (2005) 12 *Canadian Foreign Policy Journal* 33.

⁹⁸ Kamla Kempadoo, *Introduction*, *supra* note 16.

⁹⁹ Lepp, *Feminization of Migration*, *supra* note 21.

¹⁰⁰ Global Alliance Against Trafficking in Women, *Collateral Damage: The Impact Of Anti-Trafficking Measures On Human Rights Around The World* (Thailand: Amarin Printing & Publishing Public Company Limited, 2007), online: GAATW <http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf>.

¹⁰¹ Doezema, *Forced to Choose*, *supra* note 17 and Doezema, *Loose Women*, *supra* note 23.

¹⁰² Penelope Saunders, "Traffic Violations: Determining the Meaning of Violence in Sexual Trafficking Versus Sex Work" (2005) 20(3) *Journal of Interpersonal Violence* 343.

¹⁰³ Laura María Agustín, *Sex at the Margins: Migration, Labour Markets and the Rescue Industry* (Zed Books: London, 2007).

undermine their voice. The rhetoric created thus affords sex workers fewer protections that are useful and relevant to them as rights-bearing individuals. The critiques levied by GAATW and these authors are similar to those put forth by the Canadian authors above, indicating a grave concern with the ways in which anti-trafficking work, which is portrayed as a mechanism assisting “victims”, has actually had the opposite effect. This dissertation builds on the remarkable work that has been done by these critical scholars.

B. PROJECT OVERVIEW

Building on the critical perspectives espoused by the aforementioned authors, this project is also designed to interrogate the ways in which trafficking paradigms and anti-trafficking work has supported or hindered various groups’ access to rights in Canada. The goal of this project is to expand on some of those critiques by discussing the ways in which Canada’s specific anti-trafficking project was created, and to use empirically-gathered data from a broad range of sources to document the particular ways in which this project supports or hinders various vulnerable groups’ access to rights in Canada, including migrants and sex workers, two of the key target groups in anti-trafficking programming. Ultimately this work recommends dispensing with the category of “trafficking” as a means for addressing issues related to migration and exploitation and instituting more appropriate responses to benefit individuals who may be suffering exploitation in Canada.

i. Theoretical Framework

This project analyses the effect of Canada’s anti-trafficking rhetoric and programming on vulnerable groups in Canada, and does so through the lens of Critical Legal Pluralism (CLP).¹⁰⁴ Legal Pluralist theory seeks to challenge particular presumptions about the value of positivist interpretations of written legislation and question the primacy of state-controlled legal instruments and adjudicative bodies as primary forces for social ordering

¹⁰⁴ See R.A. Macdonald and M.M. Kleinhaus, “What is a *critical* legal pluralism?” (1997) 12 *C.J.L.S.* 25; R.A. Macdonald, “Custom Made – for a non-chirographic critical legal pluralism” (2011) 26(2) *C.J.L.S.* 301; Peter Fitzpatrick, “Law and Societies” (1984) 22 *Osgoode Hall L. J.* 115.

and societal behaviour.¹⁰⁵ For example, many anti-trafficking scholars have exerted a significant amount of effort attempting to determine exactly what activities should or should not be considered “trafficking” in accordance with the elements of the Protocol. There are numerous discussions about whether or not all prostitution is in itself “exploitation”,¹⁰⁶ and whether someone could actually “consent”¹⁰⁷ to being involved in the sex trade. Scholars undertaking these endeavours presumably trust that the determination of these legal questions will ultimately provide clarity for action around preventing and prosecuting acts of trafficking. In contrast, CLP posits that social forces outside of formal legal structures have a significant impact on the legal regulation of any activity. According to CLP then strictly positivist interpretations that do not account for these forces cannot adequately describe the ways in which legal regulation is carried out.

Legal Pluralism is meant to stand in opposition to what legal pluralists sometimes refer to as “legal centralism”.¹⁰⁸ This notion is set up as the dominant conception of law in Anglo-American and continental European society, conceiving law “in terms of systems of normative ordering that have impermeable territorial and intellectual boundaries (positivism)”¹⁰⁹ or as

the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. To the extent that other, lesser normative orderings, such as the church, the family, the voluntary association and the economic organization exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state.¹¹⁰

In a version more cognizant of law as defined by those involved directly in the arena of legal practice, legal positivism (or centralism) may be characterized as the belief that “legal norms

¹⁰⁵ See Brian Tamanaha, “The Folly of the Social Scientific Conception of Legal Pluralism (1993) 20 *Journal of Law and Society* 192. See also Macdonald and Kleinans, *supra* note 104 at 20 and John Griffiths, “What is Legal Pluralism” (1986) 24 *J. Legal Pluralism & Unofficial L.* 1 on the concept of “legal centrism” at 3.

¹⁰⁶ See e.g. Simm, *supra* note 18 for an overview of the debates around prostitution and the Protocol.

¹⁰⁷ See Abramson, *supra* note 51 for an overview of the scholarship around “consent” and the Protocol.

¹⁰⁸ See Macdonald & Kleinans, *supra* note 104; Cf Griffiths, *supra* note 105.

¹⁰⁹ Macdonald & Kleinans, *supra* note 104 at 29.

¹¹⁰ Griffiths, *supra* note 105 at 3. He goes on to claim that:

In the legal centralist conception, law is an exclusive, systematic and unified hierarchical ordering of normative propositions, which can be looked at either from the top downwards as depending from [sic] a sovereign command (Bodin, 1576; Hobbes, 1651; Austin, 1832) or from the bottom upwards as deriving their validity from ever more general layers of norms until one reaches some ultimate norm(s) (Kelsen, 1949; Hart, 1961). In either case, while the various subordinate norms which constitute “law” carry moral authority because of their position in the hierarchy, the apex itself – the sovereign or the grundnorm or the rule of recognition – is essentially a given.

are those norms legitimately recognized as such by legal actors, including code provisions promulgated in advance of enforcement activities.”¹¹¹

In response to this centralist, monist and hierarchical definition of law, legal pluralists have posited a diffuse, pluralist and non-hierarchical approach to defining or describing legal processes. Legal Pluralism has focused generally on the

rejection of the State legal order as the lynch-pin of legal normativity, on resistance to the prescriptions of this State legal order, and on the reconciliation of multiple competing legal orders within a given social or geographic field. In theory, State law was no longer conceived of as a dominating normative force acting upon a passive society. Instead ... legal pluralists have hypothesized a variety of interacting, competing normative orders – each mutually influencing the emergence and operation of each other’s rules, processes and institutions.¹¹²

Legal Pluralism takes many different forms and there are significant debates within the field, which are not addressed in this project in great detail.¹¹³ Classical strands of Legal Pluralism tend to focus on pluralities of legal systems co-existing in one regime.¹¹⁴ Others focus on identifying social groups, communities or communal identities that work to regulate individuals’ behaviours outside of traditional legal bodies, positing that these forces are akin to legal regulation.¹¹⁵ More contemporary legal pluralists seek to describe “norm-generating communities”¹¹⁶ defining law as any social norm arising out of the activities of particular groups.¹¹⁷ Ultimately much of this theorizing still aims to answer the question “what is law”¹¹⁸ with the assumption that what is defined as “law” plays a primary role in social ordering within any given society.

¹¹¹ Brian Tamanaha, “An Analytical Map of Social Scientific Approaches to the Concept of Law”, (1995) 15(4) *Oxford Journal of Legal Studies* 501 at 524.

¹¹² Macdonald & Kleinmans, *supra* note 104 at 31.

¹¹³ See for example E. Ehrlich, *The Fundamental Principles of the Sociology of Law*, (Cambridge: Harvard University Press, 1936); B. Malinowski, *Crime and Custom in Savage Society*, (New York: Harcourt, Brace & Co., 1926); M. B. Hooker, *Legal Pluralism – An Introduction to Colonial and Neo-Colonial Laws* (Oxford University Press: Oxford, 1975). See also J. Vanderlinden, “Return to Legal Pluralism: Twenty Years Later” (1989) 28 *Journal of Legal Pluralism and Unofficial Law* 149, S.E. Merry, “Legal Pluralism” (1988) 22(5) *Law & Society Review* 869, Macdonald & Kleinmans, *supra* note 104 at 35 and Griffiths, *supra* note 105 at 5.

¹¹⁴ Griffiths, *supra* note 105 at 5. See most notably Ehrlich, *supra* note 113. See also John Gillisen, as quoted in Griffiths, *supra* note 105 at 10.

¹¹⁵ See for example S.F. Moore, “Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study” in S.F. Moore, ed., *Law as Process: An Anthropological Approach* (London: Routledge & Kegan Paul, 1978) 54.

¹¹⁶ Macdonald & Kleinmans, *supra* note 104 at 35.

¹¹⁷ See S.F. Moore, *Law and Social Change*, and *Law as Process*, *supra* note 115.

¹¹⁸ See Brian Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global” (2007) 30 *Sydney Law Review* 375 at 391.

In this project, a specific critical approach within legal pluralist thinking is taken. In this approach, CLP posits that social groups of various forms are in a dynamic dialogue with formal legal structures such that they constitute them as much as they are regulated by them.¹¹⁹ It assumes that legal instruments and implementation bodies do not act in isolation in determining the regulation of activities in ways that are thought of as “legal”. It posits rather that other social actors have equal impact on such regulation. Thus questions about different groups’ interests, behaviours and political motivations are taken to be equally important methods of inquiry as positivist “legal interpretation” when seeking to illuminate the legal regulation of any activity.

Critical legal theorists such as Roderick Macdonald emphasize the multi-directional nature of custom and norm creation, positing that formal norms and institutions are constantly transformed by “informal normative orders.”¹²⁰ Macdonald states that this transformation sometimes occurs in a self-conscious fashion, where legislators are aware of or purposely include limitations within their enactments such that the development of practice under the statute is deferred to individuals or communities.¹²¹ However, he suggests that in most cases legislators attempt to comprehensively regulate the social practices in the given field of action under scrutiny, but in fact “everyday social practices quickly encrust legislation with barnacles of interpretation and action.”¹²² This interpretation goes further than that which takes place through judicial decision-making processes, although he does note that case-law can work in tandem with legislation, both constituting and being constituted by legislative enactments. However, he goes on to point out that formal legal norms are shaped by a succession of individuals “interpreting and acting without the sanction of a formal normative institution to give meaning to their actions.”¹²³ He uses the examples of police discretion in

¹¹⁹ See Macdonald, *Custom Made*, *supra* note 104 at 22:

The making of custom is bidirectional: Implicit and informal norms are often explicitly made into customized legislative norms; and explicitly and formally made legislative norms are often implicitly made over into customized informal norms for everyday use. Moreover, this latter customization through practice occurs not only in informal settings or in informal institutions. It is also found in the practices of formal or official institutions ... the customizing of normative regimes to suit the particular coordination requirements of particular sub-sets of a society, or sub-groups.

¹²⁰ Macdonald, *Custom Made*, *supra* note 104 at 319.

¹²¹ Macdonald gives the examples of spousal/family law and commercial practices between insiders as spaces where legislators are self-consciously aware of limitations placed within enactments because strong “interpersonal normativity” exists in these spheres: Macdonald, *Custom Made*, *supra* note 104.

¹²² Macdonald, *Custom Made*, *supra* note 104 at 320.

¹²³ Macdonald, *Custom Made*, *supra* note 104 at 320.

arrest and bail provisions as an illustration of how officials may play a part in the creation of informal legal orders, and how practices on shop-floors often modify or entirely overrule the terms of collective agreements.¹²⁴ Macdonald proposes that the “customizing” of laws takes place through informal practices and “without any recognizable delegation of authority to do so in the legislative instrument itself.”¹²⁵ In this sense the processes are bi-directional.¹²⁶

Critical Legal Pluralism does not attempt to definitively demarcate the field of law from other social “norm-generating” activities, but does emphasize that “there is a difference between law and economics, and between law and basket-weaving.” However, state-generated law is not assumed to have any sort of primacy in constituting behavioural norms. Law, although seen to be something regulatory and distinct, is not confined only to state-legislated legal instruments; it also includes individuals’ experiences and interaction with various forms of legal regulation.¹²⁷ Thus the premise with which I will be working is that “custom supports law, but law transforms the elements of custom that it appropriates into its own image and likeness. Law, in turn, supports other social forms, but becomes in the process part of the other forms.”¹²⁸ Teubner refers to this premise as “mutual constitution”.¹²⁹ Law is thus a distinct set of norms yet interwoven and mutually constituted by “custom” or the other social factors involved in its general surroundings. This framework is essentially, according to Macdonald, a “way of portraying legal and social phenomena in relation to each other and in their full richness of detail; but it is not itself an analytical model.”¹³⁰ He also notes that when using CLP frameworks one “accepts that its descriptions will always be works of the imagination, no matter how much they are informed by empirical investigation.”¹³¹

With respect to the regulation of trafficking specifically, a multiplicity of actors are identified as having an impact on the ways in which “trafficking” as a norm is conceived of under the law. Using a CLP lens, this norm is considered dynamic and multi-directional, both impacting

¹²⁴ Macdonald, *Custom Made*, *supra* note 104 at 320.

¹²⁵ Macdonald, *Custom Made*, *supra* note 104 at 320.

¹²⁶ For more detailed elaboration, see R.A. Macdonald, “Call-Centre Governance: For the Rule of Law, Press #” (2005) 55 *University of Toronto Law Review* 449.

¹²⁷ R.A. Macdonald, “Unitary Law Re-form, Pluralistic Law Re-Substance: Illuminating Social Change” (2007) 59 *Louisiana Law Review* 1144.

¹²⁸ Fitzpatrick, *supra* note 104 122

¹²⁹ Gunther Teubner, “The Two Faces of Janus: Rethinking Legal Pluralism” (1992) 13 *Cardozo L. Rev.* 1443 at 1456.

¹³⁰ Macdonald, *Custom Made*, *supra* note 104.

¹³¹ Macdonald, *Custom Made*, *supra* note 104.

and being impacted by the various actors identified. Through a close analysis of data from a variety of sources, a number of social groups, including political officials, law enforcement officers, migrants, NGOs, IGOs and media sources are all examined to determine their influences on the ways in which the legal regulation of trafficking is carried out in Canada.¹³² This regulation is then ultimately discussed with respect to its impact on vulnerable groups.

ii. *Methods*

This dissertation is based on analysis of materials gathered using the following methods:

a. Literature Review

Firstly, international instruments on trafficking were examined as were the negotiations relevant to their development. Next, an analysis of the scholarly and “grey” literature on trafficking was conducted. A myriad of legal and non-legal scholars have addressed issues pertaining to trafficking in persons in several countries and a large body of literature has been generated from governmental and non-governmental organizations interested in the issue. Given this dissertation’s intended focus on legal regulatory practices related to trafficking in Canada and their impact, the following categories of literature were canvassed: the writings of major legal scholars¹³³ from the key English-language academic regions, including North America, Europe and Australia/New Zealand; the primary feminist legal and non-legal theorists who have focused on the negotiations to the Protocol and debates around sex work; non-legal scholars’ writing on the issue of trafficking in the Canadian academic context and relevant references taken from those writings. There is also an enormous amount of writing on region-specific trends and approaches to the implementation of the Protocol. From this body of work I only canvassed those works where a primary international organization that addressed trafficking was involved in the study and the

¹³² This project does not aim to answer the question of whether or not these different groups’ activities should be considered “legal”, as much legal pluralist theorizing seeks to do. While a potentially important question, the focus of this work is to describe the processes by which trafficking is regulated rather than to label them. Here, the purpose of using CLP as a standpoint is strictly to provide a framework for understanding the impact of various groups on the ways in which the regulation of trafficking is conducted in Canada, not to determine their level of legitimacy as legal bodies or to argue for co-existing legal regimes. See Merry’s objection to calling all forms of social ordering law, *supra* note 113 and Teubner’s critique, *supra* note 129 at 1449.

¹³³ “Major” or “primary” authors are considered for the purpose of this dissertation to be those authors who are most frequently cited as having expertise on a specific issue, those who wrote the initial treatise on a specific topic and/or those who have developed innovative critical theories on the protocol’s application.

authors attempted to provide worldwide overviews, or where Canada was the specific focus of the inquiry. With respect to precarious migration, existing scholarly literature and NGO research reports on migrant workers in Canada were consulted. Canadian governmental documents discussing or describing trafficking were also examined, including those providing guidance to law enforcement or justice personnel.

b. Data-collection

The research question initially framing the study conducted for purposes of this work was: *Do particular perceptions of trafficking inform the implementation of anti-trafficking programming, and if so, in what ways?* This question necessarily entailed investigation into what the perceptions of trafficking are, who is implementing anti-trafficking laws and programs, and what explicit and implicit assumptions underlie that implementation. The study was thus conducted to elucidate ways in which the term “trafficking” is conceived and ways in which those conceptions affect the implementation of anti-trafficking programming, and ultimately how these conceptions affect the legal regulation of “trafficking”.

This work is not intended to provide a comprehensive overview of all conceptions of trafficking or all anti-trafficking programming nor does it strive to generalize about any group of actors that plays a role in that programming. Rather, through a review of the data, this inquiry highlights a number of dominant characteristics associated with trafficking and the impacts those have on legal orientations towards anti-trafficking programming in Canada. This method of inquiry aims “to address questions about people’s ways of organizing, relating to, and interacting with the world.”¹³⁴ In particular this inquiry aims to address ways in which individuals and groups relate to the concept of trafficking and the ways those conceptions get applied in the legal context. Ultimately these orientations are brought to light in order to question their utility and the ways in which they affect laws and decisions relating to marginalized groups in Canadian society.

¹³⁴ Guest, Namey & Mitchell. *Collecting Qualitative Data: A Field Manual for Applied Research* (Sage Publications Inc., 2013) at 1.

With respect to data collection, qualitative inquiry presupposes at least initial *purposive* sampling,¹³⁵ referring to the selection of sites for study “because they can purposefully inform an understanding of the research problem and central phenomenon in the study.”¹³⁶ Sources of data are thus not chosen randomly but reflect the author’s decisions about what categories of data will lend themselves to providing useful information to answer the question at hand. The categories initially chosen for examination were: academic and grey published literature including publications produced by key stakeholders, Canadian legislation and parliamentary debates, Canadian case law, publicly available online and print media, and data drawn from interviews with key stakeholders undertaken in related projects.

Given the focus on laws and implementation of legal provisions in this inquiry, literature, legislation and case law were determined to be appropriate categories for generating data. Further, the focus on public perceptions of trafficking made media an appropriate choice. Last, given the integral role service providers play in the implementation of anti-trafficking activities, it was determined that revisiting data drawn from previous interviews with key stakeholders in related projects led by the author and other researchers in the area would be appropriate to illustrate perceptions and approaches to programming. Within each of these categories, specific sampling methods were undertaken that best matched the type of data under examination.

1. Literature

The academic and grey literature canvassed for the literature review was used for two purposes. The literature mentioned above under *Literature Review* was examined for its concepts and contribution to discussions of trafficking and used as analytic context; this same literature was then also used as a means for generating data. The literature was examined for descriptions of cases of trafficking, “victims” of trafficking, “traffickers” and

¹³⁵ Ted Palys, “Purposive Sampling”, in Lisa Given ed. , *Sage Encyclopedia of Qualitative Research* (Sage Publications Inc., 2008).

¹³⁶ John Cresswell, *Qualitative Inquiry and Research Design: Choosing among Five Approaches* (Sage Publications Inc., 2007) at 125.

rescue operations and organizations involved. These data were extracted from the literature for purposes of analysis.

2. Canadian Legislation and Parliamentary Debates

Canadian legislation was examined as part of a classical legal analysis of trafficking and the implementation of trafficking laws in Canada. However, in addition, parliamentary debates recorded in the development of these laws were also used to generate raw data. Canadian Parliament's *LegisInfo* site was searched using the term "trafficking" between 2000 and 2012 and those bills that were ultimately passed by Parliament were identified. These included: i) Bill C-49: Amendment to Criminal Code to introduce crime of trafficking in persons, 38th Parliament 1st session; ii) Bill C-49 Amendment to the Immigration and Refugee Protection Act, 40th Parliament 3rd session; iii) Bill C-268: An Act to Amend the Criminal Code (minimum sentence for offences involving trafficking of persons under the age of eighteen years), 40th Parliament 3rd session; and iv) Bill C-10: Amendment to Immigration and Refugee Protection Act to allow officers to refuse to authorize foreign nationals to work in Canada, 40th Parliament 3rd session, and v) Bill C-310: An Act to Amend the Criminal Code (trafficking in persons), 41st Parliament 1st session. The texts of the debates were then scanned for descriptions of trafficking, trafficking victims, traffickers, as well as references to academic sources, media, international documents and specific recommendations for action.

3. Case Law

Case law was used both for classical legal analysis interpreting specific provisions in Canadian law, and as a data source permitting discussion of the implementation of anti-trafficking legislation and determinations about who is or is not designated as trafficked. Case law on human trafficking was searched for the years 1999 onwards through Lexis Nexis Quicklaw service, Canlii databases and through a search of Immigration and Refugee Board cases not reported. Quicklaw was searched using the criminal law "topical" database, utilizing the terms "human trafficking" or "trafficking in persons" and 279, as well as the immigration law "topical" database, utilizing the terms "118 and trafficking". All hits were searched for relevance to trafficking in persons cases or discussions. The immigration law

“administrative tribunal decisions” source was also searched in Quicklaw using the term “human trafficking”. An alert for a period of two years (May 2010-May 2012) was set up using (“trafficking /2 persons” but not /2 drug). Immigration and Refugee Board cases reported through Canlii were searched using the terms “human trafficking” and “trafficking in persons”. Additionally, in 2011 the Immigration and Refugee Board research services conducted a search of cases on their internal database containing both negative and positive unreported decisions using the term “gender” limited to 10 years prior to the search date. Positive decisions were then forwarded to the author without names and dates.

A number of cases were retrieved that were decided under other criminal offences, but speak to elements of the *Criminal Code* offence of trafficking at section 279.01. These were used to clarify particular nuances related to the *Criminal Code* provision through a classical legal analysis. Through this data collection it came to light that several charges have been levied against persons accused of trafficking under section 279.01 of the *Criminal Code* and convictions have been entered, but no written reasons were provided for those decisions as in many of the cases the accused pled guilty. Only two reported decisions were located in Canada that specifically implement anti-trafficking legislation, one with oral reasons only. These were decided under s.118 of IRPA. Given the tenor of these cases, which focused on identification of the victim as trafficked or not-trafficked rather than providing specific tests or precedents for future judicial decision-making, they were not used as part of the classical legal analysis, but rather as sources of data highlighting particular norms associated with trafficking. The other cases with written reasons that were generated in the data search arose out of Immigration and Refugee Board cases determining the appropriateness of refugee or asylum claims in Canada. These were not decided under provisions specifically related to “trafficking” but trafficking was raised as a ground for asylum, under the “social class” group in the definition of refugee at s.96 of IRPA. While a complete analysis of refugee and asylum in Canada is beyond the scope of this work, case law generated was used to identify the ways in which norms around trafficking impact quasi-judicial decisions. The cases were analysed in terms of whether or not the individuals were determined to be “trafficked”, and the reasoning behind that determination. To this end the data that was extracted from all cases included descriptions of trafficking scenarios, victims and traffickers

as well as the decisions in each case whether or not to designate the individual in question as a “victim of trafficking”.

4. Media

Throughout the period of data gathering (2007-2013) media reports were scanned using the term “trafficking”. Articles were also canvassed as they were posted on the Canadian Council for Refugees’ listserv and website between May 2011 and May 2012. In order to ensure comprehensive coverage the following media searches were also conducted: a Google search was conducted using the term “human trafficking” on May 21, 2012 which resulted in over 63,000 Canadian hits. The first 100 of these were examined. Additionally, given the specific stated links between prostitution and trafficking, a Google search was also conducted on May 21, 2012 for responses to the Ontario Court of Appeal decision in *Bedford v. Canada*¹³⁷ through the use of search terms “Bedford”, “Prostitution”, and “Trafficking” limited to the 30 days prior to the search. Of the 444 Canadian hits, the first 20 hits were then included as data. On January 21, 2014 an additional search was conducted using the terms “Bedford” and “Trafficking” in response to the Supreme Court of Canada’s appeal of the Ontario Court of Appeal decision.¹³⁸ The first 20 hits were scanned. All of the hits generated in this category were scanned for data describing “trafficking”, “traffickers”, “victims of trafficking” and rescue organizations and operations, as well as for quotes from state officials, law enforcement and NGOs describing trafficking and trafficking cases, and information on legal cases and pending legislation.

5. Key Informant Interviews

Background to the collection of interview data

The interview data used for this study was collected for a number of separate projects commissioned by the Government of Canada and retained for use in this study.

¹³⁷ *Canada (Attorney General) v. Bedford*, 2012 ONCA 186.

¹³⁸ *Canada (Attorney General) v. Bedford*, 2013 SCC 72.

Ethics approval to conduct interviews with key informants was granted by the University of Ottawa's Office of Research Ethics and Integrity in December, 2007. At that time the author was conducting LL.M research, under the supervision of Professor Elizabeth Sheehy. Between January and March of 2008, the author was separately commissioned to undertake research for three projects: the first for the Senate of Canada through Senator Mobina Jaffer's office; the second for the RCMP's National Missing Children's Service; and the third for the Institute on Governance,¹³⁹ on behalf of the Office of the Federal Interlocutor for Metis and Non-Status Indians. These projects included conducting key informant interviews across Canada on various topics related to trafficking in persons. Beginning in February 2008, key informant interviews were undertaken for these three projects.¹⁴⁰ The author retained rights to use data collected during these interviews for purposes of this study. The author transferred into the LL.D program of the University of Ottawa in September 2008 and a modification of the project was approved by the Research Ethics and Integrity Office in December 2008. The modified research approval was renewed on an annual basis until 2011.¹⁴¹ In total 171 key informant interviews were conducted over this time period. Although the primary purpose of the interviews related to the work undertaken by the author in the course of the separate, commissioned studies, this thesis is informed by the information gleaned in many of those interviews.

Sampling

In determining suitable key informants to be interviewed for the projects, a variety of sampling methods were used. Initially, key stakeholder groups¹⁴² that address trafficking or participate in anti-trafficking initiatives were identified. These groups included law enforcement officers, Canada Citizenship and Immigration officers, and Canada Border Services Agency officers addressing the issue of trafficking. It also included immigrant and

¹³⁹ Institute on Governance, *Indigenous Governance*, online: IOG <<http://iog.ca/our-business-lines/indigenous-governance/>>.

¹⁴⁰ Research project, Commissioned by Senate of Canada, Senator Mobina Jaffer's office - "Trafficking and the 2010 Olympics" and National Missing Children's Service, Royal Canadian Mounted Police, *Hidden Abuse Hidden Crime: Domestic Trafficking of Children and Youth in Canada*, online: CPC <<http://cpc.phippisinc.com/cplib/pdf/74192.pdf>>.

¹⁴¹ All ethics approvals for this project are attached as Annex B.

¹⁴² Palys, *supra* note 135 states that Stakeholder Sampling is

Particularly useful in the context of evaluation research and policy analysis, this strategy involves identifying who the major stakeholders are who are involved in designing, giving, receiving, or administering the program or service being evaluated, and who might otherwise be affected by it.

migrant worker settlement and advocacy groups, Aboriginal organizations, sex worker advocacy groups, including former sex workers working within those groups, organizations devoted to addressing trafficking in persons, organizations that, as part of their mandates, provide shelter and/or assistance to victims of trafficking, youth advocacy organizations that provide care or assistance to sexually exploited youth, social workers having experience dealing with sexually exploited youth and provincial agencies addressing migrant employment or trafficking issues. Members of each of these groups were initially identified through the review of literature and references to key stakeholders in governmental and non-governmental publications. The author's own contacts through previous work in the area were also used to identify potential key informants from each group. As geographical differences had been frequently cited in the literature, initial contacts were identified in various geographical regions: British Columbia, Alberta, Manitoba, Saskatchewan, and Ontario.¹⁴³

Once these initial contacts were identified, snowball sampling or *chain referral method* sampling¹⁴⁴ was used to identify further stakeholders within each group and each geographical region. Given that some law enforcement and governmental officers specialize in anti-trafficking work, such referral methods were necessary in order to identify and invite suitable informants to participate. Furthermore, limited funds and communications budgets do not always allow advocacy groups to be identified easily through internet or literature searches, as some are working at a strictly local level, and thus referrals were also necessary in order to identify potential key informants from this sector. While all referrals were contacted, maximum variation¹⁴⁵ was sought particularly among the various assistance and advocacy groups as a means to increase the likelihood that the findings would reflect different perspectives.¹⁴⁶ Given that different perspectives on assistance, prevention, prosecution and identification of trafficked persons arose through the literature review or

¹⁴³ The author's language competencies and the funds supporting this work were insufficient to also include Quebec or the Maritime provinces in this study. Other researchers were conducting similar interviews in those areas. These were included as part of the data retrieved through literature review.

¹⁴⁴ Snowball Sampling "yields a study sample through referrals made among people who share or know of others who possess some characteristics that are of research interest." P. Biernacki and D. Waldorf, "Snowball sampling: Problems and techniques of chain referral sampling" 1981 (10) Sociological Methods Research 141.

¹⁴⁵ This approach consists of determining in advance some criteria that differentiate the sites or participants, and seeking participants that differ on those criteria, see Cresswell, *supra* note 136 at 126.

¹⁴⁶ Cresswell, *supra* note 136 at 126.

interviews, referrals were sought for key informants specifically supporting those different viewpoints until no new viewpoints emerged. The guiding principle in each region, category and viewpoint was to achieve “saturation”, referring to the point when interviews become “counter-productive”¹⁴⁷ in that they no longer provide new information relevant to the inquiry. However, limitations on time and funding also played a role in determining the number of interviews possible in any region. In addition, as with any study using snowball sampling methods, limitations also apply with respect to saturation based on the initial contacts the author had. Snowball sampling may present a biased subset of informants based on those initial contacts¹⁴⁸, and is likely to generate key informants who are more well-known than those who are not. In order to mitigate this limitation, maximum variation sampling was also used, and informants were sought through literature review as well as through the author’s existing contacts.

Based on these methods, 171 key informant interviews were conducted between January 2008 and February 2009 in Vancouver, Kamloops, Kelowna, Prince George, Calgary, Edmonton, Fort McMurray, Saskatoon, Regina, Prince Albert, Winnipeg, Ottawa, and Toronto with informants from the various groups:

¹⁴⁷ Mark Mason, “Sample Size and Saturation in PhD Studies Using Qualitative Interviews” (2010) 11(3) *Forum: Qualitative Social Research* at 8, online: <<http://www.qualitative-research.net/index.php/fqs/article/view/1428/3027>>.

¹⁴⁸ David Morgan “Snowball Sampling” in Lisa Given ed., *Sage Encyclopedia*, *supra* note 135.

KEY INFORMANT CHART

	British Columbia	Alberta	Saskatchewan/ Manitoba	Ontario
Citizenship and Immigration/CBSA	2		2	
Law Enforcement	5	8	8	2
Migrant serving agencies	16	11	2	2
Aboriginal Organizations	2	3	13	4
Sex worker advocacy groups	15	16	7	1
Anti-trafficking organizations	4	6	3	
Youth care organizations	4	4	17	3
Social Workers	3	2		
Provincial government	1	1	4	
TOTALS	52	51	56	12

Interviews varied in length and depth from brief telephone conversations to lengthy in-depth interviews. Informants were asked a series of open-ended questions¹⁴⁹ constructed to elicit information about the informants' definitions of trafficking, their knowledge about individuals involved in migrant labour that the informants considered exploitative, the

¹⁴⁹ See Annex A for list of questions.

existence of individuals involved in sex work that the informants considered exploitative, and the involvement of third parties in domestic prostitution. All informants were provided with and signed consent forms. No remuneration was provided. The interviews were not recorded. This decision was taken in large part after discussions with key informants who expressed anxiety at discussing these sensitive issues on tape.¹⁵⁰ As an alternative to recording, extensive notes were taken during interviews.¹⁵¹ In order to ensure transparency in the research and to ensure accuracy and consent, summaries of interviews were sent to each informant via email and phrases/sentences offered by the informants during the interview considered data were extracted and listed. Informants provided consent for use of each piece of data and suggested revisions when wording was considered inaccurate in representing their statements during the interview.¹⁵² The limitation inherent in this method was that not all words spoken by informants during the interviews could be captured. However, given the anxieties expressed, it was decided that extensive note taking was the better option.

6. Raw data from previously conducted research

In 2004, Jacqueline Oxman Martinez, Marie Lacroix and Jill Hanley conducted research on trafficking with front line service providers involved in anti-trafficking work. This research resulted in the Department of Justice publication “Victims of Trafficking in Persons: Perspectives from the Canadian Community Sector”¹⁵³. Interviews were conducted specifically with community sector participants, immigration organizations, organizations working on the issue of sex work and others. Upon agreement with the primary investigator of the project (Oxman-Martinez), Professor Jill Hanley retrieved specific information from the data gathered for that project, related to perceptions of trafficking, for use in this dissertation. Answers to one question asked of the participants, namely, “how do you define

¹⁵⁰ See David Fetterman, *Ethnography: Step by Step* (Newbury Park, Calif: Sage Publications, 1989) at 81:

However, unless the informant is a public figure who is very used to being recorded, the very existence of the recorder during the interview may often prove threatening to the informant because their voices are identifiable on the tapes.

This is particularly the case where the interview is on sensitive issues.

¹⁵¹ In some situations, tape-recording may be inappropriate, or overly intrusive, and so field notes may be used, see Ellie Fossey et al, “Understanding and Evaluating Qualitative Research” (2002) 36(6) *Australian and New Zealand Journal of Psychiatry* 717 at 728.

¹⁵² *ibid.*

¹⁵³ Martinez & Hanley, *Perspectives*, *supra* note 82.

trafficking” were extracted and a document was generated anonymizing the data only to reflect the location of the participant – Montreal, Toronto, Vancouver – and the answer to the question. An application was made to the University of Ottawa’s Office for Research Ethics and Integrity for use of this secondary data, and its approval is found in Appendix B.

c. Data use and analysis

The data was analyzed primarily using phenomenological analytic techniques. The purpose of this approach is to “attend[...] to unique themes of meaning within the data, as well as common themes of meaning across data.”¹⁵⁴ This procedure involved first reviewing, identifying and coding recurrent themes within the data for each informant, data source and category and second identifying common themes across those categories.¹⁵⁵ These commonalities were brought “back together into meaningful relation with each other” to develop “a narrative or structural synthesis of the core elements of the experience described.”¹⁵⁶ The coding and analysis process was not meant to generate a quantitatively verifiable generalization about the different groups’ conceptions. Rather, common themes were noted and within these themes, regularly-appearing key-words and descriptors were identified.

Data extracted from academic literature, governmental (agency) documents, non-governmental documents, and media were reviewed for common themes, which ultimately generated a number of categories described above, namely: descriptions of trafficking, traffickers, trafficking victims, and rescue operations. Key informant data generated similar categories, given the specific questions asked on these topics, and thus were coded for similarities and differences. Furthermore, key informant data was also scanned for descriptions of services provided to individuals deemed by NGOs, government or law enforcement to be trafficked or potentially subject to trafficking. Parliamentary debates were coded for the same descriptors, but given the particularities of public, parliamentary discourse, namely its context (public political debate), and its specific aim (to pass legislation

¹⁵⁴ Fossey, *supra* note 153 at 728.

¹⁵⁵ Fossey, *supra* note 153 at 728.

¹⁵⁶ Fossey, *supra* note 153 at 728.

and shape public opinion)¹⁵⁷ these debates were also coded for “calls to action”. Case law was used as part of classical legal analysis of the implementation of anti-trafficking provisions, but cases referring directly to trafficking victims were also coded for themes relating to trafficking descriptors and used as data in the study. And while ultimately the communicative interactions between the various groups formed the very basis of this work’s analysis, both media sources and parliamentary debates were specifically coded for references to each other’s knowledge sources, including academic writings, governmental and NGO statistics and speech by governmental agents.

The common themes and descriptors identified through this process make up what becomes referred to as the “dominant paradigm” of trafficking in the ensuing analysis. The term “dominant” does not refer to its exclusive or quantitatively primary position as an interpretive device amongst all social actors identified. Rather, the description of the paradigm derived from the characteristics frequently appearing in the review of all of the data combined, including information gathered from key informant interviews in which participants specifically referred to common or “dominant” conceptions of trafficking. The legal regulation of trafficking was then viewed through the lens of the dominant paradigm, and instances in which the dominant paradigm appeared were specifically highlighted. The findings in relation to the legal regulation of trafficking are thus also not intended to be quantifiable generalizations. Rather, they discuss the ways in which this particular paradigm has affected the legal regulation of trafficking, in the creation and maintenance of laws, and in their implementation through governmental policies and case law.

C. STRUCTURE

The dissertation is organized into two parts, each of which contains two chapters:

¹⁵⁷ See Teun A. van Dijk, “On the analysis of parliamentary debates on immigration” In M. Reisigl & R. Wodak (Eds.), *The semiotics of racism. Approaches to critical discourse analysis* (Vienna: Passagen Verlag, 2000) 85-103.

In Part One I outline the international framework by discussing the background to the creation of the Protocol and reactions to it. In this part I interrogate the history of the creation of the dominant discourses around trafficking and examine how they have framed the various approaches to anti-trafficking work at an international level. Chapter One traces the history of the anti-trafficking movement leading to the call for the Protocol, the negotiations that took place in determining the language of the Protocol and the final definition agreed upon. It then turns to a discussion about reactions to the Protocol, approaches taken to anti-trafficking work at an international level and dominant discourses that emerged in interpreting the Protocol and implementing its obligations. This includes review of classical legal analyses as well as critical approaches to anti-trafficking campaigns. Regional anti-trafficking mechanisms are also canvassed in this Chapter, as well as international mechanisms potentially related to anti-trafficking initiatives but not identified as such. In Chapter Two I discuss the influences of a variety of actors on the creation of these norms related to trafficking. Using the framework of CLP, data was reviewed as it pertained to international conceptions of trafficking and dominant characteristics emerging from that data are analyzed. In this chapter I then go on to also discuss the various international critiques levied against the dominant trafficking discourse and anti-trafficking work in general.

Part Two turns to the Canadian context. First, in Chapter Three, classical legal methodologies are employed to discuss Canada's obligations under international law, including those protections Canada has agreed to extend to trafficked persons and precarious migrants. The next section discusses the creation of the definitions of trafficking in Canada, and in particular the creation of criminal and immigration provisions specific to trafficking, as well as the few reported decisions interpreting the statutes. In this context, and through review of parliamentary debates related to the creation of these provisions, I discuss the migration of international norms pertaining to trafficking into the Canadian context and the ways in which those played a role in legislative creation. After completing this historical narrative in Chapter Three, Chapter Four reviews the data from all sources through the lens of CLP to discuss the ways in which various state and non-state actors perceive trafficking in Canada. In this section I examine how these perceptions contribute to the creation of the Canadian

legal regulatory context and how this context in turn influences those perceptions. As a continuation of this discussion, I analyze the formal implementation of the laws and policies created around trafficking through a discussion of case law, media and the execution of anti-trafficking activities and programming. At the end of Chapter Four, I critique anti-trafficking rhetoric and programming in Canada and identify the negative repercussions of anti-trafficking work.

On this basis, in the Conclusion to this work I provide potential alternative approaches to addressing phenomena currently being dealt with through anti-trafficking frameworks. I suggest a move beyond “trafficking” to a sectoral approach more cognizant of the complexities of the various groups affected by current anti-trafficking rhetoric and interventions. I recommend dispensing with the term “trafficking” as a means of providing redress to marginalized and exploited groups, instead replacing it with one that views potential beneficiaries as historically and socially situated, rights-bearing individuals, entitled to the various rights dictated by their particular needs and circumstances. I suggest that the catch-all rubric of “trafficking” has failed to achieve any meaningful redress for these groups, despite their having been identified as the beneficiaries of anti-trafficking work and, as such, needs to be replaced.

PART I – THE INTERNATIONAL FRAMEWORK

CHAPTER ONE- THE INTERNATIONAL LEGAL FRAMEWORK REGULATING TRAFFICKING IN PERSONS

Understanding the development of the international legal definition of trafficking and the instruments that regulate this activity is integral to a full understanding of the context in which anti-trafficking discourse and activities currently take place. The attempt to create legislation around trafficking required that a definition be created and as such, that particular activities that occurred in the world would become labeled as “trafficking”. This process of *naming* inevitably impacts the ways in which programs are developed and activities are understood, given that defining particular things as trafficking consequently means excluding other activities from the definition. Thus, in order to understand the current discourse around trafficking I first turn to a discussion of the negotiations and development of these international instruments. Several authors, most notably Anne Gallagher, Barbara Sullivan, Janie Chuang and Jo Doezema, have meticulously documented the processes, assumptions and consequences of these various instruments and Gallagher has recently produced a comprehensive overview of the international legal framework relating to trafficking. Thus the following overview is meant not as a comprehensive review but rather a short summary of the salient points gleaned from the texts and analyses for the purposes of contextualizing the negotiations around the Protocol and current trafficking debates.

A. DEVELOPMENT OF THE PROTOCOL

i. History of Anti-trafficking legislation

The term “trafficking” first came to be used in legislation in its current form in the *International Agreement for the Suppression of White Slave Traffic*¹ that came into existence in 1904 amidst concerns about the kidnapping and sale of “white” women into prostitution.² Jo Doezema, in her book *Sex Slaves and Discourse Masters*,³ undertakes a review of the various social movements and the creation of the “white slave” concept, as well as the regulations

¹ *International Agreement for the Suppression of the White Slave Traffic*, May 18, 1904, 1 L.N.T.S. 83.

² Nora V. Demleitner, “Forced Prostitution: Naming an International Offence” (1994) 18 *Fordham Int’l L.J.* 163 at 167.

³ Jo Doezema, *Sex Slaves and Discourse Masters, The Construction of Trafficking* (London: Zed Books, 2010).

designed to protect her. Doezema recounts a popular image of “white” women being kidnapped and shackled and sold into prostitution, although few of these very specific types of cases are known to have actually existed.⁴ She carries out an extensive review of discourse around the “white slave” during the early twentieth century in Europe and North America that provides excellent background to the forthcoming analysis.⁵

Doezema notes that “purity reformers” (those seeking to “rid the world of vice”), “regulationists” (those “who believed that the necessary evil of prostitution should be controlled by stringent state regulation”) and “proto-feminists” (those explicitly seeking women’s equality) all rallied around the cause of white slavery in the late nineteenth and early twentieth century.⁶ While the different groups held different theoretical stances on prostitution, ultimately a distinction between “innocent” and “prostitute” was common to each. While purity reformers were sympathetic to the “lost innocents sacrificed by white slavers, they were severe in their judgment of girls and women whose immodest behaviour led them into a life of shame.”⁷ Regulationists supported the protection of an innocent woman or girl, but “once fallen, it was society that needed protection from the immoral woman. The best way to protect society ... was to register and medically control prostitutes.”⁸ Feminists collapsed the distinction between white slavery and prostitution, attempting to break down the distinction between innocent and prostitute. However, underlying this latter approach was an assumption that no woman would voluntarily enter prostitution – thus third parties involved in luring innocents into immorality were the group to be punished.⁹ Doezema notes the tension inherent in these dichotomies:

Women were considered sexually passive, which made them more ‘virtuous’ than men, but, paradoxically, once that virtue was ‘lost’ through illicit sexual behaviour,

⁴ Anna Zalewski, “Migrants for Sale: The International Failure to Address Contemporary Human Trafficking” (2005-2006) 29 *Suffolk Transnat’l L. Rev* 113 at 115; Jo Doezema, “Loose Women or Lost Women? The re-emergence of the myth of White Slavery in Contemporary Discourses of Trafficking in Women” (2000) 18(1) *Gender Issues* 23.

⁵ Her conclusions regarding the origins of particular representations around trafficking will be discussed in Chapter Two.

⁶ Doezema, *Sex Slaves*, *supra* note 3 at 18.

⁷ Doezema, *Sex Slaves*, *supra* note 3 at 18.

⁸ This approach was epitomized by the passing of the Contagious Diseases Act in Britain that allowed for detention and examination of prostitutes found infected with a ‘social disease’. See Doezema, *Sex Slaves*, *supra* note 3 at 18 for further discussion on this topic.

⁹ Doezema, *Sex Slaves*, *supra* note 3 at 18.

women's sexual nature became dangerous. Consequently, calls for the need to protect women's purity alternated with attempts to reform and discipline prostitutes.¹⁰

Campaigns against white slavery coincided with various anti-prostitution sentiments throughout this period, and became particularly heightened as an "unprecedented migration of women"¹¹ continued from the country to the city and from colonial powers to colonized countries. This movement was accompanied by other changes including "urbanization and the increased politicization of the working class ... initiated by the industrial revolution."¹² Fears and anxieties raised by these changes partly took shape through anti-"white slavery" campaigns and anti-prostitution initiatives.

This binary of "innocent/prostitute" is reflected in the 1904 Agreement as it focuses primarily on the recruitment and hire of women where they have not "fallen prey to the 'procuration ... with a view to their debauchery in a foreign country'".¹³ It distinguishes between these women and those "who surrender themselves to prostitution", setting up a clear dichotomy between victim and prostitute. This imagery was further solidified in the 1910 *International Convention for the Suppression of White Slave Traffic*,¹⁴ which focused primarily on criminalizing the recruitment, hire and transportation of women for "immoral purposes".¹⁵ It did not deal directly with the issue of prostitution, which was taken to be a strictly domestic issue, and thus did not criminalize the retention of women in brothels,¹⁶ but only the recruitment and transfer of women for this purpose. Women already taken to have "fallen prey" to prostitution were not protected under this instrument. The 1921 *International Convention for the Suppression of Traffic in Women and Children*¹⁷ also continued to primarily focus on the recruiting, threatening and kidnapping aspects of the activity rather than the activities to which the women and children were put.

¹⁰ Doezema, *Sex Slaves*, *supra* note 3 at 18.

¹¹ Doezema, *Sex Slaves*, *supra* note 3 at 54.

¹² Doezema, *Sex Slaves*, *supra* note 3 at 54.

¹³ Demleitner, *supra* note 2 at 167.

¹⁴ *International Agreement for the Suppression of the White Slave Traffic*, *supra* note 1.

¹⁵ Demleitner, *supra* note 2 at 167.

¹⁶ Janie Chuang, "Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts" (1998) 11 Harv. Hum. Rts. J 65 at 74.

¹⁷ *International Convention for the Suppression of Traffic in Women and Children*, Sept 30, 1921, 9 L.N.T.S. 415.

The 1933 *International Convention on the Suppression of the Traffic of Women of Full Age*¹⁸ however, began to reflect a more anti-prostitution stance, defining trafficking as: “Any person who, in order to gratify the passions of another person, procures, entices or leads away, *even with her consent*, a woman or a girl of full age for immoral purposes to be carried out in another country.”¹⁹ [My emphasis] This still applied only to international traffic.

The 1949 *Convention on the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others*²⁰ solidified and clarified the former agreements and conventions, but went somewhat further to include gender-neutral language in its title and to expand the regulation of prostitution directly into the domestic sphere.²¹ The issue of prostitution was explicitly addressed in this convention, shifting the focus slightly to a condemnation of the exploitative conditions as well as the forcible recruitment. Article 1 obliges State Parties to punish anyone who “to gratify the passions of another”, “procures, entices or leads away, for the purposes of prostitution, another person, even with the consent of that person.”²²

Interestingly, specific obligations were placed on states to refrain from regulating prostitution or prosecuting prostitutes²³, measures that have been contentious in current anti-trafficking debates. The focus of this document was ultimately the abolition of prostitution, as evidenced by its preamble which states that “prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community”.²⁴ This Convention received little support and some argue did little to combat the evils of trafficking or prostitution identified in the document.²⁵ However, this shift towards focusing on the “end-game” or the type of labour rather than the recruitment element set the stage for the conflation of the trafficking and prostitution

¹⁸ International Convention for the Suppression of Traffic in Women of Full Age, Oct 11, 1933, 150 L.N.T.S. 431.

¹⁹ *International Convention for the Suppression of Traffic in Women of Full Age*, *ibid* at art 1.

²⁰ UN General Assembly, *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 2 December 1949, A/RES/317.

²¹ Chuang, *supra* note 16 at 75.

²² *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, *supra* note 19, art.1.

²³ Chuang, *supra* note 16 at 76.

²⁴ *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, *supra* note 19, art.1.

²⁵ Barbara Sullivan, “Trafficking in Women” (2003) 5(1) *International Feminist Journal of Politics* 67 at 69.

debates, and the assumption that trafficking for the purposes of prostitution should be the main focus of attention.

During the 1980s and 1990s a resurgence of interest in trafficking in women arose, through prohibitionist feminists and “sex worker rights” feminists. Kathleen Barry, for example, contended that the current international instruments were insufficient to address the widespread exploitation of women and focused clearly and consciously on naming all prostitution as exploitation regardless of circumstance.²⁶ Prostitution and trafficking became inextricably fused in this discourse and the focus of anti-trafficking debate became much more clearly honed on whether the “end-game” of prostitution should be explicitly delineated in trafficking definitions, in contrast to earlier debates about the features of movement and recruitment. Barry then became the first director of the Coalition Against Trafficking in Women (CATW) in the 1980s, promoting wholesale abolition of prostitution and the institution of a new, more comprehensive convention against trafficking. CATW was opposed by a number of feminist advocates such as Jo Bindman and Jo Doezema on the basis that sex work should be considered a form of labour with similar protections to other income-generating activities. These advocates argued that the prohibitionist feminist approach did not sufficiently account for the voices of women migrants and sex workers.²⁷ The Network of Sex Workers Project (NSWP), including Jo Doezema, advocated against the use of anti-trafficking language altogether, arguing that historically anti-trafficking measures were used against sex workers rather than against traffickers, and that rather than protecting women from violence they punished female migrants and sex workers.²⁸ Additionally there were several human rights groups advocating for stricter anti-trafficking measures but who distinguished between voluntary and forced prostitution, promoting sex workers’ rights as well as a focus on preventing and punishing forced prostitution and trafficking. The Global Alliance Against Trafficking in Women (GAATW) became extremely active on this front in the early 1990s and became a significant force in the negotiation

²⁶ Kathleen Barry, *The Prostitution of Sexuality. The Global Exploitation of Women*. (New York: NYU Press, 1995). See Sullivan, *supra* Introduction note 19 at 69 for a more detailed review of Barry’s work.

²⁷ Jo Bindman and Jo Doezema. *Redefining Prostitution as Sex Work on the International Agenda*. (London: Anti-Slavery International, 1997). See Sullivan, *supra* note 25 at 71 for detailed review of this work and Doezema’s activism around sex-workers’ rights.

²⁸ Jo Doezema, “Now You See Her, Now You Don’t: Sex Workers at the UN Trafficking Protocol Negotiation” (2005) 14(1) *Social & Legal Studies* 61 at 62. See also Sullivan, *supra* Introduction note 19 at 72.

process to the new UN Protocol.²⁹

ii. Negotiation of the Protocol

a. Key Actors

Argentina first raised the issue of an international document addressing trafficking in its contemporary form in 1997 at the UN Commission on Crime Prevention and Criminal Justice.³⁰ While protection of trafficked persons was taken to be of great importance, Argentina was “concerned that a purely human rights perspective to this issue would be insufficient and accordingly lobbied strongly for trafficking to be dealt with as part of the broader international attack on transnational organized crime.”³¹ The Protocol was eventually negotiated as an adjunct instrument to the *United Nations Convention Against Transnational Organized Crime* (Convention)³², the stated aim of which is “to promote inter-state cooperation in order to combat transnational organized crime more effectively.”³³

While the groups of activists involved in drafting the Protocol’s language were diverse in their views regarding the desired outcomes of anti-trafficking legislation, the purpose of anti-trafficking work and even the utility of the trafficking framework,³⁴ Doezema argues that the negotiation process ostensibly split activists into two camps: the prohibitionist feminists, collectively led by the CATW versus the sex worker rights³⁵ feminists collectively known as the “Human Rights Caucus” (HRC) including GAATW, the International Human Rights Law Group (IHRL) and the Asian Women’s Human Rights Council (AWRC).³⁶ The NSWP eventually joined the efforts of the HRC to ensure that no damage was done to sex workers rights in the process of developing the Protocol,³⁷ but members held reservations

²⁹ Sullivan, *supra* note 25 at 71.

³⁰ United Nations Economic and Social Council Commission on Crime Prevention and Criminal Justice, Sixth Session, CN.15/1997/12. See also Anne Gallagher, “Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis” (2001) 23(4) *Human Rights Quarterly* 975 at 982.

³¹ Gallagher, *New UN Protocols*, *ibid* at 982.

³² *United Nations Convention Against Transnational Organized Crime*, G.A. res. 55/25, annex II, 55 U.N. GAOR Supp. No. 49, U.N. Doc. A/45/49 (Vol. I) (2001) 60, art. 3.

³³ Gallagher, *New UN Protocols*, *supra* note 30 at 978.

³⁴ Doezema, *Now You See Her*, *supra* note 28 at 76.

³⁵ For a full discussion of these two feminist approaches to prostitution see Kate Sutherland, “Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade” (2004) 42 *Osgoode Hall Law Journal* 139 at 140.

³⁶ Doezema, *Now You See Her*, *supra* note 28 at 68.

³⁷ Doezema, *Now You See Her*, *supra* note 28 at 62.

about the enactment of any anti-trafficking treaty. Although the members of the informal and formal alliances were divergent in their particular approaches, the grouping of activists into the two “camps” resulted in a type of coherence with respect to subject matter. Setting up the prohibitionist versus sex worker rights debate among those concerned about human rights thus assumed that the anti-trafficking framework was, at the very least, a legitimate means to protect those rights. The debate could then progress to determination of who that “victim” was to be and ultimately hinged on two issues: the inclusion of prostitution as a specific reference in the definition of trafficking, and the issue of whether or not consensual prostitution should be included. The protracted debates eventually culminated in a definition of “trafficking in persons” that represented a compromise between the two camps, with broad concepts open to interpretation at the state level as each country saw fit.³⁸

b. Definition of trafficking

The two major issues under negotiation in the lead up to the Protocol concerned the definition of trafficking. The first point of contention emerged when CATW and several states argued for an explicit reference to prostitution in the definition of trafficking. While prostitution was assumed to be a primary area of concern, its specific inclusion as a term in the definition of the offence became a matter of significant debate.³⁹ During the beginning stages of the negotiation process in 1998 Greece recommended that in addressing trafficking, all forms of trafficking should be covered and the document should not be limited to trafficking for the purposes of prostitution.⁴⁰ This particular proposal did not appear contentious in the negotiation processes and all parties readily agreed that trafficking for the purposes of extracting any sort of labour should be covered. However, although it was understood that all forms of labour and debt bondage would be covered by any resulting instrument, debate still ensued over whether prostitution should be explicitly named as a separate “end-purpose” in the document.⁴¹

³⁸ Annalee Lepp, “Trafficking Women and the Feminization of Migration: The Canadian Case” (2002) 22(3/4) *Canadian Woman Studies* 90 at 94.

³⁹ Doezema, *Now You See Her*, *supra* note 28 at 78.

⁴⁰ Natalia Ollus, “The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: A Tool for Criminal Justice Personnel” in Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, *Work Product of the 122nd International Training Course*, online: <http://www.unafei.or.jp/english/pdf/PDF_rms_all/no62.pdf> at 20.

⁴¹ Doezema, *Now You See Her*, *supra* note 28 at 78.

For example, in 1999 CATW publicly accused President Clinton of supporting “legalized prostitution” in the negotiations around the Protocol.⁴² In conjunction with conservative religious groups, CATW enlisted conservative Senator Jesse Helms to promote an anti-prostitution stance.⁴³ The US’s domestic prostitution laws were primarily prohibitionist⁴⁴, targeting pimps, procurers and prostitutes.⁴⁵ Thus in keeping with this legal approach, in 1999 after the condemnation levied by the CATW the US proposed a recommendation at the negotiations that aimed at addressing the demand for prostitutes.⁴⁶ The US also issued a “document kit” to negotiators, US legislators and the media clarifying its anti-prostitution stance, noting that:

The Administration opposes prostitution in all its forms. The United States has perhaps the most far-reaching prostitution laws in the world. There are international human rights and humanitarian laws that fight exploitation and prostitution. We will not agree to a treaty that weakens existing prostitution laws here or around the world.⁴⁷

The HRC, in contrast, focused on rights to migration and labour standards for all, and thus argued for the removal of prostitution as a specific focus of the document, arguing that treating prostitution separately negatively affected the migration and labour rights of all sex workers.⁴⁸ Those seeking to promote the prohibitionist position in the document argued that prostitution should be specifically referenced, as it was not similar to other forms of labour, and that such inclusion would “confirm international legal opposition to all prostitution.”⁴⁹ The HRC argued that such an inclusion would make the definition overly broad and would “lead to a diversion of attention and resources away from the real problem.”⁵⁰ While primarily advocating for sex workers rights to labour and human rights

⁴² Doezema, *Sex Slaves*, *supra* note 3 at 129.

⁴³ Doezema, *Sex Slaves*, *supra* note 3 at 129.

⁴⁴ “Systems of regulating prostitution [that] make the act of prostitution itself illegal, with prostitutes and procurers alike subject to arrest.” Doezema, *Sex Slaves*, at 18.

⁴⁵ Doezema, *Sex Slaves*, *supra* note 3 at 129.

⁴⁶ Doezema, *Sex Slaves*, *supra* note 3 at 130.

⁴⁷ US President’s Inter-Agency Council on Women, 2000, quoted in Doezema, *Sex Slaves*, *supra* note 3 at 129.

⁴⁸ Doezema, *Now You See Her*, *supra* note 30 at 76.

⁴⁹ Gallagher, *New UN Protocols*, *supra* note 30 at 985.

⁵⁰ Gallagher, *New UN Protocols*, *supra* note 30 at 985.

protections, in addressing state delegates on the topic, they turned to resource allocation as a lobbying consideration, writing that:

Scarce resources will be diverted from real trafficking cases in order to ‘rescue’ and enforce ‘rehabilitation’ of non-coerced migrant sex workers who do not want to be ‘rescued’ or ‘rehabilitated’, states will have to pay hundreds of millions of dollars to ‘help’ voluntary migrant sex workers who do not ask for nor want help or assistance. This will divert funds away from trafficking victims.⁵¹

However, ultimately HRC’s attempts at wholesale removal of prostitution in the definition were abandoned and supporting states “conceded to allowing prostitution to be mentioned, as long as the definition made a clear distinction between trafficking and prostitution.”⁵² The term “exploitation of the prostitution of others”⁵³ was agreed upon as a sufficient compromise, though the types of activities that would constitute “exploitation” were left undefined. The *travaux preparatoires* to the Protocol⁵⁴ note that “the Protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms ‘exploitation of the prostitution of others’ or ‘other forms of sexual exploitation’ are not defined in the Protocol, which is therefore without prejudice to how State Parties address prostitution in their respective domestic laws.”⁵⁵

The second but interrelated issue that arose was around the issue of consent. Similar arguments were raised as to whether or not an individual could truly consent to any form of prostitution. This once again underlined the strict dichotomy between prohibitionists and sex workers’ rights advocates. While the CATW argued that wording should explicitly reference the idea that no one can consent to prostitution, GAATW and the HRC, viewing trafficking as a “violation of the right to self determination,” argued that the Protocol must also respect “the self determination of adult persons who are voluntarily engaged in

⁵¹ HRC Letter to Delegates, 2000, quoted in Doezeema, *Sex Slaves*, *supra* note 3 at 123.

⁵² Gallagher, *New UN Protocols*, *supra* note 30 at 985.

⁵³ Protocol, art.3.

⁵⁴ The *Travaux Preparatoires (Official Records)* of the negotiations to the Convention and Protocols were consolidated and published in 2006 by the UN Office on Drugs and Crime and included the interpretive notes and records of decisions made during the negotiations: *Travaux Preparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (NY: United Nations, 2006).

⁵⁵ Interpretative notes for the official records (*travaux preparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, GA 55th Sess, U.N. Doc A/55/383/Add.1 (2000) at para 64.

prostitution.”⁵⁶ Given that force and coercion had already been agreed upon as elements in the definition, the HRC’s position was that “by definition, no one can consent to abuse or coercion” and thus explicit language regarding prostitution was excessive and could divert attention from the goal of anti-trafficking work.⁵⁷ Not including the possibility of consent also raised legal issues regarding the potential for excluding valid defenses.⁵⁸ Thus a compromise was reached that specified that consent would be considered irrelevant in cases in which victims were subject to coercion, abduction, fraud, deception, abuse of power or abuse of a position of vulnerability.⁵⁹ Furthermore, consent was to be considered at each stage of the trafficking process and needed to be raised at each stage of the defense. Consent to the initial recruitment would not be considered consent to the entire journey or to exploitative labour conditions.⁶⁰

The *travaux préparatoires* attempt to provide some clarification on the issue of the “abuse of a position of vulnerability” as a means to mitigate consent. It stated that it “is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.”⁶¹ But this provides little concrete interpretive value. Additionally, although the definition attempts to address the issue directly by mitigating consent where any of the abovementioned means are used, in practice it does little to clarify the role of consent in trafficking. For example, questions arise still as to whether or not an activity could be considered trafficking when an individual recruits someone with the requisite intent to exploit them, but does not use deception, fraud or abuse of power.⁶² It is unclear whether an intent to exploit in itself would constitute deception and whether or not one could ever consent to exploitation.

For the purposes of the Protocol, trafficking became defined as:

⁵⁶ Doezeema, *Now You See Her*, *supra* note 28 at 68.

⁵⁷ Gallagher, *New UN Protocols*, *supra* note 30 at 985.

⁵⁸ Elizabeth F. Defeis, “Protocol to Prevent, Suppress and Punish Trafficking in Persons - A new Approach” (2004) 10 *ILSA Journal of International & Comparative Law*, 485 at 488.

⁵⁹ Protocol, art. 3.

⁶⁰ Defeis, *supra* note 58 at 488.

⁶¹ Interpretive Notes, *supra* note 55 at para 63.

⁶² Kara Abramson, “Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol” (2003) 44(2) *Harvard International Law Journal* 473 at 477.

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

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

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

(d) “Child” shall mean any person under eighteen years of age.⁶³

The compromises that were finally reached in the definition allowed states to interpret broadly worded clauses in accordance with their own priorities regarding prostitution and the ability to consent, but did little to provide concrete guidance to any of the contentious issues initially raised. Ann Jordan of the Human Rights Caucus commented on the compromises, noting that:

The terms ‘exploitation of the prostitution of others’ and ‘sexual exploitation’ are not defined in the Protocol or anywhere else in international law. They are undefined and included in the definition as a means to end an unnecessary yearlong debate over whether or not voluntary adult prostitution should be defined as trafficking. Delegates were unable to reach any agreement on this point and so finally compromised on the last day of the negotiations by leaving the terms undefined.⁶⁴

c. Criminalization

While there was no significant dissent on the part of negotiating states as to the obligation to include the criminalization of trafficking as an offence, particularly given the nature of the Protocol’s parent Convention addressing transnational organized crime, in the end no obligation was placed on states to impose any particular sanction on perpetrators.⁶⁵ States

⁶³ Protocol, article 3.

⁶⁴ Quoted in Doezeema, *Now You See Her*, *supra* note 28 at 80.

⁶⁵ Anne Gallagher, *The International Law of Human Trafficking* (New York: Cambridge University Press, 2010) at 79. See also Mohamed Y Mattar, “Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in

are obligated to “adopt such legislative and other measures as may be necessary to establish ... criminal offences” including attempts to commit the offence, participation as an accomplice to the offence, and organizing or directing other persons to commit the offence.”⁶⁶ However, although up until October of 2000 specific provisions had been accepted to “impose penalties that take into account the grave nature of those offences”,⁶⁷ this phrase was ultimately omitted from the document. It may have been understood to be included in the Convention and thus unnecessarily repetitive, but the *travaux préparatoires* do not explain the sudden decision for the omission.⁶⁸

A concern was raised by the HRC during the negotiations that the Protocol did nothing to ensure that law enforcement officials would treat trafficked persons as victims and not as criminals. Although recognized as victims in the document, the HRC noted that the language of the Protocol was in danger of slipping towards treating victims as “prostitutes” and thereby as criminals, particularly with the use of the term “rehabilitation” in early drafts of the Protocol.⁶⁹ The High Commissioner for Human Rights also addressed this issue, noting that the term “rehabilitation ... is generally reserved for offenders. The terms ... ‘restitution’, ‘compensation’ and ‘assistance’ would be much more appropriate in this context”.⁷⁰ Doezema notes that this term “rehabilitation” reflected a “fear of the victim” as related to migrant sex workers.⁷¹ She argues that this fear is further reflected in “rather innocuous-sounding phrases”⁷² around border control, such as those negotiated in article 11: “States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.” Doezema points to the UK’s reticence in adopting strong protections for trafficked persons as a corollary to its “border control policy of identifying certain migrant women as ‘possible prostitutes’ and a deportation policy targeting sex workers for the purpose of preventing trafficking in women.”⁷³ She also notes

Domestic Laws: From the United Nations Protocol to the European Convention” (2006) 14 *Tulane Journal of International and Comparative Law* 357 at 378.

⁶⁶ Protocol, article 5.

⁶⁷ *Travaux préparatoires*, *supra* note 54 at 363; see also Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 80.

⁶⁸ See Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 80.

⁶⁹ See Doezema, *Sex Slaves*, *supra* note 3 at 121 for further discussion on this topic.

⁷⁰ UNHCR, 1999 quoted in Doezema, *Sex Slaves*, *supra* note 3 at 121.

⁷¹ Doezema, *Sex Slaves*, *supra* note 3 at 121.

⁷² Doezema, *Sex Slaves*, *supra* note 3 at 121.

⁷³ HRC Recommendations, 1999, quoted in Doezema, *Sex Slaves*, *supra* note 3 at 122.

the difficulties many delegates had distinguishing trafficking from smuggling and the continued use of the term “illegal trafficking” as evidence of the continued interrelation between the trafficked person/prostitute categories.⁷⁴

d. Protection and Repatriation of Victims

The major provisions aimed at providing protections for trafficked persons were included in Part Two of the Protocol. The HRC had argued to state delegates who were concerned primarily with law enforcement strategies that stronger human rights protections would serve to make prosecutions of traffickers easier; victims would more likely come forward if they did not fear prosecution and deportation.⁷⁵ However, the vast majority of the protections made available to victims were framed in voluntary terms such as “[e]ach state party *shall consider* implementing measures to provide for the physical, psychological and social recovery of victims of trafficking” and they “*shall endeavour* to provide for the physical safety of victims.”⁷⁶ Gallagher points out in her review of the Protocol that, “[w]hile victim protection and support is one of the three stated purposes of the Trafficking Protocol, the corresponding provisions reflect a level of reluctance, on the part of states, to tie themselves down to specific obligations in this regard.”⁷⁷

It was agreed that states are obligated to “ensure that domestic law provides victims with the possibility of obtaining compensation”⁷⁸ but the specific provision relating to the use of materials seized, confiscated and garnered through the disposal of gains from trafficking for the direct purpose of compensation to victims was deleted from the final text.⁷⁹ Although a corresponding general confiscation scheme exists in the Convention, and the *travaux preparatoires* indicate that it would apply to the Protocol,⁸⁰ there is now no obligation to create a fund for compensation to victims of trafficking specifically. The legislative guide indicates that the high cost of this obligation and the extension of the obligation to all states

⁷⁴ Doezema, *Sex Slaves*, *supra* note 3 at 121.

⁷⁵ Doezema, *Sex Slaves*, *supra* note 3 at 117.

⁷⁶ Protocol, art. 6.

⁷⁷ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 307.

⁷⁸ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 82.

⁷⁹ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 82.

⁸⁰ Travaux Preparatoires, *supra* note 54 at 443; Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 82.

in which victims are found precluded states from making them mandatory.⁸¹ Doezema also indicates that there was some fear of encouraging illegal migration to their countries should assistance provisions be made obligatory.⁸²

Women and children were given special consideration in the protection and prevention provisions. The Protocol indicated that “age, gender and special needs” be taken into account⁸³ and that states shall “protect victims of trafficking in persons, especially women and children, from revictimization.”⁸⁴ Additionally, although not mandatory, states are called on to consider preventative measures that “alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.”⁸⁵

The primary negotiation point with respect to victim assistance was around immigration status. While NGOs and a coalition of intergovernmental agencies (the “Interagency Group”)⁸⁶ advocated for at least temporary regularization of trafficked persons’ status in the receiving countries as a matter of right, State Parties were reluctant to include such a provision for fear that it would promote illicit migration.⁸⁷ It was ultimately recognized that in some cases, particularly where humanitarian considerations arose or where trafficked persons could be further harmed by traffickers, trafficked persons should be allowed to remain in the destination country.⁸⁸ Thus the final text showed a compromise and a lack of mandatory provision on regularization of status, indicating only that “each State Party *shall consider* adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.”⁸⁹ Further, with respect to repatriation, the Inter-Agency Group lobbied strongly for the

⁸¹ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 83. UN Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, (NY: United Nations, 2004) at 288.

⁸² Doezema, *Sex Slaves*, *supra* note 3 at 123.

⁸³ Protocol, art 6, Abramson, *supra* Introduction, note 52 at 479.

⁸⁴ Protocol, art. 8.

⁸⁵ Abramson, *supra* note 62.

⁸⁶ Consisting of the Office of the United Nations High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, the United Nations Children’s Fund, the UN Special Rapporteur on Violence Against Women and the International Organization for Migration. See Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 83.

⁸⁷ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 85.

⁸⁸ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 85.

⁸⁹ Protocol, art 7.1.

inclusion of a provision prohibiting repatriation of trafficking victims against their will, and for the identification of a trafficked person to be sufficient to engage the protections outlined in the Protocol.⁹⁰ With the same concerns in mind regarding the potential for illicit migration, the final text of the Protocol only included provisions requiring that repatriation take place “with the due regard of the safety of that person”⁹¹ and that it “preferably be voluntary.”⁹² The *travaux préparatoires* are clear in indicating that this phrase is not to be taken as imposing any specific obligations on the returning State Party.⁹³

The differences in approaches and motivations of the various groups involved in the creation of the Protocol, including NGO’s, state delegates and law enforcement authorities, all contributed to the particular way in which the definition and obligations were drafted. Given the variety of concerns relating to border security, global migration issues, prostitution and labour exploitation, the document was created as a compromise that allowed states to implement domestic laws in accordance with their own priorities.

B. PROTOCOL - INTERPRETATIONS AND ANALYSIS

A number of interpretive mechanisms were drafted in the wake of the Protocol, aiming to provide guidance on some of the more broad or vague provisions in the document. In 2004 the UN Office on Drugs and Crime produced a legislative guide⁹⁴ to assist in interpretation of the Convention and in 2006 the official records of the negotiation process, the *travaux préparatoires*, were consolidated with several interpretive notes and provide significant guidance as to the intent of the drafters. While the interpretations contained in these documents are not binding, they provide some clarity on the drafters’ legislative intent to aid in states’ domestic implementation of the Protocol. Recently a comprehensive overview of international legal frameworks related to trafficking was developed, a significant portion of which is dedicated to analyzing the Protocol’s provisions and legal implications.⁹⁵ Thus it is

⁹⁰ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 86.

⁹¹ Protocol, art. 8.2.

⁹² Protocol, art. 8.2.

⁹³ Travaux, *supra* note 54 at 388, see also Gallagher, *The International law of Human Trafficking*, *supra* Introduction, note 31 at 86.

⁹⁴ UNODC, *Legislative Guides*, *supra* note 81.

⁹⁵ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 31.

unnecessary to duplicate this work already so thoroughly researched. However, a small number of salient points are important to highlight for purposes of this dissertation.

i. Application to domestic criminal law

First, the provisions of the Convention apply *mutatis mutandis* to the Protocol⁹⁶, clarified as meaning “with the necessary modifications”. However, the Protocol is divided into three sections: the prevention and combating of trafficking, the protection and support of victims and the promotion of cooperation between State Parties;⁹⁷ the Convention applies differently to each of these sections. Generally the application of the Protocol is limited by the Convention to an activity that “has some element of transnationality and some degree of involvement of an ‘organized criminal group’.”⁹⁸ However, the Convention specifically states that legislators are not required to incorporate elements of transnationality or organized criminal groups into domestic offences. Thus at the state level, acts of trafficking may be prosecuted without any element of cross-border movement or organized criminal activity.⁹⁹ Also with respect to domestic criminalization provisions, the Convention expands the obligations of State Parties beyond prosecuting trafficking offences to also include the criminalization of laundering the proceeds of trafficking and the obstruction of justice provisions pertaining to tracing, freezing and confiscating the proceeds of trafficking, the protection of trafficked persons and witnesses from potential retaliation or intimidation, and the encouragement of those involved in trafficking to cooperate with or assist national authorities.¹⁰⁰

ii. Victim assistance and status obligations

Second, the Protocol is taken not to supersede any rights or obligations undertaken by State Parties prior to its inception but rather “only adds to them to the extent that is provided for

⁹⁶ Protocol art 1.2

⁹⁷ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 79; Protocol art 2.

⁹⁸ UNODC, *Legislative Guides*, *supra* note 81 at 258.

⁹⁹ UNODC, *Legislative Guides*, *supra* note 81 at 258.

¹⁰⁰ UNODC, *Legislative Guides*, *supra* note 81 at 259; Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 80-81: State Parties are also required to “take appropriate measures to ensure that conditions of release for defendants do not jeopardize the ability to secure their presence at subsequent criminal proceedings”, to “establish a long statute of limitations period for trafficking offences”, to “provide other State Parties with mutual legal assistance in investigation prosecution and judicial proceedings for trafficking offences” and “Provide for channels of communication and police-to-police cooperation in relation to the investigation of trafficking offences”.

in the text.”¹⁰¹ This particularly impacts states’ obligations towards trafficked persons. The legislative guide indicates that “for example, requirements established by different instruments for dealing with asylum seekers and victims of trafficking would apply jointly to the same case whenever a victim requests political asylum.”¹⁰² This interaction is clearly identified in the Protocol at article 14 where it specifically refers to the obligations of states with respect to “the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.”¹⁰³ However, in a related provision, article 11 states that “Without prejudice to international commitments in relation to the free movement of people, State Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.” Thus while the commitment to upholding internationally recognized rights of asylum is confirmed, border controls are seen as an important measure to be taken in terms of combating trafficking and these two commitments may sometimes be at odds.

However, the International Human Rights Law Group (IHRLG) suggested otherwise, noting that states are still obligated under other mechanisms to protect the rights of the kinds of “victims” anticipated by the Protocol.¹⁰⁴ The IHRLG developed a compendium of documents just subsequent to the creation of the Protocol that provides the Protocol, Convention, *travaux preparatoires* available to that date and annotations by the group, where they point out that,

Despite the weakness of the protections language, advocates can rely upon other international and regional human rights instruments that obligate governments to

¹⁰¹ UNODC, *Legislative Guides*, *supra* note 81 at 258.

¹⁰² UNODC, *Legislative Guides*, *supra* note 81 at 258.

¹⁰³ Protocol, art 14.

¹⁰⁴ They point specifically to the League of Nations, *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 LNTS 253; the UN *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 226 U.N.T.S. 3, entered into force 30 April 1957; the UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171; the UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13; the UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 and the accompanying UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 16 March 2001, A/RES/54/263; the International Labour Organization, *Convention concerning forced or Compulsory Labour* (ILO No. 29), 29 U.N.T.S. 55, entered into force May 1, 1932, and the International Labour Organization, *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor* (ILO No. 192), 2133 U.N.T.S. 161, entered into force Nov. 19, 2000; the Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 and the Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

protect the rights of trafficked persons. Governments are obligated by those instruments to protect the rights of trafficked persons *even if* they do not sign the Trafficking Protocol. Furthermore, article 14 ensures that nothing in the Trafficking Protocol or the Convention can undermine international obligations to protect human rights. Accordingly, the Trafficking Protocol only establishes certain minimum standards and must be supplemented by human rights obligations contained in international and regional human rights instruments.¹⁰⁵

Gallagher also contends that although there is no clear obligation in the Protocol for State Parties to adopt measures to permit trafficked persons to remain in their territories,

[c]ertain rights and obligations ... are relevant to a consideration of whether or not a State should (or indeed is obliged to) grant victims a right of temporary residence. These include the right of victims to participate in legal proceedings against traffickers, their right to receive protection from further harm, their right to access effective remedies, the obligation on States not to return victims when they are at serious risk of harm, and the special rights of child victims of trafficking.¹⁰⁶

It is thus still somewhat unclear as to the extent of the obligation to allow victims of trafficking to remain in a receiving state's territory and under what circumstances. The wording of article 14 in the Protocol appears to lend itself to a number of different interpretations.

iii. Elements of the definition

Given that, in accordance with article 14, the Protocol is clearly to be read in conjunction with other international instruments, some of the vagaries in the definition of trafficking itself may be clarified by reference to similar language in previously constructed documents. With respect to any particular state's commitment, the interpretation will only have force should the state also be a party to the referenced instrument. However, regardless of states' particular status with regard to that document, the provisions may provide insight into the legislative intent behind the similar terms in the Protocol, as drafters would have had particular definitions in mind when creating terminology. The Legislative Guide specifically references the use of pre-existing documents in this regard:

¹⁰⁵ International Human Rights Law Group (IHR LG), *Annotated Guide to the Complete UN Protocol*, online: <www.hrlawgroup.org/initiatives/trafficking_persons/> at 3.

¹⁰⁶ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 321.

The Trafficking in Persons Protocol is only the latest in a series of international instruments that deal with trafficking in human beings or related subjects. Slavery and different forms of trafficking in humans have long been a matter of concern, and other attempts have been made to prevent and combat the problem. That made it necessary, in the course of drafting the Protocol, to consider carefully the language of the various provisions and how they would interact with principles already established in international law.¹⁰⁷

The three elements required for an act to be considered trafficking under the Protocol¹⁰⁸ are *the act*: recruitment, transportation, transfer, harbouring or receipt of persons; *the means*: threat or use of force or other forms of coercion, of abduction, fraud, deception, the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person; and *the purpose*: exploitation. Thus the *act* and the *means* elements together constitute the *actus reus* of the offence, while the *purpose* element acts as the *mens rea*. The nature and scope of these elements are left essentially undefined in the Protocol, and thus reference is necessary to the *travaux préparatoires*, legislative guide and other international instruments.

With respect to the *act* element, the kinds of activities covered are extremely broad. Unlike the former trafficking instruments, this definition includes both harbouring and receipt of persons as possible activities related to trafficking. Thus not only is the process of movement outlawed, but the receiving person has also become culpable. This changes the focus from only outlawing the process of recruitment and transfer to also addressing those who are involved in the “end result” – the exploitation.¹⁰⁹ Under this definition the recruiters and brokers could not only potentially be held liable, but also owners or managers in any place of exploitation such as a brothel, factory or farm.¹¹⁰ Gallagher notes that this could potentially “result in the concept of trafficking being extended to situations of exploitation in which there was no preceding process”,¹¹¹ such as intergenerational bonded labour or a workplace that changes from an acceptable situation to an exploitative one. She further notes that while the text may support such a conclusion, there appears to be little legislative

¹⁰⁷ UNODC, *Legislative Guides*, *supra* note 81 at 255.

¹⁰⁸ The “means” element is waived when the victim is a child under 18 years of age, Art.3 Protocol.

¹⁰⁹ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 30.

¹¹⁰ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 30.

¹¹¹ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 31.

intent to cover such situations and states were intent on limiting the scope of trafficking by introducing the three pronged test including the means and purpose elements.¹¹² However, these situations still may be covered if individuals were deceived or subjected to abuse of authority in order to keep them “harboured” in exploitative situations.

With respect to the *means* element, there has been little discussion about the seriousness and types of activities that would be required to satisfy the various *means* identified in the Protocol, such as coercion, deception, or fraud.¹¹³ Some have argued that “coercion” could include economic as well as psychological coercion,¹¹⁴ but Gallagher argues that this “may go beyond the intention of the drafters.”¹¹⁵ The concept of “abuse of power or of a position of vulnerability” has appeared in other international instruments but has similarly not been defined.¹¹⁶ In the *travaux préparatoires* it indicates that the term should “include the power that male family members might have over female family members in some legal systems and the power that parents might have over their children”,¹¹⁷ but that the precise meaning was itself a topic of dispute during the drafting process.¹¹⁸ The *travaux préparatoires* go on to state in the same interpretive note that abuse of vulnerability “is understood as referring to any situation in which the person involved has no real or acceptable alternative but to submit to the abuse involved.”¹¹⁹ They are also similarly vague and provide little guidance on “the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.” Gallagher notes that a subsequent document, the UN Office on Drugs and Crime (UNODC) *Model Trafficking Law*,¹²⁰ has tried to identify specific instances that would qualify. The list includes “taking advantage of the vulnerable position a person is placed in as a result of ...

- i. Having entered the country illegally or without proper documentation; or

¹¹² Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 31.

¹¹³ See Gallagher, *The International Law of Human Trafficking*, *supra* note 65 at 31.

¹¹⁴ L.A. Malone, “Economic Hardship as Coercion Under the Protocol on International Trafficking in Persons by Organized Crime Elements”, (2001) 25 *Fordham International Law Journal*, 54 at 55.

¹¹⁵ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 32.

¹¹⁶ *International Agreement for the Suppression of the White Slave Traffic*, *supra* note 1.

¹¹⁷ *Travaux Préparatoires*, *supra* note 54 at 343.

¹¹⁸ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 32.

¹¹⁹ *Travaux Préparatoires*, *supra* note 54 at 343.

¹²⁰ United Nations Office on Drugs and Crime, *Model Law on Trafficking in Persons* (NY: United Nations Press, 2009) UN Sales NO. E.09. V.11 (UNODC Model Law)

- ii. Pregnancy or any physical or mental disease or disability of the person, including addiction to the use of any substance; or
- iii. Reduced capacity to form judgments by virtue of being a child, illness, infirmity or a physical or mental disability; or
- iv. Promises or giving sums of money or other advantages to those having authority over a person; or
- v. Being in a precarious situation from the standpoint of social survival; or
- vi. Other relevant factors.”¹²¹

This list was created subsequent to the Protocol. It is not binding nor does it have official interpretive value, even to the degree that prior existing instruments or the *travaux preparatoires* or Legislative Guides do. However, the UNODC has assumed a primary role in combating trafficking and thus the list may provide insight into the ways in which it is interpreting the Protocol.

Finally, with respect to the *purpose* element, there are a number of external documents that can provide clarification of some of the terms. “Exploitation” in the Protocol is defined as “at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”¹²² As indicated above, “the exploitation of prostitution” and “sexual exploitation” were left undefined so as to allow states to regulate prostitution in accordance with their own policy objectives. However, Gallagher warns that this broad wording, especially with respect to an undefined “sexual exploitation” potentially leaves room for “adult prostitution and the production, possession, or use of pornography – [to come] within the scope of the definition of trafficking. Such an interpretation would go against the intention of the drafters. There was clear consensus within the drafting group that the Trafficking Protocol definition was not to extend to prostitution or pornography per se.”¹²³ Barbara Sullivan also expresses concern at the potential breadth of this definition, noting that this provision “may also apply to non-forced or even overtly consensual activities that are seen to fall into the realm of ‘sexual exploitation’”. It is certainly not clear whether

¹²¹ UNODC *Model Law*, *ibid* at 9-10. See Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 33.

¹²² Protocol, art 3.1.

¹²³ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 39.

prostitution and other commercial sexual practices are always to be regarded as 'exploitative'.¹²⁴

Forced labour is defined in the ILO Convention No. 29 from 1930 as "all work or service which is exacted from any person under the menace of any penalty, and for which the said person has not offered himself voluntarily."¹²⁵ The International Labour Organization (ILO) notes that the "threat of penalty" could include the loss of rights or privileges,¹²⁶ and Gallagher suggests that immigration status could qualify as one of those rights or privileges.¹²⁷ The 1926 Slavery Convention identified slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."¹²⁸ However "practices similar to slavery" is not defined at international law. Gallagher notes that, in the negotiation process, the following definition of "servitude" was proposed and survived until October 2000:

The condition of a person who is unlawfully compelled or coerced by another to render any service to the same person or to others and who has no reasonable alternative but to perform the service, and shall include domestic service and debt bondage.¹²⁹

This definition, however, was not included. The UNODC Model Law now proposes that servitude should include "the labour conditions and/or the obligation to work or to render services from which the person in question cannot escape and which he or she cannot change",¹³⁰ but this provides little clarity.

vii. Critiques of the Protocol

Several critiques have been levied against the Protocol as a tool for combating trafficking in persons, the most important one being the non-obligatory nature of the protection obligations in the document and the weak language with respect to the upholding of human

¹²⁴ Sullivan, *supra* note 25 at 81.

¹²⁵ ILO, *Forced Labour Convention*, *supra* note 104. For further analysis see Gallagher, *The International law of Human Trafficking*, *supra* Introduction, note 31 at 35.

¹²⁶ International Labour Office, *Forced labour and trafficking : a casebook of court decisions : a training manual for judges, prosecutors and legal practitioners* (Geneva: ILO, 2009).

¹²⁷ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 36.

¹²⁸ League of Nations, *Convention to Suppress the Slave Trade*, *supra* note 104.

¹²⁹ UNODC, 11th Session, *Seventh Revised Draft of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, UN Doc. A/AC.254/4/Add.3/Rev.7, July 19, 2000 at art 2.

¹³⁰ UNODC Model Law, *supra* note 120 at 18.

rights of trafficked persons. The Protocol is organized around three sets of obligations: Prosecution of Offenders, Protection of Victims and Prevention of Trafficking (the *Three P's*). However, the IHRLG points out that the UN Crime Commission which developed the Protocol is a law enforcement, not a human rights body. It also notes that the Commission's location in Vienna isolated it from the human rights bodies in Geneva and New York. IHRLG acknowledges that the impetus for developing the Protocol was a "desire of governments to create a tool to combat the enormous growth of transnational organized crime"¹³¹ and thus the law enforcement provisions are strong whereas the provisions for protecting trafficked persons are relatively weak.¹³² This sentiment was echoed both by the Inter-Agency Group and by the Special Rapporteur on Violence against Women, as well as by the ILO¹³³ and numerous academics¹³⁴ including Gallagher:

While human rights concerns may have provided some impetus (or cover) for collective action, it is the sovereignty/security issues surrounding trafficking and migrant smuggling which are the true driving force behind such efforts. ...Opportunities for lawful migration to the preferred destinations have dramatically diminished at the same time as individuals are moving ... in far greater numbers than ever before. A growing demand for third-party assistance in the migration process is a direct consequence of this reality. Evidence of organized criminal involvement in trafficking and migrant smuggling operations has provided affected states with additional incentives to lobby for a stronger international response.¹³⁵

The Legislative Guide does note, however, that although implementation of assistance provisions may not be mandatory, State Parties are required to *consider* implementing these measures and are "urged to do so to the greatest extent possible within resource and other constraints."¹³⁶

A related criticism has been the Protocol's lack of sufficient measures to compel states to properly identify trafficked persons. Gallagher notes that given the significant financial

¹³¹ IHRLG, *supra* note 105 at 2.

¹³² IHRLG, *supra* note 105 at 2-3.

¹³³ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 83.

¹³⁴ See Marta Iñiguez de Heredia, "People Trafficking: Conceptual issues with the United Nations Trafficking Protocol 2000" (2008) 9 Human Rights Review 299 at 306; Gallagher, *The International law of Human Trafficking*, *supra* Introduction, note 31 at 307; Konrad, *supra* Introduction note 66 at 73.

73; Sullivan, *supra* note 25 at 84.

¹³⁵ Gallagher, *New UN Protocols*, *supra* note 30 at 976.

¹³⁶ See Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 307.

burdens imposed on states when providing assistance measures to trafficked persons, there is a “clear incentive” to identify individuals as illegal migrants or smuggled persons rather than trafficked.¹³⁷ The issue of identification was brought to states’ attention during the drafting process, but they did not pursue the task of clarifying specific differences between trafficked and smuggled persons nor discuss the potential for obliging states to search for and identify victims.¹³⁸ The Legislative Guide recommends that legislators at state levels consider establishing processes for victim identification and ways in which individuals can be accorded victim status.¹³⁹ However, the Protocol itself is silent on the issue. The primary criticism levied against this omission is that “failure to correctly identify a victim will likely lead to a denial of that person’s rights as well as problems in the prosecution process.”¹⁴⁰ Entitlement to assistance is “inextricably tied up with their status as victims of crime and victims of human rights violations.”¹⁴¹ And although the provisions in the Protocol itself are not mandatory, being identified as a victim of crime as opposed to, for example, a smuggled person or “illegal immigrant” entitle an individual to other protections such as the “measures that ensure their well-being and avoid revictimization”, as well as “the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.”¹⁴² Failure to identify thus absolves states from being obliged to provide these other measures.

Failure in this regard has also led to criticisms regarding the criminalization of trafficked persons who are incorrectly identified. Gallagher, among others, note that “trafficked persons are often arrested, detained, charged and even prosecuted for unlawful activities such as entering illegally, working illegally, or engaging in prostitution.”¹⁴³ The lack of impetus and formal obligation on State Parties to identify trafficked persons, coupled with the somewhat vague and non-mandatory provisions related to the regularization of the

¹³⁷ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 280.

¹³⁸ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 280.

¹³⁹ UNODC, *Legislative Guide*, *supra* note 81 at 289.

¹⁴⁰ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 280.

¹⁴¹ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 305.

¹⁴² Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 305; See UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, A/RES/40/34, 29 November 1985 and UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147.

¹⁴³ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 283.

status of “victims” of trafficking allows for states to criminalize trafficked persons without directly breaching the provisions of the Protocol.¹⁴⁴

Where trafficked persons are identified, there has been significant critique of the interaction between assistance to victims being conditional on their cooperation with law enforcement authorities. Nothing specific is stated within the Protocol defining the parameters under which a victim would be entitled to assistance. In fact, Gallagher notes that several states have explicitly formulated that assistance is contingent on cooperation. She then goes on to suggest that the omission of these parameters may be explained by the optional nature of the assistance provisions in the document.¹⁴⁵ However, the Legislative Guide to the Protocol states that ‘support and protection shall ... not be made conditional upon the victim’s capacity or willingness to cooperate in legal proceedings’.¹⁴⁶ And that other interpretive documents such as the UNODC Toolkit to Combat Trafficking in Persons¹⁴⁶ and the UNODC Handbook for Parliamentarians¹⁴⁷ also support this principle.¹⁴⁸

Finally, some authors and advocates have criticized the Protocol for not using strong enough language linking trafficking with the purchase and sale of persons. Marta Heredia argues that the Protocol focuses primarily on transportation and trans-border issues, denying an “essential part of the activity, which is the selling and buying of people.”¹⁴⁹ She notes that the Protocol mentions only the “receiving and giving of payments ... without acknowledging that they are defining characteristics of trafficking itself and not just a means of trafficking people.”¹⁵⁰ She argues that the Protocol should have more firmly acknowledged that the exchange of money for the use of a person is in itself trafficking, and not simply an element thereof. “The ‘giving and receiving of payments’ should not be just the means to commit the

¹⁴⁴ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 284.

¹⁴⁵ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 298. Note that the United States specifically links victim assistance to cooperation with prosecuting authorities, discussed *infra*. Canada does not officially link the two. However, as discussed in Part Two, other factors have influenced the coordination of victim assistance and have created a *de facto* link.

¹⁴⁶ bis. UNODC, *Legislative Guide*, *supra* note 81 at 288

¹⁴⁶ UN Office on Drugs and Crime (UNODC), *Toolkit to Combat Trafficking in Persons*, October 2008, 2nd edition, online: UNODC < http://www.unodc.org/documents/human-trafficking/HT_Toolkit08_English.pdf>.

¹⁴⁷ UNODC, *Handbook for Parliamentarians* (New York: UN, 2009)

¹⁴⁸ Gallagher, *The International law of Human Trafficking*, *supra* Introduction, note 31 at 299.

¹⁴⁹ Heredia, *supra* note 134 at 308.

¹⁵⁰ Heredia, *supra* note 134 at 309.

trafficking or to ‘achieve the consent of a person’, but also the act of trafficking itself.”¹⁵¹ She notes that Radhika Coomaraswamy, the UN Special Rapporteur on Violence Against Women, had been promoting a definition of trafficking that included the “purchase” and “sale” of persons as acts of trafficking. However, these specific terms were not included in the Protocol definition and Heredia suggests that this omission insufficiently accounts for the activity of buying and selling persons that anti-trafficking documents should address.¹⁵²

However, as noted above, the Protocol does not stand alone as the only international document addressing activities classified as trafficking in persons. Other international instruments dedicated to combating trafficking, whether created by the UN or by regional agreement, may fill some of the gaps as identified in the criticisms levied against the Protocol. Furthermore, other human rights, labour and criminal instruments in existence in the international sphere also address many activities related to trafficking and thus a review of these instruments and their relevance is also warranted.

C. OTHER INTERNATIONAL INSTRUMENTS

i. Regional Agreements

The primary transnational agreements on trafficking arise out of the European Union (EU) and South Asia. In Europe, several instruments were created to address trafficking, both prior to and after the Protocol’s inception. Prior to the Protocol, the European Union undertook the “Joint Action of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children”¹⁵³. This document confirmed Europe’s commitments to combat trafficking and cooperate in the prevention of such criminal activity.¹⁵⁴ However, this Joint Action was subsequently replaced in 2002 by the EU Framework Decision on Combating Trafficking.¹⁵⁵ The Framework Decision had the effect

¹⁵¹ Heredia, *supra* note 134 at 309.

¹⁵² Heredia, *supra* note 134 at 309.

¹⁵³ European Union: Council of the European Union, *Council Joint Action to combat trafficking in human beings and sexual exploitation of children*, 24 February 1997, 97/154/JHA.

¹⁵⁴ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 96.

¹⁵⁵ European Union: Council of the European Union, *Council Framework Decision 2002/629 on Combating Trafficking in Human Beings*, 19 July 2002, 2002/629/JHA.

of requiring all member and candidate states¹⁵⁶ of the EU to implement anti-trafficking legislation in accordance with the Decision by July 31, 2004.¹⁵⁷ It was created in parallel with the Protocol and was designed to provide clear guidelines for member states on the implementation of anti-trafficking programming. The document primarily enhanced the criminal provisions in the Protocol, extending the offences subject to prosecution and including specific rules for penalties.¹⁵⁸ However, it was criticized for being weak on provisions relating to human rights, victim assistance and prevention of trafficking.¹⁵⁹ In 2004, the EU also established a Council Directive on residency permits¹⁶⁰ that provided for the legalization of residency status of victims of trafficking where they cooperated with authorities to prosecute their traffickers. Under this directive, member states were required, at their discretion, to provide emergency medical and psychological care and to offer victims temporary residency permits.¹⁶¹ Victims were also to be granted a “reflection period” that provided victims with an initial period of time in which to escape traffickers’ influences and recover from the trafficking experience enough to make an informed decision about cooperating with authorities on prosecution.¹⁶² It is important to note, however, that the Council was very clear that it was not concerned with victim or witness protection¹⁶³ and thus the Directive is written in a “highly restrictive”¹⁶⁴ manner, focused on prosecution and limitations on claims made by “fraudulent victims”.¹⁶⁵

¹⁵⁶ It is useful to note that while candidate states and other states seeking entry into the EU were not directly subject to the regulations imposed, compliance was in some cases taken to be a priority as a means for demonstrating suitability. See chapter two for further discussion on this topic with specific reference to Kosovo during the years 2002-2006.

¹⁵⁷ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 97.

¹⁵⁸ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 97.

¹⁵⁹ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 97.

¹⁶⁰ European Union: Council of the European Union, *Council Directive 2004/81/EC of 29 April 2004 on the Residence Permit Issued to Third-Country Nationals Who are Victims of Trafficking in Human Beings or Who Have Been the Subject of an Action to Facilitate Illegal Immigration, Who Cooperate With the Competent Authorities*, 6 August 2004, 2004/81/EC.

¹⁶¹ European Union, *Council Directive*, *ibid* at art 5.

¹⁶² Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 101; Council Directive, *supra* note 160 at art. 5.

¹⁶³ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 101

¹⁶⁴ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 101

¹⁶⁵ See Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 101 fn 334 where she quotes the outcome document of the European Conference on Trafficking – “Recommendations, Standards and Best Practices Brussels,” in “Declaration on Preventing and Combating Trafficking in Human Beings,” Annex, adopted by the European Conference on Preventing and Combating Trafficking in Human Beings – Global Challenge for the 21st Century, Brussels, Sept. 18-20, 2002, at 11.

Simultaneous with the initiatives generated by the EU and its Council, the Council of Europe (CoE) also created its *Convention on Action against Trafficking in Human Beings*.¹⁶⁶ Although there was some tension between the EU Council and the Council of Europe on the overlap between the existing and proposed documents, the CoE noted in its Explanatory Report to the Convention that the treaty:

Does not aim at competing with other instruments adopted at a global or regional level but at improving the protection afforded by them and developing the standards contained therein, in particular in relation to the protection of the human rights of the victims of trafficking.¹⁶⁷

The Convention widened the stated scope of trafficking offences to include those not committed within the context of organized crime.¹⁶⁸ It also affirms a commitment to human rights standards for victims,¹⁶⁹ somewhat absent in the weak provisions surrounding victim protection in the Protocol. The definition adopted in the Convention was identical to that of the Protocol,¹⁷⁰ but the explanatory notes to the Convention shed some light on some of the more contested and vague provisions outlined above. For example, in the document it states that “abuse of a position of vulnerability ... encompasses ‘any state of hardship in which a human being is impelled to accept being exploited,’ including ‘abusing the economic insecurity or poverty of an adult hoping to better their own and their family’s lot’”.¹⁷¹ It also indicates that “the fact an individual is willing to engage in prostitution does not mean that he or she has consented to exploitation.”¹⁷² It also affirms that “trafficking can occur even where a border was crossed legally and presence on national territory is lawful.”¹⁷³ The Convention itself also identifies who a victim of trafficking is: “any natural person who is subject to trafficking in human beings.”¹⁷⁴ It supplements the Protocol by including

¹⁶⁶ Council of Europe, *Convention on Action against Trafficking in Human Beings and its Explanatory Report*, ETS 197, 16. V.2005, done May 16, 2005, entered into force Feb.1, 2008.

¹⁶⁷ Quoted in Gallagher, *The International Law of Human Trafficking*, *supra* note 65 at 112; Council of Europe, *Explanatory Report*, *ibid* at para 30.

¹⁶⁸ Gallagher, *The International Law of Human Trafficking*, *supra* note 65 at 115; Council of Europe, *Convention*, *supra* note 166 at art. 2.

¹⁶⁹ Council of Europe, *Convention*, *supra* note 166 at art. 1.

¹⁷⁰ Council of Europe, *Convention*, *supra* note 166 at art. 4.

¹⁷¹ Quoted in Gallagher, *The International Law of Human Trafficking*, *supra* note 65 at 115; Council of Europe, *Explanatory Report*, *supra* note 166 at para 83

¹⁷² Referenced in Gallagher, *The International Law of Human Trafficking*, *supra* note 65 at 115; European Trafficking Convention Explanatory notes, *supra* note 166 at para 97.

¹⁷³ Referenced in Gallagher, *The International Law of Human Trafficking*, *supra* note 65 at 115; European Trafficking Convention Explanatory notes, *supra* note 166 at para 80.

¹⁷⁴ Council of Europe, *Convention*, *supra* note 166 at art. 4(e).

mandatory provisions on prevention,¹⁷⁵ measures to discourage demand that fosters exploitation,¹⁷⁶ and processes to correctly identify and assist victims of trafficking.¹⁷⁷

According to Gallagher, “[e]valuation and monitoring of the European Union’s response to trafficking over the period 2006-2008 confirmed that there were a number of significant problems”¹⁷⁸ with the anti-trafficking directives and policies in place at the time. Thus, as of March 2010 the European Commission initiated a proposal for a new “Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings.”¹⁷⁹ The aim of the new directive as stated is “[m]ore rigorous prevention, prosecution and protection of victims’ rights.”¹⁸⁰ After significant consultation with NGO groups and victim support advocates, the explanatory memorandum to the Proposed Directive indicated that the proposal contained the following recommended changes to the existing structure. With respect to criminal law provisions, the Proposed Directive would clarify the definition of trafficking, aggravating circumstances and penalties, and non application of penalties to the victim; with respect to jurisdiction, it would provide more binding extraterritorial jurisdiction and investigative tools; with respect to victim assistance and support, it would establish processes for early identification and assistance and standards of assistance to victims, including special measures for children; with respect to protection of victims, it would provide for special treatment aimed at preventing secondary victimization, risk assessments and legal counseling and representation; with respect to prevention, it would mandate action aimed at discouraging the demand for sexual services and cheap labour; and it would provide for training, criminalization of users of services of a trafficked person where the user knows the person has been trafficked, and establish

¹⁷⁵ Council of Europe, *Convention*, *supra* note 166 at art. 5.

¹⁷⁶ Council of Europe, *Convention*, *supra* note 166 at art. 6.

¹⁷⁷ Council of Europe, *Convention*, *supra* note 166 at art. 10.

¹⁷⁸ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 103.

¹⁷⁹ European Commission, *Proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA*, COM (2010) 95 final, Mar. 29, 2010.

¹⁸⁰ European Commission, *Proposed Directive*, *ibid* at para 3.

monitoring mechanisms through National Rapporteurs or other similar bodies.¹⁸¹ The directive was officially adopted in March 2011 and came into force in April 2011.¹⁸²

The explanatory memorandum also states that there is some added-value to the European Trafficking Convention of the CoE, including clarification of the precise level of penalties for offences, more binding extraterritorial jurisdiction and broader scope of non-application of penalties to victims, as well as higher standards of mandated victim assistance. However, the particular value of the EU Directive in integrating similar provisions to the CoE European Trafficking Convention would be “the stronger constraints imposed by the EU legal order, namely immediate entry into force and monitoring of implementation.”¹⁸³ Given its recent adoption, its effects have not yet been assessed.

Additionally, in 1999 the member states of the South Asian Association for Regional Cooperation (SAARC), including India, Pakistan, Bangladesh, Sri Lanka, Nepal, the Maldives, Bhutan and Afghanistan created the *Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*.¹⁸⁴ This convention focuses strictly on prostitution, and defines trafficking as the “moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking.”¹⁸⁵ The text was drafted in 1999, prior to the inception of the Protocol, and the Convention itself was agreed upon in 2002, with ratification and coming into force in late 2005. However, it appears that little has been done with respect to implementation of this Convention, and most of the member states who are party to it have now signed and ratified the Protocol. Gallagher argues that such collective disregard for the SAARC Convention could result in it becoming obsolete.¹⁸⁶

¹⁸¹ European Commission, *Proposed Directive– Explanatory Memorandum*, *supra* note 179 at pp.6-7.

¹⁸² European Union: Council of the European Union, *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*, 15 April 2011, 2011/36/EU.

¹⁸³ European Commission, *Proposed Directive– Explanatory Memorandum*, *supra* note 179 at p. 7.

¹⁸⁴ South Asian Association for Regional Cooperation, *Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*. Done Jan 5, 2002, entered into force Dec 1, 2005.

¹⁸⁵ SAARC Convention, *ibid*, art.1(3)

¹⁸⁶ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 132.

Each of these different documents applies to different geographical regions and has different spheres of application. The differences in approaches and definitions are thus not necessarily inconsistent but reflect a combination of political motivation and regional differences. The Protocol currently has 117 signatories and 146 State Parties globally.¹⁸⁷ The Current EU Framework Decision and Council Directive on Residency Permits apply to all European Union member states and, as noted above, were seen as attempts to clarify and expand the Protocol for these countries. The new directive also applies to all member states. The CoE Convention applies only to those member states that have signed the treaty, currently 41 that have ratified and 3 that have signed and have not yet ratified.¹⁸⁸ SAARC applies only to those Asian countries that are parties to the treaty outlined above. Additionally, as discussed below while the United States' *Trafficking Victims Protection Act* (TVPA)¹⁸⁹ is obviously only applicable within the country, it stipulates monitoring and sanction provisions for other countries in the world. Thus although its provisions do not directly apply, the publicity generated through the US's annual Trafficking in Persons report¹⁹⁰ and the sanction mechanisms contained within the TVPA potentially induce compliance with what would otherwise be a strictly domestic document.

ii. National Instruments – the Trafficking Victims Protection Act

States around the world have adopted various types of legislation to combat trafficking and a review of all of these mechanisms is beyond the purview of this project.¹⁹¹ However, given Canada's proximity and relationship to the United States, the TVPA is of particular relevance and thus a brief overview of this document is necessary.

¹⁸⁷ UN Treaty Collection, Status: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, online: <http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-a&chapter=18&lang=en>

¹⁸⁸ Council of Europe Treaty Office, *Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No.: 197, online: <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=1&DF=&CL=ENG>>

¹⁸⁹ *Trafficking Victims Protection Act of 2000*, Pub L.No 106-386, div A, 114 Stat. 1466 (codified as amended at 22 U.S.C. §§ 7101 (2000)) (Hereinafter "TVPA")

¹⁹⁰ See United States Department of State, *Trafficking in Persons Reports*, online: State.gov <<http://www.state.gov/g/tip/rls/tiprpt/>>.

¹⁹¹ See Mattar, *supra* note 65 for a comprehensive discussion of national instruments to combat trafficking.

In 1998 President Bill Clinton issued an anti-trafficking directive which began the discussions leading to the TVPA currently in existence.¹⁹² During the discussions, feminist prohibitionists teamed up with conservative politicians to condemn prostitution and to conflate it with trafficking. Another group of legislators focused on human rights of all trafficked persons, including those trafficked for purposes other than sex work.¹⁹³ However the legislative record still focused almost exclusively on victims of sex trafficking and was “replete with stories of girls and women ... whose entry into sex trafficking was forcible or fraudulent – they were either physically coerced or lured into it against (or without) their will.¹⁹⁴ These stories often used terms like “kidnapping” and “abduction” to describe the traffickers’ actions in source countries.¹⁹⁵ In the end a compromise was reached with the labour and human rights camp to include a broader understanding of trafficking that would include forced labour, and that recognized that individuals may have had some decision making power at various points throughout their interaction with traffickers.¹⁹⁶

This compromise is reflected in the US Congress’ “Findings”, the preamble to the TVPA. It noted that, “many ... persons are trafficked into the international sex trade, often by force, fraud, or coercion.”¹⁹⁷ “Trafficking in persons is not limited to the sex industry. This growing transnational crime also includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide.”¹⁹⁸ In the preamble, Congress stated that traffickers “lure women and girls into their networks through false promises of decent working conditions at relatively good pay as nannies, maids, dancers, factory workers, restaurant workers, sales clerks, or models. Traffickers also buy children from poor families and sell them into prostitution or into various types of forced or bonded labour”.¹⁹⁹ It went on to state that “[v]ictims are often forced through physical violence to engage in sex acts or perform slavery-like labor. Such force includes rape and other forms of sexual abuse,

¹⁹² Jayashri Srikantiah, “Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law” (2007) 87 Boston University Law Review 157 at 168.

¹⁹³ Srikantiah, *ibid* at 169.

¹⁹⁴ Srikantiah, *supra* note 192 at 170.

¹⁹⁵ Srikantiah, *supra* note 192 170.

¹⁹⁶ See Srikantiah, *supra* note 192 at 170 for further discussion on terminology used to garner support for the TVPA.

¹⁹⁷ TVPA sec 102(b)(2).

¹⁹⁸ TVPA sec 102(b)(3).

¹⁹⁹ TVPA sec 102(b)(4).

torture, starvation, imprisonment threats, psychological abuse, and coercion.”²⁰⁰ It also noted that traffickers “often make representations to their victims that physical harm may occur to them or others should the victim escape or attempt to escape. Such representations can have the same coercive effects on victims as direct threats to inflict such harm.”²⁰¹ Clearly overriding the 1988 Supreme Court Ruling in *United States v. Kozminski*²⁰² that deemed that the term “involuntary servitude” should be narrowly interpreted in the absence of a definition from Congress, the Findings stated that, “Involuntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion”.²⁰³ Trafficking was said to be “increasingly perpetrated by organized, sophisticated criminal enterprises ... the fastest growing source of profits for organized criminal enterprises worldwide.”²⁰⁴ It acknowledged that laws often fail to protect victims and sometimes punish them more harshly than the traffickers, that adequate services do not exist for victims, and that victims of “severe forms of trafficking” should not be inappropriately punished for unlawful acts committed as a direct result of being trafficked.²⁰⁵

The TVPA contains specific measures designed to prevent trafficking, thereby mandating the U.S. President to undertake measures which are only discretionary under the Protocol. In the TVPA, the President is required to carry out international initiatives to enhance economic opportunities for potential victims, increase public awareness of trafficking and consult with nongovernmental organizations with respect to implementation of those initiatives.²⁰⁶

With respect to prosecution, the TVPA creates a number of new offences, including providing or trafficking in labour through force or coercion,²⁰⁷ sex trafficking of adults by force or

²⁰⁰ TVPA sec 102(b)(6).

²⁰¹ TVPA sec 102(b)(7).

²⁰² *U.S. v. Kozminski*, 487 U.S. 931 (1988).

²⁰³ TVPA sec 102(b)(13).

²⁰⁴ TVPA sec 102(b)(8).

²⁰⁵ TVPA sections 102(b)(17), 102(b)(18) and 102(b)(19).

²⁰⁶ TVPA sec 106.

²⁰⁷ See TVPA sec 112, amending 18 U.S.C. § 1589.

coercion, sex trafficking of children by any means²⁰⁸ and unlawful conduct with regards to trafficked persons' documents.²⁰⁹ "Coercion" in these cases is taken to mean:

- (A) threats of serious harm to or physical restraint against any person;
- (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
- (C) the abuse or threatened abuse of law or the legal process.²¹⁰

This definition of coercion greatly expands on the narrow view espoused by *Kozminski*, allowing for the acknowledgement of various types of trafficking activities. "Debt bondage" is also defined in the statute²¹¹ and "involuntary servitude" is defined as a condition of servitude by means of coercion, as indicated above.²¹² The TVPA also increases sentencing for already existing trafficking offences.²¹³

Unlike the Protocol and the European instruments, the TVPA distinguishes between "severe" forms of trafficking and other types, allocating assistance and immigration support only to some of those who are victims of the "severe forms". Individuals considered to be victims of "severe forms of trafficking in persons" are those who have been subjected to sex trafficking (a commercial sex act induced by force, fraud or coercion, or induced by any means if the victim is under 18), or the "recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."²¹⁴ Victims are thus those who are forced or coerced to engage in commercial sex acts, or who are induced in any way to perform those acts and are under 18, or those who are forced or coerced into involuntary servitude, peonage, debt bondage or slavery and are recruited, harbored, transported or obtained specifically for those purposes. The requirement for recruitment or

²⁰⁸ See TVPA sec 112, amending 18 U.S.C. § 1591.

²⁰⁹ See TVPA sec 112, amending 18 U.S.C. § 1592.

²¹⁰ See TVPA sec 103 and sec 112 amending 18 U.S.C. § 1589 and 18 U.S.C. § 1591 (2000 & Sup. IV 2004).

²¹¹ TVPA sec 103:

(4) DEBT BONDAGE.—The term "debt bondage" means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

²¹² TVPA sec 103(5).

²¹³ See TVPA sec 112, amending 18 U.S.C. § 1581(a), 1583, and 1584.

²¹⁴ TVPA 103(8).

transportation similar to the *act* section in the Protocol definition is not present where the purpose of the trafficking is commercial sex trade. In addition, persons under 18 are treated the same as adults with respect to trafficking for the purposes of involuntary servitude but not for sex.

The distinction between trafficking and “severe forms” of trafficking is made partly as a means to determine the allocation of benefits and immigration relief to specific groups of individuals under the TVPA. Thus, with respect to protection of victims under the TVPA, all acts of trafficking may be prosecuted under various statutes, but only victims of severe forms of trafficking are entitled to assistance and residency. All victims of severe forms of trafficking are entitled to medical care and assistance, the right not to be detained in facilities inappropriate to their status as crime victims, and protection where their safety is at risk or if there is a danger of recapture by the trafficker.²¹⁵ Victims of severe trafficking are also entitled to information about their rights and to translation services.²¹⁶ Victims of severe forms of trafficking who don’t have legal immigration status in the U.S. may also be allowed to stay in the country where law enforcement determine that they are witnesses and that their “continued presence” is required in order to prosecute the traffickers. In these cases, the individual is not eligible for residency based on their “continued presence”²¹⁷ in the US, but law enforcement is required to protect their safety and protect them and their family from intimidation or reprisals.²¹⁸

Only a victim who is under 18 or who has been “certified” by the Secretary of Health and Human Services in consultation with the Attorney General as someone “willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons; and ...has made a bona fide application for a [T-Visa] ...that has not been denied” or is someone “whose continued presence in the United States the Attorney General is ensuring in order to effectuate prosecution of traffickers in persons”²¹⁹ is eligible for the specific

²¹⁵ TVPA sec 107(c)(1).

²¹⁶ TVPA sec 107(c)(2).

²¹⁷ TVPA sec 107(b)(1).

²¹⁸ TVPA sec 107(e)(1).

²¹⁹ TVPA sec 107(e)(1).

assistance measures accorded to “severe victims of trafficking” outlined in the TVPA. These victims are entitled to all benefits and services that would be extended to refugees. Additionally, they are entitled to (and in fact are required to do so in order to receive benefits) apply for a “T-Visa” that would allow them residency for up to three years and can lead to permanent status in the U.S.²²⁰ To be eligible for the T-Visa, a victim of severe forms of trafficking must be certified by the Attorney General: 1) to be present in the U.S.; 2) to comply with “any reasonable request for assistance in the investigation or prosecution of acts of trafficking” or to be not yet 15 years of age; and 3) to show that he or she would “suffer extreme hardship involving unusual and severe harm upon removal.”²²¹ Where the Attorney General also considers it necessary to avoid extreme hardship she or he can also allow the spouse and children of the victim a visa, and if the victim is under 21 also his or her parents.²²² Only 5000 primary T-Visas may be issued in any given year, not including those allocated to family members of victims.²²³ Some authors note that the number of T-Visas authorized under this statute fall well below the estimated number of trafficked victims in the country.²²⁴ Given the arbitrary nature of this number in relation to the number of victims this cap has been widely criticized.²²⁵ However, the number of visas granted per year also falls well below the 5,000 maximum.²²⁶

Several authors criticize the TVPA for its focus on prosecution to the potential detriment of victims. They note that the stated humanitarian aims of the Protocol are undercut by the requirement of victims to cooperate with prosecutors in order to receive benefits and immigration status. The legislative requirement for the allocation of T-Visas being dependant on victim cooperation has been a source of much critique.²²⁷ This is also true of

²²⁰ TVPA sec 107(e)(4).

²²¹ TVPA sec 107(e)(1).

²²² TVPA sec 107(e)(1).

²²³ See TVPA sec 107, amending 18 U.S.C. § 1184(n)(2).

²²⁴ See for example Jennifer Chacon, “Misery and Myopia: Understanding failures of US Efforts to Stop Human Trafficking” (2005) 74 Fordham Law Review 2977 at note 197 and Srikantiah, *supra* Introduction note 3 at 160.

²²⁵ See Chacon, *ibid* at note 197, Tala Hartsough, “Asylum for Trafficked Women: Escape Strategies Beyond the T Visa” (2002) 13 Hastings women’s L.J. 77, and Hussein Sadruddin, Natalia Walter & Jose Hidalgo, “Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses” (2005) 16 St. L. & Pol’y Rev. 379.

²²⁶ Susan Tiefenbrun, “Updating the Domestic and International Impact of the U. S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?” (2007) 38 Case W. Res. J. Intl. L. 249 at 264.

²²⁷ Joyce Koo Dalrymple “Human Trafficking: Protecting Human Rights in the Trafficking Victims Protection Act” (2005) 25 B.C. Third World L.J. 451 at 472 and Sadruddin et al, *supra* note 225.

the separation of victims of “severe” forms of trafficking from others, creating a distinction between innocent and guilty “victims”.²²⁸ In particular, authors point out that exploitative labour must be coupled with abuse or deceptive forms of recruitment, whereas sex trafficking may be committed simply by using coercive tactics to engage someone in prostitution. Wendy Chapkis notes that this distinction “reinforc[es] the notion that migrant abuse is largely a problem of the sexual violation of women and children.”²²⁹ The creation of the distinction arose out of fears that the legislation might otherwise become part of “an ongoing trend to expand the grounds for asylum, especially for women”.²³⁰ And thus it became justified in order to “prevent hundreds of thousands of people claiming to be trafficking victims . . . [leading] to a massive amnesty for illegal aliens.”²³¹

Authors also widely discuss the shortcomings of the TVPA in terms of its methods of enforcement. Some discuss the narrowing of the statutory language of the TVPA by the Department of Homeland Security and the Department of Justice, claiming that the implementing agencies focus on prosecutorial goals to the detriment of victims. To this end they question the decision to allocate the responsibility of identifying victims to law enforcement and prosecuting agencies, suggesting that this results in the failure of these agencies to identify victims who do not present themselves as good witnesses.²³² Others note that the TVPA does not specifically discuss the effect of a victim’s “consent” in determining whether or not an act is trafficking, in contrast to the definition outlined in the Protocol. While this could potentially result in an expansive view of activities that constitute trafficking, including both consensual and non-consensual activity and allowing any number of exploited persons to receive assistance through TVPA programming, authors suggest that the TVPA has not been implemented in this manner.²³³ Instead, while this expansive interpretation has been heralded by the State Department,²³⁴ it has been used primarily to

²²⁸ See for example Wendy Chapkis “Trafficking, Migration, and the Law Protecting Innocents, Punishing Immigrants”, (2003) 17(6) *Gender & Society* 923 at 929.

²²⁹ Chapkis, *ibid* at 927.

²³⁰ Mark Krikorian, Executive director for the Center for Immigration Studies, quoted in Chapkis, *supra* note 228 at 929.

²³¹ Congressman Lamar Smith from Texas, quoted in Chapkis, *supra* note 228 at 929.

²³² Srikantiah, *supra* note 192 at 160.

²³³ Chacon, *supra* note 224 at 3020.

²³⁴ United States Department of State, *Trafficking in Persons Report 2005*, online: State.gov <<http://www.state.gov/j/tip/rls/tiprpt/2005/index.htm> > at 9-10.

prosecute traffickers as opposed to protect victims. The liberal interpretation of acts of trafficking does not necessarily extend to the interpretation of what constitutes a “severe” form of trafficking, and hence does not trigger the protection mechanisms. As a result, while the TVPA has been hailed as an important step towards combating trafficking in the US and abroad, its specific protection mechanisms and enforcement practices appear to reflect a tendency towards favouring the criminalization of traffickers over victim assistance, despite the Act’s title.

iii. Related International Instruments

A number of authors²³⁵ have discussed the various international human rights, labour and applicable criminal instruments related to trafficking. Gallagher has recently thoroughly outlined and analysed these documents.²³⁶ The following offers a brief discussion of relevant instruments and international norms that may be relevant to the issue of trafficking, for the purposes of providing background to Canada’s obligations.²³⁷

The primary international human rights documents²³⁸ may apply to trafficking scenarios in that the various human rights of trafficked person may be violated through trafficking processes. If subject to physical force the rights to life, security of the person and freedom from physical violence under the ICCPR may be triggered.²³⁹ If individuals are held captive such activities violate the right to freedom of movement.²⁴⁰ And if individuals are subjected to exploitative working conditions, those circumstances could trigger the right to just, fair and safe work conditions under the ICESR.²⁴¹ The ICCPR also prohibits torture, and cruel or degrading treatment or punishment at article 7, and thus physical assaults or other

²³⁵ See for example Shelly Case Inglis, “Expanding International and National Protections against Trafficking for Forced Labour using a Human Rights Framework” (2001) 7 *Buffalo Human Rights Law Review* 55, Joan Fitzpatrick, “Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking” (2003) 24(4) *Mich J. Int’l L* 1143 and UN Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 20 May 2002, E/2002/68/Add.1

²³⁶ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 31.

²³⁷ Canada’s specific obligations under these instruments will be discussed in Part Two.

²³⁸ *Covenant on Civil and Political Rights*, *supra* note 104 (ICCPR); UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, UNTS vol. 993, p. 3 (ICESR)

²³⁹ ICCPR arts. 6 & 9.

²⁴⁰ ICCPR art 12.

²⁴¹ ICESR arts. 6 & 7. See also Inglis, *supra* note 235 at 59 and Office of the UN High Commissioner for Human Rights, David Weissbrodt and Anti-Slavery International, “Abolishing Slavery and its Contemporary Forms”, UN Doc. HR/PUB/02/4, 2002 at para 27 for further discussion of these obligations.

employment related physical abuse would be subject to scrutiny under this prohibition.²⁴² In addition, State Parties to the *Convention on the Rights of the Child* (CRC) are required to take all measures to “prevent the abduction of, sale of or traffic in children for any purpose or in any form”²⁴³ as well as other measures to prevent the sexual and economic exploitation of children.²⁴⁴

While the protection of rights of non-citizens has been a contentious issue at international law,²⁴⁵ the major international human rights instruments proclaim to afford similar protections to migrants and citizens.²⁴⁶ The applicability of the rights enshrined at international law to migrants has relevance to individuals trafficked across national borders. The ICCPR and the ICESCR both apply to all migrants as well as to individuals residing in their home states.²⁴⁷ The ICCPR extends protections to all individuals within a state’s territory and subject to its jurisdiction,²⁴⁸ and guarantees “to all persons” equal protection of the law without discrimination.²⁴⁹ These rights are somewhat limited, and particularly the non-discrimination clauses are derogable in times of national emergency²⁵⁰ and freedom of movement and safeguards against arbitrary expulsion are limited to persons lawfully within the state’s territory. The ICESCR also contains a non-discrimination clause²⁵¹ but does not accord the benefit of equal protection of the law and lower-income countries can limit the extent to which they provide for economic rights for non-nationals.²⁵² The CRC states that all provisions apply to all children within a state’s jurisdiction without distinction.²⁵³ However, it has been difficult to put protections for vulnerable non-nationals into practice

²⁴² See UNHCR, *Abolishing Slavery*, *ibid* at para 23.

²⁴³ *Convention on the Rights of the Child*, *supra* note 104 (CRC) at art. 35. See also Inglis, *supra* note 235 at 58.

²⁴⁴ CRC at art. 34.

²⁴⁵ Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 146.

²⁴⁶ Some scholars argue that international law of state responsibility has always recognized particular duties of states owed towards non-nationals within their territories. Rules of customary international law dictate that states owe a responsibility to other states not to mistreat foreign nationals on their territory. The international human rights documents work in conjunction with customary law but also vest the rights in the individual and not their state. See Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 145-146 for further discussion on this topic.

²⁴⁷ Antoine Pécoud & Paul de Guchteneire, “Migration, Human Rights And The United Nations” (2006) 24 Windsor YB Access Just. 241 at 243.

²⁴⁸ ICCPR art 2.

²⁴⁹ ICCPR art 26.

²⁵⁰ ICCPR art 4(1).

²⁵¹ ICESCR art 2(2).

²⁵² ICESCR art. 2(3). See also Gallagher, *The International law of Human Trafficking*, *supra* Introduction, note 31 at 150.

²⁵³ CRC art. 2(1).

and thus more specific documents have been created holding states accountable for their treatment of various vulnerable groups.²⁵⁴

For example, individuals who fear persecution in their home countries are protected through asylum law instruments, and these rights obviously extend to all persons regardless of nationality. The *Convention Relating to the Status of Refugees*²⁵⁵ outlines specific circumstances under which non-nationals are to be admitted entry and residence into a member state's territory. An individual who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country" is to be provided asylum by host countries.²⁵⁶ The main elements of the definition are: a well-founded fear of persecution, based on membership in a particular listed group, and, because of that fear, individuals are unwilling to return to their home country. Trafficked victims in particular circumstances may or may not fulfill all of the elements required for asylum.²⁵⁷

Whether or not an individual experienced events significantly extreme or repetitive enough to constitute "persecution" can be determined in each case. A determination would also be made in each case as to whether or not such persecution would continue if the individual were repatriated. Persecution in this case could refer to social ostracism, re-trafficking or, if the events were traumatic enough, simply returning to the country if that experience would be psychologically damaging. Women trafficked for the purposes of prostitution would likely be considered a member of a particular social group given that such activities are recognized as gender-based violence. However, other forms of trafficking may not lend themselves as easily to this particular analysis, and showing that the individual is being persecuted based on membership in one or more of the listed groups may or may not be possible. The agent of persecution can be the individual trafficker, the community or state

²⁵⁴ Pécoud, *supra* note 247 at 243.

²⁵⁵ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137 (Refugee Convention).

²⁵⁶ Refugee Convention, 1(A)(2).

²⁵⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, 7 April 2006, HCR/GIP/06/07 at para 12.

agents such as law enforcement or criminal justice officials. Where the agent of persecution is stated to be the individual trafficker or other non-state actor, the activity must be “knowingly tolerated by the authorities or [it must be shown that] the authorities refuse, or prove unable to offer effective protection.”²⁵⁸

The Convention on the Elimination of all Forms of Discrimination Against Women²⁵⁹ (CEDAW) also has particular applicability to the issue of trafficking. Article 6 places the direct responsibility on states to take all measures required to suppress traffic in women and exploitation of prostitution. Additionally, while violence against women is not directly discussed within the Convention itself, General Recommendation 19²⁶⁰ issued by the CEDAW committee stipulates that violence against women is to be considered discrimination under the general prohibition against discrimination against women in CEDAW at article 1. The Declaration on Violence Against Women identifies violence against women as: “any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such actions, coercion or arbitrary deprivation of liberty, whether occurring in public or in private.”²⁶¹ While the Declaration does not have the force of a Convention, the principles and definitions may be used as interpretive mechanisms for CEDAW and other relevant documents. Particular forms of trafficking that involve violence against women could be addressed through these mechanisms. The Optional Protocol to CEDAW, in fact, allows individuals to make claims against State Parties to seek enforcement of their obligations under the Convention.²⁶²

²⁵⁸ See, UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3 para 65; UN High Commissioner for Refugees (UNHCR), *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, para 19; UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01, para 19. For a thorough analysis of the relationship between trafficking and asylum see UN High Commissioner for Refugees, *Guidelines*, Ryszard Piotrowicz “Victims of People Trafficking and entitlement to International Protection” (2005) 24 Aust. YBIL 159 and Gallagher, *The International law of Human Trafficking*, *supra* note 65 at 198-205.

²⁵⁹ *Convention on the Elimination of All Forms of Discrimination Against Women*, (CEDAW) *supra* note 104.

²⁶⁰ UN Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992*, 1992, A/47/38.

²⁶¹ UN General Assembly, *Declaration on the Elimination of Violence Against Women*, UN Doc. A/48/49, Dec. 20, 1993, at art 1.

²⁶² UN General Assembly, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women : resolution / adopted by the General Assembly*, 15 October 1999, A/RES/54/4 at art. 2. See also Gallagher, *The International law of Human Trafficking*, *supra* Introduction, note 31 at 192, and Inglis *supra* note 235 at 57.

Additionally, the General Recommendation on Women Migrant Workers,²⁶³ drafted by the Committee on the Elimination of Discrimination Against Women, addresses situations of abuse, forced labour and exploitation within the context of women's migration and employment. The Recommendation places specific emphasis on: (a) women migrant workers who migrate independently; (b) women migrant workers who join their spouses or other members of their families who are also workers; (c) undocumented migrant workers.²⁶⁴ While all women migrants are entitled to the benefit of the provisions of CEDAW, these women are viewed as being at the highest risk for abuse and discrimination. As such, the Committee reaffirms states' responsibilities under various human rights instruments to uphold their right to life, the right to personal liberty and security, the right not to be tortured, the right to be free of degrading and inhumane treatment, the right to be free from discrimination on the basis of sex, race, ethnicity, cultural particularities, nationality, language, religion or other status, the right to be free from poverty, the right to an adequate standard of living, the right to equality before the law and the right to benefit from the due processes of the law. Furthermore, particularly relevant to anti-trafficking work is the requirement for states to ensure that,

Undocumented women migrant workers must have access to legal remedies and justice in cases of risk to life and of cruel and degrading treatment, or if they are coerced into forced labour, face deprivation of fulfillment of basic needs, including in times of health emergencies or pregnancy and maternity, or if they are abused physically or sexually by employers or others. If they are arrested or detained, the States parties must ensure that undocumented women migrant workers receive humane treatment and have access to due process of the law, including through free legal aid. In that regard, States parties should repeal or amend laws and practices that prevent undocumented women migrant workers from using the courts and other systems of redress. If deportation cannot be avoided, States parties need to treat each case individually, with due consideration to the gender-related circumstances and risks of human rights violations in the country of origin.²⁶⁵

The various prohibitions against slavery also have particular relevance to anti-trafficking work. In addition to the UN Slavery Convention, slavery is prohibited under the Universal

²⁶³ Committee on the Elimination of Discrimination Against Women, *General Recommendation No.26 on Women Migrant Workers*, CEDAW/C/2009/WP.1/R.

²⁶⁴ CEDAW, *General Recommendation*, *ibid*, para 4

²⁶⁵ CEDAW, *General Recommendation*, *supra* note 263, para 25(l)

Declaration of Human Rights,²⁶⁶ the ICCPR²⁶⁷ and the European Convention for the Protection of Human Rights and Fundamental Freedoms.²⁶⁸ The prohibition is also a preemptory norm of customary international law, also known as *jus cogens*.²⁶⁹ As noted above, the UN Slavery Convention defines slavery as “the status or condition of a person over whom any or all of the powers of the right of ownership are exercised.”²⁷⁰ It also calls for the abolition of “all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to being sold or exchanged and, in general, every act of trade or transport in slaves.”²⁷¹

Although slavery is defined in this document, it is left undefined in the UDHR and ICCPR. Additionally, there is no precise definition of “servitude” in the relevant international instruments. In the discussions around the draft Universal Declaration one participant noted that the word “servitude was intended to cover certain forms of slavery, such as that imposed on prisoners of war by the Nazis, and the traffic in women and children.”²⁷² And on the difference between “slavery” and “servitude” in the European Convention on Human Rights one commentary suggests that “the status or condition of servitude does not involve ownership and differs from slavery on that count.”²⁷³ The applicability of these provisions to any particular trafficking scenario will depend on the means by which coercion was exerted and the type of exploitation and its links to the provision of labour or service, as well as the specific definition of slavery or servitude used in each document.

²⁶⁶ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) S states at article 4 that “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms”.

²⁶⁷ ICCPR, art. 8.

²⁶⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 at art. 4: “No one shall be held in slavery or servitude. No one shall be required to perform forced or compulsory labour.”

²⁶⁹ See A. Yasmine Rassam, “International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach” (2005) 23 Penn St. Int’l L. Rev 809 where she states:

The Restatement of U.S. Foreign Relations states that nations violate international law if they commit, encourage, or condone genocide, slavery, torture, or inhuman or degrading treatment. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 (1987).

See also M. Cherif Bassiouni, “Enslavement As An International Crime” (1991) 23 N.Y.U.J. INT’L L. & POL. 445, 445: (“It is well established that prohibitions against slavery and slave-related practices have achieved the level of customary international law and have attained *jus cogens* status.”).

²⁷⁰ Rassam, *ibid* at 813.

²⁷¹ League of Nations, *Convention to Suppress the Slave Trade*, *supra* note 104 art. 2. See also Rassam, *supra* note 269 at 828.

²⁷² Quoted in UNHCR, *Abolishing Slavery*, *supra* note 241 at note 26.

²⁷³ D.J. Harris, M. O’Boyle and C. Warbrick, *Law of the European Convention on Human Rights*, 1995, p. 91, as quoted in UNHCR, *Abolishing Slavery*, *supra* note 241 at note 26.

While no specific definitions of “servitude” exist, there has been extensive scholarship on the topic of forced labour and what constitutes such activity. The International Labour Organization adopted the *Convention Concerning the Abolition of Forced Labour*²⁷⁴ in 1957 requiring governments to take measures to suppress the use of forced or compulsory labour as punishment, for political views, as a means for economic development, as discipline, as punishment for having participated in strikes or as a means of national, racial, social or religious discrimination.²⁷⁵ Forced labour is defined in the 1930 *Forced Labour Convention*²⁷⁶ as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”²⁷⁷ In this Convention, which works simultaneously with the 1957 Convention, member states are also required not to “impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations.”²⁷⁸ The ICCPR at article 8 also prohibits the use of forced or compulsory labour, but makes some exceptions for individuals in detention for military service. Thus the concept of forced labour is actually delineated somewhat more clearly than some other forms of exploitation related to trafficking, and states’ responsibilities to prevent and suppress this activity are well recognized.

Instruments related to migrant workers in particular may apply to trafficked persons at different points throughout their journeys. The *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*²⁷⁹ (ICRMW) has the most relevance to the issue but only 47 states (primarily “sending” states) have become parties since it came into force in 2003.²⁸⁰ Canada is not a party. The language of the Convention was drafted “after a decade of complex negotiation and significant compromise between what one of the principal drafters has characterized as the ‘visionaries’ and the ‘conservatives’.”²⁸¹ Migrant workers are defined extremely broadly in the Convention as “a

²⁷⁴ *Abolition of Forced Labour Convention* (ILO No. 105), 320 U.N.T.S. 291, entered into force Jan 17, 1959.

²⁷⁵ ILO *Abolition of Forced Labour Convention*, *ibid*, art 1.

²⁷⁶ ILO *Convention concerning Forced or Compulsory Labour*, *supra* note 104.

²⁷⁷ ILO *Convention concerning Forced or Compulsory Labour*, *supra* note 104 at art 2.1.

²⁷⁸ ILO *Convention concerning Forced or Compulsory Labour*, *supra* note 104 at art 4.

²⁷⁹ UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158. (ICRMW)

²⁸⁰ UN Treaty Collection, Status: International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, online: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en>*

²⁸¹ Gallagher, *The International law of Human Trafficking*, *supra* Introduction, note 31 at 169.

person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”,²⁸² including undocumented workers. However, individuals who are in an “undocumented” or “irregular” situation as defined in article 5(b) of the Convention as not having complied with the conditions required to be “authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party” are exempted from certain protections under the convention. It is important to note also that the definition specifically excludes refugees or stateless persons.²⁸³ The Convention reinforces that the civil and social rights accorded by the ICCPR and the ICESR are applicable to migrant workers and their families,²⁸⁴ but also goes further to identify particular protections relevant to the situation of migrant workers.²⁸⁵

Migrant workers under the ICRMW are entitled to decent living and working conditions,²⁸⁶ are protected against physical and sexual abuse²⁸⁷ and degrading treatment,²⁸⁸ and are entitled to access to information about their rights and urgent medical care.²⁸⁹ They are also protected from arbitrary detention of property or documents and collective expulsion.²⁹⁰ The ICRMW entitles migrants to the same benefits of working life as those accorded to states’ nationals, including similar remuneration and conditions of work,²⁹¹ ability to participate in trade union activities²⁹² and capacity to receive social security benefits.²⁹³ Documented migrants are additionally entitled to move freely within the employer-state’s territory,²⁹⁴

²⁸² UN, ICRMW, *supra* note 279 at art. 1.

²⁸³ UN, ICRMW, *supra* note 279 at art. 3(d).

²⁸⁴ UN, ICRMW, *supra* note 279 at arts. 8-35.

²⁸⁵ See Pécoud, *supra* note 247 at 4 and Office Of The United Nations High Commissioner For Human Rights, The International Convention on Migrant Workers and its Committee: Fact Sheet No.24 (Rev.1) (NY and Geneva: United Nations, 2005) p.5.

²⁸⁶ UN, ICRMW, *supra* note 279 at arts. 10-11.

²⁸⁷ UN, ICRMW, *supra* note 279 at art. 25.

²⁸⁸ UN, ICRMW, *supra* note 279 at art. 54.

²⁸⁹ UN, ICRMW, *supra* note 279 at arts. 33 and 27.

²⁹⁰ UN, ICRMW, *supra* note 279 at arts. 15, 21 and 22.

²⁹¹ UN, ICRMW, *supra* note 279 at art. 25.

²⁹² UN, ICRMW, *supra* note 279 at art. 26.

²⁹³ UN, ICRMW, *supra* note 279 at art. 27.

²⁹⁴ UN, ICRMW, *supra* note 279 at art. 39.

form associations and trade unions,²⁹⁵ and access education, vocational training, social and health services available to state nationals.²⁹⁶

Based on UNESCO reports in several countries pertaining to the ICRMW, Antoine Pécoud and Paul de Guchteneire argue that a number of major obstacles hinder the widespread ratification of the Convention. First, while some states take issue with specific labour or family-oriented rights accorded by the convention, many suffered from the misconception that they would be constrained with respect to immigration policies and could incur excessive costs were they to ratify. Second, administrative obstacles in coordinating the various sectors on which the ICRMW touches (for example, health, immigration, and employment) posed some difficulties in some countries. And finally, political obstacles have been the most dissuasive for states, including the reliance on cheap and expendable labour in some economies, differing conceptions of the utility of human rights frameworks, fears around being held accountable by the UN monitoring system, and a fear of being the first in any given region to ratify the Convention, thereby potentially penalizing and isolating themselves from nearby country competitors. There have also been concerns about public opinion on the issue of migration and national security.²⁹⁷

In 1995, the International Labour Organization (ILO) also identified eight “Fundamental Conventions”²⁹⁸ that generally apply to workers regardless of nationality.²⁹⁹ In 1998, its *Declaration on Fundamental Principles and Rights at Work*³⁰⁰ (ILO Declaration) was created stating that all member states, regardless of the current state of their ratifications of other ILO conventions, must promote and realize four fundamental rights of all workers. These include: (a) freedom of association and the effective recognition of the right to collective

²⁹⁵ UN, ICRMW, *supra* note 279 at art. 40.

²⁹⁶ UN, ICRMW, *supra* note 279 at arts. 43 and 44.

²⁹⁷ Pécoud, *supra* note 247 at 12-18.

²⁹⁸ The ILO recognizes 8 fundamental conventions: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) , Right to Organize and Collective Bargaining Convention, 1949 (No. 98) , Forced Labour Convention, 1930 (No. 29) , Abolition of Forced Labour Convention, 1957 (No. 105) , Minimum Age Convention, 1973 (No. 138) , Worst Forms of Child Labour Convention, 1999 (No. 182) , Equal Remuneration Convention, 1951 (No. 100) , Discrimination (Employment and Occupation) Convention, 1958 (No. 111). See ILO, *Conventions and Recommendations*, online: ILO <[http://www.ilo.org/global/What_we_do/International_LabourStandards/Introduction/Conventions and Recommendations/lang--en/index.htm](http://www.ilo.org/global/What_we_do/International_LabourStandards/Introduction/Conventions_and_Recommendations/lang--en/index.htm)> .

²⁹⁹ Patrick Taran and Eduardo Geronimi, *Globalization, Labour and Migration: Protection is Paramount*, (ILO: Geneva, 2003) available online: <<http://www.ilo.org/public/english/protection/migrant/download/pom/pom3e.pdf>> at 12.

³⁰⁰ ILO, *Declaration on Fundamental Principles and Rights at Work*, online: ILO: The Declaration and Its Follow Up, <<http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>>

bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination with respect to employment and occupation.³⁰¹

Prior to these declarations and the ICRME, the ILO had also adopted a number of documents applicable particularly to migrant workers. Convention 97, the *Migration for Employment Convention*³⁰² extends rights similar to that of the ICRMW and holds a similar definition of a “migrant for employment”, but in this case does not specifically exclude refugees from its purview as the ICRMW does.³⁰³ The document does, however, strictly limit protections to persons lawfully on state territories.³⁰⁴ ILO Convention 143, the *Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*³⁰⁵ also does not exclude refugees from its definition of “migrant worker”³⁰⁶ and requires states to guarantee equality of opportunity and treatment with respect to employment, social security, trade union and individual and collective freedoms for migrant workers.³⁰⁷ However, while requiring states to “respect the basic human rights of all migrant workers”, most of the guarantees included in the document are extended only to migrants who are “lawfully within [a state’s] territory”.³⁰⁸ It requires states to systematically determine whether abuses are being perpetrated against illegally employed migrant workers,³⁰⁹ and to suppress clandestine movements and illegal employment of migrants in order to prevent such abuses,³¹⁰ but does not accord many specific rights to the migrants themselves. Over and above the right to enjoy benefits from rights arising out of

³⁰¹ ILO, *Declaration on Fundamental Principles and Rights at Work*, *ibid*, art. 2.

³⁰² *Convention concerning Migration for Employment*, (ILO No. 97), 120 U.N.T.S. 70, entered into force January 22, 1952.

³⁰³ ILO *Convention concerning Migration for Employment*, *ibid*, art 11:

1. For the purpose of this Convention the term *migrant for employment* means a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment.

2. This Convention does not apply to--(a) frontier workers;(b) short-term entry of members of the liberal professions and artistes; and(c) seamen. .

³⁰⁴ ILO *Convention concerning Migration for Employment*, *supra* note 302 art 6 states:

1. Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters

³⁰⁵ *Migrant Workers (Supplementary Provisions) Convention*, (ILO No. 143), 1120 U.N.T.S. 323 , entered into force 24 June 1975.

³⁰⁶ ILO *Convention on Migrations in Abusive Conditions*, *ibid* at art. 11.

³⁰⁷ ILO *Convention on Migrations in Abusive Conditions*, *supra* note 305 at art. 10.

³⁰⁸ ILO *Convention on Migrations in Abusive Conditions*, *supra* note 305 at art. 10.

³⁰⁹ ILO *Convention on Migrations in Abusive Conditions*, *supra* note 305 at art 2.

³¹⁰ ILO *Convention on Migrations in Abusive Conditions*, *supra* note 305 at art 3.

past employment,³¹¹ and access to due process,³¹² the “basic human rights” applicable to irregular migrants are not delineated in the Convention itself. The Committee of Experts on the Application of Conventions and Recommendations at the ILO has interpreted them to include all fundamental human rights contained within the United Nations human rights instruments.³¹³ This Convention has not received widespread support, and the ICRMW was partly a response to some countries’ concern that the ILO instruments were not widely supported by host countries.³¹⁴

The ILO’s *Private Employment Agencies Convention*³¹⁵ of 1997 specifically targets recruitment practices with respect to migrant workers, prohibiting private agencies from charging fees to workers. This prohibition serves to guard against workers ending up in situations of debt-bondage to the agencies that find them work. It also requires states to ensure, for all migrant workers recruited through employment agencies, freedoms of association and collective bargaining, minimum wages, occupational health and working condition protections and compensation, and maternity/parental benefits.³¹⁶ This document does not specifically limit its scope to foreign nationals with legal immigration status.

These labour-related documents primarily address migrants’ rights while in the country of employment, but the question of whether or not some would apply to an individual migrant worker may partly be determined by circumstances that occurred prior to landing in the country. Whether or not a person has legal status to work in a country, for example, may depend on the method taken to travel, the people relied on to travel, and the specific immigration programs a country has that would allow the individual to claim legal work and residency authorization. Thus the application of these various documents may depend upon circumstances in the migrant’s home country. It is also useful to note that the documents’ direct applicability to trafficking has been questioned by some authors, suggesting that the “remunerated activity” element of the definition of migrant worker in the ICRMW indicates

³¹¹ ILO *Convention on Migrations in Abusive Conditions*, *supra* note 305 at art 9(1).

³¹² ILO *Convention on Migrations in Abusive Conditions*, *supra* note 305 at art 9(2).

³¹³ Taran, *Protection is Paramount*, *supra* note 299 at 13.

³¹⁴ Gallagher, *The International Law of Human Trafficking*, *supra* note 65 at 169.

³¹⁵ ILO, *Private Employment Agencies Convention*, C181, 2115 U.N.T.S. 249, *entered into force* May 10, 2000.

³¹⁶ ILO, *Private Employment Agencies Convention*, *ibid*, art. 11.

“gainful employment” and does not include situations that would be contrary to public order.³¹⁷ However, alternatively, Gallagher argues that:

[M]any trafficked persons are migrant workers in the very real sense that they have left their homes in search of gainful employment in another country. To deny that such a person is a migrant worker, and therefore to exclude him or her from any added value provided by the Convention, would appear to go against the Convention’s inclusive approach; its recognition of the vulnerability of migrant workers, especially those who are undocumented or otherwise “irregular”.³¹⁸

The question remains, however, as to the impact of any international instruments on the conduct of the states that are party to them. In order to undertake the creation and administration of international laws, “foreign policy practitioners operate on the assumption of a general propensity of states to comply with international obligations.”³¹⁹ However, while the instruments outlined above are technically “in force” in varying degrees and in varying countries, their utility in addressing trafficking, from a strictly positivist standpoint, lies in their ability to induce compliance with the principles contained therein. The Protocol has some internal enforcement measures but by and large the sanctions imposed on states due to non-compliance come from regional bodies or particularly involved states and focus heavily on prosecution and deterrence of organized transnational criminal activity as opposed to victim protection.³²⁰ As discussed in this chapter, states may in fact be motivated not to apply the Protocol for various economic and political reasons. Identifying a person as “trafficked” may bring about further responsibilities on the part of the state to provide safe refuge, protection or assistance, whereas categorizing the individual as a “migrant worker” may not.

Additionally, some scholars have noted the absence of strict enforcement measures within the general field of human rights law,³²¹ in contrast to those available for other forms of international law such as trade. It is argued that breaches of human rights provisions do not

³¹⁷ Ryszard Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (USA: Oxford University Press, 1997) at 151.

³¹⁸ Gallagher, *The International Law of Human Trafficking*, *supra* note 65 at 171.

³¹⁹ Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, (Cambridge: Harvard University Press, 1995) at 3.

³²⁰ See for example the United States Department of State, *Trafficking in Persons Reports*, online: State.gov <<http://www.state.gov/g/tip/rls/tiprpt/>>.

³²¹ See for example Oona Hathaway, “Do Human Rights Treaties Make a Difference?” (2002) 111 Yale L.J. 1935; Louis Henkin, *How Nations Behave* (NY: Columbia University Press, 1979) at 47.

tend to have the same negative consequences for states as do breaches of, for example, money laws, because a state's actions against individuals, and particularly their own citizens, are not seen to harm other states' interests.³²² For example, Oona Hathaway's study in 2002 suggests that ratification of international human rights treaties has little favourable impact on individual countries' compliance with the standards in the documents.³²³ In fact, she proposes that human rights treaties reward countries who simply ratify documents, which may serve to offset pressure for real change.³²⁴ Subsequent studies have also shown that compliance is directly related to domestic legal enforcement of those treaty commitments. States that are held accountable by their judiciary or legislature are more likely to comply with the commitments contained in the treaties, whereas states with little domestic accountability are rewarded internationally for committing to the standards set out in the document without fearing reprisal from the international community or from domestic bodies.³²⁵ Thus it is not entirely clear that the high rates of ratification of the Protocol and other human rights documents outlined above directly influence compliance with the standards therein.

While there is an enormous body of literature devoted to the intricacies of state responsibility at international law, this dissertation does not focus on establishing such accountability. Rather, in the next chapter the focus turns to the impact of these instruments as part of a larger body of influences which impact the ways in which trafficking is regulated and anti-trafficking work is carried out.

³²² Hathaway, *Do Human Rights Treaties Make a Difference*, *ibid* at 1938.

³²³ Hathaway, *Do Human Rights Treaties Make a Difference*, *supra* note 321.

³²⁴ Hathaway, *Do Human Rights Treaties Make a Difference*, *supra* note 321 at 2013.

³²⁵ Oona Hathaway, "Why Do Countries Commit to Human Rights Treaties" (2007) 51 *Journal of Conflict Resolution* 588 at 593.

CHAPTER TWO – CREATION OF AN INTERNATIONAL PARADIGM: WHAT IS TRAFFICKING?

A. INTRODUCTION: “MYTHS” AND ASSUMPTIONS

The rights and potential venues for the protection of trafficked persons that were outlined in the last chapter were created within particular social and political contexts and are implemented within current social and political structures. With respect to international laws and policies related to trafficked persons, Chapter One discussed the ways in which different social agendas influenced the construction of both international and domestic statutes. This chapter further documents and analyzes various social movements that have emerged since the advent of the Protocol, and the ways in which they have shaped dominant trafficking discourse. I discuss the ways in which this discourse in turn affects both the creation and implementation of legal protections afforded to trafficked persons. In this framework, legal instruments and the administrators and implementers of those instruments are viewed as only one facet of an intricate web of social forces constructing the dominant conception of trafficking, both influenced by and influencing other actors and texts in the process.

As discussed in the Introduction, Critical Legal Pluralism (CLP) was chosen over other approaches as the most appropriate means for describing processes that have shaped the regulation of trafficking. This framework allows for the identification of numerous social actors that have generated “norms” of various sorts with respect to understanding and addressing trafficking. These in turn influence the legal regulation of trafficking, both through implementation and through direct impact on the construction of legislation. In turn, the legislation influences these actors’ understandings and activities. Barbara Sullivan discusses the effect of legislation on norm creation particularly in the context of trafficking:

Law has a constitutive effect and is an important factor in the construction of meaning and possibility. The Trafficking Protocol, for example, works to conceptualize a ‘new’ international problem; it establishes the first definition of trafficking in international law and puts in place a set of measures for international co-operation to address this

problem. It genders the victims of trafficking and posits a (gendered) relationship between trafficking, prostitution and 'sexual exploitation'. The Trafficking Protocol establishes a set of existing and new rights for victims of trafficking and specifies the obligations of state parties to support and defend these rights. The Protocol is, then, a document actively involved in the construction of meaning and possibility in the global domain and may have an important impact on the global status of women.¹

Chapter One highlighted the influence of various bodies and interests on the creation of international legislation and Sullivan discusses the flow of influence from that legislation back to implementation. My analysis considers both of these flows and discusses them within the framework of CLP. Given the premise that law and social actors are "mutually constitutive", I propose that what is "mutually constituted" is a specific set of norms related to trafficking that I refer to as the "dominant paradigm".

This set of norms, the "dominant paradigm" is the answer to the question of "what is trafficking", or what is perceived to be trafficking at any given time. Where I expand somewhat on other critical legal pluralist analyses is my suggestion that this paradigm becomes another actor on the stage. The paradigm that is created by the interaction of social actors (for example legal instruments, legal implementers, NGO's, inter-governmental organizations, media, states and migrants) takes on a character of its own and itself impacts or "constitutes" what becomes law and how that law is implemented in practice. This chapter then focuses on the variety of influences and actors that have created the dominant paradigm of trafficking and how it has played out on the international stage.

Authors discussing trafficking often begin their works with an acknowledgement of how difficult it is to come to consensus on definitions, and many rail at the policy implications that such disparities cause. Jo Doezema argues that this is often accompanied by "calls for better definitions that appeal to the 'real' situation – the need for a definition that will more accurately reflect what is *really* going on."² This appeal for clarification is presumably underscored by an assumption that finally determining the truth about what trafficking definitively *is* will allay the problems thus far encountered in empirical research around the issue. And in particular settings, it is clear that definitions matter. With respect to policy

¹ Barbara Sullivan, "Trafficking in Women. Feminism and New International Law" (2003) 5(1) *International Feminist Journal of Politics* 67 at 68.

² Jo Doezema, *Sex Slaves and Discourse Masters, The Construction of Trafficking* (London: Zed Books, 2010) at 5.

choices, definitions are not just an “academic or ideological issue. The strategies or policies that should be pursued, depend to a high extent on the definition of the problem. ... [S]olutions vary, according to what is perceived as the problem to be solved: organized crime, illegal migration, prostitution, forced labour, violence and the abuse of women, unequal economic relationships or poverty ...”³ However, in the search for definition what is left uninterrogated is the means by which those definitions have been created and the players, purposes and power-dynamics involved in their creation.

Jo Doezema notes in her recently published book *Sex Slaves and Discourse Masters* that,

the majority of research on trafficking in women is concerned with documenting and explaining the ‘phenomena’ of trafficking itself: it attempts to establish who is being trafficked, who is doing the trafficking, how it is happening, why it is happening, and what can be done. This research can be helpful in correcting assumptions and misunderstandings about ‘trafficking in women’, and can serve as a basis for creating policy that will better protect the human rights of migrant (sex) workers. However, an approach that seeks to establish the ‘facts’ about trafficking, valuable as it may be, leaves unanswered the questions of how these ‘facts’ will be interpreted and which interpretations will come to be accepted as legitimate knowledge. To answer this we need to look at the effect of power on knowledge: the way in which social power is exercised in knowledge creation, and the ways in which representations of people and problems are used to legitimate knowledge.⁴

In her book, Doezema undertakes an extensive analysis of the “myth” of trafficking in its prior incarnation as “white slavery” and in its current form. In this case “myth” does not imply a falsehood in the sense of an incongruity with objective reality; rather she points to the use of myth as a “collective belief that simplifies reality.”⁵ She is “concerned with how certain definitions of the problem become dominant, with whose knowledge is accepted and whose sidelined, and with the social practices involved in constructing and legitimizing knowledge.”⁶ Similar to CLP analyses, it is the process of producing the norm of trafficking that is under scrutiny rather than the veracity of the norm itself as judged against some essential truth.

³ Global Alliance Against Trafficking in Women, cited in Wijers, Marian and Lin Lap-Chew, *Trafficking in Women, Forced Labour and Slavery-Like Practices in Marriage, Domestic Labour and Prostitution* (Bangkok and Utrecht: GAATW and STV, 1997) at 16.

⁴ Doezema *Sex Slaves*, *supra* note 2 at 10.

⁵ Grittner, quoted in Doezema *Sex Slaves*, *supra* note 2 at 31.

⁶ Doezema *Sex Slaves*, *supra* note 2 at 9.

According to Doezema, through narrative, the myth of white slavery/trafficking takes on the appearance of reality.⁷ However, she does not attempt to prove that such representations are “false” through empirical study; instead she questions the ability of such studies to adequately address the social processes underway in the creation of those representations. Doezema maintains that working to prove that history does not correspond to the “myth” of trafficking in fact reinforces the original imagery:

The ironic power of the myth of trafficking is that in attempting to lift the mask through exposure of the ‘facts’, it only settles firmer. ... The myth of trafficking persuades us that we are on the right course: we investigate the facts, denounce the distortions and triumphantly claim that the myth of trafficking is no more – exposed to the harsh light of truth. Yet, our every step has been at the behest of myth. We imagine ourselves free from trafficking at the moment we are most captured by it.⁸

Thus the question of whether or not a specific statistic or story is “true” in fact already presumes the framework of the existing myth. Doezema suggests that statistical questions frequently asked about the “truth” about trafficking (for example, “how much trafficking is there”) cannot be answered by empirical study since “the problem is not one of inadequate definitions or statistical shortcomings (as has most often been argued), but rather a matter of differing ideologies.”⁹ To conduct such empirical research is thus to assume some form of objective reality against which the produced myth can be judged “as though this image were simply a matter of ill-informed representation”.¹⁰ It does not account for the power of such myths, the reasons behind their production and the reasons behind their persistence. Uncovering the “myth” of trafficking does not presume to “disprove” the existence of particular incidents or statistics conveyed by various actors or condone them. Rather, in a pursuit similar to that of CLP analysis, Doezema proposes an inquiry into the “relationships among those who shape meanings of ‘trafficking in women’.”¹¹ Her goal is thus not to argue that myths need replacing by the “truth”, but rather that “it may be necessary to replace old myths with new ones.”¹² The goal of Doezema’s work is not to uncover “true” statistics or create a universal definition of “trafficking” against which incidents can be judged “true” or

⁷ Doezema *Sex Slaves*, *supra* note 2 at 53.

⁸ Doezema *Sex Slaves*, *supra* note 2 at 45.

⁹ Doezema *Sex Slaves*, *supra* note 2 at 35.

¹⁰ Doezema *Sex Slaves*, *supra* note 2 at 9.

¹¹ Doezema *Sex Slaves*, *supra* note 2 at 11.

¹² Doezema *Sex Slaves*, *supra* note 2 at 48.

not. Rather, it looks to the utility of the current myth, its origins and motivations and the consequences that the creation of the term “trafficking” has had on various people impacted by it.

In order to conduct an analysis of current myths around trafficking, Doezema discusses historical representations of “white slavery” and highlights similarities in discourse and public policy concerns between campaigns against white slavery and current anti-trafficking campaigns. In this dissertation, I continue Doezema and others’ work in this regard, relying heavily on Doezema’s thorough historical analysis in part 1(A). However, where I expand on their work is that first, I undertake a CLP analysis, describing the ways in which various stakeholders in the myth – academics, international organizations, law enforcement, states, NGO’s, and media – specifically influence and are influenced by the dominant paradigm of trafficking. Second, I include the “myth” as having its own personality and influences. Third, I am able to update the analysis, including documents, speeches, and campaigns created in the past ten years, during which there has been a proliferation of campaigns, programming and documentation dedicated to addressing the issue of “trafficking”. Last, the key contribution of this work is to apply the analysis to a Canadian context, which will be the focus of Part II of the dissertation.

It is important to note that there are certainly individuals and groups within each stakeholder category who do not subscribe to nor propound the trafficking myth as it has been created, and I do not wish to oversimplify the many different and varied approaches and language used. As discussed in section 3B on varying approaches to anti-trafficking work, many authors and NGOs take issue with the primacy of the dominant paradigm, and particularly the focus on sex work. They offer wider or alternative views of who should be protected under trafficking programs and how. Other authors argue that offering other views of who is “trafficked” still belies an understanding of trafficking as something definable, external to rhetoric and political agendas. Still others, particularly discussed in section 2.5 of this chapter, argue that the term is purposefully vague, leaving the door open for using it in ways that accord with particular political agendas, sometimes proving detrimental to the interests of a variety of vulnerable groups.

Through the analysis described above, my project critiques the very notion of trafficking as something ultimately definable, highlighting the ways in which the term has been constructed through the interests and rhetoric of various political and non-political actors. I propose that “trafficking” is not an identifiable phenomenon separate from other activities, but rather is an umbrella term used to refer to a subset of activities for which other names exist (e.g. prostitution, child prostitution, labour exploitation, domestic servitude, child labour, forcible arranged marriages), with each subset possessing similar, identifiable qualities. I also propose that this term has been used to implement programs that can actually harm people involved in these activities.

B. LAW, DISCOURSE AND THE CHARACTERISTICS OF TRAFFICKING

i. History of the “Myth” and the paradigm of White Slavery

To begin with, it is necessary to discuss the history of the trafficking “myth”, as the actors involved in its development and the instruments that impact it did not suddenly appear in the contemporary fight against trafficking. Rather, these actors have been involved in the creation of the trafficking paradigm since the spectre of “white slavery” arose amidst concerns around prostitution and immigration in the “west”¹³ in the late nineteenth and early twentieth centuries. A widely-publicized characterization of trafficking in late nineteenth century England provides a clear illustration of the fears and attitudes towards prostitution intertwining with white slavery rhetoric:

Prostitution in England is Purgatory; under the State regulated system which prevails abroad it is Hell. The foreign traffic is the indefinite prolongation of the labyrinth of modern Babylon, with absolute and utter hopelessness of any redemption. When a girl steps over the fatal brink she is at once regarded as fair game for the slave trader who collects his human ‘parcels’ in the great central mart of London for transmission to the uttermost ends of the earth. They move from stage to stage, from town to town – bought, exchanged, sold – driven on and ever on like the restless ghosts of the damned, until at last they too sleep ‘where the wicked cease from troubling and weary are at rest.’¹⁴

¹³ The focus of this analysis is on the UK and the US, given the particular use of the term “white slavery” at the time and the similarities to current ant-trafficking rhetoric.

¹⁴ Stead, 1885, *Maiden Tribute of Modern Babylon*, quoted in *Dozema Sex Slaves* at 71.

There are numerous images and narratives encompassed in this one story, and there are various historical and contemporary social anxieties at play. In Doezema's historical review of white slavery rhetoric during the "Progressive Era",¹⁵ she notes the increase in concerns around prostitution in both Britain and the US.¹⁶ These concerns reflected anxieties around increased urbanization, which some suggest made prostitution more visible,¹⁷ and in the US the more general transformation of the country from a predominantly rural agricultural society to one dependent on large scale manufacturing.¹⁸ One historian of US white slavery rhetoric argues that antiprostitution efforts "had at least as much to do with the anxieties produced by the transformation of American society ... as with the actual existence of red-light districts ... Prostitution became a master symbol, a code word, for a wide range of anxieties."¹⁹ These concerns led to various "purity crusades"²⁰ in both Britain and the US that impacted white slavery rhetoric immensely.

Feminists, temperance groups, religious groups, medical professionals, journalists, as well as policy and law makers²¹ were all involved in defining prostitution in their attempts to decide what should be done about it. Although ideologically these groups differed, prohibitionist campaigners paired with working men's organizations and religious groups, as well as groups involved in the "purity crusades" in the attempt to eliminate the evil of prostitution.²² Grittner, a historian of white slavery rhetoric, remarks that social purity reformers "soon discovered the rhetorical power that 'white slavery' had on their middle-class audience."²³ Prohibitionist groups at the time also "had discovered how useful it was to adopt in their arguments the prohibitionist language of 'protecting women' and 'saving women'.²⁴ In antiprostitution efforts, it was only when "prostitution was grasped through the myth of white slavery that it began to resonate with the national conscience"²⁵ and

¹⁵ Doezema *Sex Slaves*, *supra* note 2 at 55.

¹⁶ Doezema *Sex Slaves*, *supra* note 2 at 57 and 78.

¹⁷ See Connelly, quoted in Doezema *sex slaves*, *supra* note 2 at 77.

¹⁸ Doezema *Sex Slaves*, *supra* note 2 at 78.

¹⁹ See Connelly, quoted in Doezema *sex slaves*, *supra* note 2 at 38.

²⁰ Doezema *Sex Slaves*, *supra* note 2 at 78.

²¹ Doezema *Sex Slaves*, *supra* note 2 at 57 and 77.

²² Doezema *Sex Slaves*, *supra* note 2 at 60.

²³ Frederick Grittner, quoted in Doezema *Sex Slaves*, *supra* note 2 at 60.

²⁴ Doezema *Sex Slaves*, *supra* note 2 at 112.

²⁵ Doezema *Sex Slaves*, *supra* note 2 at 80.

engendered national concern in the US.²⁶ The two concepts became inextricably linked. In the US particularly, “it is a mistake to see ‘white slavery’ as a distinct, bounded area within the larger area of concern with prostitution. For campaigners, policy makers and the public the distinctions between prostitution and white slavery were blurred or nonexistent: for many, white slavery was synonymous with prostitution.”²⁷ In addition, “the links with other types of crime, and the control of prostitution by ‘foreign criminal gangs’, were all key themes in the white slavery myth.”²⁸ Images of the “evil ‘white slave’ trader”²⁹ were sometimes drawn in terms of the already “ruined” woman perpetrating the downfall of other innocents³⁰ (the “ruiner”), but most often they took on a dark, foreign aspect, providing an outlet for xenophobic fears. One anti white-slave campaigner in the US describes white slave traders as,

human vultures who fatten on the shame of innocent young girls. Many of these white slave traders are recruited from the scum of the criminal classes of Europe. ... On the one hand the victims, pure, innocent, unsuspecting, trusting young girls – not a few of them mere children. On the other hand, the white slave trader, low, vile, depraved and cunning – *organically* a criminal. [emphasis added]³¹

Concerns about the “foreigner” were heightened when significant changes took place in immigration trends to the United States. Previous immigration from northern Europe was increasingly replaced by southern Europeans and those from the Austro-Hungarian empire.³² Alongside anxieties over the changes in industrial landscape from rural to urban were xenophobic fears of those representing different ethnic, social and cultural backgrounds, as reflected in the description of the “scum of the criminal classes of Europe.” And while a “reforming impulse”³³ emerged in the progressive era, in which middle class men and women sought to address injustices in the health, work and living conditions of cities’ working classes and immigrants, these impulses combined with social purity ideals in

²⁶ Doezema *Sex Slaves*, *supra* note 2 at 80.

²⁷ Doezema *Sex Slaves*, *supra* note 2 at 80.

²⁸ Doezema *Sex Slaves*, *supra* note 2 at 138.

²⁹ Doezema *Sex Slaves*, *supra* note 2 at 81.

³⁰ Doezema *Sex Slaves*, *supra* note 2 at 97.

³¹ E. A. Bell, *Fighting the Traffic in Young Girls* (Chicago: G. S. Ball, 1910) at 16.

³² Doezema *Sex Slaves*, *supra* note 2 at 78.

³³ Doezema *Sex Slaves*, *supra* note 2 at 79.

the context of prostitution reform led to “an equation between poor working/living conditions and immorality.”³⁴

Doezema points to devices such as “the repetition of key phrases such as ‘naïve and innocent’, the invocation of iconic indicators of youth such as dolls and teddy bears, the lingering descriptions of fresh youthful beauty, and the pitiful descriptions of poverty.”³⁵ These narratives stressed youth, whiteness and unwillingness to be a prostitute³⁶ as key to establishing victimhood. However, as a corollary, downfall was a key part of the narrative, both with respect to victims’ beauty and their virtuousness.³⁷ Innocence was “complicated by the presence of the image of the prostitute as ruiner, herself the destroyer of innocence. It is no surprise that the magic word that performed the transformation was ‘consent’.”³⁸

The immigrant victim played a specific role, with part of her situation attributed to “the backwardness of her own culture, and the failure of immigrants successfully to adopt or adapt to American ‘civilization’”, while also remaining “a powerful symbol of outrage for campaigners against the low wages and poor living conditions of immigrants. The mythical tide of immigrant prostitution was used both by those who championed the cause of immigrants and those who sought to keep them out.”³⁹ The rhetoric of white slavery was also ideal for conflating racial anxieties, with white slavers being identified as both foreigners as well as black men in America. “In American white slavery narratives, the role of virtue’s downfall was very often played by immigrant men and freed male slaves. As ‘white slavers’, pimps and clients, ‘racially other’ men were charged with perpetrating a vast immoral network which threatened not only innocent American girlhood, but the very moral fibre of the nation.”⁴⁰ This also played into fears about increased industrialization, perpetuating a belief about the increasing control of (black) pimps over prostitution in a move towards the “commercialization” of the industry.⁴¹ This move also reveals a “perverse

³⁴ Nicky Roberts quoted in Doezema *sex slaves*, *supra* note 2 at 80.

³⁵ Doezema *Sex Slaves*, *supra* note 2 at 49.

³⁶ Doezema *Sex Slaves*, *supra* note 2 at 81.

³⁷ Doezema *Sex Slaves*, *supra* note 2 at 94.

³⁸ Doezema *Sex Slaves*, *supra* note 2 at 49.

³⁹ Doezema *Sex Slaves*, *supra* note 2 at 90.

⁴⁰ Doezema, *Sex Slaves* 83. See also Doezema’s analysis at p. 89 of *Sex Slaves* on the 1912 prosecution of Jack Johnson, a black male boxer in Galveston, Texas, under the Mann Act of 1910 (White Slave Trade) for further discussion of this topic.

⁴¹ Doezema *Sex Slaves*, *supra* note 2 at 102-103.

inversion of the historical reality of black slavery in America”⁴² with much of the rhetorical strength of the campaigns resting on the outrage engendered by anti-slavery discourse.⁴³

These operated in the excerpt from Stead’s story cited at the beginning of this section. The symbols within the story (and others like it) were juxtaposed against their opposites – the trafficked victim versus the prostitute, the innocent versus the guilty, the trafficked versus the trafficker, the white victim versus the dark foreigner. In this narrative, prohibitionist sentiments combined with social and religious puritanical ideals in the characterizations of prostitution as Purgatory, and in the portrayal of “foreign” prostitution as one step closer to religious decay – “Hell” absolute. These symbols also implied a sense of moral blame, given the subsequent references to “Babylon” and a lack of possible “redemption”. Although a sympathetic character, the victim participated in the loss of her own innocence as she “steps over” the brink, at which point she became “fair game” for the dark, ominous, foreign “other” who lay in wait to orchestrate her disappearance. At this point she became the subject of a parable of caution to others.

ii. *Trafficking – Characteristics and “Causes”*

The characteristics associated with trafficking in persons today, which form the dominant paradigm, clearly reflect the symbols and language created around “white slavery” panic of the Progressive Era. Current conceptions have their basis in the myth created during that historical period and similar social anxieties underlie trafficking discourse today. The rhetoric is so similar in fact that Doezema accuses contemporary discourses of performing “a macabre ‘zombie magic’, rousing the corpses of the Victorian imagination from their well-deserved rest.”⁴⁴ She notes three “genealogical signposts”⁴⁵ in the context of the white slavery myths during the Progressive Era that echo in future trafficking discourse. First, she highlights the societal changes taking place during the Progressive Era that have similar today. She emphasizes “mass migration, industrialization, and the seeds of the disintegration of the old global order of British-dominated colonialism.”⁴⁶ Second, she notes

⁴² Doezema *Sex Slaves*, *supra* note 2 at 83.

⁴³ Doezema *Sex Slaves*, *supra* note 2 at 82.

⁴⁴ Doezema *Sex Slaves*, *supra* note 2 at 77.

⁴⁵ Doezema *Sex Slaves*, *supra* note 2 at 80.

⁴⁶ Doezema *Sex Slaves*, *supra* note 2 at 80.

the similarities in contemporary anti-trafficking discourse's use of "the language of slavery, lending urgency and historical significance to their campaigns."⁴⁷ Finally, she draws attention to the demonization of the immigrant as a perpetrator of this evil, arguing that "the supposed threat to the nation by immigrants is one of the most potent aspects of the contemporary trafficking myth."⁴⁸

These and other elements of the contemporary trafficking myth have also been identified by other commentators in the field. Jyoti Sanghera, for example, identifies 15 elements in modern trafficking discourse – some arising from the trafficking narratives and some from the narratives of those who aim to "rescue" victims from their fate:

- 1) Trafficking of children and women is an ever-growing phenomenon;
- 2) Increasing numbers of victims of trafficking are younger girls;
- 3) Most trafficking happens for the purpose of prostitution;
- 4) Poverty is the sole or principal cause of trafficking;
- 5) Trafficking within the Asian subcontinent and the region is controlled and perpetrated by organized crime gangs;
- 6) All entry of women in to the sex industry is forced and the notion of "consent" in prostitution is based upon false consciousness or falsehood;
- 7) Based on the assumption that most women in prostitution are coerced and trafficked, it is then assumed that they would be only too happy to be rescued and reintegrated with their families, or rehabilitated;
- 8) Rehabilitation into families and communities is viewed as an unproblematic strategy for it is assumed to provide adequate protection and safety to the victims of trafficking;
- 9) Brothel-based prostitution is the sole or major form through which sex trade in the region is conducted;
- 10) Police-facilitated raids and rescue operations in brothels will reduce the number of victims of trafficking in the prostitution industry;
- 11) Absence of stringent border surveillance and border control is the principal reason for facilitation of transborder trafficking;
- 12) Anti-migration strategies based upon awareness-raising campaigns which alert communities to the dangers of trafficking by instilling fear of strangers, and fear of big metropolises and cities, will curb migration and hence trafficking;
- 13) Strategies which lump women and children together will be equally beneficial to both in extending protection against trafficking and redress after being trafficked;
- 14) all persons under 18 years of age constitute a homogenous category – children, devoid equally of sexual identity and sexual activity, bereft equally of the ability to exercise agency, and hence in need of identical protective measures;

⁴⁷ Doezema *Sex Slaves*, *supra* note 2 at 82.

⁴⁸ Doezema *Sex Slaves*, *supra* note 2 at 91.

15) Law enforcement is a neutral and unproblematic category and all it needs is sensitization and training on issues of trafficking in order to intervene effectively to curb the problem of trafficking.⁴⁹

Based on Doezema's analysis, we can potentially see Sanghera's fifth point expanded to include all trafficking, not just that on the Asian subcontinent. Doezema notes that the existence of "criminal networks" in current anti-trafficking discourse is "an article of faith constantly repeated in accounts by feminists, NGOs, police, journalists and politicians."⁵⁰

Doezema also notes the conflation of trafficking and smuggling that many states perpetuated in the discussions around the Protocol that underscore the focus on "illegality" and fears around global migration. She states that "[t]he confusion between trafficking and smuggling is more than linguistic. It indicates the importance of the ideas of who deserves protection and who deserves punishment."⁵¹ This conflation is displayed through the continued use of the term "illegal trafficking" by States Parties during the negotiations to the Protocol, and the presumption of illegality in the introduction used to frame the work of the International Centre for Crime Prevention – the body of the UN under whose aegis the Protocol was negotiated:

Globalization has provided the environment for a growing internationalization of criminal activities. Multinational criminal syndicates have significantly broadened the range of their operations from drug and arms trafficking to money laundering. Traffickers move as many as 4 million illegal migrants each year generating gross earnings of between 5 and 7 billion US dollars.⁵²

The discussion moves seamlessly from organized crime to illegal migration all under the auspices of the Protocol, without making explicit the reasons for the links or the relevance of the statistics proffered. Doezema uses terminology from Lacau, naming this rhetorical move "chains of equivalence". Such chains are created when "concepts become interchangeable, so when one term is mentioned, the entire sequence is evoked."⁵³

⁴⁹ Jyoti Sanghera, "Unpacking the Trafficking Discourse" in Kamala Kempadoo, ed., *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (Boulder: Paradigm Publishers, 2005)

⁵⁰ Doezema *Sex Slaves*, *supra* note 2 at 138.

⁵¹ Doezema *Sex Slaves*, *supra* note 2 at 121.

⁵² Doezema *Sex Slaves*, *supra* note 2 at 12.

⁵³ Doezema *Sex Slaves*, *supra* note 2 at 131.

Jayashri Srikantiah discusses the current rhetoric that focuses on trafficking victims, pointing to US lawmakers' repeated references to "victims as meek, passive objects of sexual exploitation ... exercising no free will during their illegal entry into the United States and ... passive during their subsequent sexual exploitation." He provides two reasons for the persistence of this imagery. First, this particular stereotype aims to draw a clear distinction between trafficking victims and illegal migrants, thereby clearly demarcating the line between the innocent victim and the culpable "illegal", who are increasingly characterized as brown-skinned "intruders, trespassers, law breakers", taking US residents' jobs and draining social services.⁵⁴ Doezema notes that the division applies both to prostitution and to current debates around trafficking and smuggling in which "'genuine asylum seekers' [are] pitted against 'bogus asylum seekers' or 'economic migrants'."⁵⁵ Secondly, Srikantiah also speaks to a common narrative about trafficking where victims are forced or coerced into performing sexual labour, with the coercion being severe enough to make them appear as good witnesses. In this narrative they must remain passive until rescued by law enforcement, whereupon they reveal their entire story to authorities.⁵⁶ He notes that the characterization of the victim as meek and passive allows for prosecutors to ascribe maximum culpability to offenders.⁵⁷ Claudia Aradau builds on this notion of the passive trafficked victim, explaining that "[b]eing intrinsically linked to emotions, to sentiment, victimhood is supposed to trigger direct reactions in the spectator Trafficked women ...suffering at the hands of traffickers makes them extraordinary, beyond the ordinary identifications with illegal migrants and prostitutes."⁵⁸

With these characteristics in mind, the victim of trafficking as portrayed through modern-day narrative emerges. She is entirely under the control of her captors, who are members of "organized criminal enterprises", and she is completely devoid of choice or agency. She is

⁵⁴ Jayashri Srikantiah, "Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law" (2007) 87 *Boston University Law Review* 157 at 190.

⁵⁵ Srikantiah, *ibid* at 127. See also the discussion in Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008) at 18 wherein she notes that formerly seeking to better one's life (being an "economic migrant") used to be a primary reason to migrate as opposed to a reason to be excluded from migrating.

⁵⁶ Srikantiah, *supra* note 54 at 187.

⁵⁷ Srikantiah, *supra* note 54 at 160.

⁵⁸ Claudia Aradau, "Trafficking in Women Human Rights or Human Risks?" 22(3/4) *Canadian Woman Studies* 56.

innocent, meek, subdued, usually bruised and beaten, constantly looking over her shoulder, and thrilled to be saved from her captor. Illegality also plays a large role in her situation, and reinforces her vulnerability. She has either entered the country illegally or stays beyond the point when she is legally permitted, and was forced or enticed to do so under false pretenses. Her illegal immigration status and her illicit sexual conduct are used to enforce her isolation and fear of authorities (thereby removing any responsibility from the hands of official state actors). This paradigm has been created through an interaction between historical and contemporary societal anxieties around prostitution and immigration, the reinforcement of heterosexual norms around women as passive sexual recipients and males as sexual aggressors, law enforcement and prosecution requirements and appeals to public sentiments around victims. It continues to be perpetuated and reshaped through the interplay between the various interested groups identified in Figure A below, and, as shown in the next section, this process is clearly reflected in the discourse they each use.

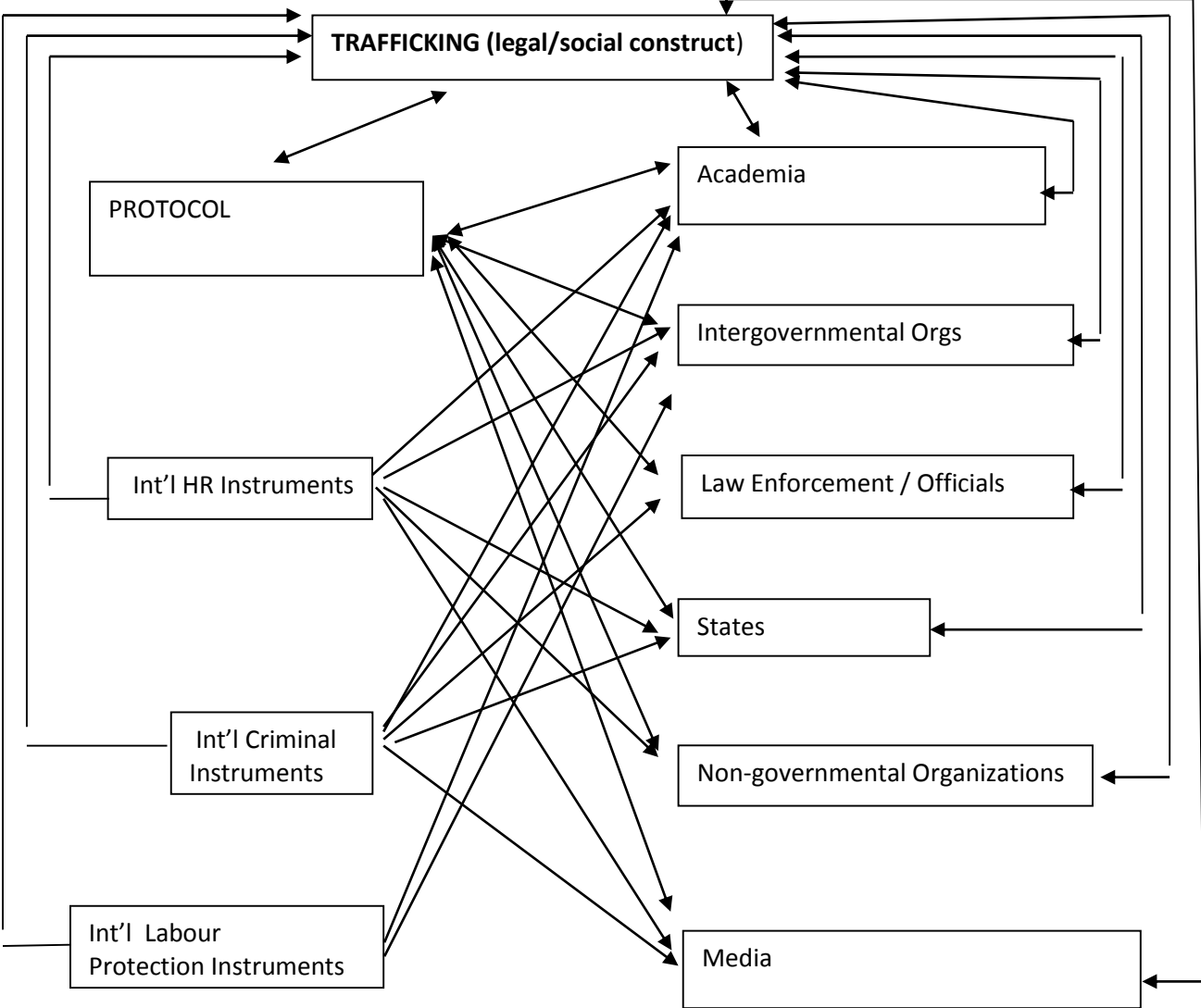
C. ACTORS AND INFLUENCES

The dominant paradigm is reflected in the words used to describe trafficked persons uttered by academics, international organizations, state actors, law enforcement, media displays and NGOs and the ways in which these texts and speeches both influence international instruments as well as being influenced by them. Through an analysis of the current texts of these different actors, it is possible to highlight the ways in which the imagery is being played out and modified to fit modern-day political concerns. The promotion of the dominant paradigm in the texts, images and speeches provided by the various actors often takes place through an overlap between descriptions of trafficking and normative characterizations of what *should* be considered trafficking. Through the operation of various “chains of equivalence” and other rhetorical devices, debates slip between the two forms of language. This “slipperiness”⁵⁹ fuels the assumptions that underlie adherence to the dominant paradigm and the implementation of particular anti-trafficking activities and programs.

⁵⁹ Doezema *Sex Slaves*, *supra* note 2 at 46.

Figure A represents the interaction of the various “actors” at an international level in the construction of the norm of trafficking. Each box represents actors or instruments that have influenced and/or been influenced by the dominant paradigm of trafficking. I identify the major instruments relating to trafficking as: the Protocol, international human rights instruments, international criminal instruments and international labour protection instruments, particularly those identified in Chapter 1. I identify the actors whose actions and/or discourse influence the conception of the dominant paradigm as: academics, international organizations, state officials and their official state discourse, law enforcement, NGO’s and activities and reports produced by them, and journalists and their media publications. I argue that each of these actors and instruments have played a role in the generating of the dominant paradigm of trafficking. I further argue that this dominant paradigm continues to be transformed through the activities of these actors and their interaction with the various relevant instruments. The dominant paradigm in turn shapes actors’ discourse and activities, ultimately shifting the framework of legal regulation around trafficking.

FIGURE A: THE INTERNATIONAL CONTEXT



i. Academia

The academic community is of particular interest given that some members reflect and influence the dominant paradigm in their work, while others comment on and critique it. In this subsection I discuss both of these approaches as well as those that critique problematic conceptualizations of trafficking but continue to perpetuate assumptions.

Despite widespread disagreement as to the characteristics of trafficking, as evidenced in the negotiations to the Protocol, many authors will attempt to describe the phenomenon in terms that suggest that some consensus exists. For example, Anna Zalewski recounts what she terms a “typical trafficking scenario”:

Deng volunteered to leave her home country of Thailand to work in Australia as a prostitute. When she arrived, traffickers took her passport and forced her to service hundreds of men to pay off a “debt” of over \$30,000. The traffickers locked Deng in a house, gave her little to eat, and forcibly brought her to work in a brothel seven days a week.⁶⁰

This author subsequently attempts to contextualize trafficking within global migration, defining it as an “exploitative form of irregular migration”.⁶¹ However, the inclusion of the “typical” trafficking scenario undermines that careful definition and the nuances within it. Others provide broad definitions of trafficking, such as “the recruitment and transportation of human beings through deception and coercion for the purposes of exploitation”,⁶² but go on to speak of trafficking as the “selling of vulnerable people – *often* but not exclusively young women and girls – into sexual bondage and other exploitative activities”⁶³ (my emphasis). In this latter case, the authors state that the definition employed in their work is derived from the definition of trafficking included in the Protocol, but quantification is inserted when they state that,

victims can be physically enslaved and imprisoned ... or a number of forms of leverage and coercion can be employed Victims *are often* given some of the money they generate in the sex industry ... [and] [v]ictims *often* perceive that public authorities

⁶⁰ Anna Zalewski, “Migrants for Sale: The International Failure to Address Contemporary Human Trafficking” (2005-2006) 29 *Suffolk Transnat’l L. Rev* 113 at 114.

⁶¹ Zalewski, *ibid* at 114.

⁶² Sally Cameron and Edward Newman, “Introduction” in Sally Cameron and Edward Newman eds, *Trafficking in Human\$: Social, Cultural and Political Dimensions* (UN University Press, NY, 2008) 1.

⁶³ Cameron and Newman, *Introduction, ibid* at 4.

are unsympathetic, or they are afraid of approaching these authorities for fear of being prosecuted as a prostitute or illegal immigrant.⁶⁴ (my emphasis)

This particular image thus becomes the primary image of the trafficked person. The shift then takes on a normative character when the authors call for a distinction to be made "between trafficking and migrating, trafficking and prostitution and voluntary and forced prostitution",⁶⁵ as though these categories are clear and unquestioned and such distinctions do not carry with them normative value and power.

Key characteristics of the paradigmatic trafficked victim abound in much academic writing on the topic. For example, one author describes trafficking as occurring when

unsuspecting victims are enticed with the promises of job opportunities and financial prosperity, or kidnapped and coerced, forced to engage in other activities that are exploitative and enslaving at their destination. Much like the chattel slaves of the past, trafficked victims are also sold by their "master" (the trafficker) and exploited until the expiration of their indenture.⁶⁶

Here the image of the innocent white slave deceived into a life of degradation emerges, reflecting the paradigmatic trafficked victim. The trafficked victim is poor and/or "ethnic":

trafficking victims are likely to be more disadvantaged than other migrants, and evidence indicates that they are disproportionately female and members of racial or ethnic minorities or other groups that suffer discrimination in the home country"⁶⁷,

This characterization reaffirms their innocence and vulnerability as a group. They are illegal and afraid: "Most of the victims of trafficking are usually not able to speak the local language; they have no money, no papers and are under constant threat."⁶⁸

Other authors note that "[u]pon arrival in a foreign land their papers are seized and their movement confined, and, even if they have the opportunity, they are too frightened to seek

⁶⁴ Cameron and Newman, *Introduction*, *supra* note 62 at 5-6.

⁶⁵ Cameron and Newman, *Introduction*, *supra* note 62 at 13.

⁶⁶ Nana Derby, "The causes and characteristics of "contemporary slavery": impacts on women and girls" (2003) 22 (3/4) *Canadian Woman Studies* 60 at 62.

⁶⁷ Kinsey Aldan Dinan, "Globalization and National Sovereignty: From Migration to Trafficking" in Edward Newman and Sally Cameron eds. *Trafficking in Humans: Social, Cultural and Political Dimensions* (Tokyo: United Nations University Press, 2008) 58 at 73.

⁶⁸ Helga Konrad, "Trafficking from the European Perspective" in Edward Newman and Sally Cameron eds. *Trafficking in Humans: Social, Cultural and Political Dimensions* (Tokyo: United Nations University Press, 2008) at 169.

help.”⁶⁹ “Trafficked women *tend to be* illegal immigrants or engaged in illegal activities”⁷⁰ (my emphasis) and the link between trafficked victims and illegality is seen as implicit: “The phenomenon of human trafficking stands out as the starkest example of illegal border crossing.”⁷¹ The victim is not in fact a victim until she becomes “illegal”: “[w]ith international migration on the rise, increasing numbers of women subjected to forced labor/slavery-like practices in a foreign country have not been trafficked, but rather have entered the country legally or illegally by other means”⁷², thus drawing a direct line from an individual’s irregular migration status and their status as victim, although legal definitions make no such explicit link. Trafficking is viewed as being distinct from voluntary migration and “smuggling”, thereby bypassing any blame that may be associated with a woman’s choice to risk migrating, because “traffickers control both the movement and the labour exploitation.”⁷³

Victims are still portrayed primarily as being coerced into the sex industry, partly to absolve law enforcement from responsibility for being unable to adequately address the issue: “Trafficked women tend to be illegal immigrants or engaged in illegal activities – such as prostitution – and therefore are reluctant to lodge complaints with the authorities over labour issues or coercion.”⁷⁴ It is also the sordid and morally reprehensible quality of the labour that has given rise to the current attention given to trafficking, and has taken precedence as the most widely identified activity:

though trafficking into other forms of labour does exist, trafficking into prostitution is far and away the most significant form of trafficking in the present. Ignoring the significance of prostitution as a destination will make it more difficult to work out how to stop trafficking. The fact that it is the overwhelming destination makes it necessary to ask what is it about prostitution that makes it particularly suited to servitude.⁷⁵

⁶⁹ Cameron and Newman, *Introduction*, *supra* note 62 at 5.

⁷⁰ Cameron and Newman, *Introduction*, *supra* note 62 at 6.

⁷¹ Catherine Dauvergne, *Yet We Are Not Saved: Hegemony and the Global War on Human Trafficking*, Talk delivered at the University of Toronto Diversity Workshop, November 10, 2005, online: <<http://www.utoronto.ca/ethnicstudies/DauvergnePaper.pdf>>

⁷² Janie Chuang, “Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts” (1998) 11 *Harv. Hum. Rts. J.* 65 at 66.

⁷³ International Council on Social Welfare, *Trafficking and labour related exploitation in the ASEAN Region*, online: <<http://www.icsw.org/doc/Trafficking%20Labour%20Exploitation%20in%20ASEAN%2007.pdf>>.

⁷⁴ Cameron and Newman, *Introduction*, *supra* note 62 at 6.

⁷⁵ Sheila Jeffreys, ‘The Traffic in Women: Human Rights Violation or Migration for Work?’ In Agrawal, Anuja (ed.). *Migrant Women and Work*, (New Delhi, Thousand Oaks, California, London: Sage Publications) 194 at 201.

The presumption is that not only is prostitution the worst site of trafficking, and thus the victims in this context are the most worthy of protection, but also that this is the “real” trafficking. When describing the trajectory of deception trafficked women face, authors have noted that “[s]ome may have some idea about what they are going to be involved in. Others will have been completely deceived into thinking that they would be working as innocent entertainers, maids or factory workers”.⁷⁶ The assumption is that only when an individual is deceived into working in the sex industry does she enter the realm of the “trafficked”.

The trafficked person is in the end defined by the trafficker, the one who does the deceiving and lures the innocent. Recruiters or traffickers may be “a family friend, an employment agency, or even reputable individuals within the community ... [who] frequently use deception as a tactic to lure ‘willing’ women to gainful ‘work’ abroad ... when in reality they are trafficked into prostitution.”⁷⁷ Traffickers are said to “use various methods to solicit the compliance of their victims ... by threats to harm the victim, threats to turn them over to officials for deportation, physical abuse, torture, rape, confinement, seclusion, and even threats to the victim’s family in the nation of origin.”⁷⁸ However, whatever means are employed, the trafficker is inevitably associated with organized crime and the seedy underworld of criminal activity. Some authors speak of the organized criminal groups cashing in on an already existing phenomenon: “[T]ransnational organized crime syndicates found an abundant supply of a new commodity to be traded for profit: human labour. The result was increased trafficking of men, women and children.”⁷⁹ And some authors presume the link without even finding it necessary to make the connection explicit: “Human trafficking is the third top revenue source for organized crime and the fastest growing criminal industry in the world”⁸⁰ and is said to be the “fastest growing criminal enterprise”.⁸¹

⁷⁶ Cameron and Newman, *Introduction*, *supra* note 62 at 5.

⁷⁷ Shaheen P. Torgoley, “Trafficking and Forced Prostitution: A Manifestation of Modern Slavery” 2005 *Tulane Journal of International and Comparative Law* 553 at 562

⁷⁸ Torgoley, *ibid* at 562

⁷⁹ Janie Chuang “The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking” (2006) 27 *Michigan Journal of International Law* 437 at 441. See also Sarah Shannon, “Prostitution and the Mafia : The Involvement of Organized Crime in the Global Economy” in *Illegal Immigration and Commercial Sex. The New Slave Trade*. Phil Williams (ed.). (London: Frank Cass Publishers, 1999) 119-144 and Richard O’Neill A, *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime* (Washington, D.C.: Center for the Study of Intelligence (CIA), 2000)

⁸⁰ Zalewski, *supra* note 60 at 120

⁸¹ Cameron Newman, *Introduction*, *supra* note 62 at 4

As noted in Chapter One, the Protocol does not specify the involvement of organized crime as a feature in the definition of trafficking nor is illegal transnational movement necessarily a prerequisite to an activity potentially falling within the legal definition. In these characterizations we see the reflection of the myth of trafficking and implicit notions of innocence and sexual deviance that shape, narrow and clarify the ways in which the legal definition is interpreted.

ii. Intergovernmental Organizations (IGOs)

IGOs use similar rhetoric in their discussions of trafficking. The International Community, consisting of IGOs, NGOs, state representatives and military organizations, has played a significant role in determining the image of the trafficked victim today. I use the term “International Community” to identify situations in which these groups are working collectively around a particular issue, whether a response to international conflict or to a particular substantive issue such as trafficking. Given the worldwide attention focused on the Protocol, created under the auspices of the UN, it is clear that IGOs have played a particularly prominent role in defining trafficking. Since IGOs are officially a collective of state representatives, it is clear that state priorities take precedence in representatives’ conduct in official proceedings. However, such gatherings are also influenced by organizational procedures, organizational priorities - such as consistency with internal United Nations human rights declarations and instruments, and informal relations between states that support compliance with particular standards. Consequently, I discuss texts and activities undertaken by IGOs as a collective separately from particular state actors operating outside the auspices of the International Community. The major IGOs involved in the anti-trafficking movement are the UN, through its subsidiaries such as the United Nations Children’s Fund (UNICEF) and the UN Office on Drugs and Crime (UNODC) – which also works in tandem with UN Global Initiative Against Trafficking (UNGIFT), a joint initiative of various UN agencies. In Europe the Organization for Security and Cooperation in Europe (OSCE), and its subsidiary institution the Office of Democratic Institutions and Human Rights (ODIHR) lead several anti-trafficking programs alongside the EC and the EU.

In the spirit of comprehensive review, it is important to note that in recent years many of these organizations have worked to expand and clarify the notion of trafficking and the forms of responses that are taken to the issue. Given the rigorous editing standards and public relations considerations in organizations such as the OSCE and UNODC, the language used in reports is generally more neutral with respect to trafficking than that used by NGOs or found in media reports. For example, in the 2010 OSCE Annual Report of the Special Representative for Combating Trafficking in Human Beings the author states that although the prevalent image of what a trafficked victim is still remains the coerced prostitute, terrorized by violence and the possibility of retaliation by her exploiters, she goes on to argue:

Trafficking is no longer a crime implying the victimization of only women and girls, but rather a crime that also heavily involves boys and young men, and even elderly people. It is acknowledged today that trafficking has many forms in addition to trafficking for the purpose of sexual exploitation, namely also for labour exploitation, for forced begging, for forced criminality, and for the removal of organs.⁸²

However, when noting the “four strategic priorities” the Special Representative has set for her work in the coming years, she returns immediately to a focus on vulnerable women and children, and associate slavery with trafficking without hesitation. The prevention activities she aims to undertake are:

1. Enhancing prevention of trafficking for labour exploitation, including domestic servitude
2. Enhancing prevention of child trafficking by strengthening child protection systems
3. Promoting women’s empowerment and gender-sensitive migration policies
4. Raising awareness to promote an anti-slavery movement in the OSCE area.⁸³

The only focused study undertaken by the OSCE on trafficking for the purposes of labour was on domestic work, with specific attention paid to women working in this sector.⁸⁴ When discussing labour trafficking in the context of more general reports on trafficking, there is

⁸² Organization for Security and Cooperation in Europe, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Combating Trafficking As Modern-Day Slavery: A Matter Of Rights, Freedoms And Security*, online: OSCE <<http://www.osce.org/cthb/74730>>.

⁸³ Organization for Security and Cooperation in Europe’s Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Preventing and Combating Trafficking in Human Beings in the OSCE Region*, online: OSCE <<http://www.osce.org/cthb/74755>> at p.4

⁸⁴ Organization for Security and Cooperation in Europe’s Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Unprotected Work, Invisible Exploitation: Trafficking for the Purpose of Domestic Servitude*, online: OSCE <<http://www.osce.org/cthb/75804>>.

still a heavy focus on the innocence, coercion and the gendered nature of the activity that draws on images from the dominant paradigm:

Trafficked persons' documents are typically confiscated, and they are forced to work during long hours, and are poorly paid or receive no wages at all. They often have to pay back an insurmountable debt in conditions that amount to slavery. They are socially isolated and often unable to speak or understand the local language. They are often exposed to ill and degrading treatment, including rape, psychological and sexual abuse, confinement, and physical punishment. ... This is the reality of trafficking in human beings today. It is a massive phenomenon of modern-day slavery. It is also one of the worst forms of violence against women and girls, who are particularly targeted not only for sexual exploitation but for specific purposes such as domestic servitude, owing to social vulnerability factors such as feminization of poverty, and to a persistent imbalance of power between the sexes.⁸⁵

The Special Representative also indicates unequivocally that trafficking is “not a form of exploitation mostly managed by predatory individuals, be they husbands or false lovers, but rather mostly a business of organized crime.”⁸⁶

Claudia Aradau also points to the 2001 poster for the “Europe Against Trafficking in Persons” conference held by the OSCE, noting that “[t]he trafficking experience is unequivocally inscribed on the body. The body that is pierced by the sale tag and smeared by the blood trace can be any other body, its suffering is directly visible and identifiable.” She suggests that, “In this straightforward approach, victimization is to be made physical and thus unambiguous. Physical suffering acts both as a difference effacer between categories of victims and it makes victim identification immediate.”⁸⁷

There is a tension in many IGO anti-trafficking activities between a recognition that current anti-trafficking efforts may not be sufficiently addressing the reality of migrant exploitation and a ready reliance on imagery so commonly associated with trafficking. For example, the UNODC/UNGIFT Global Report on Trafficking in Persons 2009⁸⁸ is, in many ways, carefully crafted, noting that the different emphases placed on divergent elements by states result in

⁸⁵ Office of the Special Representative, *supra* note 82 at 10.

⁸⁶ Office of the Special Representative, *supra* note 82 at 3.

⁸⁷ Aradau, *supra* note 58 at 56.

⁸⁸ United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2009*, online: UNODC <http://www.unodc.org/documents/Global_Report_on_TIP.pdf>

criminal justice figures being unreliable measures of the kinds of trafficking that exist in any region.⁸⁹ It also notes that research into trafficking suffers from a failure to understand the multidimensional nature of various intersecting activities.⁹⁰ However, it goes on to discuss the complexities of trafficking through use of imagery common to the dominant paradigm that falls into the traps the authors initially highlight:

We must, but cannot, catalogue (for lack of data) the different types of slavery: exploitation through child-begging in Europe is different from what goes on in a brothel, or on a street corner in Australia. Preventative measures must also be adapted to take into account that an *Asian father* sells his underage daughter under circumstances different from what forces an *African teenager* into a rag-tag army of killers, or what pushes an *illegal immigrant* into a sweat shop in the Americas.⁹¹ (my emphasis)

The overtly racialized language and references to the “illegal immigrant” in this introduction serve to set the tone of the report, despite the authors’ pleas for complexity and sophistication in trafficking research.

UNGIFT’s *Human Trafficking: The Facts* website also provides clear evidence of the continued existence of the trafficking myth in its simplistic characterizations of the trafficked victim. UNODC and ILO sources are quoted to support the “facts”, but the document offers no background or methodological basis for the conclusions reached:

The majority of trafficking victims are **between 18 and 24 years** of age
An estimated **1.2 million children** are trafficked each year
95% of victims experienced physical or sexual violence during
trafficking (based on
data from selected European countries)
43% of victims are used for **forced commercial sexual exploitation**, of whom 98 per
cent are women and girls
32% of victims are used for **forced economic exploitation**, of whom 56 per cent are
women and girls⁹²

⁸⁹ UNODC *Global Report*, *ibid* at 15.

⁹⁰ UNODC, *Global Report*, *supra* note 88 at 7.

⁹¹ UNODC, *Global Report*, *supra* note 88 at 7.

⁹² UN Global Initiative to Combat trafficking, *Human Trafficking: The Facts*, online: UNGIFT <http://www.unglobalcompact.org/docs/issues_doc/labour/Forced_labour/HUMAN_TRAFFICKING_-_THE_FACTS_-_final.pdf>.

The European Commission also focuses on women and girls, sexual exploitation and vulnerability as key characteristics of trafficking. Its Home Office website has the following explanation of trafficking in persons along with an evocative picture of a person in captivity:

A modern form of slavery



Trafficking is different from irregular migration or the smuggling of irregular migrants. Once having crossed the border, a trafficked migrant is further exploited in coercive or inhuman conditions. People are trafficked for the purpose of sexual and labour exploitation or the removal of organs. Women and children are particularly affected: women and girls represent 56 % of victims of forced economic exploitation and 98 % of victims of forced commercial sexual exploitation. Children are also trafficked to be exploited for begging or illegal activities, such as petty theft.⁹³

In these images and captions the common threads of the trafficking myth are replayed in modern discourse. Even in the publications in which neutrality of language is promoted, slavery, gendered work, organized crime, sexual exploitation, fears around migration, innocence and racialization are present.

iii. Law enforcement

Another major actor on the anti-trafficking stage is law enforcement. Particularly given the Protocol's focus on criminalization, organized crime and border control, law enforcement authorities, including both police and border authorities, play a significant role in anti-trafficking efforts. While these actors generally operate at a domestic level, or in some cases at a domestic level but cooperating transnationally, there are a few examples of influential international law enforcement bodies setting the tone for discussions of trafficking. Given

⁹³ European Commission, *Home Affairs*, online: EC <http://ec.europa.eu/home-affairs/policies/crime/crime_human_trafficking_en.htm>.

that local law enforcement agencies participate in transnational conferences and international agencies such as UNODC provide them with toolkits and trainings, these agencies' characterizations of trafficking can have significant influence on the operation of law enforcement at a domestic level.

The Deputy Director of Europol gave a speech to the International Organization for Migration in 2002 on trafficking entitled "Illegal immigration and trafficking in human beings seen as a security problem for Europe."⁹⁴ Even in the title, the two terms "illegal immigration" and "trafficking" are melded together, setting the tenor for the speech. In addition to this fusing of terms in the title, the officer goes on to make a distinction between illegal immigration and trafficking, noting that routes of travel may be the same between the two, but emphasizing that the two are separate activities. In this speech he also identifies three types of trafficking victims in the commercial sex sector, characterizing each as more or less a "true" victim:

[T]hree types of victims can be observed: those described either as exploited, deceived or kidnapped. The exploited victims are those who knew that they were going to be employed in the sex industry, but would never have imagined the slavlike conditions they have to work under, or the fact that little or no money would be left for them.

The deceived victims have been recruited to work in the service or entertainment industry, often through seemingly legitimate employment agencies or brokerages, and once they arrive in the Member States they are forced into prostitution.

The kidnapped victims were unwilling from the start. Though they may already have been working in the sex industry in the source country, they had no intention of going abroad. These victims remain the property of their owners and are often sold amongst networks or individual pimps. They are sex slaves in the truest sense.

The routes for trafficking in human beings are basically the same as the ones used for drugs and illegal immigrants. The Balkan route is a notorious example. As for the methods used to gain entry into a Member State, they are also very similar to those used by illegal immigrants, with a larger use of forged or stolen travel documents. These can be official documents (passports, visas) or personal ones (marriage papers, letters of invitation, job offers or student placement).⁹⁵

These characterizations of who is trafficked in the "truest sense" speaks volumes about who is viewed as most deserving of benefit and assistance.

⁹⁴ W. Bruggeman, *Illegal immigration and trafficking in human beings seen as a security problem for Europe*, online: <<http://www.heart-intl.net/HEART/030106/IllegalImmigrationandtrafficking.pdf>>.

⁹⁵ Bruggeman, *ibid* at 5.

UNODC has also played a large role in developing law enforcement strategies globally in response to trafficking activities. Two of its most notable contributions to this effort have been the *Toolkit to Combat Trafficking in Persons, 2nd ed*⁹⁶ released in 2008 and its *Anti-human trafficking manual for criminal justice practitioners* published in 2009 (Manual).⁹⁷ Particularly telling are the indicators referred to in the Manual on what a victim of trafficking may look like:

General indicators that a person may be a victim of trafficking include:

- Age—generally younger people of both genders are prone to be trafficked for all purposes;
- Gender—in sexual exploitation mainly female. In other forms of trafficking, victim types vary according to nature of exploitation etc.;
- Location of origin—developing economies, locations in crisis or transition;
- Documentation—travel or identity documents held by others;
- Last location—location associated with exploitation of commercial trafficking processes;
- Transport—escorted travel even for short distances;
- Circumstances of referral—referred after recovery by NGO, client rescue, self-referral, etc.;
- Evidence of abuse—physical signs, but look for more subtle forms of control;⁹⁸

These indicators are more thoroughly discussed earlier on in the Manual and some nuances are added in the elaboration. However, the dominant discourse still prevails in locating trafficking in poor countries, associating trafficking with the “undesirable migrant”, characterizing it as involving the withholding of identity papers, escorted travel and by focusing on identification through “rescue” by law enforcement or an NGO, a major feature of law enforcement’s understanding of a “victim”.

iv. States

Numerous states have made public statements about trafficking, adding to the general discourse on the topic. At a domestic level and as part of the larger International Community, official state press releases and speeches have an enormous impact on shaping legal and

⁹⁶ UN Office on Drugs and Crime (UNODC), *Toolkit to Combat Trafficking in Persons*, October 2008, 2nd edition, online: UNODC <http://www.unodc.org/documents/human-trafficking/HT_Toolkit08_English.pdf>.

⁹⁷ UNODC, *Anti-human trafficking manual for criminal justice practitioners*, online: UNODC <<http://www.unodc.org/unodc/en/human-trafficking/2009/anti-human-trafficking-manual.html>>

⁹⁸ Manual, *ibid*, module 2.

moral responses to the issue. As in the discussion in Chapter One on domestic legislation, here I have chosen the United States as a focus for analysis due to its proximity to and influence on Canadian policy. Canadian discourse itself will be addressed in Part II. There is an extraordinary amount of state discourse on trafficking in persons from the United States Government and thus I am discussing only a fraction of the available data. These data were specifically chosen because of their prominence and wide distribution.

First, visions of the trafficking myth can be found in the United States' allegations that the government was promoting prostitution during the negotiations to the Protocol. During the negotiations, CATW worked with a conservative women's organization, "Concerned Women for America", to mount a critique against the US for "calling for the adoption of a definition that would make 'voluntary' prostitution a legitimate form of labor. ... This immoral policy would not help women. It would only increase the spread of HIV/AIDS, among other problems. Prostitution is degrading."⁹⁹ These statements were accompanied by the joining of forces between CATW and Senator Jesse Helms in an attempt to discredit the US negotiators and pressure them to move towards a more anti-prostitution stance.¹⁰⁰

The US Department of State issued a toolkit to clarify their position with respect to the Protocol, including a document entitled "UN Trafficking Treaty: Myths/Facts"¹⁰¹ in which it firmly articulated an anti-prostitution stance, not specifically elucidated prior to the allegations:

FACT: The Administration opposes prostitution in all its forms. The United States has perhaps the most far-reaching prostitution laws in the world. There are international human rights and humanitarian laws that fight exploitation and prostitution. We will not agree to a treaty that weakens existing prostitution laws here or around the world.

At the same time the document discussed other forms of "slavery" specifically affecting women and children and highlighted characteristics found in the dominant trafficking paradigm, including the deceptive contract, captivity, sexual abuse and illegal immigration:

⁹⁹ Doeze *sex slaves*, *supra* note 2 at 129.

¹⁰⁰ Doeze *sex slaves*, *supra* note 2 at 129.

¹⁰¹ US Department of State, *UN Trafficking Treaty: Myths/Facts*, online: <http://www.state.gov/www/global/women/fs_000118_myths.html>

FACT: This debate is about much more than the sex industry. Every day, women and girls are being sold not only into prostitution but also domestic servitude, sweatshop labor, debt bondage, and other forms of modern-day slavery. Often lured with promises of jobs as waitresses or hairdressers, they may be held captive and forced to work in inhumane conditions. They may be raped or beaten continuously.

These crimes are violations of human dignity. The United States will not rest until all forms of trafficking are stopped. The draft protocol addresses trafficking --in the sex industry and elsewhere--that involves force, deception, fraud, and coercion. It would help punish those who profit from buying and selling women and girls. And it would encourage countries to offer truly unprecedented protection and assistance to the victims. In appropriate cases, women and girls who have suffered unspeakable harm would be offered the possibility of lawful resident status, health care, shelter, restitution, and other tools they need to rebuild their lives.

In turn, when legislative discussions were held on the wording of the TVPA, similar myths appeared in the unequivocal language of some Senators. Senator Brownback from Kansas stated:

International sex trafficking is the new slavery. It includes all the elements associated with slavery, including being abducted from your family and home, taken to a strange country where you do not speak the language, losing your identity and freedom, being forced to work against your will with no pay, being beaten and raped, having no defense against the one who rules you, and eventually dying early because of this criminal misuse.¹⁰²

Given these types of images in the lead up to the creation of the TVPA, it is unsurprising that sex trafficking was so prominent in the legislation. All of the hallmarks of the paradigmatic trafficking victim were present in this statement and the TVPA incorporated its elements in its distinction between “severe” and other forms of trafficking. Sexual exploitation is preeminent as a severe form of trafficking in the TVPA and only victims of severe forms of trafficking are eligible for allocated benefits.

President George Bush also directly spoke on the issue of human trafficking on a number of occasions. At the UN General Assembly in 2003, he completed his address on terrorism and stated:

¹⁰² Senator Sam Brownback, quoted in Srikantiah, *supra* note 54 at 170 fn 71. See also pp. 170-171 for several other examples from the congressional hearings leading up to the drafting of the TVPA.

There is another humanitarian crisis, spreading and yet hidden from view. Each year, an estimated eight to nine hundred thousand human beings are bought, sold, or forced across the world's borders. Among them are hundreds of thousands of teenage girls, and others as young as five, who fall victim to the sex trade. This commerce in human life generates billions of dollars each year -- much of which is used to finance organized crime.

There's a special evil in the abuse and exploitation of the most innocent and vulnerable. The victims of sex trade see little of life before they see the very worst of life—an underground of brutality and lonely fear. Those who create these victims and profit from their suffering must be severely punished. Those who patronize this industry debase themselves and deepen the misery of others. And governments that tolerate this trade are tolerating a form of slavery.”¹⁰³

There was no question about the link made between the sex trade, human trafficking and slavery and the imagery from one becomes the imagery of the other – a “chain of equivalence”.¹⁰⁴ Furthermore, the discussion of organized crime and the fight against terror in earlier parts of the address is echoed in the call to fight trafficking and those organized criminal elements who profit from it.

Finally, it is of particular interest to note the way that the US's annual Trafficking in Persons Report (TiP Report) is structured and the types of images it displays. While it is notable that the Office to Monitor and Combat Trafficking in Persons began to explicitly draw attention to trafficking for forced labour in 2010,¹⁰⁵ the concern is often still couched in gendered terms. Ambassador Cdebaca expressed this concern in a press release announcing the 2010 Tip Report:

The feminization of trafficking is a trend that we see in this year's report, and that's something that's expanding beyond the conventional stereotypes of sex trafficking. Today, more than 56 percent of trafficking in women are women and girls, and we see more and more women suffering from labor trafficking, specifically involuntary domestic servitude. These maids suffer in silence behind closed doors, and in some ways are the most vulnerable because they do not know anyone other than their captors. Often, as I've personally seen while I prosecuted these cases at an earlier

¹⁰³ Dan Collins, “Text of Bush's speech in Iraq”, online: CBS <<http://www.cbsnews.com/stories/2003/09/23/iraq/main574713.shtml>>.

¹⁰⁴ Doezema *sex slaves*, *supra* note 2 at 131.

¹⁰⁵ Luis CdeBaca, Ambassador for Secretary of State Hillary Clinton in charge of the Office of Trafficking in Persons, Teleconference June 14, 2010, US Embassy in Ottawa, *Remarks*, online: USDOS <<http://www.state.gov/g/tip/rls/rm/2010/143107.htm>>.

career at the Department of Justice, and as still holds true today, these women, and in some cases men and boys, are also forced into sex slavery by those who would hold them in involuntary domestic servitude.¹⁰⁶

Trafficking becomes more vile and more worthy of outrage when the enslaved domestic servant becomes sexually exploited. Without this sordid feature, the Ambassador must call for action against labour exploitation. However, the addition of the possibility of sexual slavery puts the need for such calls to rest.

The TiP Reports present many of the paradigmatic trafficking images, even in their most recent incarnation, despite attestations otherwise. The reports are distributed worldwide, created under the auspices of the TVPA¹⁰⁷ and are widely quoted and thus extremely influential. The TVPA is also specifically linked to aid measures, with various benefits and assistance packages going to countries that rank in the top two Tiers according to the reports' assessments (Tier 1 and Tier 2) and suspended for those countries not making appropriate anti-trafficking efforts (Tier 3).¹⁰⁸ Thus compliance with measures seen to be in line with American approaches is key.

The TiP reports are generally structured in such a way as to highlight sexual slavery and child exploitation, although throughout the document statements are made about forced labour in the fight against trafficking.¹⁰⁹ For example in the 2010 report, of 14 "victim stories" presented in the early pages of the report, seven were cases of child trafficking, two of which involved prostitution and two which involved sexual components such as rape or sexual abuse. Of the other seven, six were about women, four of them were explicitly trafficked for the purposes of prostitution and one other involved sexual components. The

¹⁰⁶ *Ibid.*

¹⁰⁷ TVPA ss.104

¹⁰⁸ *Ibid.* See also USDOS, *Tier Placements, Trafficking in Persons Report 2013*, online: USDOS <<http://www.state.gov/j/tip/rls/tiprpt/2013/210548.htm>>.

¹⁰⁹ See, for example, USDOS, *Policy Priorities, Trafficking in Persons Report 2010*, online: USDOS <<http://www.state.gov/g/tip/rls/tiprpt/2010/142748.htm>>:

Policy Priorities: Governments, corporations, and consumers can come together to ensure that free trade means labor that is freely offered because of fair compensation, rather than labor taken for free. Prevention must address key vulnerabilities in legal systems: policies and implementation loopholes that allow trafficking to occur, tolerance within government procurement and contracting, unscrupulous labor recruiting companies, restrictive visa practices used as coercive tools, and lax enforcement of labor laws. Effective prevention lies in targeted initiatives to protect the rights of marginalized, low-income workers, such as domestic servants, farm workers, miners, and garment workers. These workers are too often subjected to offenses that span a continuum of labor exploitation, including at its worst, human trafficking."

lone adult male story involved employers threatening to revoke immigration status, thereby rendering the Jamaican man illegal.¹¹⁰ This focus alone serves to highlight cases of sexual exploitation, severe physical abuse and the innocence of young children such that other stories are hidden from view.

v. *NGOs*

As seen in the negotiations to the Protocol, NGOs have played a particularly prominent role in both the responses to trafficking and the building of the various paradigms through which to approach the issue. While many advocate nuanced, critical and needs-based responses to trafficking, many of the international and transnational NGOs base their responses very heavily on a specific view of trafficking that is built on the dominant paradigm and various trafficking myths. There are literally hundreds of anti-trafficking NGOs internationally, and thus a very small fraction was chosen as illustrations of a broader phenomenon.

The International Organization for Migration, a notable force in the development of anti-trafficking measures particularly in the Balkan states, cautions prospective service providers that “[t]rafficking in human beings is often controlled by international organized criminal networks.”¹¹¹ This warning appears early in IOM’s 2007 *Handbook for Direct Assistance to Victims of Trafficking*¹¹² (Handbook), and sets the tone for various risk assessments to be undertaken with respect to the rescue and shelter of victims of trafficking.¹¹³ The authors go on to distinguish clearly between “smuggled migrants” and “trafficking”, allocating particular characteristics to the trafficked person that deserve redress, in contrast with the criminally liable smuggled migrant:

¹¹⁰USDOS, *Victims’ Stories*, online: USDOS <<http://www.state.gov/g/tip/rls/tiprpt/2010/142751.htm>>.

¹¹¹ International Organization for Migration, *IOM Handbook for Direct Assistance to Victims of Trafficking* (Geneva: International Organization for Migration, 2007) online: IOM <http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/CT%20handbook.pdf> at 2.

¹¹² IOM, *Handbook*, *ibid.*

¹¹³ See for example IOM, *Handbook*, *supra* note 111 at 18:

Trafficking victims are victims of serious crimes, and particular security arrangements and procedures are necessary since the service delivery organization personnel assisting them are themselves exposed to particular risks. There are indications that organized criminal groups have attempted to infiltrate IGO-NGO support and assistance programmes to locate their victims who have either escaped or who testify, or are about to testify, against them.

In many destination countries trafficking victims may be mistaken for irregular migrants and summarily deported or put in detention facilities without being properly identified.¹¹⁴

This concern raised by IOM takes into account the possibility that authorities may misidentify someone as a smuggled migrant, given the potential for overlap in the appearance of characteristics. However, the authors are clear that such mistakes are simply ones of apprehension, as the line between the two is in reality observable:

Whilst evidence shows that smuggled migrants are often exposed to serious danger during the transportation phase, it is not characteristic for them to be subjected to systematic physical, sexual and psychological abuse or to be deprived of their liberty and subjected to exploitation over a significant period of time in the sex industry or illegal labour markets. However, most if not all of these characteristics are likely to be present in trafficking cases.¹¹⁵

The authors do not raise concerns about the summary deportation or detention of those falling outside of the “victim” category.

In the past, the IOM has been severely criticized for the imagery it used in its anti-trafficking campaigns. In the early part of the last decade the posters and brochures employed by the agency often contained paradigmatic and hyper-sexualized images of trafficked victims. Its Mass Information Unit director arguing that such “strikingly fierce” images were necessary in order to be effective, and that real experiences of trafficking were far more shocking.¹¹⁶

¹¹⁴ IOM, *Handbook*, *supra* note 111 at 17.

¹¹⁵ IOM, *Handbook*, *supra* note 11 at 2.

¹¹⁶ Susanne Schatral, “Awareness Raising Campaigns against Human Trafficking in the Russian Federation: Simply Adding Males or Redefining a Gendered Issue” (2010) 28(1) *The Anthropology of East Europe Review* 239 at 243.



(trans: you will be sold like a doll)

In response to critiques, the IOM recently recalled these posters and began to change the imagery in their campaign materials. However, these “victimizing pictures of female bodies as passive objects of male violence, and the stag[ing of] trafficking of women as an eroticized and voyeuristic spectacle”¹¹⁷ have contributed to the dominant picture of the trafficked victim that still exists. Furthermore, Susanne Schatral argues in her analysis of IOM representations that, “These images were accompanied by traditional ideas about femininity and masculinity, which were not only intended to discourage women to migrate, but also supposed to keep them in their place, both in the ‘home’ and in their nation of origin.”¹¹⁸ Similarly, during the white slave panic in the late nineteenth and early twentieth centuries,

¹¹⁷ Schatral, *ibid* at 243.

¹¹⁸ Schatral, *supra* note 116 at 243.

leaflets and posters in railway stations warned girls about travelling to cities lest they become part of the insidious trade in women.¹¹⁹

IOM straddles the border between IGO and NGO. It is not strictly a collective of states, with voting or consensus-based decision-making, and thus it is widely considered to be an NGO. However, it plays such an integral role in both the identification and “assistance” of trafficked persons worldwide that its function often falls alongside state agencies such as law enforcement and prosecution. CATW, in contrast, performs a particularly NGO-like function in its advocacy and lobbying efforts with IGOs and states. CATW is clear about its stance on prostitution and its characterization of all prostitution as trafficking. However, in its quest to rid the world of prostitution, the language employed in its training and media materials still belies dichotomies of innocence and guilt, illegal versus legal migrants, smuggled versus trafficked, unchanged since its advocacy around the Protocol.

In April 2007, for example, at a conference on sex trafficking in North Carolina,¹²⁰ the CATW made a presentation on their programs around the world. The powerpoint presentation is replete with stock images from campaigns evoking all of the hallmarks of the trafficking myth. The first image entitled “They are Not Toys” calls to mind the depths of Hell, lost innocence and sexual enslavement:

¹¹⁹ Doezema, *Sex Slaves*, *supra* note 2 at 126.

¹²⁰ Dorchen Leidholdt, “Ending the Demand for Sex Trafficking”, presentation for Carolina Women’s centre Conference *Combating Sex Trafficking in North Carolina and Worldwide*, online: UNC <<http://www.unc.edu/cwc/08conference/proceed/Dorchen%20Leidholdt.pdf>> (CATW powerpoint)



Mimi Chakarova

Anti-trafficking poster from Eastern Europe. It reads, “They are not toys.”¹²¹

This image is followed by a picture of a small presumably Latin American girl, a suspected leader of a sex trafficking ring in Macedonia, a woman’s bare shoulder with a barcode stamped on it, and accompanying captions pointing to the humiliation and sexual degradation of victims. While not all of the posters were originally created by CATW, given CATW’s status as a recognized NGO in the field of human trafficking internationally, their support of these representations holds influence in the greater anti-trafficking community.

When speaking on the force of international NGOs on the world stage, Diane Otto notes the increasing influence of these agencies and actors and highlights the complexity and fluidity of the interests they represent:

There is no single narrative that describes the significance of this third voice [International Civil Society] in international relations. Broadly, it is based on identification as transnational citizens. In the postliberal view, this identity is multilayered, multinational, and highly participatory. It manifests the force of a common interest that is something more than the aggregate of separate national

¹²¹ CATW Powerpoint, *ibid* at slide 3.

interests and vastly more fluid and empowering than the homogenizing hegemonic liberal idea of the universal citizen.¹²²

The language and imagery used by IOM and CATW both reflect the dominant paradigm and support its continuation and their influence as anti-trafficking experts and advocates is particularly potent.

vi. Media

The most striking examples of the trafficking myth can be found where artistic license prevails. Film and television programs have added to the conversation on trafficking in a variety of ways and news reports and editorials have helped to shape trafficking discourse. News reports in particular add to the discussion of the nature and scope of trafficking, using quotes from published research to support their hypotheses without any requirement to discuss methodology and methodological debates. It is clear from the discussions around the Protocol that public pressure garnered through media has had an impact on the International Community (IC) and its responses to trafficking and various forms of media have been used to disseminate the particular images desired. These images affect public perceptions of trafficking and support the paradigm that currently dominates anti-trafficking work.

Film and television dramas have repeatedly covered the issue of trafficking in women, playing on the most salacious aspects of the trafficking myth in the process.¹²³ UNGIFT has a link to trafficking films and documentaries from around the world on its website.¹²⁴ The movies and documentaries listed are nearly all focused on sex trafficking and their descriptions evoke innocence, betrayal, organized crime, slavery and racialization. The description of the film *Trade* (2007) encapsulates the trafficking myth in a few sentences:

¹²² Dianne Otto, "Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society" (1996) 18(1) 107 at 128.

¹²³ See also Jennifer Jozwiaki, "My Father, the Hero: Paternal Masculinities in Contemporary Sex Trafficking Films" and Amy de Blois, "Anti-Sex Trade/Trafficking Campaigns in American Cultural Media: The Problematic Support for Abolitionism" in Eds. Kamla Kempadoo and Darja Davydova, *From Bleeding Hearts to Critical Thinking: Exploring the Issue of Human Trafficking*, (Centre for Feminist Research, York University, Toronto: 2012), online: CFR ,<http://cfr.info.yorku.ca/files/2012/11/From-Bleeding-Hearts-to-Critical-Thinking.pdf>.

¹²⁴ UN Global Initiative to Fight Human Trafficking, *Films on Human Trafficking*, online: UN.GIFT <<http://www.ungift.org/knowledgehub/media/films.html>>.

When 13-year-old Adriana (Paulina Gaitan) is kidnapped by sex traffickers in Mexico City, her 17-year-old brother, Jorge (Cesar Ramos), sets off on a desperate mission to save her. Trapped by an underground network of international thugs who earn millions exploiting their human cargo, Adriana's only friend throughout her ordeal is Veronica (Alicja Bachleda), a young Polish woman captured by the same criminal gang.

The film *Human Trafficking*¹²⁵ (2005) also plays on many of these myths and stereotypes.

UNGIFT describes the movie as follows:

Every day, women and children are enslaved - kidnapped or sold into sex-trafficking rings. This is a tough, uncompromising drama about the brutal realities faced by some of them, and the rookie immigration agent who, with the help of her boss and his team, works to bust the ring she uncovers and get its victims to safety. This emotional tale of survival and justice is a must-see, as it exposes the horror stories that could happen in any neighborhood - including yours.

The movie involved several young women from around the world, abducted and or duped into applying for jobs as “models” and then physically forced into prostitution upon arrival in the U.S. The beginning scenes of each of these abductions/kidnappings present particular types of innocence – one beautiful young Eastern European girl and her friend are excited at the prospect of fame and fortune modelling in the US, another kisses her daughter and mother goodbye, and another American child traveling with her mother in the Phillipines asks “mom am I going to look like you when I grow up?” One trailer for the movie includes a caption on the screen announcing: “INNOCENCE LOST”.¹²⁶ Quotes from the movie highlighted in the trailer include the traffickers ominously declaring “we own you” to one of the young women, and one of the rescuing criminal justice heroes protesting, “Somebody had her turning 20 tricks a day when she should have been going to the junior prom.” Another hero sums up the process by stating: “The criminals who bring these young women into this country brutalize them until they are dehumanized and destroyed.” Ultimately, these girls are portrayed as having all that was ideal about them stripped as they become further subjected to sex trafficking.

¹²⁵ UNGIFT, *Films, ibid.*

¹²⁶ Trailer, *Human Trafficking*, online: youtube <<http://www.youtube.com/watch?v=t4237pS55h4>>.

One of the most recent displays of the trafficking myth comes in its incarnation as a product of hyper-masculinity during wartime. The themes of innocence lost, the foreign trafficker and the illegal migrant still arise in the movie *The Whistleblower* (2010), but corruption and organized crime are linked to UN Peacekeepers in foreign lands. As with many anti-trafficking films, this movie borders the line between fiction and documentary; they are portrayed as giving voice to an existing social problem by making empirical statements at the outset, such as "Sex Trafficking is a disturbing, realistic portrayal of young women sold into sexual slavery."¹²⁷ *The Whistleblower* is a "fictionalized dramatic representation"¹²⁸ of a U.S. officer's book with the same title. The book recounts the officer's work in uncovering sex trafficking within the ranks of the United Nations' International Police Task Force in Bosnia in the late 1990s. Commenting on the crossover between the events that the author witnessed, the book written about those events and the movie dramatizing the book, one journalist notes:

Yes, it's drama—but the real-life response by the U.N. at the time, and the contractor charged with recruiting for the agency, was not dissimilar. Which is why there's been speculation that the directorial debut of filmmaker Larysa Kondracki is the summer thriller that the diplomatic community is hoping you won't see.

An internal U.N. memo sent among senior advisers last month (and leaked to the filmmakers) highlights the organization's early strategy discussions on how to handle the film's release—namely, whether to embrace it, by informing the public on "improvements in U.N. policy," or downplay it altogether. The U.N. has not commented directly on the film, but tells *The Daily Beast*, quoting from a July 26 press briefing, that the organization does "welcome all efforts to draw attention to such human rights violations."

A statement put out by DynCorp, the contractors who hired Bolkovac in 1999—and ultimately fired her—meanwhile, touts the company's "zero tolerance policy on human trafficking," and notes that Bolkovac's allegations that the agency was involved in trafficking were "aggressively and responsibly addressed" at the time. The company declined to elaborate further.

"Is this an effort to shame publicly? Yes," says Kondracki, the director. "There is no excuse for any international government, the United Nations, the U.S. State

¹²⁷ Trailer, *Sex Traffic*, online: < <https://www.youtube.com/watch?v=Ql9vj11U40k>>.

¹²⁸ Wikipedia, *The Whistleblower*, online: < http://en.wikipedia.org/wiki/The_Whistleblower>.

Department or any private contractor, to engage in, encourage or cover up such activity. Let's face it—that's what happened."¹²⁹

Here we see film and public opinion directly affecting the actions of an IGO, with those actions then reported in the media, further contributing to the depiction of the paradigm exhibited in the movie. The movie itself, while focusing on the corruption in the United Nations' force in Bosnia, also upholds the paradigmatic trafficking victim in the process. In this movie, the stereotypical young, innocent Balkan girl is lured by underworld traffickers able to ply their trade in the lawless, post-conflict society. The fact that the consumers are UN Peacekeepers brought to Bosnia ostensibly to protect these women only adds to the moral outrage. The rescue motif is ever-present as an officer attempts to take the IPTF to task on the issue of their involvement and continues to do so despite threats and attempts on her life. One of the rescued girls asks the officer "you promise you can stop these men?" to which the officer responds after a dramatic pause, "I promise."¹³⁰

In conjunction with dramatic films and generally listed together on anti-trafficking websites are the numerous documentaries that discuss trafficking across the globe. There are dozens of such documentaries focusing on several different forms of trafficking, but the most common narrative is to document sex trafficking and sexual exploitation. On the UNGIFT website documentaries are listed with names such as "Forced Prostitution" (2010), "Virgin Harvest" (2008), "Cargo Innocence Lost" (2007), "Lives for Sale" (2007), and "Born into Brothels" (2004). While this may indicate the preference of the UNGIFT website designers, it is these documentaries that appear highlighted when searching for movies and documentaries on the internet.¹³¹

TV news magazine shows have held a particularly prominent place in discussions of trafficking. Dateline NBC, a widely watched news magazine program from the United States,

¹²⁹ The Daily Beast, *The Real Life Whistleblower*, online: <<http://www.thedailybeast.com/articles/2011/08/05/kathryn-bolkovac-the-real-whistleblower-on-human-trafficking-in-bosnia.html>>.

¹³⁰ The Daily Beast, *ibid.*

¹³¹ The top 10 results of a google search conducted on August 5, 2011 with the terms: (documentary human trafficking) revealed sites that primarily focused on sex trafficking and listed the abovementioned documentaries on their pages.

conducted a piece on human trafficking in Cambodia in 2005 entitled “Children for Sale”. The “investigation” was described in the following terms:

It's an exotic vacation destination, with ancient cities, bold colors, legendary temples, remarkable beauty — and horrendous crimes that go on behind closed doors. Children, some as young as 5 years old, are being sold as slaves for sex. It's a shameful secret that's now capturing the attention of the world and the White House, a secret that has been exposed by Dateline's hidden cameras. Dateline ventured into this dark place, where sexual predators can gain access to terrified children for a handful of cash. How could this be happening? And how can it be stopped?

Inside the world of child sex trafficking, each year, by some estimates, hundreds of thousands of girls and boys are bought, sold or kidnapped and then forced to have sex with grown men. Dateline's investigation leads to the troubled and distant land of Cambodia. We reveal what “tourists,” like one American doctor, may be up to, and we'll take you inside a dramatic operation to rescue the children.¹³²

All of the hallmarks of the paradigmatic trafficked victim are present in this characterization. *Frontline*, another popular U.S. news magazine show on PBS, broadcast a film directed by Canadian Rick Esther Bikenstock entitled *Sex Slaves* (2005), which documented a sex trafficking ring from Odessa Ukraine to Turkey.¹³³ The announcer's initial narrative sets the tone for the film: “These women have been torn from their lives, taken from their families and sold into slavery. They are victims of a multi-billion-dollar international business that traffics hundreds of thousands of women a year.”¹³⁴ Later in the film, the narrator ensures that a distinction is made between migrant workers and trafficked women.

Aksaray is a bustling district in the heart of Istanbul, home to growing numbers of expatriate Soviets. Compared to what they left behind, Aksaray is full of opportunities. But for many young women, Aksaray will be the bitter end to their dreams. Olga leads the team to a notorious spot in Aksaray. This parking lot is an unofficial market for Russian migrant workers. Goods are exchanged, deals are made, legal and illegal workers head to their new employers. And women are sold.¹³⁵

The hustle and bustle of foreign marketplaces is evoked, lending mystery and intrigue to the story. “Legal and illegal workers” are distinguished from “women” in this story of broken

¹³² MSNBC, *Children for Sale*, online: <http://www.msnbc.msn.com/id/14483961/ns/msnbc_tv-documentaries/t/children-sale/#.Tzii-FF7k-A>.

¹³³ Frontline, *Transcripts, Sex slaves*, online: Frontline <<http://www.pbs.org/wgbh/pages/frontline/slaves/etc/script.html>>.

¹³⁴ Frontline, *Sex Slaves, ibid.*

¹³⁵ Frontline, *Sex Slaves, supra* note 132.

dreams. Buying and selling pertains to trafficked women and those who come to work are categorically different. Various narratives of rescue and despair are told throughout the documentary, with a heavy focus on the rescuers, including Felix Golubev, the producer of the movie. The husband negotiates with his wife's traffickers, who are frequently described as cruel and brutal. The woman's first trafficker even describes the person to whom he "sold" as follows: "Apo is a person without a shred of human decency. He has no principles whatsoever. At times, he can be very cruel."¹³⁶ Despite being aware of the imminent danger of associating with these brutal beings, the rescuing husband heads to Turkey to save his wife, "this time without the help of the police. Viorel knows this may be his last chance to get Katia back. And all he has is Apo's telephone number."¹³⁷ Felix goes on to speak excitedly of his pending foray into the world of organized crime: "I had a business card that said 'Exotic Entertainment'. I pretended that I was a guy from the West who's interested in buying Eastern European girls. From the get-go, it was very plain and simple. 'I buy girls from you?' 'Yes.' 'How much?'"¹³⁸ The girls' stories are told in terms of the brutality exacted upon them with little other biographical or historical information.

Doezema comments on a similar report undertaken by the Institute for War and Peace Reporting in 2003 in which the journalist's very presence in this dangerous world attracts commendation:

Despite the professed desire to throw light on the trade through showing 'a victim's point of view', the text is mainly concerned with the journalist's scary adventures in Bucharest's seedy underworld ... After much effort and reported danger to his own person ... the journalist finally succeeds in 'buying' a nineteen-year old 'mentally retarded' woman ... and as her savior, delivers her to an NGO.¹³⁹

The rescue myth works in tandem with the myths of innocence lost, the criminal underworld and the mystery/fear surrounding the exotic and the "other" in these pieces to reinforce stereotypical imagery around trafficking. The same is true of this NY Times piece from 2004 that inspired the movie *Trade*, referenced above:

¹³⁶ Frontline, *Sex Slaves*, *supra* note 132.

¹³⁷ Frontline, *Sex Slaves*, *supra* note 132.

¹³⁸ Frontline, *Sex Slaves*, *supra* note 132.

¹³⁹ Doezeama *sex slaves*, *supra* note 2 at 65.

On a tip, the Plainfield police raided the house in February 2002, expecting to find illegal aliens working an underground brothel. What the police found were four girls between the ages of 14 and 17. They were all Mexican nationals without documentation. But they weren't prostitutes; they were sex slaves. The distinction is important: these girls weren't working for profit or a paycheck. They were captives to the traffickers and keepers who controlled their every move. "I consider myself hardened," Mark J. Kelly, now a special agent with Immigration and Customs Enforcement (the largest investigative arm of the Department of Homeland Security), told me recently. "I spent time in the Marine Corps. But seeing some of the stuff I saw, then heard about, from those girls was a difficult, eye-opening experience."

The police found a squalid, land-based equivalent of a 19th-century slave ship, with rancid, doorless bathrooms; bare, putrid mattresses; and a stash of penicillin, "morning after" pills and misoprostol, an antiulcer medication that can induce abortion. The girls were pale, exhausted and malnourished. ... Most of them -- whether they started out in Eastern Europe or Latin America -- are taken to the United States through Mexico. Some of them have been baited by promises of legitimate jobs and a better life in America; many have been abducted; others have been bought from or abandoned by their impoverished families.

Because of the porousness of the U.S.-Mexico border and the criminal networks that traverse it, the towns and cities along that border have become the main staging area in an illicit and barbaric industry, whose "products" are women and girls. On both sides of the border, they are rented out for sex for as little as 15 minutes at a time, dozens of times a day. Sometimes they are sold outright to other traffickers and sex rings, victims and experts say. These sex slaves earn no money, there is nothing voluntary about what they do and if they try to escape they are often beaten and sometimes killed.¹⁴⁰

Canadian journalist Victor Malarek's book *The Natashas*¹⁴⁰ is almost exclusively devoted to providing shocking images of innocents trafficked, villainous traffickers and heroic rescues. Malarek traveled to Bosnia and other areas of Eastern Europe gathering stories for his book, now ten years old but still quoted by Canadian media, parliamentarians and other actors.¹⁴¹ He speaks about an interview with a local women's group *Lara* in Bijeljina, Bosnia, during which the worker "shakes her head in disgust at the Arizona Market" where girls are traded. At page 140 he states: "They order the girls to take off all their clothes and they are standing in the road naked. They are exposed to be purchased like cattle."

¹⁴⁰ bis. Peter Landsman, *The Girls Next Door*, (2004) *The New York Times*, online: NY Times <<http://www.nytimes.com/2004/01/25/magazine/25SEXTRAFFIC.html>>.

¹⁴⁰ Victor Malarek, *the Natashas: Inside the New Global Sex Trade* (Viking Canada, 2003).

¹⁴¹ See Chapter Four for specific examples.

In *The Natashas*, Malarek immediately separates the “whores” from the innocents, stating at p. 4 that “[t]o the casual observer, they blend in seamlessly with the women who have *chosen* to exchange money for sex. In their cheap makeup, sleazy outfits and stiletto heels, they walk the same walk and talk the same talk.” The innocents about which he speaks sometimes get individual names, but more often are referred to collectively as “the Natashas”. At page 4: “Day in, day out, the Natashas are forced to service anywhere from ten to thirty men a night. The money they make goes to their ‘owners.’ They live in appalling conditions, suffering frequent beatings and threats.”¹⁴² They are a nameless, faceless mass of sexual slavery.

The heroes who stand up to their fellow brethren in the UN Peacekeeping Mission in Kosovo and conduct the raids on brothels are hailed as saviours. He speaks at length about a Canadian police officer who

formed the Trafficking and Prostitution Investigation Unit and went straight to work. Backed by peacekeeping troops, his small unit began kicking down doors and raiding flesh pits.... For Moon, the level of inhumanity these women were forced to endure while in captivity was difficult to fathom. The married father of three had seen his share of crime working in the OPP ... back home, but this was the stuff of nightmares.¹⁴³

With respect to his role in combating this scourge in Kosovo, Malarek describes a scene out of a wild west movie script, complete with vigilante justice necessary in the context of a corrupt UN mission to save a poor Slavic *Natasha* from certain doom where police wouldn’t intervene:

Chappell stared hard at the road for a moment and then glanced over at me. We had the same thought. He made a sharp U-turn and headed for Ferizaj (sic). As we neared the town, a massive incandescent yellow glow bounced off the night sky. It was the lights from Camp Bondsteel – the sprawling U.S. army base. ... As we motored through Ferizaj (sic), the streets were deserted. It was a dismal, run-down, industrial town. ... When we marched in, the sight that awaited us was, to say the least, odd. Five young women dressed in short shorts, skimpy halters and high platform shoes were huddled together on a couch adjacent to the bar. About a dozen men sat at tables scattered around the room with their backs against the wall. It was as though they had been expecting us. ...

¹⁴² *The Natashas*, *supra* note 140.

¹⁴³ *The Natashas*, *supra* note 140 at 101.

Turning to the traffickers in the Balkans, Malarek describes them using the words of a former human rights investigator in Bosnia, David Lamb, stating that “organized crime warlords control the prostitution and trafficking trade in Bosnia, ‘most of whom came to power as aggressive and ruthless military or militia commanders during the war’.”¹⁴⁴ This connection between war, crime and trafficking is present throughout his descriptions of the Balkans.

With war and trafficking connected through images of Eastern European organized crime, it has also been relatively easy for NGOs and media outlets to team up in some cases to highlight the links between terrorism and trafficking. Nandita Sharma points to a *Washington Post* article written by two CATW spokespeople, Chesler and Hughes, where they call for feminists and others to “actively oppose the traffickers” in the context of a fight for “civility”.¹⁴⁵ Sharma goes on to analyse the text of the article itself:

Actively mobilizing dominant post-9/11 tropes, Chesler and Hughes argue that principles of the “secular, Judeo-Christian, modern West” need to be set against “totalitarian” regimes, particularly those relying on ideologies of Islamic fundamentalism. In contrast to unspecified (but presumably non-Muslim) “conservative or faith-based groups” seen as potentially “better allies on some issues [such as anti-trafficking] than the liberal left has been,” they argue that “Islamism” is a “fascist political movement that aims for world domination”. The links between trafficking and Islamic fundamentalism are not clearly specified (perhaps post-9/11 it is simply enough to link them in the reader’s mind). But what is clear is that supporting anti-trafficking campaigns is tantamount to becoming:

‘[a] force for literate, civil democracies. They [“twenty-first-century feminists”] must oppose dictatorships and totalitarian movements that crush the liberty and rights of people, especially women and girls. They would be wise to abandon multicultural relativism and instead uphold a universal standard of human rights. They should demand that all girls have the opportunity to reach their full potential instead of living and dying in the gulags of the sex trade.’

It is such perceptions of trafficking that fuel public concern and reinforce the imagery that is propounded by NGOs and other anti-trafficking actors. These bodies, as we have seen, in turn affect legislation and policy created at both the international and national levels. And,

¹⁴⁴ *The Natashas*, *supra* note 140 at 180.

¹⁴⁵ Nandita Sharma, “Anti-Trafficking Rhetoric and the Making of a Global Apartheid”, (2005) 17(3) *National Women’s Studies Journal* 88 at 101.

as discussed in the following section, such imagery and paradigms affect the ways in which such legislation is implemented and anti-trafficking activities are approached.

D. EFFECTS OF THE PARADIGM – ANTI- TRAFFICKING RESEARCH, PROGRAMMING AND THE RUSH TO SAVE THE VICTIM

This paradigmatic vision of trafficking can be seen concretely in research on trafficking and in anti-trafficking programming. Research into trafficking is often undertaken with a view to quantifying and describing the “thing-in-itself” – the phenomenon of trafficking, defined in terms of the dominant paradigm or molded to fit particular agendas, such as anti-prostitution or anti-immigration stances. In the simple act of identifying trafficking as a separate and identifiable phenomenon, the effect of the paradigm is evident in the collection of data itself, and the data collected in turn reinforces standard perceptions about the “phenomenon” of trafficking. Where anti-trafficking advocates accept a particular image of what a trafficked person *really* is, such assumptions show through in the ways in which research is conducted and these research products then influence the ways in which anti-trafficking programming is implemented. Anti-trafficking programming can be seen to reflect the paradigmatic notions of the trafficked victim and then itself to influence media, popular perception and laws or policies drafted to address the issue.

i. The Problem with Numbers – Counting Victims

Researchers, governments and anti-trafficking advocates have expressed significant concern about the lack of verifiable data on trafficking – its scope, characteristics, nature, relationship to organized crime and other criminal activities. However, several issues arise in this context. First are the strict methodological issues, which are the most straightforward and easiest to address. There appears to be a widespread use of unverified data among anti-trafficking advocates,¹⁴⁶ Kamla Kempadoo noting that there are “[i]n some cases ... an underutilization or lack of reliance on some sources and an overreliance on others.”¹⁴⁷

¹⁴⁶ Advisory Council of Jurists, *Background Paper: Consideration of the Issue of Trafficking* (Prepared for: Asia Pacific Forum of National Human Rights Institutions, 2002) at 12.

¹⁴⁷ Kamla Kempadoo, “Introduction” in Kempadoo, Sanghera and Pattanaik, *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (Boulder: Paradigm Publishers, 2005) at xx.

According to Kempadoo, “Newspaper stories created by visiting journalists or case studies collected from a handful of ‘rescued’ girls by eager social workers are commonly seized upon as ‘the facts’.”¹⁴⁸ And these individual “victims” often are brought forward to support claims that although there is no real data on the subject, “the number is huge.”¹⁴⁹ The numbers generated thus support the mythology and victim-identity crafted by anti-trafficking advocates, spilling over into their strategies to address “trafficking in persons”. As Sanghera notes, “[a]s a result, the interventions and programs flowing from their understanding have rarely led to the desired or expected results, i.e., the reduction of trafficking”¹⁵⁰ as they see it.

Second, statistics gathered also vary depending on the sphere in which they are collected and the purpose for which they are gathered. As discussed above, the concept of trafficking can be used as both a descriptive and normative device. In some cases, it is used to describe a situation, in others it is used to distinguish who the author thinks *should* be classified as trafficked, particularly where the provision of benefits is at issue. Bridget Anderson has argued,

It is important when considering this however to remember that “Victim of trafficking” is both an *administrative category* entailing certain state protections and obligations towards individuals, and a *descriptive term* applied by NGOs and other civil society actors to people who have certain sets of experiences – though exactly what should constitute those sets of experiences is contested. Those who fit the *descriptive term* do not necessarily fall into the *administrative category*, a further reason for discrepancies between large-scale numbers of estimated victims, which have a strong reliance on NGO figures and estimates, and the numbers of those officially registered.¹⁵¹

¹⁴⁸ Kempadoo, *Introduction*, *supra* note 147 at xxiii.

¹⁴⁹ See Kempadoo, *Introduction*, *supra* note 147 at xxiii.

¹⁵⁰ Sanghera, *supra* note 49 at 4.

¹⁵¹ See Bridget Anderson, “Motherhood, Apple Pie and Slavery: Reflections on Trafficking Debates” (Prepared for: Centre on Migration, Policy and Society, University of Oxford, 2007) at 12 where she states further that:

Indeed state officials can be less than rigorous in their usage of the term. Take the tragedy in Dover in 2000 where 58 Chinese people died in the back of a truck having paid £15,000 each to a group that organised their illegal entry to the UK. This was widely publicised as an instance of “deadly traffic in humans”.... Official European documents give this as an example of trafficking but given that they had entered voluntarily into the contract, were entering the UK illegally it is highly doubtful that they would have been designated “trafficked” had they been found alive. Like many illegal entrants discovered entering the UK in extremely dangerous and difficult conditions, they would have been classed as smuggled and in all probability returned to their country of origin.

These two trends, when combined with the dominant understanding of trafficking, result in excessive and unreliable claims. In *Sex Slaves*, Doezema notes that although the concern is frequently raised by authors that statistical evidence on trafficking is scarce, “[t]his does not, however, lead to the degree of caution that might be expected. While acknowledging the difficulty of putting hard and fast numbers to trafficking, most reports go on to quote large numbers without any indication of what they are actually referring to.”¹⁵² She attempts to trace the source of one such number, found in the following passage from a 1999 OSCE report:

CEE [Central and Eastern Europe] and the NIS [Newly Independent States] now constitute the fastest growing source for trafficked women and girls for the sex industry. A US Government source has conservatively estimated that more than 175,000 women and girls are trafficked from CEE and the NIS each year. In 1995 IOM estimated the number at 500,000 annually to Western Europe alone.¹⁵³

She then goes on to analyse this claim:

How are we to interpret the number 500,000 that is cited in this quotation? In the context in which it is presented, it would seem to have to be a misprint, as 500,000 is much larger than the total of 175,000 trafficked women mentioned earlier in the paragraph. The number itself is not directly referenced, but a list of resources at the end of the ... report mentions a 1995 IOM report. The number 500,000 does not appear anywhere in this report. Given that it seems to obviously be a misprint, it would be tempting to dismiss it. However, the number is mentioned repeatedly when trafficking in Europe is being discussed. The number 500,000 has gone on to live a life of its own in newspaper reports, for example: “it is estimated that around 500,000 women have been beaten or drugged into submission by pimps working in Europe’s biggest organized crime gang” (Daily Mirror, Dublin, 4 July 2000)

I checked all possible sources to track down the basis for the figure of “500,000”, reviewing IOM publications and writing and phoning the IOM in Geneva and Brussels. I was unable to find any material indicating how the IOM arrived at this number. One official in Geneva suggested that the number had been cited in a presentation by an IOM official at a meeting of the European Parliament, and had been picked up by journalists there. I was unable to confirm this.¹⁵⁴

¹⁵² Doezema *Sex Slaves*, *supra* note 2 at 7.

¹⁵³ Doezema *Sex Slaves*, *supra* note 2 at 7.

¹⁵⁴ Doezema *Sex Slaves*, *supra* note 2 at 7.

A particularly striking example of this phenomenon revolved around the FIFA World Cup held in Germany in 2006. Throughout the lead-up to the games, anti-trafficking groups initiated a fierce campaign against the sex trafficking they maintained was going to take place during the games. Particularly active in the fight was the CATW through its “Buying Sex is not a Sport” campaign.¹⁵⁵ It claimed that,

Reports estimated that 3 million football fans – mostly men – would attend events in the 12 cities hosting the World Cup Games, and that 40,000 women would be “imported” into Germany from Central and Eastern Europe to “sexually service” the men. Germany legalized pimping and the sex industry in 2002, but the industry predicted that the legal red light districts would be too small for the thousands of sport/sex tourists in attendance. Thus, the German sex industry erected a massive prostitution complex for the “booming business” expected during the games with a 3,000 meter mega brothel built next to the main World Cup venue in Berlin to accommodate 650 male clients. Wooden “sex huts” called “performance boxes” were also fabricated in fenced-in areas the size of a football field, with condoms, showers and parking for the buyers and a special focus on protecting their “anonymity.”¹⁵⁶

This number of 40,000 also took on a life of its own, and has been subsequently attacked as having been “pulled out of thin air.”¹⁵⁷ The number is cited in numerous blog-posts, news articles and chat rooms¹⁵⁸ and although completely unverified, officials continued to use it even in 2010:

‘It just makes sense that the World Cup would fuel sex trafficking’, according to Mark P. Lagon, former ambassador at large and director of the State Department’s Office to Monitor and Combat Trafficking in Persons during the George W. Bush administration. ‘A huge sporting event like that creates a major hazard,’ Lagon said. ‘The number 40,000 is not outlandish in my mind, at all.’¹⁵⁹

The IOM sought to trace the source of the number in its post-games report *Trafficking in Human Beings and the 2006 World Cup in Germany*. The study notes that the

¹⁵⁵ Coalition Against Trafficking in Women Asia Pacific, *Buying Sex is Not a Sport*, online: CATW-AP <<http://catwap.wordpress.com/2006/01/29/buying-sex-is-not-a-sport/>>.

¹⁵⁶ Coalition Against Trafficking in Women, *Coalition Report – 2006*, online: CATW <<http://www.catwinternational.org/Content/Documents/Reports/CATW06newsletter.pdf>>.

¹⁵⁷ Migrants Rights Network, “40,000” Victims: Sex trafficking, the 2006 World Cup, and the 2012 Olympics, online: MRN <<http://www.migrantsrights.org.uk/migration-pulse/2011/40000-victims-sex-trafficking-2006-world-cup-and-2012-olympics>>.

¹⁵⁸ See *ibid* for examples.

¹⁵⁹ Carl Bialik, *The Elusive Link Between Trafficking and Sporting Events*, (2010) *Wall Street Journal*, online: Wall Street Journal <<http://blogs.wsj.com/numbersguy/the-elusive-link-between-sex-trafficking-and-sporting-events-952/>>.

first public mention of an estimate to the German Womens' Council (Deutscher Frauenrat), who used the figure of more than 30,000 prostituted that were to be smuggled into Germany for the World Cup with reference to the women's representative of the German Association of Cities and Towns (Deutscher Städtetag). The German newspaper "taz" then quoted the British Guardian's "up to 40,000". And subsequently, in the German women's magazine "Emma", the quote became 40,000 forced prostitutes. By this time the German Association of Cities and Towns had already disclaimed the figure.¹⁶⁰

Yet the figure continued to be used throughout the campaign. CATW critiqued IOM's claim that the figure was "unfounded and unrealistic", and that "an increase in human trafficking, during and after the World Cup did not occur",¹⁶¹ but cited no discrete research data. CATW made the following comments:

Before the Games, official sources acknowledged that the number of those in prostitution in Germany is 400,000 (M. Jurgen Wohlfarth, Administrative Director of the Municipality of Saarbruck, Germany. Madrid, June17, 2004, ?Les Villes Face a la Prostitution). It has also been estimated by many sources that 90 percent of women in the sex industry in Germany are from foreign countries (M. Jurgen Wohlfarth, Administrative Director of the Municipality of Saarbruck, Germany. Madrid, June17, 2004, ?Les Villes Face a la Prostitution).

Early on, German NGOs (e.g., Solwodi, the largest organization providing services to victims of trafficking) and media statements warned of a potential increase in 40,000 women entering Germany to sexually service sports fans during the Games. CATW accepted this estimate since it represented a conservative increase of only 10 percent of the widely-accepted estimate of 400,000 persons currently in prostitution. An increase of 40,000 women was thought to be a reasonable prediction also given the preparations of the German sex industry which, in anticipation of the Games, was opening/enlarging more prostitution venues and expanding its publicity.¹⁶²

The organization provided no means of verification of the "widely-accepted" number of 400,000 women in prostitution or the figure that 90% were foreign. In response to the allegation that sex trafficking did not increase during the games, CATW argues:

¹⁶⁰ International Organization for Migration, *Trafficking in Human Beings and the 2006 World Cup in Germany*, online: <http://www.iom.int/jahia/webdav/shared/shared/mainsite/projects/documents/World_Cup_2006_CT_Draft_Report.pdf> at 14

¹⁶¹ IOM, *Trafficking in Human Beings and the 2006 World Cup*, *ibid* at 2

¹⁶² Janice G. Raymond, Coalition Against Trafficking in Women, *Post World Cup Statement*, (2006) online: <<http://www.catwinternational.org/Home/Article/126-postworld-cup-statement>>.

As acknowledged by German authorities, the police mainly carried out searches to look for women without legal entry papers. Given that large numbers of women in the sex venues are from countries in Eastern Europe and the Baltics that are now part of the European Union, they can easily be moved by pimps and traffickers among countries in the European Union legally. Looking for evidence of trafficking, mainly based on women without legal documents, is an outdated strategy in a Europe that increasingly is without national borders. Women with legal papers still may have been trafficked. Most foreign women who are prostituted and trafficked and end up in the brothels of Germany do not have the financial wherewithal to subsidize their own travel, documents, and “job placement.” In other words, they did not get there on their own resources.¹⁶³

Again, CATW provided no basis for the claims regarding “most foreign women who are prostituted and trafficked.”

Furthermore, the ways in which particular statistics are juxtaposed against other statements can lead the reader in specific directions, without the necessity of validating a claim. Doezema points to one such passage from another 1999 OSCE report that claims:

Every year, millions of men, women and children are trafficked worldwide into conditions amounting to slavery. Among these, many thousands are young women and girls lured, abducted, or sold into forced prostitution and other forms of sexual servitude ... in 1997, an estimated 175,000 women and girls were trafficked from Central and Eastern Europe and the Newly Independent States alone.¹⁶⁴

Doezema suggests that “[t]he placing of the second sentence in the quoted paragraph gives the impression that these 175,000 women ‘trafficked’ have all been trafficked for prostitution. Moreover, it is impossible to tell how this number was arrived at, and on what sort of evidence it is based.”¹⁶⁵

There is evidence of statistics being used in these rather slippery ways in numerous anti-trafficking sectors. In its 2009 *Global Report*, UNODC claims that “In the 52 countries where the form of exploitation was specified, 79% of the victims were subjected to sexual exploitation. While it remains likely that labour exploitation and male victims are relatively under-detected, the over-representation of sexually exploited women is true across regions,

¹⁶³ CATW, *ibid.*

¹⁶⁴ Doezema *Sex Slaves*, *supra* note 2 at 8.

¹⁶⁵ Doezema *Sex Slaves*, *supra* note 2 at 8.

even in countries where other forms of trafficking are routinely detected.”¹⁶⁶ While on the one hand noting that labour exploitation is under-detected, a “truth” is still claimed about sexual exploitation and the phenomenon of trafficking. The same report also notes that

It might be assumed that human trafficking, where violence and threats are keys to the business, would likewise be overwhelmingly male dominated. But, surprisingly, the data on the gender of those convicted for trafficking in persons do not support this premise. The data gathered on the gender of offenders in 46 countries suggest that women play a key role as perpetrators of human trafficking. In Europe, for example, women make up a larger share of those convicted for human trafficking offences than for most other forms of crime.¹⁶⁷

This “fact” is put forward with no analysis of the means by which particular forms of trafficking are detected, and how suspects are apprehended. There is no mention made of the possibility that women prostitutes may be convicted at a higher rate for trafficking offences, or that they are simply easier to locate, possibly having worked as prostitutes themselves.

In contrast, other authors’ analyses find specific relationships without rigorously determining whether or not they exist. For example, Torgley states that,

In 2004 the Department of Homeland Security received 520 applications for a T-visa, approved 136, denied 292, and continued to consider 92. Although the number of T-visas processed has increased each year since 2000, five thousand of these visas are available and offer the possibility of permanent residency. The surprisingly low number of visas issued *indicates* the fear of reprisals that sex trafficking victims face if they agree to assist in the prosecution of traffickers.¹⁶⁸ [my emphasis]

The author provides no evidence as to the reasoning for the low numbers of visas issued but fuses this concern with the paradigmatic trafficked victim. In this way she is able to make the transition to what appears to be a reasoned argument without providing a basis for the move.

Many social scientists have raised the issue of the methodological challenges involved in conducting research on trafficking and several of these challenges have been identified.

¹⁶⁶ UNODC, *Global Report*, *supra* note 88 at 11.

¹⁶⁷ UNODC, *Global Report*, *supra* note 88 at 10.

¹⁶⁸ Torgley, *supra* note 77 at 264.

Primarily it is the “clandestine nature”¹⁶⁹ of the activity that reportedly hinders correct quantification – the notion that individuals who are trafficked are afraid of repercussions or mistrustful of law enforcement or other authorities because of their illegal activity or immigration status.¹⁷⁰ There are numerous ways in which this challenge is framed, from a very specific focus on individuals who are afraid to talk because of their particular situations¹⁷¹ to a more encompassing view that takes into account that the “populations relevant to the study of human trafficking, such as prostitutes, traffickers, victims/survivors, or illegal immigrants constitute so-called hidden populations.”¹⁷² This is said to result in the individuals’ refusing to cooperate or giving unreliable answers to protect their privacy.¹⁷³

Challenges are also said to arise because definitions of who to count as trafficked are inconsistent, and because the characteristics that make someone a victim of trafficking are not easily observable, causing difficulties in locating them.¹⁷⁴ Many argue that the distinction between those who are trafficked and those who are smuggled is often blurred, skewing the data one way or another.¹⁷⁵ It is also not easily discernible whether or not the data recorded by law enforcement authorities on trafficking represents simply the “tip of the iceberg” or closely mirrors the extent of trafficking (as identified by the relevant agency) in that jurisdiction.¹⁷⁶ Social science researchers have also recognized the inability to evaluate much of the data collected in reports produced by NGOs and anti-trafficking advocates. Much of what is recorded is secondary data collected by organizations through interviews of “experts” in the field, and the studies themselves lack methodological rigour.¹⁷⁷ Researchers are somewhat critical of these studies given that they often have to be completed within a short timeframe and with limited resources.¹⁷⁸

¹⁶⁹ Frank Laczko and Elzbieta Godziak, “Introduction”, *Data and Research on Human Trafficking: A Global Survey*, (2005) 43 (1/2) *International Migration* 1 at 12

¹⁷⁰ Laczko, *Introduction*, *ibid* at 8.

¹⁷¹ Laczko, *Introduction*, *supra* note 169 at 8.

¹⁷² Guri Tyldum and Anette Brunovskis, “Describing the Unobserved: Methodological Challenges in Empirical Studies on Human Trafficking”, in Laczko, *supra* note 169 at 18.

¹⁷³ Tyldum, *ibid* at 18.

¹⁷⁴ Tyldum, *supra* note 172 at 20.

¹⁷⁵ Kathy Richards, “The Trafficking of Migrant Workers: What are the Links between Labour Trafficking and Corruption?” (2004) 42(5) *International Migration* 147 at 153

¹⁷⁶ Tyldum, *supra* note 172 at 23.

¹⁷⁷ Tyldum, *supra* note 172 at 27.

¹⁷⁸ Laczko, *Introduction*, *supra* note 169 at 9.

However, despite the various criticisms, there continues to be optimism regarding the potential for research into the field. Researchers are encouraged to pursue longer term research,¹⁷⁹ conduct interdisciplinary studies looking at health, law enforcement, immigration and human rights impacts together,¹⁸⁰ allow for more participation of “ex-captives” in the research itself,¹⁸¹ focus more on agency responses,¹⁸² and collect data more systematically.¹⁸³ Through these improvements, the challenges in trafficking research may be addressed. Other researchers acknowledge the politicized character of trafficking and how this impacts on trafficking research, but focus on ways of studying it that are removed from its political discourse. Tudlum and Brunovskis note:

Many policy areas related to human trafficking, such as prostitution, labour market protection, and immigration laws, are highly politicized, and this further complicates the situation. Key actors with access to relevant information can have political agendas that may influence how they choose to use the information they have at their disposal. A substantial number of publications on trafficking for sexual exploitation are influenced by political debates surrounding these topics. While the importance of a continuous social debate on ideological and moral issues should not be downplayed, there is now a need for more systematic empirical knowledge on the mechanisms of human trafficking, who it influences, and how it can be countered.¹⁸⁴

However, what these authors appear to be presuming is the possibility for research that *is* devoid of this political character and that with rigour and strong evaluative procedures, research into trafficking can be free from these methodological difficulties. What is actually most detrimental to the collection of “sound” data on trafficking is the term itself. Researchers searching for “trafficked” individuals or incidents of “trafficking” presume that trafficking *is* something more than its rhetoric and its political construction. This presumes that somehow the real issue can be parsed out of the ideological debates and can be studied on its own. Yet without the “myth” of trafficking the term itself does not refer to anything in particular. The construction of trafficking as described above, through the operation of numerous actors and legal components, has renamed several activities under the umbrella

¹⁷⁹ Laczko, *Introduction*, *supra* note 169 at 14.

¹⁸⁰ Laczko, *Introduction*, *supra* note 169 at 14.

¹⁸¹ Denise Brennan, “Methodological Challenges in Research with Trafficked Persons: Tales from the Field”, in Laczko, *supra* note 169 at 35.

¹⁸² Laczko, *Introduction*, *supra* note 169 at 14.

¹⁸³ Laczko, *Introduction*, *supra* note 169 at 14.

¹⁸⁴ Tyldum, *supra* note 172 at 18.

of “trafficking” and has thus given the impression that there is a distinct, identifiable phenomenon that is to be studied *apart from these other phenomena*. And given that this myth is fluid and bound up with anxieties and fears around political issues such as prostitution and immigration, the search for the thing-in-itself to be studied cannot succeed.

This is not to argue by any means that stories collected from individuals who have been in exploitative circumstances are untrue. To the contrary, there are significant numbers of individuals who have been subjected to horrendous circumstances in the context of labour, including sexual exploitation. However, the validity of the “fact” of their existence is not what is at issue. It is the means of telling their various stories as a part of the trafficking narrative that has posed problems for research and programming. The issue is not whether the stories are true, but rather how they are told. As noted by Doezema, “it is entirely possible to decry sexist, racist and nationalistic elements in trafficking debates without questioning the legitimacy of evidence of trafficking or even the ‘reality’ of trafficking itself.”¹⁸⁵

The various categories of abused migrant labourer, sexually exploited child, marginalized prostitute, and victim of domestic violence are subsumed under one label and endless debate continues about what is to be counted in the context of “trafficking”. This conflation not only serves to muddy the waters around each of these categories but also serves to undermine the different needs and desires emanating from each group. The status of “trafficked” is the goal one must reach in order to be counted and the widely differing solutions to the problems faced by each group are largely ignored.

ii. Anti-Trafficking Programming

The various incarnations of the trafficked victim can be concretely seen through anti-trafficking programming as well as through research. It is the paradigmatic victim who becomes the intended target and beneficiary of anti-trafficking work. Given the plethora of anti-trafficking initiatives that have been launched worldwide, academics have sought to

¹⁸⁵ Doezema *Sex Slaves*, *supra* note 2 at 39.

categorize the different approaches in order to determine their strengths and weaknesses. However, these critiques often fall prey to the same fault as occurs in the quantitative research sphere. They still uphold the ideal of the trafficked victim in her various incarnations (sex slave, sexually abused domestic worker, abused child) and debate only what is the most suitable means for protecting her. I identify the three main approaches discussed in the academic literature here, while also going somewhat further by discussing the assumptions on which these categorizations are based. Additionally, and most importantly, I go on to identify the ways in which programs based on these approaches have actually proved to be detrimental to the interests of marginalized groups, some of whom are actually identified as being targeted beneficiaries of these programs.

a. Anti-trafficking approaches Identified

Several approaches to anti-trafficking work have been highlighted in the academic literature and critiques have been levied between approaches, some favouring stricter law enforcement measures and others focusing on protection of victims. However, while each approach reacts to different fears and anxieties around migration, prostitution and criminality, they share in the characterization of the trafficking phenomenon overall. “Approaches” in this context refers to those priorities and assumptions implicit and explicit in the creation of programs for states, IGO’s and NGOs to address trafficking. There are a number of authors who critique the overall paradigm of trafficking, and they will be addressed at the end of this chapter, but the three most widely discussed approaches are the law enforcement, human rights and migrant labour and it is to these I now turn.

When discussing approaches to anti-trafficking work, academics play a particularly unique role, similar to that discussed above with respect to the creation of the dominant paradigm of trafficking. Academics not only identify, analyse and critique approaches to anti-trafficking work, but through their writings sometimes uphold various strands of the dominant paradigm and suggest approaches built upon those norms. Annalee Lepp notes that solutions and approaches will vary according to what problem is perceived as requiring resolution, whether that is “organized crime, illegal migration, prostitution, forced labour,

violence and abuse of women, unequal economic relationships or poverty.”¹⁸⁶ Given the heavy focus on border integrity, criminality and moral outrage around prostitution in the creation of the dominant paradigm, the three most frequently identified approaches are law enforcement, rights-based and migrant labour-focused. In the law enforcement approach “[t]rafficking in human beings is seen as a crime very similar to trafficking in arms and drugs, often committed by the same international organised crime groups.”¹⁸⁷ The human rights approach focuses on the victim of the crime rather than the prosecution of perpetrators and “underlines the need and obligations of states to protect the human rights of trafficked persons.”¹⁸⁸ The migration approach arose out of programming created for stranded migrants – those persons whose illegal status in a country generated a need for humanitarian assistance from a repatriation agency.¹⁸⁹ The assumptions inherent in this approach are based on “an understanding of the problem of trafficking as principally one of unregulated economic migration.”¹⁹⁰

1. Law enforcement approach

In general, the international documents related to trafficking in persons are formulated from a law enforcement perspective.¹⁹¹ This approach takes as its primary assumption that trafficking is best addressed through the punishment of those committing trafficking and other related offences. Resources are available for crime-oriented programming and accountability is made easy through arrest and prosecution statistics.¹⁹² Arrest and prosecution of traffickers enables states to justify their programs under international law and particularly with respect to the annual U.S. Trafficking in Persons Report that rates states’ compliance with the Protocol on a yearly basis. Trafficking-related offences often overlap with existing domestic offences and are often perceived to take place in conjunction

¹⁸⁶ See Annalee Lepp “Trafficking in women and the feminization of migration: the Canadian context” (2002) 21/22(4/1) Canadian Woman Studies 90 at 91.

¹⁸⁷ Barbara Limanowska, *Anti-trafficking action in south-eastern Europe: Lack of effectiveness of law enforcement and migration approaches*, (2004) UN Division for the Advancement of Women, Consultative Meeting on “Migration and Mobility and how this movement affects Women”, Malmö, Sweden, online: <<http://www.un.org/womenwatch/daw/meetings/consult/CM-Dec03-EP6.pdf>> at 4.

¹⁸⁸ Limanowska, *ibid* at 4.

¹⁸⁹ Limanowska, *supra* note 187 at 3.

¹⁹⁰ Limanowska, *supra* note 187 at 3.

¹⁹¹ Elizabeth M. Brunch, “Models Wanted: The Search for an Effective Response to Human Trafficking” (2004) 40 Stanford Journal of International Law 1 at 16

¹⁹² Brunch, *ibid* at 17.

with other forms of criminal activity.¹⁹³ This approach is implemented through the enactment and enforcement of criminal legislation and through law enforcement programs aimed at identifying victims, including “raids” on places suspected of harbouring trafficked persons.

The law enforcement approach is consistently criticized by academics and NGOs on a number of fronts. For example, Bernadette McSherry notes on a technical level that the requirement to prove all elements of trafficking offences makes prosecution more difficult than addressing the issue through existing legislation around slavery, kidnapping and sexual offences.¹⁹⁴ In 2009, the UK enacted a new statute on slavery¹⁹⁵ after advocacy groups raised concerns about the difficulty in proving trafficking offences.¹⁹⁶ However, the primary allegation against the overall law enforcement perspective is that it favours criminalization and in the process ignores or marginalizes human rights and labour concerns.¹⁹⁷ Given that the primary aim of these programs is prosecution, critics allege that victims’ rights become secondary and are too often linked to their cooperation with the investigative process.¹⁹⁸ This is evident in the wording of the Protocol as discussed above, with the criminal justice provisions identified as mandatory State Parties’ obligations and the assistance and protection provisions as optional.

Gallagher supports the law enforcement approach as an integral part of any state’s anti-trafficking program, suggesting that it can secure justice for victims and prioritize rights in

¹⁹³ Brunch, *supra* note 191 at 17.

¹⁹⁴ Bernadette McSherry and Miriam Cullen, “The Criminal Justice Response to Trafficking in Persons: Practical Problems with Enforcement in the Asia-Pacific Region” (2007) 19(3) *Global Change, Peace & Security* 205 at 206

¹⁹⁵ *Coroners and Justice Act 2009* (Commencement No. 4, Transitional and Saving Provisions) Order 2010, 2010 No.816 (C. 56), s.71: (1) A person (D) commits an offence if: (a) D holds another person in slavery or servitude and the circumstances are such that D knows or ought to know that the person is so held, or (b) D requires another person to perform forced or compulsory labour and the circumstances are such that D knows or ought to know that the person is being required to perform such labour.

¹⁹⁶ Alexandra Toppling, “Leighton Buzzard “slave” empire uncovered in major police raid”, online: guardian <<http://www.guardian.co.uk/world/2011/sep/11/leighton-buzzard-slaves-released>>

¹⁹⁷ Brunch, *supra* note 191 at 21. Limanowska, *supra* note 187 at 3. See also Tala Hartsough, “Asylum for Trafficked Women: Escape Strategies Beyond the T Visa” (2002) 13(1) *Hastings Women’s Law Journal* 77 at 101 quoting the UN Special Rapporteur on Violence Against Women where she states that: ““On the issue of trafficking, Governments overwhelmingly adopt a law and order approach, with an accompanying strong anti-immigration policy. Such an approach is often at odds with the protection of human rights.”

¹⁹⁸ Hartsough, *ibid* at 101. Also note at 101 Hartsough quoting Mary Robinson, the United Nations High Commissioner for Human Rights:

“[i]t is important in this context to note that victim protection must be considered separately from witness protection, as not all victims of trafficking will be selected by investigating and prosecuting agencies to act as witnesses in criminal proceedings.”

the process.¹⁹⁹ To this end, she proposes that for states to achieve a “due diligence” standard of investigating trafficking-related offences,²⁰⁰ they must include provisions for the protection of victims, given that victim cooperation is often critical to prosecution. Such programs would contain measures for protection and support of victims and genuine incentives for cooperation (including residency permits). They would also encourage law enforcement officers to be active in investigations and ensure prosecutors and judges take such cases seriously, with full understanding of the crime and the relevant legal framework.²⁰¹ Gallagher also suggests that a more thorough understanding of the gender implications in the law enforcement approach to trafficking, including the underreporting of trafficking of men and boys, but “most obvious in relation to trafficked women and girls”,²⁰² could be integrated into this perspective and would serve to remedy some of the concerns expressed by human rights advocates.

Others argue that the approach cannot be remedied through the enhancement or fuller understanding of trafficking victims, but that rather the law enforcement project in relation to trafficking is in itself flawed. Brunch notes that the varying degrees of moral indignation and legal regulation around prostitution have led to inconsistent application of even domestic laws on trafficking. She suggests that because specific terms were not clarified in the Protocol and were left purposefully vague, there are significant inconsistencies in law enforcement approaches in different states.²⁰³ Where the Protocol has left concepts up to interpretation by states and state agents, characteristics of the dominant trafficking paradigm fill that gap. For example, as Brunch notes, the victim/prostitute dichotomy comes into play when the criminalization approach “struggles to reconcile two apparently conflicting views of prostitutes and prostitution – one that seeks to protect individuals from being trafficked into prostitution and another that seeks to exclude from protection those who willingly engage in the criminal conduct.”²⁰⁴ Additionally, the law enforcement approach risks the conflation of trafficked persons with “voluntary” migrants, particularly in

¹⁹⁹ Anne Gallagher, *The International Law of Human Trafficking* (New York: Cambridge University Press, 2010) at 370.

²⁰⁰ Gallagher, *ibid* at 382 and in chapter 4 generally for a detailed discussion of the origins of the due diligence standard for States.

²⁰¹ Gallagher, *supra* note 199 at 384.

²⁰² Gallagher, *supra* note 199 at 389.

²⁰³ Brunch, *supra* note 191 at 18.

²⁰⁴ Brunch, *supra* note 191 at 19.

the identification process. Brunch argues that many state agents have difficulty distinguishing between the two and thus trafficked persons run the risk of deportation as “illegal migrants”. Anderson also notes that states often emphasize the distinction between “trafficked” and “smuggled” in the two Protocols to the Convention, “because smuggled migrants are not entitled to any of the special protections that states should consider making available to victims of trafficking. ... Early commentators found the unclear relationship between the two protocols, and, more specifically the failure of both to provide any guidance on *identification* [of victims of trafficking vs. smuggled persons] to be a ‘significant, and no doubt deliberate, weakness’.”²⁰⁵ Limonawska also critiques the ability of law enforcement agents to deal with the issues confronted in anti-trafficking work, including the fears around prostitution, migration and organized crime found in the dominant paradigm:

On the one hand, the police treat prostitution as breaking public order and therefore accord prostitutes special attention, so that the victims of trafficking appear, from a law enforcement perspective, similar/identical to women working illegally, but more or less voluntarily, as prostitutes. On the other hand, the pressure on the police to combat illegal migration, and to prove the efficacy of the anti-migration measures, makes them treat all women without legal documents as illegal migrants. As a result, they tend to use an “everybody or nobody” strategy when identifying victims. In an everyday situation the women and children are treated as criminals (illegal migrants or prostitutes), but during the special anti-trafficking actions the police, when clearly instructed or trained, treat all women as victims of trafficking. This approach also means that young women, nationals of certain countries, experience problems while crossing borders or are refused entry, and raises questions about the negative consequences of antitrafficking measures and status of travelling and migrating women.²⁰⁶

Another criticism levied against the law enforcement approach is that it focuses only on the individual offender and does not address state complicity thoroughly enough nor speak to general state practices as being implicated in trafficking schemes.²⁰⁷ Anderson argues that given the ways in which governments create immigration controls, leaving specific categories of workers more vulnerable to abuse, it is difficult for those same governments to argue that they are providing the requisite protection for migrant workers.²⁰⁸ Ultimately

²⁰⁵ Anderson, *supra* note 151 at 5.

²⁰⁶ Limanowska, *supra* note 187 at 4.

²⁰⁷ Brunch, *supra* note 191 at 21.

²⁰⁸ Anderson, *supra* note 151 at 19.

these authors are suggesting that this approach suffers from more than simply a lack of clarity or understanding on the part of law enforcement agents. Rather a deeper conceptual difficulty exists with the very ability of a criminal justice response to reconcile those issues given the contentious nature of the subject matter²⁰⁹ and the existence of the dominant paradigm as an interpretive device.

2. Human Rights Approach

The Human Rights approach, supported by international advocates²¹⁰, NGOs²¹¹ and scholars²¹² alike, promotes the human rights of victims of trafficking as its primary goal rather than the capture and prosecution of the perpetrators. Although focused on ways to incorporate human rights into a law enforcement perspective, Gallagher's concerns about human rights discussed above provide a clear snapshot of the kinds of protections the human rights framework proposes for trafficked victims. They include legal and psychological protection for and support of victims, regularization of immigration status, and a cognizance of the various human rights violations individuals face in the process of being trafficked and investigated. This framework offers the possibility to hold states accountable for nationals and foreign nationals when in their territories and it offers the possibility of allocating rights and benefits to individuals in their capacity as human beings rather than in their capacity as "victims".

However, this framework, as generally applied, also often falls into particular traps. While advocacy around human rights for trafficked victims does vary as to goals and specified beneficiaries, much of the discussion about "human rights" in the context of trafficking has been framed as protection of "women's rights". And in these contexts advocacy is devoted exclusively to promotion of rights around violence against women. International instruments addressing trafficking have not, historically, had a human rights focus. And,

²⁰⁹ See Brunch, *supra* note 191.

²¹⁰ See UN Special Rapporteur, *supra* note 187.

²¹¹ See IOM, *Countertrafficking*, online: IOM <<http://www.iomvienna.at/en/aktivitaeten/bekaempfung-des-menschenhandels>>

²¹² See for example Anne Gallagher, "The Right to an effective remedy for victims of trafficking in persons; A Survey of International Law and Policy", (2010) prepared for the United Nations Office of the High Commissioner for Human Rights, online: <<https://www.yumpu.com/en/document/view/13309078/the-right-to-an-effective-remedy-for-victims-of-trafficking-in-persons-a->>>.

with respect to the specifically human rights-focused international legal instruments, only CEDAW mentions trafficking by name, with the Special Rapporteur on Violence Against Women having the most active voice in promoting the human rights of trafficked persons in the international arena.²¹³

Some authors argue that by “viewing it essentially as a subset of ‘women’s human rights’ – it becomes easier to marginalize or ignore the broader issues of women’s status, such as agency and resistance.”²¹³ It also focuses on specific acts of traffickers, and particularly those that take place within the context of violence against women, and thus,

ignores the complex set of factors, conditions, and rights violations that lead to human trafficking in the first place. It also ignores the realities of the lives of direct victims of trafficking, who have generally had other rights violated before, during and after the trafficking process ... [such as] the right to education, the right to work (under just conditions), the right to freedom of movement, the right to be free from discrimination, the right to be free from cruel, inhuman and degrading treatment, the right to security of the person, the right to health, and the right to equal protection of the laws.²¹⁴

Furthermore, the entire international human rights framework has often been called into question through feminist critique, with some authors noting that the international legal order is still an order created by and thus inherently favourable to male interests.²¹⁵ Non-western feminists have also critiqued western “first world” feminists for having a tendency to homogenize all women’s experiences²¹⁶ and the use of current western-based human rights discourse can fall into this same trap.

We see the dominant paradigm of trafficking playing a significant role in the determination of the human rights approach, both among advocates of the approach and those critiquing elements of it. Gallagher’s framing of the types of protections that would be most necessary for victims betrays an assumption that “most obviously”²¹⁷ women and girls’ rights need to

²¹³ bis. The UN High Commissioner for Human Rights, Mary Robinson, also produced a series of principles and guidelines in 2002 devoted specifically to the human rights of trafficked persons generally, with less focus on women and the sex trade - found here at <http://www.ohchr.org/documents/publications/traffickingen.pdf>. However, these principles were not adopted by UN member states.”

²¹³ Brunch, *supra* note 191 at 31.

²¹⁴ Brunch, *supra* note 191 at 32.

²¹⁵ Brunch, *supra* note 191 at 33.

²¹⁶ Brunch, *supra* note 191 at 34.

²¹⁷ Gallagher, *supra* note 199 at 389.

be protected. Not only does this, as Brunch notes, allow for these rights to be relegated to the realm of “women’s rights” but it in fact presumes the predominance of a particular type of trafficking and a particular type of victim. The human rights applied in the framework as promoted by scholars and advocates, while aiming to remedy the situation of people subjected to trafficking, can themselves fall prey to assumptions about the beneficiaries of those rights, tending towards the prioritization of those protections most suitable for the stereotypical victim of trafficking.

3. Migrant Labour

Although the two issues of migration and labour are often dealt with separately, and different anti-trafficking groups tend to focus more pointedly on one or the other issue, they are often advocating on behalf of individuals who are facing difficulties with respect to both of them and their remedies speak to both. Specifically in the context of anti-trafficking advocacy, labour-rights advocates often discuss the increased precariousness of working as a migrant, and those concerned with protecting migrants often refer to migrants who are seeking or undertaking employment. After a review of academic writing in the area it seems clear that the approach promoted by both of these groups loosely centers around the category of migrant workers.

Bridget Anderson speaks to this group of advocates as the “Human/workers’/migrants’ rights activists.”²¹⁸ While still promoting particular human rights – namely those of migrants and of workers, Anderson separates this category from those promoting the rights of sex workers or women’s rights specifically.²¹⁹ While some groups do encompass the promotion of all forms of rights, as noted above, the “human rights” approach often becomes focused on the rights allocated to women only, and protection of those rights tends towards the protection of the rights of those who were trafficked specifically for the purposes of prostitution. The “human/worker’s/migrants’ rights” category instead promotes an approach that aims to alleviate the exploitation of all individuals migrating for the purposes of work more generally. This includes advocates of enhanced labour law protections for

²¹⁸ Anderson, *supra* note 151 at 9.

²¹⁹ Anderson, *supra* note 151 at 7.

migrant workers as well as those looking to broader social and economic policies pertaining to exploitative labour practices in the migratory context. The premise of this approach is that “human trafficking represents an opportunistic response to the tensions between the economic necessity of migrating, and the politically motivated restrictions on doing so.”²²⁰ Janie Chuang offers this approach as an alternative to the law enforcement focus which she suggests overlooks the causes that create the problem of trafficking:

More often than not, trafficking is labor migration gone horribly wrong in our globalized economy. Notwithstanding its general economic benefits, globalization has bred an ever-widening wealth gap between countries, and between rich and poor communities within countries. This dynamic has created a spate of “survival migrants” who seek employment opportunities abroad as a means of survival as jobs disappear in their countries of origin. The desperate need to migrate for work, combined with destination countries tightening their border controls (despite a growing demand for migrant workers), render these migrants highly vulnerable to trafficking.²²¹

Groups in this field advocate strongly for overall protections for both migrants and workers, noting that the situation of migrant workers is often complicated and not always served appropriately through anti-trafficking measures.²²² In 2005 the ILO suggested in its research that migrants frequently enter destination countries of their own volition, relying on family or friends, but once there are still highly vulnerable to exploitation, particularly if their immigration status is precarious.²²³ The ILO’s report also notes that forced labour is not often accomplished through physical restraint, but rather through “more subtle patterns of coercion used to push down wages and make people work in poor or unsafe working conditions.”²²⁴ Thus given these complexities and contexts, workers’ rights advocates point out that it is difficult to distinguish between “trafficked” and “smuggled”, making protections specifically for trafficked persons difficult to implement and difficult for workers to access.

²²⁰ Janie Chuang, “Beyond a Snapshot: Preventing Human Trafficking in the Global Economy” (2006) 13(1) *Indiana Journal of Global Legal Studies* 137 at 140.

²²¹ Chuang, *ibid* at 138.

²²² ILO, *A global alliance against forced labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, (2005) 93rd Session, International Labour Conference, Geneva, online: ILO < <http://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf> > at 46

²²³ ILO, *Global Report*, *ibid* at 46.

²²⁴ ILO, *Global Report*, *supra* note 222 at 46.

These rights protections are particularly difficult to access given the threats of removal and weak incentives provided for cooperation with state authorities.²²⁵

The labour-focused approach proposes that overall workers' protections and attention to restrictive migration policies that encourage the deterioration of workplace standards should be the focus of anti-trafficking work. Advocates often promote the use of the Migrant Workers' Convention in conjunction with the Protocol as a means of addressing these needs.²²⁶ Some also suggest that protections specific to trafficked workers are required, such as the provision of assistance through the judicial process in employment standards cases where these mechanisms are the most appropriate venue for redress.²²⁷ Such protections are not made explicit in the Protocol and thus other relevant documents and standards can be used simultaneously to address the complexity of the problem.

Those who look to the labour framework as an approach to combating trafficking are also able to address gender issues within the context of trafficking and will often focus on women's place in the labour market as a guiding issue. The vulnerability of women to labour exploitation is said to lie in women's tendency to occupy less regulated sectors of the economy such as domestic work, sexual labour or low-wage production work²²⁸. Additionally, structural adjustment policies requiring governments to cut expenditures on social services have pushed women to take on additional work, pushing them further into these unregulated sectors.²²⁹ Authors promoting the labour approach to dealing with trafficking contend that labour shortages in these informal sectors are often filled by migrant workers willing to take on work that the domestic labour force refuses, with gendered and racial hierarchies allowing for a normalization of abuse.²³⁰

Thus the migrant labour approach that focuses on working conditions is able to address some of the key issues that are excluded from view in the law enforcement approach and may have a wider reach than the human rights focus. Work sites in which individuals who

²²⁵ ILO, *Global Report*, *supra* note 222 at 47.

²²⁶ Zalewski, *supra* note 60 at 134.

²²⁷ Zalewski, *supra* note 60 at 130.

²²⁸ Chuang, *supra* note 220 at 143.

²²⁹ Chuang, *supra* note 220 at 143.

²³⁰ Chuang, *supra* note 220 at 146.

have immigration status in a country are employed are not automatically excluded potential venues for trafficking. The law enforcement approach is often critiqued for failing to account for “legal” labour when seeking to identify “trafficking”. Additionally, women take their place not only as victims but as workers in this scheme, allowing for the recognition of some complexity in their migratory experience.

However, those advocates who focus too strictly on labour and pay insufficient attention to the role migration plays in any given case have also had criticisms levied against them. First, those advocating a strict labour-focused approach, particularly when focused on enhancement of labour law protections, sometimes have difficulties dealing with the unregulated or informal economies, including undocumented persons, sex workers, and others earning a living in ways not traditionally accounted for. While advocates of labour rights may push for recognition and protections for workers in the informal economy, administrative and legal mechanisms currently in place to deal with labour issues are unable to provide redress for exploitation in these forms of labour. The legal mechanisms are also criticized for being unable to address other rights issues in trafficking scenarios such as “issues of freedom of movement, security of the person, and cruel, inhuman, and degrading treatment.”²³¹ This approach is also “limited in the means by which it can hold governments accountable”,²³² again only focusing on issues within borders and those recognized as within the jurisdiction of labour laws. Anderson notes that a difficulty arises in

how to distinguish trafficking from legally tolerated employment contracts (also from legally tolerated forms of exploitation of women and children within families). Questions about what constitutes an exploitative employment practice are much disputed - indeed they have historically been, and remain, a central focus of the organised labour movement’s struggle to protect workers. ...

For migrant labour, at least for low-waged migrant labour, surely one of the reasons it is permitted by states in the first place, and in practise why it is sought by employers, is precisely because it can be exploited. How to draw a line in the sand between “trafficked” and “not trafficked but just-the-regular-kind-of-exploitation” migrants? ... The problem is that workers, migrant or not, cannot be divided into two entirely separate and distinct groups – those who are trafficked involuntarily into the misery of slavery-like conditions

²³¹ Brunch, *supra* note 191 at 27.

²³² Brunch, *supra* note 191 at 27.

in an illegal or unregulated economic sector, and those who voluntarily and legally work in the happy and protected world of the formal economy.²³³

The labour-focused approach can also be criticized for being unable to address the vulnerability that can arise from the migratory process itself. Janie Chuang notes that a strict focus on labour absolves the state of responsibility for addressing acts that take place outside of its borders, dealing only with the “exploitative end purpose of the facilitated movement” and not any coercion inherent in the movement itself.²³⁴ Chuang states that in sum “this formulation glosses over any responsibility on the part of the state for fostering emigration push or immigration pull factors.”²³⁵ She advocates instead for an approach centred on the migratory processes themselves and places the site of vulnerability within these processes rather than in the workplace. Chuang and others interested in a rights-based framework designed to pursue protections for all migrants seek to address the socio-economic factors that push and pull people into journeying for work and other activities.²³⁶

The drawback to this focus on migration is that it may fail to address the conditions of exploitation in the destination country or in venues along the journey. Focusing on migration in this way can slip into a rescue mentality where women migrants are framed as vulnerable, and thereby trafficked, denying them their personal histories and agency.²³⁷ Those who take this approach also tend to point to individuals’ undocumented status as a vehicle for exploitation, thereby ignoring exploitation that occurs within legalized immigration and employment schemes.²³⁸ Anderson criticizes a strict migration focus in its tendency to strictly equate migration with such vulnerability. She notes that:

It could be argued that movement matters because it heightens vulnerability to this outcome, and potentially, makes alleviation more problematic – if you are isolated, don’t speak the language etc. then it is both easier to exploit you, and indeed in this way movement may be part of a mechanism facilitating exploitation. However, while there is undoubtedly a problem with reducing exploitation and its mechanisms to simple mathematics and units of labour, surely what this suggests is that one has to

²³³ Anderson, *supra* note 151 at 9.

²³⁴ Chuang, *supra* note 220 at 152.

²³⁵ Chuang, *supra* note 220 at 152.

²³⁶ Dinan, *supra* note 67 at 60.

²³⁷ Ratna Kapur, “The ‘other’ side of globalization: the legal regulation of cross-border movements” (2003) 22 *Canadian Woman Studies* 6 at 10.

²³⁸ See for example discussion in Dinan, *supra* note 67 at 67.

examine the social context and relations within which all exploitation takes place, and account for and respond to it? In this instance ensuring that people have information on their rights, enforceable employment contracts, decent accommodation and possibilities for social contacts. Thus in seeking to protect a group of workers who are particularly vulnerable for reasons to do with language, familiarity etc., migrant activists focus on movement as a shorthand for this vulnerability, and take refuge on a rare patch of common ground with states around “trafficking”. However, for states the reason for the emphasis on movement is clearly based on their concern with transnational organized crime.²³⁹

Particularly worrying is the way in which the focus on migration as the site of vulnerability has, in some cases fused with the law enforcement perspective and resulted in restrictions on individual mobility in the interest of “protection”. The paradigmatic victim appears here as an object to be “protected”. Given the assumptions about the innocent, kidnapped, enslaved victim, the corollary assumption is that “rescue” involves repatriation – making the woman whole again and returning her to her original state of being in her home country. However, this ignores the various motivations an individual may have for migration and the complexities they face both in their countries of residence and during the migratory and employment processes.

Governments have placed restrictions on women’s freedom of movement out of or within countries in the name of protecting them from abuse in the context of trafficking. Some have implemented obvious programs placing conditions on women’s movement, and others have simply supported campaigns warning women of the dangers of working abroad.²⁴⁰ Ratna Kapur notes that,

Even when curbing migration is not a stated programmatic focus, an inadvertent impetus is to dissuade women and girls from moving in order to protect them from harm. Conflating trafficking with migration results in reinforcing the gender bias that women and girls need constant male or state protection from harm, and therefore must not be allowed to exercise their right to movement or right to earn a living in the manner they choose.²⁴¹

What these approaches have in common is the “assumption that the problem of trafficking in women will be solved by reducing or stopping the flow of female migration, without

²³⁹ Anderson, *supra* note 151 at 14.

²⁴⁰ Lepp, *supra* note 186 at 94.

²⁴¹ Kapur, *supra* note 237 at 9.

considering the root causes of migration, such as the absence of viable employment and the need to earn an income for their families.”²⁴² This assumption also perpetuates support for anti-trafficking campaigns that warn women of the dangers of trafficking. Yet many have called into question these campaigns’ failure to fully appreciate migrants’ perspectives. Janie Chuang discusses the misconceptions inherent in these campaigns:

That the target audiences of some of these campaigns so readily dismiss them as rich countries’ anti-migration propaganda—despite recognizing the accuracy of the risks portrayed—illustrates the depths of the migrants’ need to migrate and the great risks they are willing to assume to do so. This is similarly demonstrated in the fact that the vast majority of calls to helplines created to reach victims of trafficking were “preventive and informative”—that is, to seek information regarding migration for work abroad. ... [E]valuation of these and other counter-trafficking initiatives thus underscores governments’ chronic failure to appreciate fully the power of the socioeconomic forces underlying migratory flows.²⁴³

Some argue that the curbing of regular migration avenues may actually serve as an impetus for individuals to engage the services of those providing more clandestine means of travel.²⁴⁴ The equation of migration and vulnerability also creates very clear categories of “trafficker” or “smuggler” as the perpetrator of criminal activities, and fails to recognize the various relationships that exist between migrants and those assisting them in their journeys. The Global Alliance Against Trafficking in Women notes some of these complexities:

In West Africa, for example, where people known as ‘landlords’ have traditionally helped both adults and children migrate to towns and find jobs, it is clear that denouncing such people as traffickers has contributed to reducing the protection they can give to their clients, rather than helping stop cases of exploitation. Similarly, in Brazil the patron-client relationships which govern many aspects of social life often provide protection to the ‘clients’ involved. Identifying traffickers therefore requires a more sophisticated process than denouncing the informal mechanisms that people around the world have put in place to help them migrate (legally or illegally) and get on in the world.²⁴⁵

²⁴² Lepp, *supra* note 186 at 94.

²⁴³ Chuang, *supra* note 220 at 158.

²⁴⁴ Kapur, *supra* note 237 at 8.

²⁴⁵Global Alliance Against Trafficking in Women, *Collateral Damage: The Impact Of Anti-Trafficking Measures On Human Rights Around The World* (Thailand: Amarin Printing & Publishing Public Company Limited, 2007), online: GAATW <http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf> at 11.

Additionally, Nandita Sharma criticizes the implementation of such measures as being highly racialized:

The operation of different legal regimes, one to govern “citizens” and “permanent residents” and another to govern “illegals,” is part of the regime of global apartheid, a regime whereby discrimination against “foreigners” is not only accepted but accepted as necessary. The discursive and policy framework of anti-trafficking is one of the more nefarious ways that such differentiations are organized. The assumption of the violent nature of trafficking or smuggling enables antitrafficking campaigns to put forward an agenda calling for measures to combat it through heightened state interventions at the border and more punitive measures for traffickers and/or smugglers. Regardless of the rhetoric of *protecting* migrants, the emphasis is on controlling migration. Tighter control over the borders, stricter immigration laws, and more punitive criminal laws are called upon as indispensable measures to rescue migrants. In this way, anti-trafficking campaigns act as the moral regulatory arm of White nationalist movements by denying migration to those who are deemed incapable of deciding for themselves if and when they should move.²⁴⁶

Governments’ “preoccupation with immigration”²⁴⁷ in industrialized countries is criticized for resulting in measures that uphold this differentiation, whether in the name of immigration control or in the name of anti-trafficking measures.

While there are differences between labour and migration anti-trafficking approaches, the advocates promoting better migratory regimes often do so when migration coincides with exploitative labour, and those propounding better working conditions often do so when the individuals in question have migrated. Thus the approaches overlap considerably and the nexus of their concern is the exploited migrant. However, at this nexus we can still in some ways see the spectre of the paradigmatic trafficked victim. In the migration-focused approach, there is a tendency to focus only on undocumented individuals and those working in informal employment sectors as the object of protection, which does not sufficiently address legal and even government-sanctioned schemes that allow for significant exploitation to occur. Through the labour approach, there is often an inability to address those who are undocumented or work in the informal economy. While less obviously so than what is seen in the law enforcement or human rights approaches, traces of the paradigmatic victim still lurk in these approaches. Brunch notes that there are similarly unexamined

²⁴⁶ Sharma, *supra* note 145 at 108.

²⁴⁷ GAATW, *supra* note 245 at 16.

assumptions in all three approaches identified, hearkening back to the myths and stereotypes surrounding the trafficked victim:

In more recent years, human trafficking has again become a significant international concern due in part to the large number of people involved and its enormous financial impact. The early emphasis on protecting white women now seems obviously racist and sexist. Yet that emphasis has continued to pervade the current discussions of, and policy towards, human trafficking. Governments, intergovernmental organizations, nongovernmental organizations (“NGOs”), and activist groups have embraced trafficking as a cause, yet discussions continue both to focus on and construct “innocent” victims – ignoring those, like laborers, migrants, or sex workers, who present a more complex profile – and to play on and respond to public fears about immigration and prostitution. As a result of these biases, the current approaches to human trafficking replicate many of the flaws of earlier approaches – namely, a focus on victimization, a fruitless cycle of debate on the role of prostitution, problematic definitional questions, and a process of decision making that excludes critical voices.²⁴⁸

b. Implementation

Where we see the concrete effects of the dominant anti-trafficking paradigm and where it is positioned to do the most harm is in the implementation of the programs themselves. While states are generally taken to implement programs through a law enforcement approach, the presence of the stereotypical trafficked victim is also palpable in the human rights and sometimes labour/migration perspectives, as seen in practice in various state and organizational activities. It is here where one sees the negative consequences faced by particular groups, and those excluded from the definition of trafficking.

At the international level, the IOM is heavily involved in providing assistance to victims of trafficking and, as discussed above, was created in response to a need expressed by migrants unable to return home or obtain appropriate status in their current countries of residence.²⁴⁹ In practice, the IOM’s “migration” approach focuses on repatriation. Susanne Schatral, after conducting a comprehensive review of IOM’s anti-trafficking campaigns, notes that “an inherent part of its anti-trafficking work is the provision of direct assistances to VoTs.

²⁴⁸ Brunch, *supra* note 191 at 3.

²⁴⁹ Schatral, *supra* note 116 at 258.

Central elements of IOM's victim assistance are the programs for the so-called 'voluntary return'.²⁵⁰ Researchers have noted that IOM officials insist that "the only wish of a victim would be to return back home".²⁵¹ This indicates a particular understanding of trafficked victims as entirely deceived or coerced into their present situation without allowing for the possibility that female migrants may actually be attempting to escape personal or economic situations in their home countries.²⁵² Susanne Schatral notes:

This suggestion, which exploits the victim's desire for trust and protection, justifies policies of migration management as "voluntary" return being the most "natural" principle. Thus rendering "voluntary" return programs as "natural" helps to hide its genuine political character. Return policies, on the contrary, often entail stigmatization, if once returnees come back to their "home" countries they will be exposed as victims of sex-trafficking or at best labeled a failed migrant.²⁵³

At a domestic level we see similar understandings played out in state agencies' implementation of anti-trafficking legislation, with an even clearer border-integrity component present in their approaches.

In Nepal restrictions were placed on women's movement across the Nepalese border for a decade, in the name of preventing trafficking and protecting women.²⁵⁴ Here the migration focus of anti-trafficking work takes on a border-integrity aspect and women are prevented from freely leaving the country.²⁵⁵ The UK also reported a policy of border control, identifying certain migrant women as "possible prostitutes" and a deportation policy targeting sex workers, in the name of preventing trafficking.²⁵⁶ GAATW also notes that,

When announcing that 'victims of trafficking have been rescued', governments have taken advantage of the term trafficking to imply that the individuals concerned have been brought to the country concerned against their wishes and consequently have no wish and no right to remain there. By using the word trafficking, government officials claim they are 'rescuing' and helping trafficked persons, while in fact they take no notice of their wishes and forcibly repatriate them. [The research showed] examples of forcible repatriations from Italy and also reports on the forcible repatriation in 2003 from Nigeria of 26 young adults from the neighbouring Republic

²⁵⁰ Schatral, *supra* note 116 at 259.

²⁵¹ See Schatral, *supra* note 116 at 258.

²⁵² Schatral, *supra* note 116 at 258 - 9.

²⁵³ Schatral, *supra* note 116 at 259.

²⁵⁴ GAATW, *Collateral Damage*, *supra* note 245 at 14.

²⁵⁵ *bis*.

²⁵⁶ Doezeema *sex slaves*, *supra* note 2 at 122.

of Benin, along with 48 adolescents aged 16 or 17, none of whom were given an option to remain in Nigeria or to seek alternative work there – even though a regional treaty recognises their right to do so. They were bundled out of the country along with a group of younger children who had all been working in the same place.²⁵⁷

The ILO notes that forced labour is rarely prosecuted and even more rarely under the rubric of trafficking. It states that “[p]rosecutions are only carried out for clear-cut cases of forced labour exploitation, or cases where traffickers employ physical force, heavily restrict the victim’s movements or threaten the victims with serious harm.”²⁵⁸ It also notes that, for example in Italy, the regularization of immigration status for victims of trafficking is rarely accorded to those who were exploited through economic coercion.²⁵⁹ We can see the ways in which the stereotypical victim underlies prosecution of those who exploit migrant labourers through a case from France identified by the ILO:

In the case, a 15 year-old Togolese girl had been invited to study and live with a French family. She was made to repay the family who sponsored her journey through domestic work. However, she was not properly credited for her work and her passport was confiscated. Thereafter, she was sent to work for a second family, first during a period of time where her employer was pregnant, and then was made to stay thereafter against her will. She was made to work 12 hours a day every day of the week, and was only allowed to leave on Sundays for a short period of time, increasing her sense of isolation. She was not paid at all for her work except that she received 500 French francs once or twice. Her immigration status was never regularized and she continued to not have access to her travel documents, which according to her testimony left her constantly in fear of deportation. For a while she managed to escape these circumstances without her identity documents and worked for a friend for a fair salary. However, pressure from her original hosts to return to the second family led her to return to work there, again without any change in her immigration status and without receiving any further salary. She finally managed to regain her passport and was able to seek the help of a non-governmental organization. Here, there were several clear indicators of the victim’s vulnerability that could all be considered prima facie evidence of her vulnerability, including her illegal status, isolation, dependence on money provided by the host families, fear of denunciation to the authorities and fear of deportation. Despite clear evidence of her vulnerability, the French court found that she was neither in a state of vulnerability nor dependency. Instead, it declared that because she was able to leave her employment to work for a different family, because she was capable of calling her family in Togo from time to time, could speak French well, and had never complained about the terms of her

²⁵⁷ GAATW, *Collateral Damage*, *supra* note 245 at 16.

²⁵⁸ Rohit Malpani, *Legal Aspects of Trafficking for Forced Labour purposes in Europe*, online: International Labour Organization: <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_082021.pdf> at 8.

²⁵⁹ Malpani, *ibid* at 28.

employment, she was not sufficiently vulnerable to involuntary consent to forced labour exploitation. In overturning the decision, the [European Court of Human Rights] ECHR noted that the victim was entirely at the mercy of her employer since she did not have possession of her identity papers, was mostly isolated, had been falsely promised resolution of her precarious administrative status, and did not move around freely because she feared detection and deportation. The ECHR determined that criminal charges should have been upheld against the employers, significantly more compensation should have been paid, and the French penal law criminalizing forced labour was too ambiguous and was too open to multiple interpretations.²⁶⁰

While the ECHR ultimately declared the French court's decision inconsistent with the European human rights framework, it is clear that at the national level several issues still arose with respect to what counts as trafficking. The case was not considered under trafficking provisions, although elements clearly existed, and even still the victim was judged against the paradigmatic victim standard.

In her article “(Not) chained to a Bed in a Brothel”²⁶¹ Dina Haynes reviews transcripts of an interview with a woman migrant stopped at the U.S. border for using a false passport. While the woman was given the passport by an individual in Thailand in exchange for her own, and she was told she would be required to pay back her would-be employer in the U.S. upon arrival for her passage, immigration officials did not initiate an investigation under the TVPA or offer her the possibility of legalizing her status. She was summarily deported.²⁶² The woman was sent again to the U.S. and was at that time jailed for using a false passport. While this is only one story, Haynes argues that given other similar stories, this instance does exemplify the ways in which law enforcement personnel sometimes have difficulties seeing women entering with false documents or planning to work illegally as victims and not as criminals themselves.²⁶³ The innocent versus criminal binary plays a significant role in the determination of the allocation of benefits at this level.

The U.S. anti-sex work lobby and prohibitionist movement have also greatly affected anti-trafficking work in various states across the world. Given the self-proclaimed lead role taken

²⁶⁰ Malpani, *supra* note 258 at pp. 6-7, summarizing *Affaire Siliadin v. France*, European Court of Human Rights, Requete No. 73316/01 (2005).

²⁶¹ Dina Francesca Haynes, “(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act” (2007) 21 *Georgetown Immigration Law Journal* 337.

²⁶² Haynes, *ibid* at 368.

²⁶³ Haynes, *supra* note 261 at 368.

by the U.S. on trafficking issues, both through the institution of the TiP Report and through global funding, the specific prohibitionist leanings of U.S. governments have had widespread impact on the implementation of programs.²⁶⁴ Of particular concern has been the anti-prostitution “pledge” whereby in 2003 USAID was forbidden from funding anti-trafficking projects that were “advocating prostitution as an employment choice or which advocate or support the legalization of prostitution’.²⁶⁵ Under the President’s Emergency Plan for Aids Relief (PEPFAR), organizations were required to have explicit policies opposing “prostitution and sex trafficking” and “[n]o [federal] funds ... may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.”²⁶⁶ The immediate and yet uninterrogated connection between “prostitution” and “sex trafficking” is clear. In *Sex Slaves*, Doezema notes the resulting impact on anti-trafficking programming:

Organizations with effective and innovative programmes involving sex workers, such as Sampeda Maheen Mahila Sanstha (SANGRAM) in India, have refused to sign the pledge claiming it would impossibly compromise their work. This has led to a loss of funding and the contraction of planned services. In Bangladesh, sixteen out of twenty drop-in centres for sex workers have been forced to close as a direct result of the pledge. Agencies seeking local partners are prevented from working with sex worker organizations because they won’t sign the pledge. Self-censorship is also a large problem, with organizations preferring to play it safe, and cutting planned activities that they fear might fall foul of the pledge.

The PEPFAR pledge has to date not been reversed under the Obama administration. Early signs of how the administration will deal with trafficking and prostitution indicated initially that there may be little change from the Bush era, despite the reversal of the Global Gag Rule prohibiting recipients of US aid from promoting abortion, and despite a generally more open approach to sexuality.²⁶⁷

However, in 2010 the U.S. Court of Appeals Second Circuit upheld an injunction by a New York court ruling the PEPFAR pledge unconstitutional, in violation of the First Amendment against free speech,²⁶⁸ and in 2013 the US Supreme Court upheld the Second Circuit’s ruling.²⁶⁹ It remains to be seen if the pledge will be disbanded or how it may be altered.

²⁶⁴ The TiP report allows the US to unilaterally review countries.

²⁶⁵ Doezema *sex slaves*, *supra* note 2 at 141.

²⁶⁶ US Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 HR 1298. 22 U.S.C. §§ 7601-7682.

²⁶⁷ Doezema *sex slaves*, *supra* note 2 at 142.

²⁶⁸ *Alliance for Open Society International v. U.S. Agency for International Development*, 651 F.3d 218 (2d Cir. 2011).

²⁶⁹ *Agency for Intl. Dev. V. Alliance for Open Society Intl, Inc.*, 133 S. Ct. 2321.

While the overturning of this pledge could significantly alter the current funding scheme and allow for wider reaching programming to be reinstated, the conditions imposed by the pledge make clear the U.S.'s stance on prostitution and its relationship to anti-trafficking programs. Thus, through unilateral review of other countries' conduct through the annual TiP report, and the resulting aid packages or sanctions, the various law enforcement and prohibitionist perspectives on anti-trafficking programming can still be carried out. Chuang notes that "[t]hrough the sanctions regime does not explicitly require countries to adopt an abolitionist position ... [the U.S.] strongly signals to those in need of economic assistance that the path to gold lies on the abolitionist side of the road."²⁷⁰ Thus in addition to critiques levied against the Tier ranking on the grounds of political affiliation (Burma, North Korea and Cuba consistently receive the lowest tier ratings),²⁷¹ the TiP report also raises concerns about promotion of prohibitionist agendas. Doezema maintains that "[t]ier ranking helps determine aid given to that country, and thus it is no wonder that many countries have responded by enacting legislation that is viewed as in line with US anti-prostitution policies."²⁷²

E. CRITIQUES OF THE DOMINANT PARADIGM

With respect to the realities of global migration, the picture of the trafficked victim can never adequately represent the ways in which people move, the motivations and the complexity of various types of migration. Those who are deemed "trafficked" may in fact have began their journeys consciously seeking to migrate in one form or another, through whatever channels may be available to them.²⁷³ Using the victim-image fails to reflect the complexity of individuals' experiences, including their desire to pursue better futures through economic migration.²⁷⁴ Attempting to clearly identify a migratory movement simply as coerced or not coerced fails to capture how one act fits within the broader context of an individual's life. As Nandita Sharma describes,

²⁷⁰ Chuang, *supra* note 220 at 148.

²⁷¹ Doezema *sex slaves*, *supra* note 2 at 141, Chuang, *supra* note 220 at 148.

²⁷² Doezema *sex slaves*, *supra* note 2 at 141.

²⁷³ Chuang, *supra* note 220 at 141.

²⁷⁴ Melissa Ditmore "Trafficking in Lives: How Ideology Shapes Policy", in Kamala Kempadoo, *Trafficking and Prostitution Reconsidered* (London: Paradigm Publishers, 2005)107 at 110.

[M]ost migrants are victims of the daily, banal operation of global capitalist labor markets that are governed by nation-states. They are victimized by border control practices and the ideologies of racism, sexism, and nationalism that render *unspectacular* their everyday experience of oppression and exploitation. For these reasons, I call for the jettisoning of the framework of antitrafficking. Although a very small group of migrants have received temporary legal status as a result of being positioned as victims of trafficking, for the vast majority of migrants, the focus on smugglers/traffickers has made their clandestine journeys *more* expensive and *more* dangerous. Indeed, it can be argued that the catch-all justification of acting “for women and children” has been effectively mobilized within antitrafficking frameworks as a form of moral panic to legitimize the increasing criminalization of both the migrants who circumvent these controls and those who help them. ... By choosing to mainly focus on traffickers, anti-trafficking campaigns, I argue, function as the moral regulatory branch of anti-immigration movements.²⁷⁵

Furthermore, relationships within the migration process are complex and varied. Individuals who help others move may range from legitimately concerned saviours seeking refuge for desperate people, to those who have no idea of or concern with the end-result of the migrant’s journey, to those who are closely connected with or actually benefit from the exploitative circumstances into which they are leading the people they move. Migration may involve many players, some of whom may be involved in facilitating criminal activity, and some of whom are expert at providing irregular entry points into countries.²⁷⁶ Individuals may choose to proceed through informal or illegal channels in order to secure a better future, employment opportunities and standard of living.²⁷⁷ In these instances people are aware that each step in the process may involve administrative fees and transportation costs.²⁷⁸ Bruckert and Parent note that “there is an imperceptible transition between fully transparent and documented recruitment and the movement of people recruited through entirely criminal networks.”²⁷⁹ The conditions under which migrants decide to move, as well as the intent, knowledge and affiliations of the people who move them will vary and thus a static conception of the trafficked victim as coerced and deceived into moving cannot account for the complex reality of individual lives.

²⁷⁵ Sharma, *supra* note 145 at 92.

²⁷⁶ Kapur, *supra* note 237 at 12.

²⁷⁷ Christine Bruckert and Colette Parent, *Trafficking In Human Beings and Organized Crime: A Literature Review* (Ottawa: Research and Evaluation Branch, Community, Contract and Aboriginal Policing Services Directorate, Royal Canadian Mounted Police, 2002) at 10.

²⁷⁸ Bruckert and Parent, *ibid* at 10.

²⁷⁹ Bruckert and Parent, *supra* note 276 at 10.

However, in the current anti-trafficking climate, only those who are victims are entitled to assert rights. This is particularly difficult given the constraints of the stereotypical image one is required to produce, but also because individuals will not necessarily view *themselves* as victims, even if their circumstances might lend themselves to that legal interpretation. Kempadoo notes that “[t]he term ‘trafficked victim’ does not always generate recognition or self-identification, and may be counterproductive in everyday human rights and social justice work.” She states that instead people tend to define themselves as “migrant workers who have had some bad luck as a result of a bad decision.”²⁸⁰ The concept of the “victim” as a general tool for seeking justice has been questioned, and may in fact be detrimental to the protection of some groups.²⁸¹ The victim-concept has been used in the context of trafficking primarily as a means to distinguish a group of “deserving” migrants from the illegal, undeserving migrant.²⁸² Linked to moral outrage and sharp sympathetic emotions, “victimhood is supposed to trigger direct reactions in the spectator.”²⁸³ In a conference on this topic organized by Kamala Kempadoo, Savitri Persaud speaks to the “hegemonic categories” created through discourse around sex work and trafficking that allow for the separation of victims and non-victims,

much like the ways in which abolitionist feminists, fundamentalist religious groups, and organizations like Free the Slaves and Not for Sale engage in practices that inscribe meanings onto the body of the elusive “victim of trafficking.” In reference to Susan Dewey’s (2008) work in her chapter “Feminist Ethnographic Research in Times of Crisis,” when examining sex work, sometimes what we are left with are “hollow bodies” that are nameless and faceless under the distinct tropes of hegemonic categories, such as “trafficked body” or “migrant.” These categories invariably signal to us *which* bodies can and must be saved and which bodies do not occupy that realm of “victimhood” because of the meanings that come to constitute these “hollow” spaces.²⁸⁴

The dominant paradigm is the process of creation of these exclusive categories of “victim” and “non-victim” and the *filling in* of meaning by those with the power to interpret. In the

²⁸⁰ Kempadoo, *Introduction*, *supra* note 147 at xxiv.

²⁸¹ Aradau, *supra* note 58 at 56.

²⁸² Aradau, *supra* note 58 at 56.

²⁸³ Aradau, *supra* note 58 at 56.

²⁸⁴ Savitri Persaud, “Sex Work and Media Discourses of “Slavery”: Unpacking Al Jazeera’s *Slavery: A 21st Century Evil*” in Kempadoo, *Bleeding Hearts*, *supra* note 123.

context of trafficking, the egregious cruelty to which the “true victim” has been subjected allows the author, enforcement agent or spectator to pull her out of the realm of the illegal and place her into a body in need of rescue and healing.

While it appears that the dominant paradigm pervades anti-trafficking rhetoric and anti-trafficking work, there are a number of authors and organizations that consistently work on bringing to light the inadequacies of working within that paradigm. As noted above, many authors critique anti-trafficking legislation and anti-trafficking work, and provide recommendations for how better to legislate and implement programs to address this issue. However, Doezema, Augustin and Kempadoo, among others, write extensively and specifically on the effects of the rhetoric that has developed around anti-trafficking work as a whole. They have been critical of the motivations behind the development of anti-trafficking legislation, the anti-prostitution perspective that much anti-trafficking work relies on for its rhetorical impact, and the impact of implementing anti-trafficking strategies on sex workers and migrants generally.

Nandita Sharma raises a critical lens to anti-trafficking work through the perspective of race in particular. Building and expanding on Doezema and Kempadoo’s work on the anti-migration underpinnings of anti-trafficking work, she notes that

The ideology of antitrafficking does not recognize that migrants have been displaced by practices that have resulted in the loss of their land and/or livelihoods through international trade liberalization policies, mega-development projects, the loss of employment in capitalist labor markets, or war. ... [I]t further renders as unseeable the reasons why migrants are forced to make clandestine movements, usually with the help of people who know how to get them across national borders undetected. Since the problem of displacement and the state-controlled process of illegalizing migrants are represented as problems of trafficking, a particular “solution” comes to make common sense: criminalize those who move people clandestinely and return those who have been moved by traffickers to their “home” societies as soon as possible.²⁸⁵

...

Tighter control over the borders, stricter immigration laws, and more punitive criminal laws are called upon as indispensable measures to rescue migrants. In this way, anti-trafficking campaigns act as the moral regulatory arm of White nationalist

²⁸⁵ Sharma, *supra* note 145 at 89.

movements by denying migration to those who are deemed incapable of deciding for themselves if and when they should move. This, again, works to reposition nonWhites in particular, in subordinate positions within the nation-states in the global North and within global capitalism.²⁸⁶

Sharma argues that the effect of anti-trafficking work is to divert attention from the role that wealthier countries, globalization and fiscal policies have had on migration and instead frame it in terms of criminality. Those who are re-named as “trafficked” or “traffickers” are the individuals trying to migrate away from difficult situations in part caused by the actions of the countries to which they are potentially migrating. Thus instead of accepting some responsibility for current global economic conditions and devising ways to ensure the safe migration, settlement and integration of migrants, the focus is on the identification of criminals and victims, and responsibility is placed squarely on the (predominantly non-White) shoulders of individual migrants and those who seek to help them.

James Hathaway also views anti-trafficking work as a way of diverting attention, but he focuses more closely on labour exploitation and slavery. He notes that although anti-trafficking work has been

billed as key to the modern fight against slavery, [it] has actually promoted a very partial perspective on the problem... . By hiving off a relatively minor part of the slavery issue – no more than about three percent of modern slaves meet the definition of a “trafficked person” under the Trafficking Protocol —the world has found a means of seeming to be active on the slavery front without really addressing its predominant manifestations. This partial vision allows governments to avoid the thorny issue of culturally ingrained, endemic slavery that persists in many parts of the world today and that is often convenient for (if not essential to) the project of globalized investment and trade. In short, the decision to take action against “human trafficking,” rather than against slavery in all of its contemporary forms, has given comfort to those who prefer not to tackle the claims of the majority of enslaved persons.²⁸⁷

Gallagher responds to Hathaway’s critique by noting that his definition of slavery is more expansive than that found in international human rights documents, and that the tools used

²⁸⁶ Sharma, *supra* note 145 at 105.

²⁸⁷ James Hathaway “The Human Rights Quagmire of “Human Trafficking” (2008) 49(1) Virginia Journal of International Law 1 at 4-5.

to address slavery are more restrictive than the Trafficking Protocol in many respects.²⁸⁸ While not wanting to engage in a protracted debate about the relative merits of anti-slavery tools, it is important to identify Hathaway's critique as a recognition of the "hiving off" of particular segments of any given group identified (migrant, prostitute, slave etc) as worthy of protection. As discussed in this chapter, this labeling of trafficked versus smuggled, trafficked versus prostitute, and trafficked versus migrant worker have the effect of directing attention away from larger issues and instead creates a situation where a very select few persons identified specifically within the criminal justice framework benefit from anti-trafficking programs.

What these authors contend in general is that the initiatives arising out of anti-trafficking work provide little in the way of tangible benefits to migrants,²⁸⁹ but rather focus on "morality measures that conflate women's cross-border movement with sexual corruption and contamination."²⁹⁰ In this way "[t]he space for the migrant is being eroded through the discourse of trafficking and through the discourse of terrorism and threats to the security of the nation."²⁹¹

Thus, as seen through some of the exclusionary and restrictive measures and interpretation of trafficking in legal structures, the paradigm is not an innocuous version of events. It has led to programming and legal action that has sanctioned groups in many ways. Given the historical roots of the term "trafficking" and the development of the paradigm it is unsurprising that the implementation of anti-trafficking programming has had deleterious effects on migrants and sex workers. Thus this project is aimed at illuminating the idea that, rather than endlessly debating the extent to which protections around "trafficking" extend to particular groups or particular people, it may be preferable to focus on the needs and desires of each group that has fallen within the trafficking umbrella, designing programs that better reflect the global conditions and laws that are placing them in precarious situations. And this conclusion has particular relevance for Canada, as discussed in Part II.

²⁸⁸ Anne T. Gallagher "Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway" (2009) 49(4) *Virginia Journal of International Law* 790 at 795.

²⁸⁹ Kapur, *supra* note 237 at 9.

²⁹⁰ Kapur, *supra* note 237 at 9.

²⁹¹ Kapur, *supra* note 237 at 10.

PART II - THE CANADIAN CONTEXT

CHAPTER THREE – TRAFFICKING IN PERSONS: THE CANADIAN LEGAL RESPONSE

In order to understand the ways in which the dominant paradigm of trafficking has influenced Canadian laws and policies, it is necessary to first analyse the Canadian legal response to trafficking in persons. In this chapter I first discuss Canada's relationship with the international legal instruments identified in Chapter One as related to trafficking in persons – specifically the Protocol. Then, through an analysis of domestic laws, I examine Canada's compliance with its international mandate under the Protocol as well as the ways in which these domestic laws and their creation reflect the dominant paradigm of trafficking in a Canadian context. Finally I address other international mandates to which Canada is a signatory, not specifically trafficking-focused but potentially related to anti-trafficking work, and I address the ways in which Canadian laws relate to those obligations.

A. CANADA AND THE PROTOCOL

As discussed in Chapters One and Two, the Protocol served as a compromise between different key actors at the international level, and has gone on to provide a legal framework within which the dominant paradigm of the trafficked victim can easily fit. One sees Canada's stance on trafficking emerge early on in the debates around the language of the Protocol, clearly reflecting the dominant paradigm. Canada has been identified as a key player in the drafting process, in introducing stricter border control measures and making border integrity a primary concern:

While neither the original American nor Argentinean drafts of the Trafficking Protocol sought to impose any duty on states to intensify border controls, the governments of Australia and Canada successfully pushed for amendments to align the Trafficking Protocol with the goals of the Smuggling Protocol. As a result, border control requirements are not limited to the Smuggling Protocol; the final version of the Trafficking Protocol requires states “[w]ithout prejudice to international commitments in relation to the free movement of

people . . . [to] strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.”¹

While border integrity measures were specifically referred to in the Migrant Smuggling Protocol, highlighting border security as a key issue in anti-trafficking strategies indicates a particular understanding of the issue on Canada’s part. In its joint proposal to the UN with Australia, Canada was keen to make a very specific distinction between smuggling and trafficking, and clearly delineated what elements needed to be present in order for trafficking provisions to be engaged:

We recognize an important distinction between the subject matter covered by an optional protocol on trafficking in human beings and that covered by an optional protocol on the smuggling of migrants.

The phenomenon of trafficking includes additional forms of criminal behaviour that need to be addressed, including:

(a) Coercion, fraud, kidnapping, and “sale” prior to the movement of a person across international borders;

(b) Criminal exploitation in the country of destination, including sexual exploitation such as forced prostitution or child pornography;

(c) Forced labour, having due regard to existing international definitions such as that contained in Forced Labour Convention, 1930, of the International Labour Organization (ILO). In that connection, we have an open mind as to the expansion of the protocol beyond women and children provided that emphasis is maintained in respect of the special circumstances of both women and children;

(d) Conduct in broker countries²

And to further highlight the anxieties around migration and the impulse towards exclusion as a priority, Canada goes on to specifically state at p. 5 that: “[w]ith respect to issues pertaining to the illegal transport, movement and entry of trafficked persons, we should consider the inclusion of relevant provisions for the control of smuggling of migrants.” Given that these provisions were already included in

¹ James Hathaway, “The Human Rights Quagmire of “Human Trafficking” (2008) 49(1) *Virginia Journal of International Law* 1 at 31.

² UN, *Proposals and Contributions Received From Governments*, 4, U.N. Doc. A/AC.254/5/Add.21 (Feb. 11, 2000) at 5.

another, related Protocol,³ this push towards additional measures in a Protocol related to trafficking clearly reflects an understanding of migration as a threat.

Furthermore, while Canada did nominally recognize the need for the Protocol to be consistent with international human rights instruments, including provisions related to the human rights of detainees and refugees,⁴ the victim assistance provisions it put forward strongly reflected the image of the stereotypical trafficked victim as the intended beneficiary:

The heinous exploitation of victims of trafficking requires special measures to address their needs, as otherwise prosecution would be difficult and could lead to re-victimization.

Such measures should include:

(a) Consideration by the receiving State of humanitarian and compassionate factors in the determination of the victim's status in that State;

(b) Facilitation of the return of the victim where returning the victim is not inconsistent with other international legal obligations;

(c) Assistance and protection for victims who are witnesses in criminal proceedings against traffickers, including measures that bear in mind the sensitivities surrounding sexual exploitation. ...

(d) Victim rehabilitation in either the country of origin or the receiving country, as applicable.⁵

Here we see the spectre of the trafficked victim presenting herself. In subsection (a) there is a conceptualization of the victim as having arrived illegally in the receiving country. In subsection (b) the "return" of the victim is promoted, based on an assumption that an individual was kidnapped and thus return to his or her home country is desired. In subsection (c) there is a particular focus on sexual exploitation, and in (d) the image of the broken, traumatized and helpless victim in need of "rehabilitation" is implied. In conjunction with the border security measures advocated for by Canada and Australia in the negotiation process, these measures

³ UN General Assembly, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, UNTS Doc. A/55/383.

⁴ UN, *Proposals*, *supra* note 2 at 6.

⁵ UN, *Proposals*, *supra* note 2 at 5.

reflect a position on trafficking that is based heavily on the dominant trafficking paradigm. Subsequently we see this paradigm transferred to the domestic sphere as it shaped Canadian domestic legislation and policy based on Canada's perceived obligations under the Protocol.

As discussed in Chapter One, several international human rights mechanisms may apply to any given situation labeled as "trafficking". However, since the advent of the Protocol, this instrument has become the primary reference to which many states, including Canada, look for guidance when drafting legislation and making policy. In Canada there is ample evidence of the government's focus on the language of the Protocol during Parliamentary Debates on anti-trafficking legislation.

MP Mario Silva, a member of the Liberal government, exemplified this in his speech to the house on September 27, 2005 when discussing the bill introducing trafficking in persons as a specific offence into the *Criminal Code*:

Bill C-49 would strengthen Canada's legal framework by building upon existing local and global responses to human trafficking. Currently, there are many international mechanisms that respond to human trafficking, including the most recent one which is the United Nations Convention Against Transnational Organized Crime and its supplemental protocol to prevent, suppress and punish trafficking in persons, especially women and children. These offer a widely accepted international framework for addressing this issue. Bill C-49 more clearly reflects this framework.

Canada's approach, as it is stated in Bill C-49, focuses on the prevention of trafficking, the protection of its victims and the prosecution of the offenders.⁶

MP Harold Macklin (Lib), Parliamentary Secretary to the Minister of Justice and Attorney General of Canada at the time of drafting of Bill C-49, also notes the priority of the Protocol in his speech to Parliament⁷:

⁶ MP Mario Da Silva, Bill C-49 *An Act to Amend the Criminal Code (trafficking in persons)*, second reading September 27, 2005 38th Parliament, 1st session, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=126&Parl=38&Ses=1&Language=E&Mode=1>>

⁷ MP Harold Macklin, Bill C-49 *An Act to Amend the Criminal Code (trafficking in persons)*, second reading September 26, 2005 38th Parliament, 1st session, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=125&Parl=38&Ses=1&Language=E&Mode=1>>

There are many international instruments that address human trafficking, but the most recent one is the ...[Protocol], which offers a widely accepted international framework for addressing the issue. Bill C-49 more clearly reflects this framework. In keeping with this framework, Canada's approach, as reflected in Bill C-49, focuses on the prevention of trafficking and the protection of its victims and the prosecution of the offenders.

The wording of these two speeches is nearly identical, both coming from the government that introduced and drafted the bill. The focus of the legislation is clearly linked to Canada's perceived obligations under the Protocol, as "the most recent" incarnation of anti-trafficking obligations at international law. Its obligations may also be viewed as taking precedence over other trafficking-related obligations given the specificity of the law in relation to trafficking.⁸

As discussed in Chapter One, signatories, including Canada, are under particular obligations with respect to the domestic implementation of anti-trafficking measures, with provisions related to prosecution phrased as mandatory and protection and prevention provisions as voluntary. While no legislation in Canada explicitly implements the Protocol, it is clear from speeches in Parliament that the obligations therein were guiding factors in drafting various pieces of legislation. And while it is my contention that several different factors affected the ways in which anti-trafficking legislation and policies were created in Canada, the obligations in the

⁸ This interpretive device at international law comes from the principle of *lex specialis*, the principle that a specific law will be applied over a general one. See the International Law Commission, *Fragmentation at International Law*: online <http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf>:

2. 1. The nature of the *lex specialis* rule

There are two ways in which law takes account of the relationship of a particular rule to general rule (often termed a principle or a standard). A particular rule may be considered an application of the general rule in a given circumstance. That is to say, it may give instructions on what a general rule requires in the case at hand. Alternatively, a particular rule may be conceived as an exception to the general rule. In this case, the particular derogates from the general rule. The maxim *lex specialis derogat lex generali* is usually dealt with as a conflict rule. However, it need not be limited to conflict. In both cases – that is, either as an application of or an exception to the general law – the point of the *lex specialis* rule is to indicate which rule should be applied. In both cases, the special, as it were, steps in to replace the general.

In either case, whether applied as overriding or interpreting more general laws that apply to trafficking in persons, the Protocol mandates specific actions for States and has been looked to as the primary guiding source for legislative action in Canada.

Protocol can be seen to be at least one of those influencing forces. Thus a short summary of those obligations is warranted here.

With respect to prosecution, Canada is required to criminalize and prosecute trafficking as defined in the Protocol.⁹ While a strict interpretation of the *Convention Against Transnational Organized Crime* dictates that only those trafficking incidents involving transnational and organized criminal elements fall within the Convention's purview,¹⁰ these elements need not be incorporated into domestic offences.¹¹ Thus the domestic offence in Canada can and should contain provisions against trafficking that takes place within Canadian borders. Canada is required to criminalize not only trafficking offences, but also the laundering of the proceeds of trafficking and obstruction of justice in the context of trafficking investigations.¹² With respect to investigation of offences, Canada is required under the Protocol to "establish a long statute of limitations period for trafficking offences" and to "[p]rovide for channels of communication and police-to-police cooperation in relation to the investigation of trafficking offences."¹³ With respect to judicial procedure, Canada is required to provide trafficked persons with information on court and administrative proceedings,¹⁴ to allow victims to be present and have their views considered during the criminal process,¹⁵ and to encourage those affected by trafficking to cooperate with or assist national authorities.¹⁶ "Appropriate measures" are also to be taken under the Convention to "provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings."¹⁷ And while the Protocol itself

⁹ Protocol, art. 5.

¹⁰ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, (NY: United Nations, 2004) at 258.

¹¹ UNODC, *Legislative Guide*, *ibid* at 258.

¹² UNODC, *Legislative Guide*, *supra* note 10 at 259; Gallagher, *The International Law of Human Trafficking*, *supra* note 21 at 80-81.

¹³ Anne Gallagher, *The International Law of Human Trafficking* (New York: Cambridge University Press, 2010) at 81.

¹⁴ Gallagher, *The International Law of Human Trafficking*, *ibid* at 315.

¹⁵ UN General Assembly, *United Nations Convention against Transnational Organized Crime : resolution / adopted by the General Assembly*, 8 January 2001, A/RES/55/25, art 6(2)(b).

¹⁶ UNODC, *Legislative Guide*, *supra* note 10 at 259.

¹⁷ Gallagher, *supra* note 13 at 318. See also Gallagher at 318 where she notes that:

Various soft law sources confirm the need for States to guarantee that protections for witnesses are provided for in law, while ensuring that victims are made to understand the limits of protection and are not lured into cooperating with false or unrealistic promises regarding their safety and that of their

does not specifically separate victim assistance from witness protection, the Legislative Guide to the Protocol states that “support and protection shall ... not be made conditional upon the victim’s capacity or willingness to cooperate in legal proceedings.”¹⁸ With respect to remedies for trafficking victims, the Convention requires States to “establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by the Convention.”¹⁹ This provision does not guarantee specific assistance measures but the Protocol does require State Parties “to ensure that their domestic legal systems contain measures that offer victims of trafficking the possibility of obtaining compensation for damage suffered.”²⁰

Regarding victim protection measures, as noted above, the provisions in the Protocol are not mandatory. However, the Legislative Guide does note that states are required to consider implementing the measures and are “urged to do so to the greatest extent possible within resource and other constraints.”²¹ Additionally, assistance measures are also to be considered in light of other existing human rights protections,²² including those extended to asylum seekers and refugees under the “the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.”²³ However, it is still somewhat unclear as to what extent the obligation to allow victims of trafficking to remain on a receiving state’s territory and under what circumstances.²⁴

With respect to the obligation to “prevent and combat trafficking”, and “to protect victims ... from revictimization”,²⁵ although phrased as mandatory for State Parties,²⁶ the nature of these obligations is so unclear that it is difficult to delineate specific

families. The UN human rights treaty bodies have repeatedly reaffirmed the need for States to provide witnesses with support and protection to enable them to testify against the perpetrators of trafficking

¹⁸ Gallagher, *The International law of Human Trafficking*, *supra* note 13 at 299.
¹⁹ Gallagher, *The International law of Human Trafficking*, *supra* note 13 at 362.
²⁰ Gallagher, *The International law of Human Trafficking*, *supra* note 13 at 362.
²¹ See Gallagher, *The International law of Human Trafficking*, *supra* note 13 at 307.
²² Protocol, art. 14.
²³ Protocol, art. 14.
²⁴ See discussion *supra* Chapter One of this work at 54.
²⁵ Protocol, art. 9(1).
²⁶ Protocol, art. 9.

commitments required by Canada in this regard. Gallagher states that, “[i]n the context of trafficking in persons, prevention refers to positive measures to stop future acts of trafficking from occurring. Policies and activities identified as ‘prevention’ are generally those considered to be addressing the *causes* of trafficking.”²⁷ However, given the current disagreements around the causes of “trafficking”, measures required to address such causes must necessarily be vague.

B. CANADA’S LEGISLATIVE RESPONSE

In this section I discuss the ways in which Canada has addressed trafficking in persons through its domestic legislation. I outline the relevant legislation as a means of providing the legal framework in which anti-trafficking activities take place in Canada, but also for the purpose of highlighting particular reflections of the dominant paradigm. To this end, I discuss not only the particular wording and legislative context of the laws, but also the House of Commons and Senate debates that took place during the adoption of the provisions. Mirroring Chapter One, I highlight points at which the dominant paradigm is reflected in the legislative debates, evidencing the ways in which the international paradigm, including specific obligations under the Protocol, has played a role in the development of Canada’s legislative framework.

As with the data examined in Chapters One and Two, only a selection of available material was used as a basis for analysis.²⁸ Given that the purpose of this work is not to review every statement produced on trafficking in Canada’s parliament but rather to identify the perpetuation of particular myths and stereotypes, only a sample of data was chosen that reflected language similar to that identified in Part I. Anti-trafficking provisions in Canada have been created primarily in the immigration or criminal

²⁷ Gallagher, *The International law of Human Trafficking*, *supra* note 13 at 414.

²⁸ Initially a search was conducted in the Parliament of Canada’s “legisinfo” website: <http://www.parl.gc.ca/Default.aspx?Language=E>, using the term “trafficking”, and bills that had been passed into law were chosen for analysis. Additionally, the Canadian Library of Parliament, Parliamentary Information and Research Service, Legal and Legislative Affairs Division, produces an annual or bi-annual report *Trafficking in Persons*, that provides the legal context of trafficking in persons in Canada. The 2011 version, found at <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2011-59-e.htm> was canvassed and provisions regulating trafficking in persons in Canadian law were noted. The Parliamentary and Senate debates around the creation of these provisions were then canvassed. Parliamentary and Senate committee hearings did not form part of the data pool, only the public debates in the House of Commons and Senate were used.

spheres. The debates surrounding the passing of Canada's current immigration²⁹ and criminal³⁰ anti-trafficking provisions were thus analysed and themes drawn out from key statements and rhetorical devices similarly to those addressed in Chapters One and Two.

The data was analysed first through categorizing statements into key themes as they emerged. Four major categories were identified: description of trafficking activities, descriptions of victims of trafficking, calls for action, and denunciation of trafficking. Focusing on the first two themes, I drew out phrases, rhetorical devices and terms that provided imagery of traffickers and victims. These were then set within the framework of the dominant paradigm of trafficking, highlighting terms identified in Chapter Two, including: women and children, sex, slavery, vulnerable, innocent, threatened, deceived, threat, illegal, criminal, organized and foreign, as well as rhetorical devices such as conflation of trafficking/smuggling, and "chains of equivalence". Alternative voices were also coded and are discussed in Chapter Five. This method is based loosely on Teun van Dijk's work, widely known for its methodological approaches to the analysis of parliamentary debates, and particularly those focused on racism or culture. In his work "On the Analysis of Parliamentary Debates on Immigration",³¹ van Dijk suggests an approach to analysing parliamentary debates in which one takes into account not only the specific syntax of the language

²⁹ Bill C-10 *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts*, first reading Sept 20, 2011 41st Parliament, 1st session, online: Parliament of Canada <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=5120829>> (Safe Streets and Communities Act); Bill C-11 *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*, first reading Feb 21, 2001, 37th Parliament, 1st session, online: Parliament of Canada <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=10095>>.

³⁰ Bill C-49 *An Act to amend the Criminal Code (trafficking in persons)*, first reading May 12, 2005, 38th Parliament, 1st session, online: Parliament of Canada <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=1823906>>; Bill C-268 *An Act to amend the Criminal Code (minimum sentence for offences involving trafficking of persons under the age of eighteen years)*, first reading March 4, 2010, 40th Parliament, 3rd session, online: Parliament of Canada <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=4328299>>.

³¹ Teun v. Dijk, "On the Analysis of Parliamentary Debates on Immigration", in M. Reisigl & R. Wodak eds, *The semiotics of racism: Approaches to critical discourse analysis* (Vienna: Passagen Verlag, 2000) 85-103, online: V. Dijk <<http://www.discourses.org/OldArticles/On%20the%20analysis%20of%20parliamentary%20debates%20on%20immigration.pdf>>

in the debates, but also places that language in light of structural and contextual considerations such as racist culture. While racism and migration fears are only part of the thematic considerations in an inquiry into legal language around trafficking, this approach offers a useful template for analysis.

The key characteristics drawn out in this chapter mirror those described as integral to the dominant paradigm, discussed in Chapter Two. The “victim”, in trafficking scenarios, is portrayed as being entirely under the control of her “traffickers”, completely devoid of choice or agency, innocent, meek and subdued and most importantly, thrilled to be rescued and “rehabilitated” to her former state of being. She is used for sex or sometimes domestic work generally associated with women – but generally her story becomes worthy of telling when sex is also required of her in the context of that domestic work, and her illegality as an undocumented migrant or criminalized prostitute reinforces her vulnerability. The trafficker is demonized as the perpetrator of this evil, generally as a migrant him or herself, or recent immigrant, and often someone involved in “illegal” activity, either by having illegal immigration status or criminal activity or both. The trafficker profits considerably from these activities.

In order to form this characterization, speakers use several rhetorical devices, including frequent allusions to slavery, degradation, and humiliation of victims. We also see the use of “chains of equivalence” where particular characteristics are placed in conjunction with particular groups of persons (either victims or traffickers in this case) in such a way that they become associated, whether or not there is actual evidence of association. These devices are also highlighted in this section to draw attention to the ways in which victims and traffickers are framed. The reasons behind such characterizations were discussed at length in Chapter Two, including fears around migration and women’s sexuality, and similar fears erupt in the discourse around trafficking in Parliament.

i. Trafficking and Canadian Immigration Law

The current provision in Canadian immigration law related to trafficking was developed as part of the package of reform instituted under the 2003 *Immigration and Refugee Protection Act*³² (IRPA). Section 118 defines the offence of “trafficking in persons” using the following wording:

118(1) No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion.

(2) For the purpose of subsection (1), “organize”, with respect to persons, includes their recruitment or transportation and, after their entry into Canada, the receipt or harbouring of those persons.

The definition of trafficking in this offence is not identical to that outlined in the Protocol, but there is some similarity in wording and it is clear that the Protocol’s language formed the basis of the provision. For purposes of these sections, only two elements recognized in the Protocol must be present in order for the act to be categorized as trafficking: a) the act: to “organize”, including recruitment, transportation, receipt or harbouring of persons; and b) the means: abduction, fraud, deception or use or threat of force or coercion. In contrast to the Protocol, a perpetrator is not required to have committed these acts for the purpose of exploitation, as is required by the Protocol. The existence of such a purpose is deemed only to be an aggravating factor in sentencing.³³

The other section in IRPA where the term “trafficking” appears is with reference to detention provisions. The *Immigration and Refugee Protection Regulations* at section 245 set out the factors to be considered when determining whether or not a person constitutes a flight risk.³⁴ Subsection (f) includes considerations related to trafficked persons, giving authorities the ability to detain someone who they consider to be a risk for not appearing at an immigration hearing due to involvement in trafficking:

(f) involvement with a people smuggling or trafficking in persons operation that would likely lead the person to not appear for a measure referred to in

³² *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA].

³³ IRPA, s.121.

³⁴ *Immigration and Refugee Protection Regulations* (SOR/2002-227), s. 245. [IRPA Regulations]

paragraph 244(a) or to be vulnerable to being influenced or coerced by an organization involved in such an operation to not appear for such a measure.

This provision relates not only to people considered potential traffickers but also people who may be considered trafficked. It allows for detention of victims who may be influenced by their traffickers.

The debates surrounding the proposed immigration legislation were extensive but an enormous number of changes were included in the draft, with trafficking being only one very small part of the Act³⁵. Unlike the debates surrounding the *Criminal Code* offences, very little mention was made of the trafficking offence during the debates around the proposed *IRPA* and thus this data was not found to be relevant.

However, more recently in 2011, Bill C-10, the omnibus bill entitled the *Safe Streets and Communities Act*,³⁶ amends *IRPA* to include the possibility of visa officers denying entry to Canada for otherwise-eligible foreign nationals if they suspect that the foreign national will be exploited, and this did generate some debate. The amendment states:

206. Section 30 of the Act is amended by adding the following after subsection (1):

(1.1) An officer may, on application, authorize a foreign national to work or study in Canada if the foreign national meets the conditions set out in the regulations.

(1.2) Despite subsection (1.1), the officer shall refuse to authorize the foreign national to work in Canada if, in the officer's opinion, public policy considerations that are specified in the instructions given by the Minister justify such a refusal.

(1.3) In applying subsection (1.2), any refusal to give authorization to work in Canada requires the concurrence of a second officer.

(1.4) The instructions shall prescribe public policy considerations that aim to protect foreign nationals who are at risk of being subjected to humiliating or degrading treatment, including sexual exploitation.

³⁵ See debates to Bill C-49, *supra* note 30.

³⁶ Bill C-10, *supra* note 29.

The Minister of Citizenship and Immigration is given authority to draft instructions for visa officers on what “public policy” considerations are to be taken into account when making decisions to deny work visas to foreign nationals, primarily based on a risk of “humiliating or degrading treatment, including sexual exploitation.” This particular amendment had previously been introduced through Bill C-56 in 2010 as the *Preventing the Trafficking, Abuse and Exploitation of Vulnerable Immigrants Act*,³⁷ in 2009 as Bill C-45³⁸, in 2007 as Bill C-17³⁹ and earlier in 2007 as C-57.⁴⁰ MP Jack Harris (NDP) noted in the Parliamentary Debates on the amendment that “As a result of the legislation, we have a piece that appears to be unrelated, but nevertheless is a part of it because it is an omnibus bill and the Conservatives figured they could add it and get away with it.”⁴¹

As discussed in the Parliamentary Debates, the provision is aimed at preventing exploitation and abuse of foreign workers. In 2012, MP Rick Dykstra (Cons) noted that:

Canada is a land of opportunity and freedoms, and we should not practise anything different. Many come to Canada to seek a better life but instead find themselves vulnerable to exploitation by employers. Found in vulnerable situations, they have no one to turn to. We should not let the vulnerable be exploited. We need to stand up for those who are being exploited by others.

I am speaking about one part of Bill C-10, which deals with preventing the trafficking, abuse and exploitation of vulnerable immigrants. It is former Bill C-56. Our government is making good on the commitment we made to

³⁷ Bill C-56 *An Act to amend the Immigration and Refugee Protection Act*, first reading Nov. 19, 2010, 2005, 40th Parliament, 3rd session, online: Parliament of Canada

<<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&billId=4696239&Mode=1&View=5>>.

³⁸ Bill C-45 *An Act to amend the Immigration and Refugee Protection Act*, first reading June 17, 2009, 40th Parliament, 2nd session, online: Parliament of Canada

<<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=4002569>>.

³⁹ Bill C-17 *An Act to amend the Immigration and Refugee Protection Act*, first reading Nov 1, 2007, 39th Parliament, 2nd session, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=3091793>>.

⁴⁰ Bill C-57 *An Act to amend the Immigration and Refugee Protection Act*, first reading June 5, 2007, 39th Parliament, 1st session, online: Parliament of Canada <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=2936534>>.

⁴¹ M.P. Jack Harris, *Safe Streets and Communities Act, Consideration of Senate Amendments*, March 6, 2012, 41st Parliament, 1st session, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=90&Parl=41&Ses=1&Language=E&Mode=1>>.

Canadians. *It is our duty to hold criminals accountable for their actions and to do everything we can to make our communities safe for law-abiding citizens who work hard and play by the rules. It is our duty not to let people take advantage of our generous immigration system.*

People in St. Catharines have said that cracking down on criminals and making their community safer is one of their top priorities. People in Niagara and across the country want and deserve to be able to feel safe in their homes and communities, and that means criminals need to be kept off the street. I have heard my constituents loud and clear, and I will stand up and support the bill because they have asked me to do so.

The bill will not only keep our communities safe but will also ensure that vulnerable foreign workers who contribute to many of our communities are not exploited. As my hon. colleagues know, some temporary foreign workers may have weak language skills and very little money. They may have no family or friends in Canada and they may also fear the police and any level of government. This often puts them in a vulnerable position. With no one to turn to, their situation can place them at the mercy of those who wish to abuse them or exploit them.

...

Preventing the trafficking, abuse and exploitation of vulnerable immigrants act would authorize immigration officers to refuse work permits to vulnerable foreign nationals when it is determined that they are at risk of humiliating or degrading treatment, including sexual exploitation or human trafficking. This is but one of ten, but a step in the right direction to accomplishing that.⁴² [My emphasis]

Highlighted in the italicized text, MP Dykstra placed the need to address the exploitation of workers squarely in the context of criminal activity, moving back and forth between discussions of safety, crime, and exploitation. The “victim” also clearly appears as someone with weak language skills, little money, and in fear of the police and other authorities. These characterizations are clear reflections of the dominant paradigm of the trafficked person. And while the term “trafficking” is not used specifically in the legislation, the previous bill with similar wording that was referred to by MP Dykstra stated that the prevention of trafficking was its goal.

⁴² M.P. Rick Dykstra, *Safe Streets and Communities Act, Consideration of Senate Amendments*, March 6, 2012, 41st Parliament, 1st session, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=90&Parl=41&Ses=1&Language=E&Mode=1>>.

Furthermore, while the stated aim of the provision is to protect foreign workers, the focus on sexual exploitation and the “exotic dancer” occupation indicates a particular understanding of the “work” that is deemed to hold the most potential for exploitation. MP John Carmichael (Cons) describes the provisions as follows:

The instructions would describe situations that could represent risks to an applicant and would set out the risk factors for officers to consider. They would also help define who would be considered vulnerable depending on the situation or context. For example, an individual applying to come to Canada as an exotic dancer might be refused a work permit because he or she may be vulnerable to abuse. However, the same individual might be granted a work permit if he or she applied to come to Canada to work in another occupation or a different situation that did not pose the same risk.⁴³

There were a number of Opposition MPs who took issue with this mechanism for preventing of trafficking, pointing out that interdiction of the exploited person failed to address the underlying problem of exploitation in Canada. MPs Helene LeBlanc and Bev Shipley questioned if there were any concrete measures to ensure that temporary foreign workers would not be exploited,⁴⁴ to which Mr. Dykstra responded that CIC and Human Resources and Development Canada were addressing those measures.⁴⁵ The legislation itself did not provide any additional measures for protecting workers actually allowed into the country and Senator Mobina Jaffer also raised the issue of root causes and the focus of this provision on the workers:

For example, under this bill, an employer applies to Human Resources and Skills Development Canada for a labour market opinion setting out that there is no one in Canada that can do the job. The employer is then granted permission to bring a foreign employee in on a work permit. The challenge I have with this provision, one that I would like to have debated, is why, then, is the employee denied the work permit?

⁴³ John Carmichael, *Safe Streets and Communities Act, Consideration of Senate Amendments*, March 6, 2012, 41st Parliament, 1st session, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=90&Parl=41&Ses=1&Language=E&Mode=1>>

⁴⁴ Hélène LeBlanc, and Bev Shipley, *Safe Streets and Communities Act*, 41st Parliament 1st Session, Sept 27, 2011, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=21&Parl=41&Ses=1&Language=E&Mode=1>>

⁴⁵ Rick Dykstra, *Safe Streets and Communities Act*, 41st Parliament 1st Session, Sept 27, 2011, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=21&Parl=41&Ses=1&Language=E&Mode=1>>

In my opinion, if we are trying to protect vulnerable people, especially women, the fairer situation would be to stop the root of the problem and stop the employers from obtaining labour market opinions to hire the employees in the first place, rather than once the work permit has been given.⁴⁶

MP Harris also raised questions about the consequences of such a provision:

In an effort to prevent exploitation, the legislation is very vague and would be ineffective by itself in stopping trafficking. It would do nothing to strengthen the rights of workers in Canada, which is the source of the problem, and what would truly protect workers from exploitation.

We see examples of exploitation. The bill has been around for a while in other forms and seems to have been mounted in response to some exotic dancers who were given visas to work in Toronto. The suggestion was that this was a cover for other activities and that this bill would now give discretion, under instructions from the minister, to refuse people entry into Canada if it was thought they would be subject to exploitation.

If people are eligible to get a visa to come to Canada and the fear is that they would be subject to exploitation, surely they should have the protection of Canadian labour laws that prevent them from being exploited in Canada. If there is a danger that people coming to Canada would be exploited, then the answer is to let those people come to Canada and ensure that their freedom of movement and their ability to choose employment are not compromised by criminal and exploitative activity. That is the dream.⁴⁷

However, despite such dissent, Bill C-10, including the provision on the IRPA amendments, received Royal Assent March 13, 2012.

From the above speeches in support of Bill C-10 we see a noticeable pattern emerging in Canada's response to trafficking through immigration laws. Not only are there clear reflections of the dominant paradigm of trafficking, both with respect to what a trafficked person looks like and in relation to the nature of traffickers and trafficking enterprises, but there is also a notable focus on criminalization, detention and interdiction, consistent with international responses to trafficking based on the

⁴⁶ Mobina Jaffer, *Safe Streets and Communities Act*, Debates of the Senate, 41st Parliament 1st Session, March 1, 2012, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=21&Parl=41&Ses=1&Language=E&Mode=1>>.

⁴⁷ *Safe Streets and Communities Act*, *supra* note 44.

dominant paradigm and Canada's own concerns regarding border integrity and security.

ii. Trafficking and Canadian Criminal Law

a. Offences

In 2005 Canada introduced amendments to the *Criminal Code* that included trafficking in persons as an offence under the criminal law, without specifically incorporating the *Protocol*. Notably, the provision is housed within section 279 which relates to the offence of "kidnapping", and is generally located under the title "Kidnapping, Trafficking in Persons, Hostage-Taking and Abduction." While there is no specific requirement related to kidnapping or abduction in the provision, the framework leads to associations between trafficking and these offences, consistent with the dominant paradigm.

The wording in the *Criminal Code* is both broader and narrower than the *Protocol* and the *IRPA* definitions:

279.01(1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence ...

(2) No consent to the activity that forms the subject-matter of a charge under subsection (1) is valid.

279.02 Every person who receives a financial or other material benefit, knowing that it results from the commission of an offence under subsection 279.01(1), is guilty of an indictable offence

279.04 (1) For the purposes of sections 279.01 to 279.03, a person exploits another person if they

(a) cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service;

(2) In determining whether an accused exploits another person under subsection (1), the Court may consider, among other factors, whether the accused

(a) used or threatened to use force or another form of coercion;

(b) used deception; or

(c) abused a position of trust, power or authority.⁴⁸

For purposes of proving the *Criminal Code* offence, again only two elements need to be present: a) the act: recruitment, transportation, transfer, receipt, holding, concealing or harbouring a person, or exercise of control, direction or influence over the movements of a person; and b) the purpose: exploitation - causing the person to provide the service by causing the other person to believe that their safety or the safety of a person known to them would be threatened if they refuse. The provision does not require that a perpetrator use any specific means by which to accomplish the acts, as is required by the *Protocol* and *IRPA*.

Another significant difference between the wording in the *Criminal Code* and that in the *Protocol* or *IRPA* is that the actus reus in the *Criminal Code* can be established by proving that a person “exercises control, direction or influence over the movements of a person.” Thus the perpetrator of the crime is not actually required to move or transport a victim; he simply needs to exert control *over* the movements of that person. According to a 2012 Department of Justice (DOJ) presentation produced by one of the key drafters of the legislation,⁴⁹ “‘control’ refers to invasive behaviour which leaves little choice to the person controlled and therefore includes acts of direction and influence.” Additionally, “[e]xercise of direction over the movements of a person exists when rules or behaviours are imposed” and “[e]xercise of influence includes less constricting actions – any action done with a view to aiding, abetting or compelling that person would be considered influence.”⁵⁰

⁴⁸ Subsection (2) was added by Bill C-310, *An Act to Amend the Criminal Code (trafficking in persons)*, 41st Parliament, 1st session, Royal Assent June 28, 2012, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5697415>>.

⁴⁹ Matthew Taylor, Department of Justice Canada, in a presentation at the March 5, 2012 conference: *Trafficking of Aboriginal Women, Wahkotowin: A Knowledge Exchange Forum on Trafficking in persons and Sexual Exploitation of Aboriginal Peoples*, Ottawa, Canada

⁵⁰ The presenter referred to *R v Perreault* (1996), 113 CCC (3d) 573; *R v Rodney*, [1999] AJ No. 197; *R v Ng* [2007] BCJ No 1338 in this regard.

The *Criminal Code* also defines the term “exploitation” more narrowly than the Protocol does, by requiring that the victim’s belief that her or his safety was jeopardized be reasonable. The Protocol’s definition of “exploitation” is broader, including all activities that would be *perceived* as “slavery or practices similar to slavery”. According to the Department of Justice presentation, “proving exploitation is a two-stage process”. First one must “prove that the accused intended to cause a person to provide, or offer to provide their labour or services (or knew that they would be)” and second, it is necessary to “prove that the labour or services was provided (or offered) as a result of conduct that, in all the circumstances, could reasonably be expected to cause the person to fear for their safety.” The DOJ pointed out that such proof does not require establishing that the victim was afraid, but rather that it would be reasonable for that person, in the circumstances, to fear for their safety.”⁵¹

While the provision has not itself been interpreted in Canadian case law, what it means to “reasonably fear for one’s safety” has been interpreted in the context of other sections in the *Criminal Code*.⁵¹ What is reasonable must be interpreted bearing in mind a victim’s age, cultural background and personal history,⁵² including evidence of the accused’s prior conduct where relevant.⁵³ Additionally, while there is no differentiation made between minor and adult victims in the trafficking offence, what constitutes “control” over the movements of a child, or an activity which would cause a young girl to fear for her safety, must be viewed in the context of their age and relationship to the exploiter. As discussed below, a separate offence has recently been created for trafficking of children, and such considerations would be especially relevant in those cases. There are other considerations relevant to the interpretation of the offence. What could constitute a threat to “safety” is not restricted to physical harm but may also include mental, psychological or emotional safety,⁵⁴ and actual

⁵¹ bis. Matthew Taylor, *supra* note 49.

⁵¹ See *R v. McCraw*, [1991] 3 S.C.R. 72, *R. v. Leasak*, [2006] A.J. No. 431 and *R v. Gagnon*, [2002] A.J. 1097.

⁵² *R. v. Sousa* (1995) OJ No. 1435; *R v. Sillipp*, 1997 Canlii 10865.

⁵³ *R. v. Ryback*, [1996] BCJ No. 285.

⁵⁴ *Ryback, ibid*, *R. v. Goodwin* (1997), BCAC 269 (CA).

exploitation need not be proven to make out the offence. The actions need only have been committed for the purpose of exploiting the “victim”.

In 2009 an additional offence was created that specifically addressed the trafficking of children under 18 years of age and provided for minimum sentencing in such cases:

279.011 (1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person under the age of eighteen years, or exercises control, direction or influence over the movements of a person under the age of eighteen years, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable

(a) to imprisonment for life and to a minimum punishment of imprisonment for a term of six years if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence; or

(b) to imprisonment for a term of not more than fourteen years and to a minimum punishment of imprisonment for a term of five years, in any other case.

Additionally, when reports and agencies in Canada refer to “trafficking-related”⁵⁵ charges, they are often referring to prostitution-related charges. While prostitution-related charges do not serve to implement any particular international instrument, some implicitly address the issue of trafficking. The *Criminal Code* provisions around prostitution as they currently stand criminalize conduct surrounding the exchange of sexual services for money. They outlaw the “keeping” of a residence for the purposes of prostitution,⁵⁶ procuring people for the purposes of engaging them in prostitution,⁵⁷ benefiting from funds or other payments garnered

⁵⁵ See for example Laura Barnett, Library of Parliament, *Trafficking in Persons*, March 17, 2011, online: Parliament of Canada <<http://www.parl.gc.ca/Content/LOP/ResearchPublications/2011-59-e.htm>>.

⁵⁶ 210. (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who

(a) is an inmate of a common bawdy-house,

(b) is found, without lawful excuse, in a common bawdy-house, or

(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,

is guilty of an offence punishable on summary conviction.

⁵⁷ Section 212(1): Every one who

through acts of prostitution,⁵⁸ and communicating in public for the purposes of engaging in prostitution.⁵⁹ And while the Protocol does not specifically call for sanctions against prostitution-related activities, exploitation within the context of prostitution or other labour is prohibited. Thus when issues arose in *Canada (Attorney General) v. Bedford*⁶⁰ as to the constitutionality of these provisions, trafficking was raised as a relevant issue.⁶¹ The Ontario Court of Appeal ultimately found a number of the provisions unconstitutional and struck down portions or read in language to give constitutional validity to the language, and the Supreme Court of Canada upheld and expanded upon these rulings in December 2013.⁶² Of particular interest was section 212(1)(j), living off the avails of prostitution, which was not found to be wholly unconstitutional, but overbroad in that it applied to all relationships individuals had with people engaged in prostitution. The Ontario Court suggested a remedy for the breach through reading words of limitation into the provision, clarifying that the prohibition applies only to those who do so “in

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- (a) procures, attempts to procure or solicits a person to have illicit sexual intercourse with another person, whether in or out of Canada,
 - (b) inveigles or entices a person who is not a prostitute to a common bawdy-house for the purpose of illicit sexual intercourse or prostitution,
 - (c) knowingly conceals a person in a common bawdy-house,
 - (d) procures or attempts to procure a person to become, whether in or out of Canada, a prostitute,
 - (e) procures or attempts to procure a person to leave the usual place of abode of that person in Canada, if that place is not a common bawdy-house, with intent that the person may become an inmate or frequenter of a common bawdy-house, whether in or out of Canada,
 - (f) on the arrival of a person in Canada, directs or causes that person to be directed or takes or causes that person to be taken, to a common bawdy-house,
 - (g) procures a person to enter or leave Canada, for the purpose of prostitution,
 - (h) for the purposes of gain, exercises control, direction or influence over the movements of a person in such manner as to show that he is aiding, abetting or compelling that person to engage in or carry on prostitution with any person or generally,
 - (i) applies or administers to a person or causes that person to take any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower that person in order thereby to enable any person to have illicit sexual intercourse with that person ...
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.
- ⁵⁸ 212. (1) Every one who ...
- (j) lives wholly or in part on the avails of prostitution of another person,
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.
- ⁵⁹ 213(1) Every person who in a public place or in any place open to public view:

....

(c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

⁶⁰ *Canada (AG) v Bedford*, 2012 ONCA 186.

⁶¹ See for example paras 193, 195 and 205.

⁶² *Canada (Attorney General) v. Bedford*, 2013 SCC 72.

circumstances of exploitation”⁶³ This reading in of language clearly implements the Protocol in outlawing “the exploitation of the prostitution of others” although the references throughout the case are to trafficking in general and not to the Protocol specifically. The Supreme Court suspended implementation of the ruling for one year to allow the government to address the issue.⁶⁴

b. Collateral Pressures

The decisions around the wording of the criminal legislation can be seen to be a response to Canada’s obligations under the Protocol, as evidenced by frequent references to it in the Parliamentary Debates. However, as noted above, specific elements of the Protocol were favoured over others – namely, prosecution over prevention, and arrest and detention over protection. These emphases are consistent with the dominant paradigm as espoused in the international arena, and it is clear that international pressures of various forms affected the drafting of the legislation.

For example, the institution of the abovementioned sections into the *Criminal Code* in 2005 came on the heels of Canada falling to “Tier 2” status in the 2003 US TiP Report. In the debates around the provision, MP Betty Hinton (Cons) stated that:

I believe the OSCE puts out a report every year regarding Canada’s part in slavery, in the white slave trade, et cetera. There are three categories and I believe it is category one that has open borders and allows all of this to happen. I believe it is category three that has the tightest security. I may have those numbers reversed but Canada was a number two and I believe it still is a number two. According to the report, because of the loose immigration and the border aspect of that, women and young children are brought into this country, and held in Canada for a certain period of time and are exported to another country where child slavery, child pornography or just plain old ordinary prostitution takes place.⁶⁵

The report referred to in this passage was likely the TiP Report, given the reference to its annual publication and mention of “categories”. The reference to Canada’s fall

⁶³ *Bedford*, *supra* note 60 at para 327.

⁶⁴ *Bedford*, *SC*, *supra* note 62 at para 169.

⁶⁵ Betty Hinton, Bill C-49 *An Act to Amend the Criminal Code (trafficking in persons)*, second reading September 26, 2005 38th Parliament, 1st session, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=125&Parl=38&Ses=1&Language=E&Mode=1>>

to “number two” status is clearly indicated as a source of concern, and, perhaps even more tellingly, “open borders” and a lack of “tight security” are cited as the cause of this “failure”.

MP Vic Toews (Cons) also noted that “the United States state department reported that British Columbia had become an attractive hub for East Asian human traffickers who smuggle South Korean women through Canada to the United States, in large part attributable to the fact that South Koreans do not need a visa to enter Canada.”⁶⁶ In this vein, the institution of criminal provisions was encouraged as a means to increase Canada’s international credibility and as a means to ensure “security and prosperity”. Speaking on the proposed *Criminal Code* provision, MP John Maloney (Lib) states:

We have heard this reference to slavery several times today and all the vileness such references conjure up. It is a practice that affects all countries, including Canada, and because of this it has become an issue of prominence and priority for the international community, for Canada and for us regionally, including my region of Niagara, together with the United States and Mexico as part of the new security and prosperity partnership of North America.⁶⁷

MPs also raised the issue that other countries, including the United States, United Kingdom, France, Russia and Japan had instituted legislation specifically around trafficking in human beings,⁶⁸ and they promoted the inclusion of similar legislation in Canada. And with respect to the 2009 child-trafficking amendments, Senator Plett noted that the Dominican Republic had strict legislation around trafficking of children in particular⁶⁹.

⁶⁶ Vic Toews, Bill C-49 *An Act to Amend the Criminal Code (trafficking in persons)*, second reading September 26, 2005 38th Parliament, 1st session, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=125&Parl=38&Ses=1&Language=E&Mode=1>>.

⁶⁷ John Maloney, Bill C-49 *An Act to Amend the Criminal Code (trafficking in persons)*, second reading September 26, 2005 38th Parliament, 1st session, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=125&Parl=38&Ses=1&Language=E&Mode=1>>.

⁶⁸ See for example Richard Marceau, Bill C-49 *An Act to Amend the Criminal Code (trafficking in persons)*, second reading September 26, 2005 38th Parliament, 1st session, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=125&Parl=38&Ses=1&Language=E&Mode=1>>.

⁶⁹ Neil Plett, *Criminal Code*, Debates of the Senate, 38th Parliament 1st Session, March 23, 2010, online: Parliament of Canada: <http://www.parl.gc.ca/Content/Sen/Chamber/403/Debates/009db_2010-03-23-e.htm?Language=E>.

MPs also referred to international statistics and international methods of addressing trafficking in the Parliamentary Debates. In the 2009 debates, MP Lois Brown (Cons) repeats figures on trafficking from the 2009 report by UN GIFT referred to in Chapter Two.⁷⁰ She noted that the report indicates over 24,000 victims of trafficking were identified in 2006, with “the most common form of human trafficking [being] trafficking for the purpose of sexual exploitation.”⁷¹ While she acknowledged the potential under-reporting of labour-related trafficking, she went on to state that “victims are predominantly women and children” and that “UNICEF estimates that 1.2 million children are trafficked around the world each year.”⁷² Another MP relied on a United Nations figure that “estimates that over 700,000 people are trafficked each year.” From this figure he extrapolated to Canada, stating that “[c]learly, no country is immune ... I do not think we can say that within Canada we have resolved the problem at this point which is why we want to bring forward ... this legislation to deal with the problem that we know exists.”⁷³ The reference to international sets of numbers and pieces of “information” served to replicate and reinforce the dominant paradigm of trafficking in the Canadian context.

Particularly noteworthy was a speech by MP Paul Szabo (Lib) in 2005 where he referred to his attendance at an international conference put on by the OSCE:

[A]bout a year ago I had an opportunity to attend a conference sponsored by the Organization for Security and Cooperation in Europe. At that conference we received an excellent magazine produced by the United States on this very subject matter. It contained maps showing exactly where these incidents occur and the frequency. Just to look at the research that has been done shows us how serious a problem this has been over all these years.⁷⁴

⁷⁰ See discussion *supra* Chapter Two of this work at 110. (Note K I need to check this once changes are accepted)

⁷¹ Lois Brown, Bill C-268 *An Act to Amend the Criminal Code*, second reading, February 27, 2009, 40thth Parliament, 2nd session, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=20&Parl=40&Ses=2&Language=E&Mode=1>>.

⁷² Lois Brown, *ibid.*

⁷³ Harold Macklin, Bill C-49, *supra* note 7.

⁷⁴ Paul Szabo, Bill C-49 *An Act to Amend the Criminal Code (trafficking in persons)*, second reading September 26, 2005 38th Parliament, 1st session, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=125&Parl=38&Ses=1&Language=E&Mode=1>>.

This is a particularly clear case in which international norms in the form of “information” – maps, numbers, routes – are introduced directly into Canadian dialogue on trafficking. As discussed in Chapter Two, these seemingly innocuous pieces of information are housed within a framework replete with assumptions about who a trafficked person is, and what solutions are credible. These assumptions, together forming the dominant paradigm of trafficking, are seen throughout the dialogue in both the House of Commons and the Senate.

The influence of other countries’ research and responses to trafficking is clear throughout the Parliamentary Debates and Canada’s reputation internationally was taken as a source of concern. Although there is little by way of direct enforcement mechanisms contained in the Protocol, the international condemnation and failure to live up to standards set by other countries proved to be sources of motivation for the enactment of Canada’s criminal sanctions. And not simply sanctions, but sanctions in accordance with the dominant paradigm. Given that the Protocol was negotiated in this same international context, it is unsurprising that the pressures placed on Canada can be seen to have shaped Parliamentary and legislative discourse similar to that which shaped the Protocol.

c. The “victim”

Rhetoric reflecting the dominant paradigm comes through in a variety of ways in the debates around anti-trafficking legislation. We see ample references to the innocence and vulnerability of trafficked victims, an emphasis on women and children, and a clear focus on their distress. MP Richard Marceau (Bloc Quebecois) notes in the debates around the 2005 amendments that:

We know that organized networks with connections with major criminal organizations are taking advantage of others’ distress, young women for the most part, but children as well. Very often, these vulnerable people are ready to do anything at all to escape the poverty they are living in. The causes of this situation can vary ... but there is a common denominator relating to misery, poverty and secrecy.⁷⁵

⁷⁵ Richard Marceau, Bill C-49, *supra* note 68.

And MP Joy Smith in 2009 called parliamentarians to action through her recounting of such distress:

I ask members to take a moment to imagine a beautiful Ontario spring day in June 2008. Imagine a courtroom here in the province of Ontario where a young girl, no older than 15 years when her exploitation began, head bowed, eyes down, quietly relates a story so shocking that we as parents relive the images in our minds over and over again and pray it never happens to our daughters.

I am speaking of a young Canadian girl who lives not far from the nation's capital, telling of the horror she endured from the man who trafficked and sold her for sex for two and a half years, a man who made in excess of \$360,000 off this innocent young victim by threatening her, beating her, and forcing her to have sex with strangers.

As a result, this man was able to buy himself a BMW and an expensive house in Niagara Falls.⁷⁶

While MP Smith's quote was specifically made in context of a proposed provision around child trafficking, the reference to children was not made simply because of the specific bill being debated that day. She went on to state that in fact children *are* the focus of traffickers and thus attention should be directed towards child victims: "[I]n Canada today child sex slavery is alive and well. Traffickers make a great deal of money off innocent child victims. They prefer young children because young children are impressionable, easy to control and easy to intimidate."⁷⁷ Furthermore, in the Senate debates on the legislation in 2010, Senator Plett noted:

According to the RCMP, between 800 and 1,200 people are trafficked in Canada annually. The majority of those are children, as younger victims are more impressionable and easier to control. Children can also attract more profits both from the criminal element and from clients or johns.⁷⁸

In all of these passages we see rhetoric passing from factual to evocative to normative and back again. We see statistical language such as "the majority", "very often" and

⁷⁶ Joy Smith, Bill C-268 *An Act to Amend the Criminal Code*, second reading, February 27, 2009, 40thth Parliament, 2nd session, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=20&Parl=40&Ses=2&Language=E&Mode=1>>.

⁷⁷ Joy Smith, Bill C-268, *ibid*.

⁷⁸ Neil Plett, Bill C-49 *supra* note 69.

“a great deal” combined with emotional language such as “vulnerable”, “misery”, “innocent” and “impressionable”. Furthermore, this is compounded by the use of such evocative language as “shocking”, “horror”, and “threatening.” Together, this language amounts to a call to action, focusing on victims with characteristics consistent with the dominant paradigm.

The focus on sexual exploitation is also clear. In 2005 Parliamentary Debates, MP Marceau describes “trafficking” scenarios:

To take a familiar example: young women from the former soviet republics are approached by fake talent or modeling agencies and leap at the chance for a lucrative career in fashion. Others are approached by agencies claiming to be recruiting au pairs, that is young women to look after Canadian families’ children. They end up in the clutches of criminal organizations that take away their passports and have well organized rings forcing them into strip clubs or prostitution.

There are other cases even more disturbing ... [I]t is important to know that, in this 21st century, some of these women end up as sex slaves. They are subjected to unimaginable abuse and constant threats on their own lives or those of people back in their country of origin, children, brothers and sisters, or parents. They live with the constant fear of something happening to themselves or a loved one. Trafficking in persons is a very broad issue, and I am deliberately dwelling specifically on this grim aspect of the issue, because it is both more insidious and more common around us than we are really aware. I could just as well have brought up the case of refugees, who are often clandestine immigrants, and who are being exploited by unscrupulous businesses in terms of the basic rights of workers or by individuals who reduce them to the condition of slaves by employing them as domestics.⁷⁹

This example is to be considered “familiar” in that it has been the focus of much of the anti-trafficking rhetoric in Canada. There is little in this passage to indicate the possibility that in such “lucrative” careers in fashion or in the context of working as an “au pair” such trafficking could occur. Rather, the point at which the activity turns into a matter of concern is when individuals are forced “into strip clubs or prostitution.” These types of activities are also distinguished from the more “disturbing” cases of sex slavery. MP Marceau noted that trafficking for the purposes of sexual exploitation is “more insidious” and “more common”, thus floating back and

⁷⁹Richard Marceau, Bill C-49, *supra* note 68.

forth between factual and evocative language to call his fellow parliamentarians to act.

Furthermore, given this focus on sexual exploitation and vulnerability, we see a specific group starting to automatically be included in the rhetoric around trafficking in the debates. Aboriginal women and girls are referred to in the debates as possessing the characteristics of “trafficked victims”, and their overrepresentation in the visible sex trade makes them natural candidates for the position of “victim”. In the 2009 debates around C-268, Senator Lillian Dyck noted:

[T]he greater degree of poverty amongst Aboriginals makes them more vulnerable to exploitation by those engaged in human trafficking. ... The effects of poverty on one’s vulnerability to being exploited are exemplified by this quotation from an Aboriginal sex trafficking victim. She said:

I wish I didn’t have to do this sex trade. I do it to get food for my son. It’s really easy for people to pre-judge and say that people have a choice to do this, but if you don’t have a home to go to or if you don’t have any kinds of structures in your life, it’s not as easy as it seems.⁸⁰

The conversation is thus turned to prostitution and the vulnerabilities of street-based prostitutes, and the particular vulnerabilities experienced by Aboriginal women in Canada. At this point there is little mention of third party involvement or physical coercion but rather a general concern about Aboriginal women and girls’ involvement in prostitution. In the realm of sexual exploitation, this concern was prioritized. Senator Lillian Dyck (Lib) also notes in this regard:

I am haunted by the memory of seeing Aboriginal girls, who were only 9 or 10 years old, on the streets of Regina, where men drive by to pick them up for sexual services. Surely, there is a world of difference between a nine-year-old Aboriginal girl trafficked in a sex trade and a nine-year-old boy trafficked to work in the restaurant business washing dishes and cleaning bathrooms ...

The key question is: Is trafficking for the purpose of forced labour as heinous and repugnant to Canadian standards of decency as is trafficking for the purposes of sexual exploitation? I think everyone considers the trafficking of people for the purpose of sexual exploitation, especially of minors, as heinous,

⁸⁰ Lillian Dyck, Criminal Code, *Criminal Code*, Debates of the Senate, 38th Parliament 1st Session, March 23, 2010, online: Parliament of Canada: <http://www.parl.gc.ca/Content/Sen/Chamber/403/Debates/009db_2010-03-23-e.htm?Language=E>.

but I do not think the same is true of trafficking for the purposes of forced labour. While some who are trafficked for forced labour might be severely mistreated and suffer tremendously, some might not suffer to nearly the same extent as those trafficked for the purposes of sexual exploitation.⁸¹

d. The Trafficker, the Immigrant and the Terrorist

On the flip side of the dominant paradigm, throughout the Parliamentary Debates we also see a picture of the trafficker emerge. In the debates around amendments to the *Criminal Code* in 2005, MP Vic Toews (Cons) stated that trafficking is “a booming industry that is run by powerful, multinational criminal networks who are well funded, well organized and extremely adaptable to changing technologies.”⁸² In the allusion to the ubiquity, adaptability and craftiness of traffickers, these images evoke fear of the unknown. A similar story is told by MP Joe Comartin (NDP) during the 2005 debate:

The vast majority of these crimes are perpetrated by organized crime around the globe. Because of the nature of the traffic in this country, a great deal of that organized crime, and in particular the ringleaders of those crime syndicates are not here in Canada because the crime originates elsewhere, for example, in the former Soviet Union, in Vietnam, or in China. It is in the country of origin where the crime originates. That is where the organized crime head pins tend to be situated.⁸³

The rhetoric generated in international settings is replicated here, speaking to foreignness and placing criminality squarely in the hands of the “other”. We further see the merging of discussions of such criminality with the illegal migrant, providing chains of equivalence between “crime syndicates” and “traffic” and “elsewhere”. This then allows for a slip into fears around border integrity, as shown in this speech by MP Pat Martin (NDP):

Let me preface this by saying that I am proud that Canada is taking on the global issue of trafficking in human beings. I had some experience with this as the immigration critic for my party when not too long ago boatloads of Chinese immigrants were washing up on the shores of British Columbia. To some

⁸¹ Lilian Dyck, *Criminal Code*, *ibid.*

⁸² Vic Toews, Bill C-49, *supra* note 66.

⁸³ Joe Comartin, Bill C-49 *An Act to Amend the Criminal Code (trafficking in persons)*, second reading September 26, 2005 38th Parliament, 1st session, online: Parliament of Canada <[198](http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=125&Parl=38&Ses=1&Language=E&Mode=1.>..</p></div><div data-bbox=)

consternation, there seemed to be waves of humans being smuggled, some 600 in total.

As we investigated this rash of illegal migrants, it became clear that they were being smuggled in a very organized and structured way by groups of Asian organized crime known as snakeheads. This is a reprehensible practice. People's hopes and ambitions were being exploited by these snakeheads who I suppose offered opportunities of a better life. However, that is only one example and that perhaps is a more benign example of the type of human trafficking that is a growing problem around the world.

In that case, those people were cheated and undertook a very dangerous practice of being smuggled across the seas, often in shipping containers, or through other methods where they could risk their lives. That was bad enough but the type of human trafficking, the type of modern day slave trade trafficking that is being contemplated by Bill C-49, is of another scale and dimension altogether.⁸⁴

This move from trafficker to criminal to illegal migrant and back engenders a fear of the migrant, equating crime and migration, and supporting calls for tighter border security as a remedy for trafficking. Ultimately this equivalence allows for another spectre to enter – the terrorist – providing even further fodder for fears around “illegals” and further support for border integrity measures. Mirroring the rhetoric from the U.S. around the Iraq war, criminal threats of trafficking are fused with anti-terrorist and security concerns and the “trafficker” becomes a target for the expression of general fear around migration and security. MP Comartin states this clearly when he discusses the need to heighten border integrity measures:

I want to raise the issue of terrorism and the amount of effort we have put into combating that. We have learned a lot about how to prevent incursions into Canada, as the Americans have in the U.S., those ideas, those thoughts and those enforcement mechanisms that we have developed to fight the agent who is coming into Canada on a clandestine operation or the terrorist bent on committing a serious crime. We have become much better at getting at that.

We have not done the same at stopping the flow of human traffic, but we have learned. We can apply those same new thoughts, principles and mechanisms to help fight human trafficking, to stop it from happening in Canada.⁸⁵

⁸⁴ Pat Martin, Bill C-49 *An Act to Amend the Criminal Code (trafficking in persons)*, second reading September 26, 2005 38th Parliament, 1st session, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=125&Parl=38&Ses=1&Language=E&Mode=1>>..

⁸⁵ Joe Comartin, Bill C-49, *supra* note 83.

These various passages reveal the significance of the dominant paradigm in debates around the anti-trafficking laws in Canada. Victims are portrayed as weak, young, innocent, deceived, and forced into sexual slavery. And although a significant focus is placed on Aboriginal women and girls and the sexual exploitation of young Canadian girls, traffickers are still represented as the threatening “other” whose pervasiveness, organization and skill make them a threat to individual Canadians and to national security.

C. CANADA’S OTHER OBLIGATIONS AT INTERNATIONAL LAW

i. International Obligations

It seems clear from discourse around trafficking produced in Parliament that the Protocol has been the guiding international document with respect to legislative developments in Canada. It also seems clear that the various influences that shaped the wording of the Protocol have also played a role in the creation of Canadian law. However, as identified in Chapter One, there are a number of other provisions at international law that relate to trafficking with which Canada is to conform. While these obligations may not have influenced Canada’s response to trafficking directly, it is useful to note them and the ways in which Canada does comply. The obligations and Canada’s response to them reveal a larger picture of the ways in which exploitative practices – some of which may be classified as trafficking by anti-trafficking advocates - could be addressed outside the dominant paradigm of trafficking. With respect to those obligations identified in Chapter One, Canada has ratified some, but not all of the documents discussed.

Canada has signed and ratified both the ICCPR⁸⁶ and its Optional Protocol allowing for individual complaints to the UN. Under the ICCPR, Canada is obligated to protect

⁸⁶ ICCPR.

the right to life⁸⁷, the right against slavery or servitude⁸⁸ - also a preemptory norm of customary international law, or *jus cogens*⁸⁹- the right not to perform forced or compulsory labour (except under specified circumstances in accordance with law),⁹⁰ the right to liberty and security of the person,⁹¹ the right to be free from cruel or degrading treatment,⁹² the right to free movement,⁹³ and the right to equal protection of the law without discrimination. The ICCPR applies to migrants and thus these protections are to be extended to all persons physically in Canada.⁹⁴ However, freedom of movement and safeguards against arbitrary expulsion are limited to persons lawfully within the state's territory.⁹⁵ Under the ICESCR⁹⁶, Canada is required to "take steps, ... to the maximum of its available resources"⁹⁷ to protect the

⁸⁷ ICCPR, art 6.

⁸⁸ ICCPR, art 7.

⁸⁹ See A Yasmin Rassam, "International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach" (2005) 23 Penn St. Int'l L. Rev. 809 at note 5 where she States:

The Restatement of U.S. Foreign Relations States that nations violate international law if they commit, encourage, or condone genocide, slavery, torture, or inhuman or degrading treatment. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 (1987). See also M. Cherif Bassiouni, *Enslavement As An International Crime*, 23 N.Y.U.J. INT'L L. & POL. 445, 445 (1991) ("It is well established that prohibitions against slavery and slave-related practices have achieved the level of customary international law and have attained *jus cogens* status.").

⁹⁰ ICCPR, art 8.

⁹¹ ICCPR, art 9.

⁹² ICCPR, art 7.

⁹³ ICCPR, art 12.

⁹⁴ ICCPR, art 2. See also: UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, UN Doc. HRI\GEN\1\Rev.1 at 18 (11 April 1986):

The position of Aliens under the Covenant, affirms in its opening paragraph: «Reports from States Parties have often failed to take into account that each State Party must ensure the rights in the Covenant to "all individuals within its territory and subject to its jurisdiction" (Art. 2 para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.»;

UN Human Rights Committee (HRC), *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, CCPR/C/21/Rev.1/Add.5:

The rights of minorities (art. 27 of the ICCPR), reads «Article 27 confers rights on persons belonging to minorities which "exist" in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term "exist" connotes. (...) Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights. As any other individual in the territory of the State party, they would, also for this purpose, have the general rights, for example, to freedom of association, of assembly, and of expression.

UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32:

Right to equality before courts and tribunals and to a fair trial (art. 14 of the ICCPR), states that "The right of access to courts and tribunals and equality before them is not limited to citizens of States Parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party."

⁹⁵ ICCPR, art 12.

⁹⁶ ICESCR.

⁹⁷ ICESCR, art 2.

right to just and favourable conditions of work, including fair wages, safe and healthy working conditions, and rest, leisure and reasonable limitation of working hours, including paid holidays.⁹⁸ Canada is also party to the CEDAW and thus the non-discrimination provisions in that document apply,⁹⁹ as well as the obligations as set out under the Committee's General Recommendation on women migrant workers,¹⁰⁰ and those requiring states to "take all measures" to suppress traffic in women and exploitation of prostitution.¹⁰¹

Under the *Convention on the Rights of the Child*,¹⁰² Canada is required to take all measures to "prevent the abduction of, sale of or traffic in children for any purpose or in any form",¹⁰³ as well as other measures to prevent the sexual and economic exploitation of children.¹⁰⁴ The ILO Convention 182 also requires that Canada "take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour",¹⁰⁵ including:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.¹⁰⁶

⁹⁸ ICESCR, art 7.

⁹⁹ CEDAW art. 1.

¹⁰⁰ See Chapter One – section 2C on Committee on the Elimination of Discrimination Against Women, *General Recommendation No.26 on Women Migrant Workers*, CEDAW/C/2009/WP.1/R.

¹⁰¹ CEDAW, art. 6.

¹⁰² CRC.

¹⁰³ CRC art. 35. See also Shelley Case Inglis, "Expanding International and National Protections Against Trafficking For Forced Labor Using A Human Rights Framework" (2001) 7 *Buff. Hum. Rts. L. Rev.* 55 at 58.

¹⁰⁴ CRC, art. 34.

¹⁰⁵ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (ILO No. 182), 2133 U.N.T.S.161, *entered into force* Nov. 19, 2000, art.1.

¹⁰⁶ *Ibid*, art 3

With respect to labour protections identified in Chapter One, Canada participates in most of the instruments that outline applicable labour rights. Canada ratified the *Convention Concerning the Abolition of Forced Labour*¹⁰⁷ in 1959 requiring governments to take measures to suppress the use of forced or compulsory labour as punishment or for education regarding political views, as a means for economic development, as discipline, as punishment for having participated in strikes or as a means of national, racial, social or religious discrimination.¹⁰⁸ Only recently did Canada ratify the 1930 *Forced Labour Convention*¹⁰⁹ which more broadly defines forced labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”¹¹⁰ For several years Canada had stated that this Convention was not relevant for industrialized countries that did not have the types of practices that the Convention prohibits.¹¹¹ However, after the ILO pursued a push for ratification of 8 fundamental conventions¹¹² Canada eventually ratified the document in 2011.¹¹³ Thus Canada is now responsible at international law for preventing forced labour under any circumstances, and not only for government-imposed conditions or those based on particular grounds.

As a party to the *Convention Relating to the Status of Refugees*¹¹⁴ and its Protocol,¹¹⁵ Canada is required to protect individuals seeking asylum from persecution; this may be relevant should repatriation or return pose threats to an individual identified as

¹⁰⁷ *Abolition of Forced Labour Convention* (ILO No. 105), 320 U.N.T.S. 291, entered into force Jan. 17, 1959.

¹⁰⁸ ILO, *Abolition of Forced Labour Convention*, *ibid*, art 1.

¹⁰⁹ *Convention concerning Forced or Compulsory Labour* C 29, 39 U.N.T.S. 55, entered into force May 1, 1932.

¹¹⁰ ILO, *Convention concerning Forced or Compulsory Labour*, *ibid*, art 2.1.

¹¹¹ ILO, *The Elimination of All forms of Compulsory Labour*, online: ILO <<http://www.ilo.org/public/english/standards/relm/gb/docs/gb277/pdf/d2-elim.pdf>> at 183.

¹¹² See ILO, *Conventions and Recommendations*, online: ILO

<http://www.ilo.org/global/What_we_do/InternationalLabourStandards/Introduction/ConventionsandRecommendations/lang--en/index.htm>. The ILO recognizes 8 fundamental conventions: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) , Right to Organise and Collective Bargaining Convention, 1949 (No. 98) , Forced Labour Convention, 1930 (No. 29) , Abolition of Forced Labour Convention, 1957 (No. 105) , Minimum Age Convention, 1973 (No. 138) , Worst Forms of Child Labour Convention, 1999 (No. 182) , Equal Remuneration Convention, 1951 (No. 100), Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

¹¹³ ILO, *The Elimination of All forms of Compulsory Labour*, *supra* note 111.

¹¹⁴ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

¹¹⁵ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

trafficked. It has not signed or ratified the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.¹¹⁶ In line with many other States' concerns discussed in Chapter One, in 2006 the Department of Foreign Affairs contended that the document contains serious weaknesses and that it would be inappropriate under Canadian laws to provide temporary workers with the extensive rights contained in the document, such as education, housing and unemployment benefits.¹¹⁷ It also stated in 2002 that "the Government of Canada continues to be supportive in principle of the aims of this Convention, [it] does not accept that it would be an effective instrument to improve the rights of migrants in Canada."¹¹⁸ The Department had also noted that the rights of migrants are protected through the Canadian *Charter of Fundamental Rights and Freedoms* and the other international documents that Canada has ratified, such as the Protocol.¹¹⁹

It is important to note that, even where Canada has signed onto international obligations, they do not generally take effect until implemented through national legislation.¹²⁰ This general rule has been a mainstay in North American legal interpretation. However, there are some exceptions to this general rule. Firstly, in recent Canadian case law there is some indication that all legislation should be interpreted in light of international obligations. The Court noted in *R v. Hape*¹²¹ that, "In interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction."¹²² Previously there

¹¹⁶ UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158.

¹¹⁷ Nicole LaViolette, "The Principal International Human Rights Instruments to which Canada has not yet Adhered" (2006) 24 Windsor Y.B. Access Just. 267 at 288.

¹¹⁸ Email from Adrian Norfolk, Human Rights, Humanitarian Affairs, International Women's Equality Division, Department of Foreign Affairs (12 September 2002) cited in LaViolette, *ibid*.

¹¹⁹ ILO, *The Elimination of All forms of Compulsory Labour*, *supra* note 111 at 182.

¹²⁰ See Stephane Beaulac, "Legal Interpretation in Canada: Opening Up Legislative Language as a Means to Internationalisation", University of Edinburgh School of Law, Working Paper Series, No 2010/05 at 17:

[I]t is still assumed in North America that it is if, and only to the extent that, national legal rules of reception allow international law to be part of domestic law – and that it has in effect become part of that domestic law, such as through implementing legislation⁷⁹ – that international norms may have an impact on the interpretation and application of domestic law by domestic courts.

¹²¹ *R. v. Hape*, [2007] 2 S.C.R. 292.

¹²² *Hape*, *ibid*, at para 56.

had been some confusion with respect to applying rules of conformity with international law. For example, some case law indicated that judicial decision-making was to be undertaken in conformity with international obligations only where a statute was ambiguous.¹²³ It appears, however, that the most recent case law indicates otherwise, moving towards an understanding of ratified international laws as having direct effect in Canada. Additionally, with respect to obligations that have received “customary law” status, it has been generally accepted that no specific implementation is required and that they automatically apply in domestic law.¹²⁴

Thus each of the abovementioned obligations may have some legal bearing on the interpretation of Canadian laws and some may in fact form part of the Canadian legal regime. The actual effect of these specific obligations on anti-trafficking legislation in Canada appears to be minimal, given the lack of Parliamentary attention to international documents other than the Protocol. However, as discussed in Chapter One, these obligations can work in tandem with those under the Protocol to address various forms of exploitation, some of which may be considered trafficking by anti-trafficking advocates.

ii. Canadian Laws

While it is beyond the scope of this project to fully canvass each law that could potentially be relevant to trafficking, particularly given the fluid and varying conceptions of the term, this section outlines the major types of laws and regulations that could potentially be seen as implementing the obligations outlined above. Legislation specifically aimed at addressing “trafficking” has almost exclusively been created within the criminal or immigration realms. And while these legislative provisions do not address anti-trafficking obligations directly, broad labour, immigration and equality legislation implementing the other international obligations outlined above may address forms of exploitation more fully than specific

¹²³ See Beaulac, *supra* note 120 at 31.

¹²⁴ See Beaulac, *supra* note 120 at 18: “With regard to customary law, legal publicists opine that no implementation is required. ... [T]he dualist rules of reception call for direct application.”

anti-trafficking legislation. The section that follows serves to highlight the ways in which these obligations have been complied with in legislative acts in Canada.

The international obligations outlined above are addressed in a number of legal spheres. Several of Canada's obligations under the ICCPR are addressed through section 7 of the Canadian Charter of Rights and Freedoms (CCRF), in its protection of "life, liberty and security of the person." The challenges to the various prostitution-related provisions in *Bedford* were based primarily on this provision. The ICCPR also calls for a prohibition against discrimination and equal protection of the law, echoed generally in CEDAW as well. Canada implements these obligations through the equality provision in the CCRF at section 15, through its provincial and territorial human rights legislation, each of which contains anti-discrimination clauses, and through provincial labour codes, each of which also contain anti-discrimination clauses. While these appear to be extremely general in nature, the application of anti-discrimination legislation in cases involving migrant workers has proven to be significant¹²⁵ and thus may apply to exploitative situations classified as trafficking.

The ICCPR also requires Canada to institute prohibitions against slavery or servitude, overlapping with provisions of the *Forced Labour Convention*.¹²⁶ While a variety of sanctions exist in the criminal law that would address such conditions, such as the prohibition against trafficking itself, some requirements are also met through Canada's provincial employment standards legislation.¹²⁷ Requirements to ensure minimum wages, limits on working hours and days off are contained within the various pieces of provincial legislation. And while these do not speak directly to the prohibition on slavery, they provide a minimum standard of employment conditions that, if applied, are intended to essentially constitute a fair exchange of labour for compensation. While it is still possible that these minimum conditions could exist in

¹²⁵ See for example *C.S.W.U. Local 1611 v. SELI Canada and others (No. 8)*, 2008 BCHRT 436 where SELI Canada and others responsible for the building of the Canada Line Skytrain route in Vancouver, BC were found to have discriminated against Latin American migrant workers on the basis of race, colour, ancestry and place of origin by providing significantly less compensation to them than to their European colleagues.

¹²⁶ ILO, *Convention concerning Forced or Compulsory Labour*, *supra* note 109.

¹²⁷ Each province and territory has its own employment standards legislation. See for example *Employment Standards Act*, 2000, S.O. 2000, Ch 41 art 17(1) limiting hours of work, art 23(1), minimum wage, and art 33(1) entitlement to vacation.

a situation in which an individual did not feel it possible to leave the employment, thus being subjected to *forced labour* as defined in the Convention, the nature of these protections is to guard against unfair labour practices and provide workers with a remedy against exploitative employers. These pieces of legislation also address Canada's obligations under the ICESCR noted above, such as the right to just and favourable conditions of work, safe and healthy working conditions, and reasonable limitation of working hours. Employment standards legislation in many provinces also provides for a prohibition against child labour,¹²⁸ implementing Canada's obligations under the *Convention on the Rights of the Child*¹²⁹ and the ILO Convention 182.¹³⁰

While not officially a party to the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, Canada's *Immigration and Refugee Protection Regulations*¹³¹ do address the protection of migrant workers on Canadian soil in a number of ways. For example, Section 200 provides for a prohibition on employers hiring foreign workers where they have failed to previously provide employment, wages and working conditions to foreign nationals as set out in their employment agreements.¹³² And in the case of individuals seeking to enter Canada as "live-in caregivers" to provide childcare or eldercare for families, employers are required to satisfy CIC that the foreign national will reside in a private household, with adequate furnished and private accommodations in that household, and that the employer has sufficient financial resources to pay the caregiver the wages that were offered.¹³³ There is no specific remedy contained within the legislative framework for migrant workers to address violations of these specific IRPA obligations after arrival. However, with respect to hours of work, wages, safe working conditions and holidays, migrant workers with issued work permits¹³⁴ are also theoretically able to access remedies under employment standards and

¹²⁸ See for example *Employment Standards Act*, RSBC 1996, Ch. 113 art. 9.

¹²⁹ CRC, art. 34.

¹³⁰ ILO, *Worst Forms of Child Labour Convention*, *supra* note 105, art. 1.

¹³¹ IRPA Regulations.

¹³² IRPA Regulations, s.200(1)(b)(i)

¹³³ R IRPA Regulations, s.203(1)(d)

¹³⁴ IRPA Regulations, s.200.

occupational health and safety legislation. Currently there is some dispute in some provinces, notably Quebec, about access to particular administrative mechanisms for migrant workers who are undocumented and are thus living in Canada in contravention of IRPA.¹³⁵

Canada is also not a party to the ILO *Private Employment Agencies Convention*¹³⁶ which forbids the charging of workers for the process of recruitment. However, Manitoba's 2008 *Worker Recruitment and Protection Act*¹³⁷ implicitly implements the requirements of this convention by prohibiting recruiters from charging fees to migrant workers¹³⁸ and prohibiting employers from recovering recruiting costs after hire.¹³⁹ These provisions guard against workers ending up in situations of debt bondage from which they cannot feasibly escape. Under this legislation employers are also required to register annually with the Director of Employment Standards in the province before recruiting any foreign worker, providing information about business practices, recruiters involved, the duties of any position, screening processes and dates of employment.¹⁴⁰ Recruiters may only be members in good standing of a Canadian provincial bar or the Immigration Consultants Canada Regulatory Council, or be a member of the *Chambre des notaires du Québec*.¹⁴¹ The employer is also required to submit detailed information on all migrant workers once they begin work in Manitoba.¹⁴² These powers allow for the Director of Employment Standards to regulate conduct around the employment of migrant workers, potentially providing less scope for exploitation.

¹³⁵ See for example Anette Sikka, Katherine Lippel and Jill Hanley "The Right to Health Care and Workers' Compensation for Precarious Migrants in Québec, Ontario and New Brunswick", (2011) 5(2) *McGill Journal of Law and Health* 203, at 257.

¹³⁶ ILO, *Private Employment Agencies Convention*, C181, 2115 U.N.T.S. 249, entered into force May 10, 2000.

¹³⁷ ILO, *Abolition of Forced Labour Convention*, supra note 107, art 1.

¹³⁸ *Worker Recruitment and Protection Act*, C.C.S.M. c. W197. (WRPA)

¹³⁹ WRPA, art. 15(1).

¹⁴⁰ WRPA, art. 16(1).

¹⁴¹ WRPA, art. 11(3).

¹⁴² *Worker Recruitment and Protection Regulation*, Regulation 21/2009, art. 6.

¹⁴² *Worker Recruitment and Protection Regulation*, *ibid*, art. 14(1).

In 2009 Ontario passed similar but much less comprehensive legislation, the *Employment Protection for Foreign Nationals Act*.¹⁴³ This legislation provides similar prohibitions on charging workers for recruitment or from recovering recruitment costs,¹⁴⁴ and protects individuals from having documents or other property retained by employers.¹⁴⁵ However, the Act only applies to individuals in or seeking employment through the Live-in Caregiver program. Furthermore, under this legislation, recruiters and employers are required to keep records of the employment transactions and make them available for inspection,¹⁴⁶ but no specific requirement exists to provide information on all workers to the Director of Employment Standards.

As indicated above, not all of the legislation discussed directly addresses trafficking in persons. However, the legislation in which trafficking is clearly stipulated primarily exists within the criminal and immigration spheres. These specific trafficking-related offences indicate a penchant towards tightening border security and prosecuting individuals, providing little in the way of protections for people who might be considered trafficked. Furthermore, the individual who is classified as trafficked and the people considered to be doing the trafficking can be seen to reflect a conception of trafficking consistent with the dominant paradigm internationally. In Chapter Four I go on to discuss the ways in which this dominant paradigm is reflected in other social actors' discourse - including academics, non-Parliamentary state actors, law enforcement, non-governmental organizations and the media - and the resulting impact on both the creation of this legislation and its implementation.

¹⁴³ *Employment Protection for Foreign Nationals Act* (Live-in Caregivers and Others), 2009, SO 2009, c 32. [Employment Protection Act]

¹⁴⁴ Employment Protection Act, arts. 7 and 8.

¹⁴⁵ Employment Protection Act, art. 9(1).

¹⁴⁶ Employment Protection Act, art. 14(1).

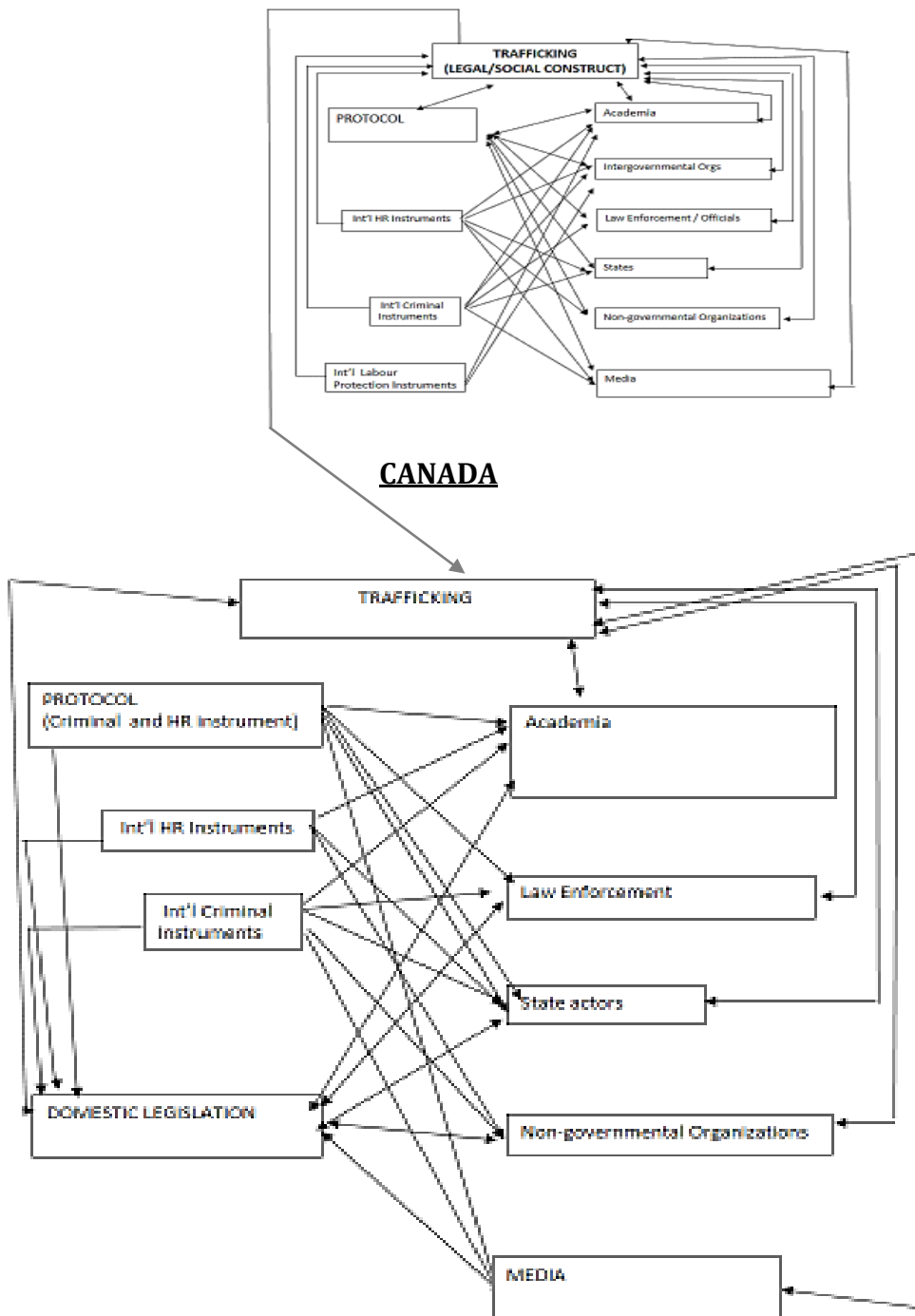
CHAPTER FOUR – THE CANADIAN PARADIGM: THE MYTH, THE ACTORS, THE CONSEQUENCES

A. INTRODUCTION

This chapter looks further at the development of the dominant paradigm of trafficking in Canada. The “paradigm” referred to is an understanding of the concept of what trafficking in persons is and how it is to be understood and applied, constructed through a variety of forces including legal language and social actors, as outlined in the international context, in Chapter Two. This current chapter builds on Chapter Three which addressed the development of legal language around the issue, and goes on to discuss the impact of various social actors on the construction of the Canadian paradigm, the forces constructing the interpretation and implementation of the laws outlined in Chapter Three and the impact of the anti-trafficking initiatives on various social groups. In Chapter Three the influence of international actors on the development of Canadian legislation was highlighted. The dominant paradigm that developed internationally, as outlined in Chapter Two, was seen to emerge in discussions around the development of Canadian legislation. This included the fear around trafficking as a growing problem, primarily focused on women and children in the sex trade, the involvement of highly organized crime rings, the need for “rescue” of victims unwittingly duped into prostitution, the necessity of “rehabilitation” of broken victims, and a focus on border security measures as a means for addressing the issue.

In this chapter we see the international paradigm being reinforced by numerous social actors and the interactions between them, while also being molded and shaped to address the specific concerns of those actors in Canada. The dominant paradigm is transferred to the Canadian context and both impacts on and is impacted by social actors in Canada in ways similar to those on the international stage. Figure B highlights these relationships:

FIGURE B: SETTING THE CANADIAN STAGE
INTERNATIONAL - (FROM FIGUREA)



The dominant paradigm is reflected in the Canadian context similarly to the ways in which it was seen internationally, as described in Chapter Two. It appears through victims being linked to innocence, vulnerability, illegality, and sexual coercion, and with traffickers linked to foreignness, highly organized criminality and threats to national integrity. Victims are meek and fearful of their traffickers, and fearful of authorities until they are “rescued” by law enforcement from their captivity. The devices used are also similar, including using “chains of equivalence” to link otherwise dissimilar phenomena. However there are particular flavours and characteristics added to the phenomena that appear as a matter of course in the Canadian context. Aboriginal women and girls are taken to be a particularly vulnerable category of individuals, as discussed in Chapter Three, and the various social actors involved in addressing trafficking have highlighted this group as a subject of concern. Additionally, the focus on domestic trafficking through “pimps” takes a center stage in anti-trafficking rhetoric in Canada, pointing to underage girls lured into prostitution circuits that operate within Canadian borders or just over the national boundary in the United States. These variations add to and complement the existing international paradigm of trafficking and victims in these cases take on the characteristics of the stereotypical trafficked person.

This chapter addresses the various ways in which the social actors in the field in Canada (identified in Figure B above) reinforce and adjust the dominant paradigm of trafficking, and the ways in which that Canadian paradigm can be seen to be reflected in implementation of laws and policies. The data collected for purposes of this chapter was derived from the literature reviews, the author’s own key informant interview data and an analysis of data gathered through other projects. The methodology relating to these various sources is outlined in the introduction to this work.

B. ACTORS AND INFLUENCES

i. Academia

As in Chapter Two, I first discuss the academic community as an influencing force on the trafficking paradigm in Canada. While in Chapter two several Canadian authors were discussed, this chapter focuses exclusively on academics writing about trafficking *in* Canada. In this section, I focus on those who reproduce the dominant paradigm in their work, and the ways in which they bring it into Canadian discourse. Again, as with the authors discussed in Chapter Two, some of the authors discussed in this section critique particular points within the paradigm, but accept the overall trafficking framework, which continues to support a binary of “trafficked” vs. “non-trafficked”. This binary in itself may be detrimental to providing services to exploited persons and thus later in this chapter I discuss the authors who critique the paradigm itself and the impacts that they consider it to have.

Some of the academic writing that supports the current paradigm in Canada has come primarily from commissioned projects, rather than authors writing solely under their own auspices. This may be somewhat of a limitation with respect to the representation of “academics” in Canada, given that commissioned projects may or may not contain particular parameters and research questions phrased in ways specifically intended to elicit responses in line with the dominant paradigm. However, the authors are academics and affiliated with higher education institutions and thus the weight attached to their findings is considerable.

In several academic pieces the characterization of trafficking can be seen in its standard form, through the lens of the dominant paradigm. In line with characterizations internationally, one author describes trafficking in Canada with almost all of the standard images rolled into one paragraph:

Human trafficking has proliferated in Canada, in part, through the growth of organized crime units that, through deception, promise women and children better lives. Victims are initially offered legitimate jobs in hotels, restaurants, and even as nannies. ... Yet these illusionary promises turn into the greatest nightmare when victims are brought to brothels and massage parlors in Vancouver, Toronto, Calgary, and Winnipeg and forced into prostitution. ¹

¹ Shadan Kapri Mohajerin, “Human Trafficking: Modern Day Slavery in the 21st Century”, (2005/2006) 12(3) Canadian Foreign Policy 125 at 125.

The same author continues:

These women are systemically deceived into believing that a better life awaits them abroad. By the time the deception is revealed, they find themselves in a foreign land without documentation and subject to a series of brutal attacks to break them into the system of prostitution. While these victims are not initially prostitutes, they are forced into this lifestyle to pay off their debt to the traffickers for bringing them into the country. The deception continues when traffickers give false illusions of freedom once their debts are paid off.²

And later:

Because these victims are primarily uneducated and speak little English, and are unaware of their rights, there needs to be specially trained advocates ... to work directly on behalf of victims, to protect them from a judicial system they fear and do not understand ...³

Such characterizations are also produced by one of the most well-known figures in anti-trafficking research in Canada, Benjamin Perrin. Mr. Perrin has received numerous accolades for his work and, as will be shown later in this chapter, has influenced programming in several ways. His characterization of trafficking and victims of trafficking is thus extremely important with respect to Canadian anti-trafficking work.

In his 2010 book, *Invisible Chains*, all of the hallmarks of the dominant paradigm appear in the story of Katya, a nine-year old Ukrainian girl who was “abducted to be sold for sex”:

For more than two decades, Katya served as a slave, devoid of comfort, rewards, or freedom. After having been sold to traffickers in Africa, Europe, and North America, she was brought to Canada by her newest “owner,” who expected to reap more profit from her body.⁴

Innocence, youth and sexual slavery permeate this description, as they do for several stories told throughout the book. With respect to traffickers the author continues to follow the dominant paradigm describing them as threatening, evil, lying in wait:

² Mohajerin, *ibid* at 126.

³ Mohajerin, *supra* note 1 at 129.

⁴ Benjamin Perrin, *Invisible Chains*, (Toronto: Penguin Group, 2010) at 41.

They say that sharks can detect an injured animal from up to one kilometer away in open water. Traffickers operating in Canada have developed similar sensory skills for detecting their quarry. When Carlos met Luisa at their English-language class in Toronto, he smelled the figurative blood in the water.⁵

Female traffickers “blend in readily”⁶ among residents of group homes, the author notes, further entrenching the duplicitousness of the offender. They operate massage parlours “just a few blocks from Rosedale Elementary and Junior High School in Calgary” and force women into brothels in a “pleasant middle-class neighbourhood in North Toronto, a residence that from the outside looked like any other home.”⁷ The spectre of the trafficker is seen as infiltrating upstanding, middle-class neighbourhoods contributing to the downfall of the innocent victims therein.

Perrin states near the beginning of *Invisible Chains* that “human trafficking in Canada involves the sexual exploitation and forced labour of a diverse array of victims: Canadian citizens and newcomers, adults and children, women and men.”⁸ All of these categories of people, essentially *all people who could possibly be on Canadian soil*, become potential victims. The kinds of exploitation that may befall different individuals all come under the rubric of trafficking. And yet, the majority of stories relayed by the author involve young Canadian girls lured by gifts and promises of romance into prostitution in their own country.⁹ The quintessential victim and perpetrator can be readily seen through depictions of these incidents, mirroring what we see in international contexts, even though no borders may be crossed, no language issues may arise and no organized crime may be involved.

An example of this comes through in his story of Naomi, who was out for a walk one night feeling “lonely and neglected” due to a troublesome home life. She met “Big Daddy” who told her she was beautiful, offered her cigarettes, and took her home with him. He made her feel special. “She thought she’d finally found her Prince

⁵ Perrin, *ibid* at 37.

⁶ Perrin, *supra* note 4 at 88.

⁷ Perrin, *supra* note 4 at 37.

⁸ Perrin, *supra* note 4 at 8.

⁹ See for example Perrin, *supra* note 4 at pp 52 and 98.

Charming”,¹⁰ the author relays. She was sent to a strip club to dance and was given cocaine, dancing for some time and giving money to Big Daddy. Eventually she comes to the realization that she no longer wishes to be part of this life and “was sick of dancing for men who looked at her the way they did”.¹¹ Big Daddy turned the tables and told her he was in control and she would continue to do what he told her with respect to dancing and other sexual activities. “She was shocked and had no idea who to turn to for help. Since she’d started seeing Big Daddy, she’d lost touch with her friends and family ... It was then that Big Daddy threatened her and beat her up. He started forcing her to have sex with random men and took all the money.”¹² This unfortunate story is not an uncommon one, and there are a myriad of approaches to prevention and protection of sexual exploitation of youth in Canada.¹³ Yet it is told as simply another facet of “trafficking”, with similar victims and traffickers. Through their inclusion in discussions around trafficking with little attention paid to the differences in circumstances, all types of exploitation are harmonized, and the threat of “trafficking” becomes ubiquitous.

To further complicate matters, an entire chapter is devoted to a discussion on travel sex, with brothel workers in Cambodia described as follows: “[t]heir eyes looked distant, their expressions defeated. They were, I estimated, between the ages of thirteen and sixteen.”¹⁴ The innocence of the victim is highlighted here as part and parcel of the quintessential trafficked victim. However, the purpose of this chapter appears to be to denigrate Canadian men who buy sexual services overseas, not to discuss issues of trafficking in Canada. The “user” of sexual services is merged with the trafficker in the ways in which they pose threats to the innocence of victims. Mr. Perrin’s agenda is clear throughout his book; he proposes abolition of prostitution as the necessary solution:

¹⁰ Perrin, *supra* note 4 at 63.

¹¹ Perrin, *supra* note 4 at 63.

¹² Perrin, *supra* note 4 at 63.

¹³ See for example Government of Alberta, Protection of Sexually Exploited Children and Youth, online: Government of Alberta <<http://humanservices.alberta.ca/documents/PSEC-manual.pdf>>.

¹⁴ Perrin, *supra* note 4 at 15.

The simple reality is that sex trafficking would not exist in Canada or abroad without demand from men who feel entitled to engage in paid sex acts of their choosing. Yet in tackling the problem, concerned parties frequently ignore the powerful role of the purchaser.¹⁵

These statements are made with no support and little contextual reference to their relevance. It is simply assumed throughout the work that discussions around the prevention and abolition of prostitution are obvious points to be made in any anti-trafficking work, further entrenching the perceived links between the two.

Perrin provides some stories of foreign women forcibly brought to Canada for the purposes of sex, but they were extremely rare, and the author relays them through the use of nearly every hallmark of the dominant paradigm. He describes a case in which massage parlours were raided, and describes the situation of the women located: “Once in Canada, the women were sold to massage parlour owners ... not hired or employed, but instead *sold*.”¹⁶ He discusses another case where a Spanish-speaking woman was coerced into working in a brothel filled primarily with Portuguese-speaking Brazilian women, language being one of the issues isolating her and preventing her from seeking assistance, and describes the “raid” of premises as part of a police operation. This brothel was “raided” by police and the intervention “ended Luisa’s exploitation, and she was able to find support from local NGOs.”¹⁷ No mention was made of the fate of the other women in the brothel, who may or may not have had permanent status, and may or may not have been criminalized and/or deported. She was “rescued” through law enforcement initiative and that was key to her extrication from her trafficker.

In presenting a case of a woman transported from Congo to Canada for the purposes of prostitution, Perrin describes the background of the woman, who had been subjected to a horrific history of sexual abuse during the Congolese conflict. However, he notes then that:

¹⁵ Perrin, *supra* note 4 at 179.

¹⁶ Perrin, *supra* note 4 at 2.

¹⁷ Perrin, *supra* note 4 at 37.

Therese's "owner" eventually realized that he could profit more from her exploitation in North America than in Africa, so at twenty-five she was brought to Canada with two other women to be sold for sex. Ironically, a country that continues to pride itself on its role in supporting the Underground Railroad for freed slaves of African origin in the nineteenth century had, by the early twenty-first century, become an attractive destination for traffickers in slaves from the same continent.¹⁸

This passage combines dominant images of both victim and trafficker, implying that the threat of people simply "realizing" that money can be made in Canada allows them to forcibly move unwitting and helpless victims to the country. It also reaffirms the link to slavery, highlighting the victim's African descent as a particular type of vulnerability. In another case related to domestic work, he states:

She didn't realize that a modern form of servitude awaited her. Yet as soon as Chantale arrived, the children's parents seized her passport and forced her to work long hours in the home, performing many chores that had little or no relationship to babysitting. By day she was isolated in the home and toiled long hours doing every domestic chore imaginable. By night the children's father sexually assaulted her time and again. A teenager from a foreign land, she had no one to turn to for help.¹⁹

Chantale is young, her documents are removed, she was forced to toil long hours and above all, she was sexually assaulted. This sexual assault is what moves the story out of simple labour exploitation to something far more heinous. This is further evidenced in another story of exploited caregivers in Vancouver, where the author notes that their "employer forced them to work excessive hours, took away their immigration papers ... In addition, they lacked a proper place to sleep, feared for their safety, were constantly harassed by their employer, and are believed to have been sexually abused by him."²⁰ Without this additional "belief" that there may have been sexual abuse, the situation may not possess the requisite horrors to be considered trafficking.

Organized crime plays a significant role in the imagery reflected in the book as well, in keeping with the paradigmatic understanding of trafficking. Many of the stories

¹⁸ Perrin, *supra* note 4 at 6.

¹⁹ Perrin, *supra* note 4 at 170.

²⁰ Perrin, *supra* note 4 at 172.

involve organized criminals participating in trafficking and operations to infiltrate such rings. Undercover officers relay instances where traffickers advised them of their tactics, including stating of trafficked women: “you can’t let them go out”,²¹ and “you have to keep them separated so they don’t start talking among themselves about how they can get out.”²² Even where no specific evidence is put forward, associating an individual trafficker with organized crime brings further authenticity to the claim:

Emerson and Kingsbury don’t appear to be independent criminals. Police believe they are affiliated with the Ledbury Banff Crips, a violent street gang that formed in the late 1990s in and around a housing project in old Ottawa South, less than fifteen minutes by car from Parliament Hill.²³

And, with a slight of hand, Perrin loops trafficking, criminality and illegal immigration together by referring to organized crime at airports, not with any specific link to a trafficking case, but just as a point deemed to be naturally relevant to the topic:

In December 2008, the RCMP ... released an unclassified report called *Project Spawn: A Strategic Assessment of Criminal Activity and Organized Crime Infiltration at Canada’s Class 1 Airports*. The report found that organized crime was active at the country’s major airports, with criminals bribing airport employees, as well as getting their own associates hired as airport staff. Vancouver International Airport and Pearson International Airport in Toronto were singled out as entry points for organized crime groups bringing foreign nationals into Canada illegally.²⁴

The passage is sandwiched between a paragraph discussing the “modus operandi of traffickers” and one discussing the case of a woman detained as a “potential victim of human trafficking”. The juxtaposition of the quote with these two paragraphs provides an association of the three, giving the impression that there is some relationship. The woman stated that the person arranging for her to enter the country under false documentation had infiltrated the airline company, thus providing some proof for the previous paragraph. However, whether or not her agent was a member of “organized crime”, and whether or not she was deemed to be trafficked, evidence of any of the other circumstances that may have provided links between the middle

²¹ Perrin, *supra* note 4 at 2.

²² Perrin, *supra* note 4 at 2.

²³ Perrin, *supra* note 4 at 88.

²⁴ Perrin, *supra* note 4 at 34.

paragraph and the other two was lacking. It simply provides another means for instilling fear in the reader of traffickers permeating secure points in Canada, threatening Canadian citizens.

This positioning also allows Perrin to directly implicate the immigration system in Canada as promoting the kinds of trafficking incidents he describes in his book: “Canada’s relatively open immigration policy and its active support of confirmed refugees inspire pride ... However, it also allows for appalling incidents of human trafficking.”²⁵ He goes on further to elaborate:

On one hand, countries such as Canada need to prevent human trafficking and protect potential victims at the earliest stage possible. On the other hand, becoming more accommodating of smuggled migrants increases the potential appeal for traffickers and other criminals to profit from illegal entry, undermining the security and integrity of Canada’s borders.”²⁶

These statements and his previous discussions around sex “users” indicate an understanding of migration and prostitution as interlinked *causes* of trafficking, and both are thus taken to be potential sources of intervention.

It is then from this understanding that Perrin develops his list of “factors” by which “you may be able to identify a potential victim of foreign sex trafficking in Canada”.²⁷ Based on unidentified “data” on “sex trafficking victims”, the following list of characteristics is presented:

1. In Canada primarily to engage in paid sex acts
2. Providing sex acts as a means of repaying a debt of an imposed or changing amount (debt bondage)
3. Encountering conditions in Canada that do not resemble those promised
4. Forced, threatened, or pressured to continue providing paid sex acts
5. Not in possession of immigration documents or passport
6. Not free to travel where and when they want, or to leave their current situation
7. Unfamiliar with the community they reside in
8. Has limited knowledge of English or French
9. Constantly accompanied by someone who speaks for them or monitors them

²⁵ Perrin, *supra* note 4 at 30.

²⁶ Perrin, *supra* note 4 at 41.

²⁷ Perrin, *supra* note 4 at 35.

10. Shows signs of trauma, including bruising, withdrawn behaviour, depression, or fear²⁸.

Later in the book Perrin produces a similar list of “fourteen ways to spot a domestic sex trafficking victim”, urging people to act because “since the victims of domestic sex trafficking are frequently unable to take the necessary steps to escape their plight, others must take responsibility for alerting authorities to any suspicions.”²⁹ The public is requested to take control over the lives of these victims who cannot help themselves and involve the “authorities” in providing for their rescue. These fourteen “indicators” are deemed to provide the public with the necessary guidance:

1. Lack of control over schedule
2. Unexplained absences from school or work
3. Chronic running away from home
4. Reference to frequent travel ... multiple hotel room keys
5. Signs of trauma: bruising, withdrawn behavior, depression, or fear
6. Signs of branding (i.e. tattoos)
7. Lying about age and carrying false identification
8. Inconsistencies in stories or explanations ...
9. Irregular physical appearance: hungry or malnourished, inappropriately dressed
10. Troubled demeanour ...
11. Being watched or monitored by someone, or appearing to have an overly controlling and abusive “boyfriend”
12. Spending significant periods of time with a new friend or boyfriend
13. Displaying expensive gifts ... with no apparent source of income to justify them

In addition to the standard imagery derived from of anti-trafficking rhetoric internationally, in Canada the dominant paradigm has also been adapted in particular ways to encompass particularly Canadian concerns. Aboriginal women and girls have been the subject of concerns around sex work and sexual exploitation particularly since Robert Pickton was charged with the murder of sex workers from the Downtown East Side of Vancouver.³⁰ A significant number of these women were Aboriginal and much research has been done noting the overrepresentation of

²⁸ Perrin, *supra* note 4 at 35.

²⁹ Perrin, *supra* note 4 at 62.

³⁰ Neal Hall, *Serial killer Robert Pickton began killing in 1991, inquiry told*, online: Globe and Mail <<http://www.vancouversun.com/news/Serial+killer+Robert+Pickton+began+killing+1991+inquiry+told/6158134/story.html#ixzz2aAdRTUvj>>.

Aboriginal women and girls in street-based sex work, and underage sexual exploitation.³¹ In addition, several NGOs have been bringing attention to the “missing and murdered”,³² referring to the over 500 Aboriginal women and girls who have gone missing, and implicating the police for a failure to properly investigate their disappearances. Some of the missing women were located when Pickton was discovered as the perpetrator of their murders and thus a link has been consistently made between missing Aboriginal women and prostitution.

This link has served to fuel associations between Aboriginal women and girls and trafficking in persons in Canada, and as such the notion of the trafficked Aboriginal girl has become part of the broader Canadian paradigm. The disappearance of these 500 women is frequently linked to the “possibility” of trafficking, without the provision of evidence for this belief. Author Anupriya Sethi notes that:

Notwithstanding the fact that 500 Aboriginal girls and women (and maybe more) have gone missing over the past thirty years (Amnesty International, 2004), domestic trafficking has not received the attention it deserves. Instead of being contextualized in a trafficking framework, sexual exploitation of Aboriginal girls is portrayed and understood as a problem of prostitution or sex work.³³

Here the numbers of the missing women are discussed in the context of trafficking as though there was an automatic relevance. Prostitution, sexual exploitation, trafficking and the disappearance of Aboriginal women all become part of one discussion without apparent need for explanation.

Perrin also notes:

At least five hundred First Nations girls and women have gone missing in Canada over the last thirty years. No one knows at this point how many of

³¹ See for example Native Women’s Association of Canada, *Understanding NWAC’s Position on Prostitution*, online: NWAC <<http://www.nwac.ca/sites/default/files/imce/Understanding%20NWAC%27s%20Position%20on%20Prostitution%20-%20Nov%202012.pdf>>.

³² See for example Native Women’s Association of Canada, *Sisters in Spirit Research*, online: NWAC <<http://www.nwac.ca/programs/sis-research>>.

³³ Anupriya Sethi, “Domestic Sex Trafficking of Aboriginal Girls in Canada: Issues and Implications,” (2007) 3:3 *First Peoples Child and Family Rev.* 57 at 57.

these disappearances are linked to the flesh market and, perhaps, domestic sex trafficking, but some believe that the two likely are related.³⁴

And while the overrepresentation of Aboriginal women and girls in precarious sex work is now firmly established, the forms of exploitation to which Aboriginal women and girls are subjected are particular to their situations. Researchers have noted that Aboriginal women and girls involved in the sex trade in Canada have been forced into the trade by family members.³⁵ It is suggested that this stems from residual impacts of colonization and residential schools, which resulted in intergenerational cycles of violence and exploitation.³⁶ There is also evidence of young adolescent girls being sexually exploited through involvement with Aboriginal gang activity.³⁷ However, there has been little evidence of Aboriginal women being disproportionately represented in other areas of the sex trade, such as escort services or exotic dancing or being subjected to traditional pimp-prostitute relationships where they are moved in “circuits” throughout Canada and the U.S.³⁸ And yet these different forms of sex work are conflated to fuel concern regarding Aboriginal women’s exploitation:

Domestic sex trafficking of Aboriginal girls in Canada has various forms. It can be familial-based i.e. family members forcing other members to take part in sex trade.... Many key informants identified familial-based sex trafficking as poverty driven and intergenerational or cyclical resulting from the residual impact of colonization and residential schools. Another type of sex trafficking is organized (gang related) **and sophisticated in the form of escort services, massage parlors or dancers**. One key informant referred to the hidden forms of domestic trafficking such as the existence of “trick pads” in some parts of Canada.³⁹ (my emphasis)

There has been nothing linking Aboriginal women in particular to these other “sophisticated” forms of sex work and nothing in this passage states that there is such a link. However, the placement of these venues of “trafficking” in amongst statements

³⁴ Perrin, *supra* note 4 at 96.

³⁵ Sethi, *supra* note 33 at 59 and Anette Sikka, “Trafficking of Aboriginal Women and Girls in Canada” (May 2009), online: Institute of Governance <http://www.iog.ca/publications/2009_trafficking_of_aboriginal_women.pdf> at 14.

³⁶ Sethi, *supra* note 33 at 59.

³⁷ Sethi, *supra* note 33 at 59; Sikka, *supra* note 35 at 16.

³⁸ Sikka, *supra* note 59 at 21.

³⁹ Sethi, *supra* note 33 at 59.

relating to the exploitation of Aboriginal girls creates a chain of equivalence between the two, and again all forms of sex work become linked, and further linked to Aboriginal girls. Thus intergenerational abuse, familial sexual abuse, familial sexual exploitation, street-based sex work, massage, escort and dancing all become part and parcel of anti-trafficking rhetoric and policy and are linked to the exploitation of Aboriginal women and girls. In a 2010 study conducted by the International Centre for Criminal Law Reform, the author notes:

Grand Chief Ron Evans of the Assembly of Manitoba Chiefs is leading the First Nations response in Manitoba to human trafficking of First Nations women and children, with a focus on youth and women in urban centres. Youth awareness of human trafficking has been a central focus of the 2009 strategy as approximately 70-80% of the 400 children sexually exploited on the streets of Winnipeg each year are Aboriginal. ... Although the precise numbers of Aboriginals trafficked is unknown, their vulnerability as a group in Canada has been documented in numerous studies. In Winnipeg, for example, 70-80% of the children in one transition program from the sex industry are Aboriginal, while only 13.6% of Manitobans are Aboriginal. Other studies show a disproportionately high percentage of Aboriginals in the Canadian sex trade. Fifty-two percent of 100 female prostitutes in Vancouver's Downtown Eastside in 2002 were Aboriginal, compared to 1.7-7% of Vancouver's population.⁴⁰

Thus in Canada, in addition to the imagery consistent with the dominant paradigm internationally, the "victim" may also include Aboriginal women and girls, particularly those involved in the sex trade. This image then colours the interpretation of the term in Canada and discussions around trafficking can flow back and forth between issues relating to immigration, Aboriginal persons, forced labour and sexual exploitation without distinguishing between the different types of concerns relevant to each issue. In a 2005 Department of Justice-sponsored study, the author states:

The RCMP has also made a conservative estimate that approximately 600 women and children are trafficked into Canada each year for sexual exploitation alone, and at least 800 for all domestic markets (involvement in

⁴⁰ Nicole Barrett, *An Exploration of Promising Practices in Response to Human Trafficking in Canada*, (2010) prepared for International Centre for Criminal Law Reform and Criminal Justice Policy, online: <<http://www.icclr.law.ubc.ca/files/2010/An%20Exploration%20of%20Promising%20Practices%20in%20Response%20to%20Human%20Trafficking%20in%20Canada.pdf>> at 42.

drug trade, domestic work, labour for garment or other industries, etc.). Moreover, the RCMP estimates that between 1,500 and 2,200 people are trafficked from Canada into the US each year, suggesting that Canada is a source, transit and destination country (RCMP, 2005, unpublished). Globally, trafficking involves the flow of people from poor, less developed countries to Western industrialized nations. In May 2005, the International Labour Organization estimated that at any given time there are a minimum of 2.45 million people in forced labour as a result of trafficking in persons of which 270 000 are trafficked into industrialized countries. Victims of trafficking who arrive in Canada come from a wide variety of source countries, but Asian countries and those of the former Soviet Union have been identified as primary sources (RCMP, 2005, unpublished). There is growing awareness of a phenomenon involving both immigrant and Canadian individuals – particularly Aboriginals – being trafficked within the country or from Canada to the US. Again, this phenomenon is linked to poverty and to other social risk factors such as addiction or lack of social support.⁴¹

The problems associated with relaying statistics on trafficking internationally can also be seen in Canadian academia and other sources. The numbers quoted above from the RCMP were never officially released as a definitive estimate and were even formally rescinded by the agency due to the difficulty of obtaining accurate information.⁴² Yet they still continue to be used, even in academic works.

In addition, the numbers of internationally trafficked persons, Canadians trafficked abroad, domestically trafficked persons and women in the sex trade are used interchangeably when referring to “statistics” on trafficking. Perrin notes:

The first major report by the RCMP ... estimated that approximately six hundred foreign nationals are brought to Canada for sex trafficking every year, with an additional two hundred being brought for forced labour trafficking annually. Obtaining enough reliable data is difficult, and the RCMP no longer cites such estimates so as not to overstate or understate the problem. ... [T]he RCMP has disclosed that it identified over one hundred and fifty human trafficking cases between 2005 and 2009. ... This is just a glimpse of the problem. The assessment does not include cases identified by NGOs that were not reported to police. Authorities concede, “[T]he number of victims

⁴¹ Jacqueline Oxman-Martinez, Marie Lacroix and Jill Hanley, *Victims of trafficking in persons: perspectives from the Canadian community sector* (Ottawa: Department of Justice Canada, 2005) at 2.

⁴² Barrett, *supra* note 40 at 14.

reporting trafficking-related crimes significantly under-represents the actual incidence of TIP (trafficking in persons).⁴³

Which “authorities” have conceded this fact is not stated. What forms of trafficking are included in the “one hundred and fifty human trafficking cases” is also not stated. Furthermore, the types of incidents “not reported to police” are not stated. All of these statements are made about an umbrella term “trafficking”, which may include a whole host of different activities, and which may be interpreted in accordance with a reader’s particular conception of what trafficking *is*. What type of trafficking, what form of victim and what geographical locus is also not apparent in Perrin’s claim that “The Criminal Intelligence Service Canada (CISC) estimates that domestic sex traffickers earn an average of \$280,000 from *every* victim under their control.”⁴⁴ The numbers were generated from an assessment of estimated financial gains from individuals who were *convicted* of human trafficking, potentially the most egregious cases given the ability of prosecutors to convict the individuals, citing \$900 per day as “estimated revenue”. Sethi, writing on Aboriginal girls and trafficking, turns entirely to prostitution statistics as indicative: “In the absence of actual figures on domestic sex trafficking in Canada, a look at the number of Aboriginal girls in prostitution can help throw some light on the extent of the issue.”⁴⁵

However, several authors also question the overall generation of statistics in Canada, including the International Centre for Criminal Law Reform:

very few empirical studies have been conducted on this issue. Of the community based research reports focusing on sex trafficking of women, all but one are qualitative in nature – with the main data sources comprised of interviews with trafficked women, key interviewees and health and social service providers. These studies do not identify the nature of the problem or victims in a comprehensive manner.⁴⁶

⁴³ Perrin, *supra* note 4 at 29.

⁴⁴ Perrin, *supra* note 4 at 111.

⁴⁵ Sethi, *supra* note 33 at 59.

⁴⁶ Barrett, *supra* note 40 at 9.

Other authors noted of participants in their study that: “In fact, the definitions [the participants] provided largely depended on their organizations’ particular needs or political stance.”⁴⁷

And many have expressed concern over the ways in which complex situations are reduced in order to classify them as “trafficking”. Timoshinka and McDonald discuss this reduction in terms of definitions of the term, when addressing findings from their meta-synthesis of trafficking studies: “No existing definition of human or sex trafficking could accurately capture the nuanced complexity and fluidity of the sex workers’ situations.”⁴⁸ They acknowledge the different histories and circumstances of women migrants, noting that “the involvement of migrants in the local sex trade is not limited to those who are classified as trafficked or smuggled: many new landed immigrants – women primarily – turn to sex work due to the lack of viable economic alternatives, often exacerbated by family breakdown”.⁴⁹ Thus speaking automatically of “trafficking” in cases of migrant sex work ignores the variety of contexts from which individuals in the sex trade come.

In the findings from a 2011 Calgary study, the author quotes a law enforcement officer who stated that “if you look at human trafficking, by anyone’s definition...there’s probably about 25 things that could, sort of, fit into that human trafficking definition.”⁵⁰ Authors in this study also critique aspects of the dominant imagery around trafficking, noting that

FGD⁵¹ participants indicated the sensationalization of the issue of human trafficking creates challenges for appropriately identifying victims of

⁴⁷ Mélanie M. Gagnon and Catherine Gauvreau, *Strategic Action Plan for the Protection of Victims of Child Trafficking in Quebec Part I*, (2007) prepared for International Bureau for Children’s Rights, online: <http://www.ibcr.org/editor/assets/thematic_report/3/2007_trafficking_report_en.pdf> at 31.

⁴⁸ Timoshkina, Natalya & Lynn McDonald, *Sex Trafficking of Women to Canada: Results from a Qualitative Metasynthesis of Empirical Research*, (2011) online: CCRweb <http://ccrweb.ca/files/sex_trafficking_timoshkina_2011.pdf> at slide 25

⁴⁹ Natalya Timoshkina, Lynn McDonald, *Building Partnerships for Service Provision to Migrant Sex Workers*, (2009) prepared for the Wellesley Institute, online: <<http://www.wellesleyinstitute.com/files/Building%20Partnerships%20for%20Service%20Provision%20to%20Migrant%20Sex%20Workers.pdf>> at 8.

⁵⁰ Lara Quarterman, Julie Kaye and Professor John Winterdyk, *Human Trafficking in Calgary: Informing a Localized Response*, (2011) prepared for Action Coalition on Human Trafficking (ACT) Alberta, online: CCR Web <http://www.actalberta.org/uploads/070712_SP8J95PMb5nXDTQ_181714.pdf> at 17.

⁵¹ Focus Group Discussion.

trafficking. Specifically, the imagery that has been presented by media and some NGO awareness raising initiatives, although potentially effective in raising public attention to the issue, has done little to develop appropriate strategies to address the rights and needs of trafficked individuals. Conversely, these campaigns reinforce the idea that human trafficking is little more than the sexual exploitation of women and girls who are forcibly confined in brothels.⁵²

These authors are critical of the ways in which agencies may interpret trafficking in persons and how those interpretations may affect identification of victims. However, the solutions proposed still advocate for continued use of the umbrella term “trafficking” and in many ways continue to uphold the dominant paradigm. In 2011, Timoshinka proposes the creation of a new definition of human trafficking recognizing inequalities between nations, economic, gender, class and ethno-racial factors as push factors for migration, and recognizing that “trafficked women are subjected to multilayered and multifaceted discrimination ... which includes mistreatment by immigration, police, and other authorities.”⁵³ Training for law enforcement on “identification of, and competent responses to, cases of sex trafficking”⁵⁴ is proposed as part of a remedy to the current failings in the anti-trafficking system. The authors of the Calgary study propose “a comprehensive understanding of human trafficking across government, nongovernment and law enforcement sectors ... [and] the importance of employing a victim-centred definition in responding to human trafficking.”⁵⁵ Without this, the authors claim, there is the possibility of overlooking individuals who have been trafficked in ways that do not meet the sensationalized images provided by media.⁵⁶

The focus of many of these authors’ solutions is on re-tooling the term and expanding services for human trafficking. They do not critique the binary between trafficked and non-trafficked nor do they acknowledge that the creation of this binary may in itself be contributing to the lack of available services for persons they deem to be

⁵² Quarterman, *supra* note 50 at 24.

⁵³ Timoshinka, *Sex Trafficking of Women to Canada*, *supra* note 48 at slide 32.

⁵⁴ Timoshinka, *Sex Trafficking of Women to Canada*, *supra* note 48 at slide 33.

⁵⁵ Timoshinka, *Sex Trafficking of Women to Canada*, *supra* note 48 at slide 24.

⁵⁶ Timoshinka, *Sex Trafficking of Women to Canada*, *supra* note 48 at slide 24.

exploited. Gagnon and Gauvreau's report on child trafficking does state that the majority of people with which the authors spoke "mentioned the importance of using existing tools that address related phenomena (street gangs, sexual assault, prostitution etc.) and therefore not develop new programs".⁵⁷ However, the authors state next that, "Furthermore, some respondents discussed the importance of developing a screening instrument that would enable them to make an evaluation and to quickly and efficiently take care of children who are at risk of ending up in a trafficking environment."⁵⁸ Thus the goal of identifying persons who are at risk of ending up "trafficked" is still paramount. The individualized and sector-specific tools available are still seen as instruments to combat "trafficking", thus perpetuating the binary of trafficked vs. not-trafficked, and placing "trafficked" as a priority concern. Thus as illustrated in Figure B, this orientation towards trafficking in the academic literature both affects and is affected by conceptions of the dominant paradigm in Canada, interacting with state actors, law enforcement and other players on the anti-trafficking stage to determine how trafficking is conceptualized. Other authors more critical of the anti-trafficking movement are discussed later in this chapter.

ii. State Actors

On its website,⁵⁹ the Department of Justice Canada notes these international instruments to which Canada is a party as being relevant to work on trafficking:

- UN Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children
- The Optional Protocol to the Convention on the Rights of the Child (CRC) on the Sale of Children, Child Prostitution, and Child Pornography⁶⁰
- ILO Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst forms of Child Labor ⁶¹

⁵⁷ Gagnon, *supra* note 47 at 42.

⁵⁸ Gagnon, *supra* note 47 at 42.

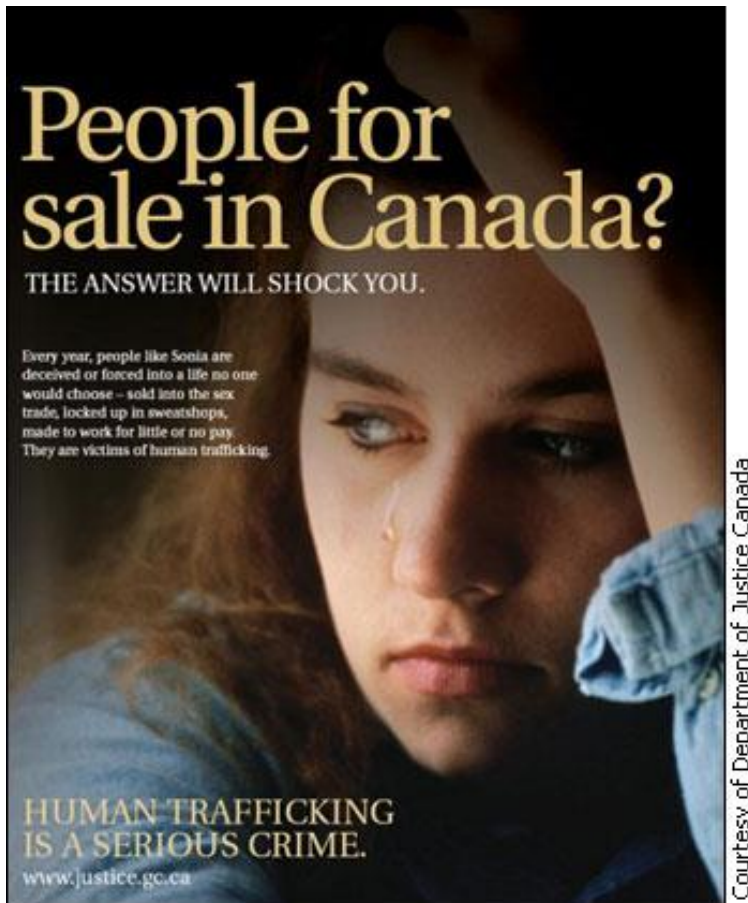
⁵⁹ Department of Justice Canada, *Human Trafficking, Legislation*, online: DOJ <<http://justice.gc.ca/eng/fs-sv/tp/legis-loi.html>>.

⁶⁰ UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 25 May 2000, A/RES/54/263.

⁶¹ *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor* (ILO No. 182), 2133 U.N.T.S. 161, entered into force Nov. 19, 2000.

- Rome Statute of the International Criminal Court⁶²

This list focuses on criminality, purchase and sale, and children. No labour treaties are mentioned relating to adults, no migration conventions and nothing relating to economic development. The trafficking paradigm is set up via reference to these particular documents and the omission of others. The Department of Justice also reflects this imagery in its visual campaigns⁶³:



In Canada's *National Action Plan* in 2012 we see further reflections of the dominant paradigm in the authors' assumptions about the nature of the activity: "This crime is taking place in Canada, where human trafficking for the purpose of sexual

⁶² UN General Assembly, *Rome Statute of the International Criminal Court*, 17 July 1998, A/CONF. 183/9.

⁶³ Capital News online, *Stopping Traffic*, online: <<http://www.capitalnews.ca/index.php/news/stopping-traffic>>

exploitation is, to date, the most common manifestation of this crime and where the vast majority of the victims are Canadian women and children.”⁶⁴

Victim imagery is further supported through descriptions of “difficulties” authorities face in dealing with foreign victims:

Obtaining cooperation from foreign victims has been particularly challenging for law enforcement. Foreign victims who were trafficked are usually in the country alone, without family or a support system, and may be obstructed by language barriers. Also, they may not always see themselves as victims of human trafficking. In most cases, they are skeptical of police and see very little value or nothing to gain from cooperating with police.⁶⁵

Victims are described as alone and facing language difficulties, these being the reasons they may not “cooperate” with law enforcement. Their “skepticism” is noted but not analysed – the wording creates an assumption that victims’ failure to see value in cooperating with law enforcement is a consequence of their having been trafficked, rather than a genuine recognition that “cooperation” would likely not be of benefit to them.

A Status of Women Canada report from 2007 declares that although the committee recognized other forms of trafficking, it “felt that it was necessary to focus on ... sexual exploitation since witnesses noted that 92% of victims are trafficked for that purpose.”⁶⁶ This figure is used earlier to describe worldwide statistics: “Between 700,000 and 4 million people a year are affected by trafficking in persons. ... 92% of victims are trafficked for the purpose of sexual exploitation”.⁶⁷ The first figure (700,000 to 4 million) is referenced, but the figure of 92% is not. In any case, the “wholesale trafficking of women and children into the worldwide sex trade” is found to be a “human rights disaster of epic proportions”⁶⁸ and thus “the Committee’s

⁶⁴ Government of Canada, *National Action Plan to Combat Human Trafficking*, (2012) online: Public Safety Canada <<http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ntnl-ctn-pln-cmbt/index-eng.aspx>> at 4.

⁶⁵ National Action Plan, *supra* note 64 at 5.

⁶⁶ “Turning Outrage into Action to Address Trafficking for the Purpose of Sexual Exploitation in Canada”, Report of the Standing Committee on the Status of Women, February 2007, 39th Parliament, 1st Session, Canada at 1.

⁶⁷ Outrage, *supra* note 66 at 1.

⁶⁸ Victor Malarek, quoted in Outrage, *supra* note 66 at 1.

attention was drawn to the urgency of the situation, an urgency which requires that Canada do more to prevent the victimization of innocent women and children.”⁶⁹ The agenda behind the research in this report is clear, with the committee stating that “prostitution and pornography are forms of sexual exploitation, wherever they occur”,⁷⁰ and that “prostitution is a form of violence and a violation of human rights. The Committee feels that the prostitute’s consent is irrelevant, because you can never consent to sexual exploitation.”⁷¹ Again we see very clearly the image of the innocent, young victim of sex trafficking who is helpless and potentially unable to recognize her own exploitation. Images of the stereotypical victim are evident throughout the report, and it includes the requisite reference to violations against Aboriginal women:

According to the Department of Justice and other witnesses, Aboriginal girls and women are at greater risk of becoming victims of trafficking within and outside Canada. Erin Wolski from the Native Women’s Association of Canada (NWAC) supported that conclusion, noting that “as more Aboriginal women go missing and a huge majority of the cases are not being investigated...trafficking must be looked at as a possible source for information.”⁷²

In addition to standing governmental departments, individual parliamentarians and parties have weighed in on the trafficking issue, some making sex trafficking a priority concern during their tenure. M.P. Joy Smith from Winnipeg has been at the forefront of the anti-trafficking movement in Parliament, introducing bills on the topic,⁷³ contributing to programming,⁷⁴ and producing an informational website.⁷⁵ The website contains several images that clearly reflect the stereotypical image of the innocent victim:

⁶⁹ Outrage, *supra* note 66 at 1.

⁷⁰ Outrage, *supra* note 66 at 3.

⁷¹ Outrage, *supra* note 66 at 5.

⁷² Outrage, *supra* note 66 at 9.

⁷³ Joy Smith, *Speech [Joy Smith] - Oct 25 2011 - Bill C-310 (trafficking in persons)*, online: <<http://vimeo.com/32806544>>

⁷⁴ See for example Joy Smith, *Human Trafficking, Connecting the Dots*, online: Joy Smith, MP <http://temp.endmoderndayslavery.ca/wp-content/uploads/2010/09/FINAL-Proposal_for_a_National_Action_Plan_to_Combat_Human_Trafficking-Sept_2010.pdf>.

⁷⁵ See for example Joy Smith, *Human Trafficking Resource CD & Kit*, online: Joy Smith, MP <http://www.joysmith.ca/main.asp?fxoid=FXMenu,12&cat_ID=27&sub_ID=111>.

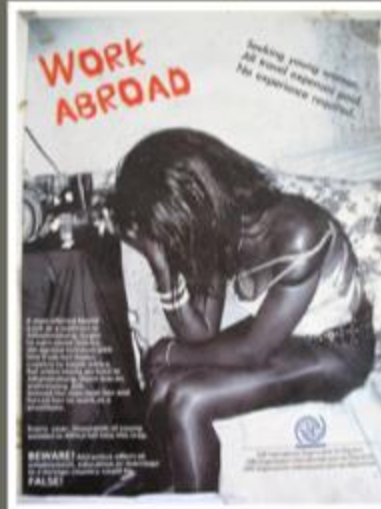
Human Trafficking - Basics



- 27 million slaves exist in the world today.
- Estimated 2 million people trafficked each year.
- UNICEF estimates over 1 million children are sold into slavery each year.
- 80% of trafficked victims are women and over 50% are children.
- Majority of victims are aged 12-16 but can be as young as 5 years old.
- Annual revenues of the slave trade reach 32 billion and are quickly surpassing drug and weapons as the biggest criminal enterprise.
- Canada is a transit and destination country but is increasingly becoming a source country.
- NGO's estimate 12,000-15,000 people are trafficked to and through Canada each year.

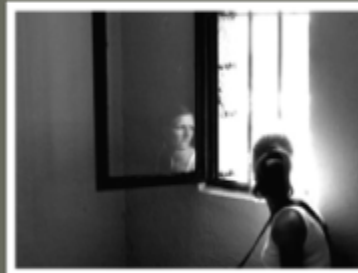
Human trafficking: Worldwide and on the rise

- ② **United Kingdom** - Up to 1,420 women are trafficked into the UK as sex slaves per year.
- ② **Netherlands** - In Amsterdam, 80% of prostitutes are foreigners, and 70% have no immigration papers, suggesting that they were trafficked.



Modern Day Slavery in Canada

- ② The RCMP estimates the number of trafficked victims per year is 800 however NGO's estimate the number of trafficked men, women and children to be much higher.
- ② Since 2006, the annual U.S. Trafficking in Persons report has recognized Canada as a source, transit, and destination country for men, women, and children trafficked for the purposes of commercial sexual exploitation and forced labour.



The website also contains a list, similar to those produced by Benjamin Perrin, on “How to Recognize a Victim”:



M.P. Smith, as discussed in Chapter Three, has introduced several bills into Parliament and has given many speeches on the topic. She is also frequently quoted in the media, in governmental reports and in Parliament as a champion of human rights for trafficked persons. Given this notoriety, as well as her direct involvement in the creation of laws around trafficking, the images she evokes when addressing the topic are of paramount importance to the interpretation of the phenomenon in Canada.

Reflections of the dominant paradigm also appear in various state actors’ depictions of the trafficker. Organized crime plays a significant role in many descriptions, as do terms evoking a sense of threat from “foreign” sources that are difficult to detect – thus could be anywhere. We saw this in Status of Women Canada’s quotation from Victor Malarek, above, warning the public that traffickers are committing these crimes in “epic proportions”. It is also evident in this quote citing Yvon Dandurand, a law enforcement expert on the issue:

The fundamental difficulty in gathering reliable and accurate data lies in the clandestine nature of trafficking. As Mr. Dandurand told the Committee, “[W]e don’t have really good information in Canada, or systematic information, on the extent of the problem...Organized crime does not publish annual reports, so it’s quite difficult to get a good sense of what it is.”⁷⁶

We also see it in the *National Action Plan’s* depiction of traffickers:

Organized criminal networks, as well as individuals, perpetrate this crime, operating within Canada’s borders and internationally. Traffickers reap large profits while robbing victims of their freedom, dignity and human potential at great cost to the individual and society at large. Traffickers control their victims in various ways such as taking away their identity documents and passports, sexual abuse, threats, intimidation, physical violence, and isolation.⁷⁷

And further, in Citizenship and Immigration Canada’s Operation Manual for Inland Processing, on the topic of Temporary Residency Permits for trafficked victims:

Traffickers use a number of methods to control their victims including the confiscation of their identification papers, monitoring and surveillance, restraint, sexual assault, and violence or threats of violence to them or to their family members. TIP may occur across or within borders; it often involves extensive organized crime networks and violates the basic human rights of its victims. Traffickers take advantage of desperate people looking for work to support themselves and their families. Traffickers prosper in poor countries and countries in transition where people may accept jobs in marginalized sectors with little or no respect for labour standards. In source countries, traffickers often lure victims through false promises of employment as domestic workers, factory and farm workers, nannies, models or exotic dancers and then coerce them into the sex trade or forced labour.⁷⁸

These depictions are taken to the extreme in some cases, creating chains of equivalence between trafficking, illegal migration, organized crime and victimization. “Trafficking” is thus used to support more stringent border security measures based on these associations. We see this clearly in the federal Conservative Party campaign ad from 2011.⁷⁹ In the ad, the narrator first states that “Canada welcomes those who

⁷⁶ Outrage, *supra* note 66 at 23.

⁷⁷ National Action Plan, *supra* note 64 at 4.

⁷⁸ Citizenship and Immigration Canada, *Inland Processing: Temporary Residency Permits*, online: CIC <<http://www.cic.gc.ca/english/resources/manuals/ip/ip01-eng.pdf>> at 24

⁷⁹ *Human Smuggling*, online: youtube <<http://www.youtube.com/watch?v=dmN8BpD09AQ>>.

want to build a better future.” The next screen, at second 3 of the ad depicts the Sun Sea,⁸⁰ a boat that landed off the coast of Vancouver in 2010 from Sri Lanka carrying 492 Tamil migrants. There were some concerns with respect to potentially trafficked persons on the boat,⁸¹ but primarily the controversy surrounded the passengers’ claims for refugee status. Yet the caption, set against a depiction of a boat carrying hundreds of passengers, reads “Human Traffickers Set to Launch on Canada”:



During this screen the narrator states: “But our openness doesn’t extend to criminals who target Canadian generosity.” Thus criminality, trafficking and illegal migration become instantly fused and brought as evidence in support of border control to protect the Canadian citizenry. The rest of the narration makes this point clear:

Stephen Harper has a plan to crack down on human smugglers and bogus claimants who jump the queue. And Michael Ignatieff and his coalition partners – they oppose temporarily detaining illegal migrants. They even

⁸⁰ Tamil migrant ship smuggling probe leads to more charges, online: youtube
<<http://www.cbc.ca/news/canada/british-columbia/story/2012/05/15/bc-mv-sun-sea-tamil-charges.html>>.

⁸¹ Stewart Bell, *Sun Sea's Canadian Links*, online: transcurrents
<http://transcurrents.com/tc/2011/03/on_the_smugglers_trail_sun_sea.html>.

oppose tougher sentences for human smugglers. Ignatieff and his reckless coalition – weak on border security, dangerously soft on crime.

The Canada Border Services Agency states that it “helps fight this criminal activity by detecting and preventing trafficking operations *and associated activities*, and the transport of victims to Canada.”⁸² (my emphasis) It also “has a network of migration integrity officers who work overseas with airline security and local authorities to prevent migrant smuggling and trafficking by identifying individuals who may be involved in trafficking activities *before they arrive in Canada*.”⁸³ (my emphasis) The Status of Women report, quoting Yvon Dandurand, also noted that “while it may be desirable to establish a means through which victims of trafficking can access permanent resident status in Canada, authorities would need to be vigilant in its application.” This vigilance is based on a perceived threat of floodgates opening to Canada by our becoming too lenient on queue-jumpers:

A mechanism has to be found to enable us to know whether such people are actually victims or not. If we open the doors wide and say that anyone who declares herself a victim is welcome in Canada, there will be a flood of people wanting to immigrate illegally to Canada who will declare themselves victims. We have to be careful because it could actually work against victims.⁸⁴

With that being said, there are several government agencies and reports that recognize the complexities of the issue and do not overgeneralize or clearly support the dominant imagery. Even within the Status of Women report, there were some aspects of the issue that were elaborated on by academics trying to draw attention to different perspectives:

Both Prof. Jeffrey and Ms. [Chantal] Tie emphasized that women already face difficulties in migrating legitimately to Canada. As Ms. Tie pointed out, [M]any women don’t qualify under the skilled worker point system, particularly if they come from countries where women are significantly disadvantaged. They are not going to have the higher education; they are not going to have the skills to qualify.

⁸² Canada Border Services Agency, *Fact Sheet*, online: <<http://www.cbsa-asfc.gc.ca/media/facts-faits/072-eng.html>>.

⁸³ Canada Border Services Agency, *Fact Sheet*, *ibid*.

⁸⁴ Outrage, *supra* note 66 at 40.

Prof. Jeffrey also pointed to evidence that trafficking decreases when women are able to migrate legally and independently. This was supported by Armand Pereira:

[W]e have a promotion of illegal migration, and as a result, we have a promotion of trafficking, because without illegal migration, you don't have a place for trafficking. So we have to close the circle by looking at these issues together. This is why it is important to focus on trafficking from the perspective of labour markets, migration, and immigration laws, legal and illegal — legal immigration laws and illegal migration practices.⁸⁵

There are also a number of government websites that include links to various authors and a variety of perspectives on the topic.⁸⁶ And at least one prominent Department of Justice expert conducts trainings for criminal justice officials using rigorous legal analyses without incorporating stereotypical “trafficking” language or imagery.⁸⁷ His training program emphasizes that the activities currently being housed under “trafficking” rubric were formerly prosecuted via other *Criminal Code* offences, and that other charges may still be warranted depending on evidence and circumstances. Given particular circumstances and given that the elements of a trafficking offence may be difficult to prove, he notes that using the “many tools in our arsenal” provides a better chance of prosecuting than simply focusing on the trafficking charge.⁸⁸

However, what we see more regularly and more prominently, illustrated in Figure B above, is parliamentarians, leaders, and government publications making bold allegations supporting the dominant paradigm and the imagery associated with it, and in turn influencing it. This sets a tone both nationally and internationally with respect to Canada's interpretation of the phenomenon of trafficking and proposed solutions.

iii. Law Enforcement

⁸⁵ Outrage, *supra* note 66 at 19.

⁸⁶ For example see Government of Canada, House Government Bill C-49 Reading List: online: <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?billId=1823906&Mode=1&View=10&Language=E;>>.

⁸⁷ Presentation by Matthew Taylor, *Wahkotowin: A Knowledge Exchange Forum on Trafficking in Persons and Sexual Exploitation of Aboriginal Peoples*, March 5, 2012, Ottawa, Canada.

⁸⁸ Presentation by Matthew Taylor, *ibid*.

Law enforcement officers have been shown, in some cases, to have a less sensationalized understanding of trafficking, having to necessarily deal with the complexities of individuals' situations. Bruckert and Parent note that

unlike the majority of Canadians whose understanding of criminal justice issues is greatly influenced by media accounts (Roberts, 1995), the media appear to have little impact on the perceptions of either criminal justice professionals or advocates in the field. ... Although the criminal justice participants were opposed to 'queue jumping', many were nonetheless empathetic to the situation of undocumented migrants regardless of their labour location and sensitive to the economic and cultural dimensions that encourage emigration and condition the alien smuggling business.⁸⁹

Key informant interviews conducted with police officers by this author also indicated a general desire to provide assistance to individuals facing exploitative circumstances. In addition, similarly to the idea expressed by individual Department of Justice officials providing training on trafficking issues,⁹⁰ the categorization of individuals as trafficked versus not trafficked was sometimes cited as a hindrance to prosecution, given the difficulty in establishing the elements of that offence as opposed to other related offences. One law enforcement officer interviewed for purposes of this study indicated that it is not worth "squashing" something into a trafficking offence. The informant noted that if someone is committing criminal acts it is just better to prosecute them for something than to try to set a precedent and lose.

However, law enforcement agencies in their public information campaigns frequently ignore such complexities and the imagery put forward publicly clearly reflects the dominant paradigm of trafficking and trafficking victims. And while these media campaigns may not necessarily influence the ways in which individual law enforcement officers perceive trafficking, some of the same images are used as tools

⁸⁹ Christine Bruckert & Colette Parent, *Organized Crime and Human Trafficking in Canada: Tracing Perceptions and Discourses*, (Ottawa: Research and Evaluation Branch, Community, Contract and Aboriginal Policing Services Directorate, Royal Canadian Mounted Police, 2004) at 38.

⁹⁰ See *supra* note 87.

and in training programs designed to specifically influence police work and other criminal justice activities.

For example, as part of the National Human Trafficking workshop developed for law enforcement and Department of Justice employees a Human Trafficking Workbook was developed by the RCMP Human Trafficking National Coordination Centre in 2008. This workbook includes a Powerpoint presentation outlining a list of factors to look for when identifying a victim:

General Indicators of Victims

- Being escorted/watched – **evidence of control**
- Not speaking on own behalf
- No passport or other forms of identification or documentation
- Limited knowledge about how to get around in a community
- Show signs of fear or intimidation⁹¹

Physical Indicators of Victims

- Signs of injuries or torture (bruises, black eyes, cigarette burns)
- Branding or tattooing indicating ownership
- Signs of malnourishment
- Body language/facial expressions (**fear, intimidation**)⁹²

The problem with this approach is that it overemphasizes the physical indicators such as displays of meekness and vulnerability by the trafficked “victim”. When these indicators are applied to individuals who may appear to have some agency (they are familiar with the language, they are provided with food to eat) or show resilience in any way, they thus fall outside the category of “victim” as generated by this checklist. Given that a significant fear of individuals potentially classed as “trafficked” is deportation, rather than direct, palpable fear of the person who is facilitating their exploitative situation, their concerns thus remain unrecognized and their exploitation ignored.

⁹¹ Provided during conversation with RCMP Human Trafficking National Coordination Centre, September 2008. RCMP Human Trafficking National Coordination Centre, *National Human Trafficking Workshop Workbook*, at 4: hard copy on file with author.

⁹² Human Trafficking Workbook, *ibid* at 4.

The York Regional Police and British Columbia RCMP also encourage the public to “help identify victims” through use of similar lists, with a description of characteristics closely reflecting the stereotypical image of the victim. From York Regional Police:

You can help put an end to human trafficking. Help identify victims by knowing the signs. Victims may:

- be unable to present identity documents
- have no cell phone
- lack access to their own money and resources
- work excessively long hours with no or few days off
- not go out unaccompanied
- be branded with tattoos of the trafficker’s name
- exhibit signs of chronic fear, guilt, shame, distrust of authority and the inability to make decisions
- have bruises and other signs of physical abuse⁹³

What is human trafficking?

Victims are alone, isolated and are trapped in a life of exploitation. They have no means to return home or any means to survive. The victim remains dependent on the trafficker for survival and believes the only way she can make money is through prostitution.

In an emergency call 9-1-1. To reach a member of the Vice Team directly, contact: 905-758-5581 or email vice@yrp.ca or send a message via Blackberry Messenger to PIN: 22D5C8CD. All calls confidential.

And the RCMP has produced a video specifically designed to help the public identify trafficked victims, depicting many of the characteristics of the dominant paradigm of trafficking. These include distinct references to organized criminality, sexual slavery, sale and purchase, youthful innocence and physical brutality:⁹⁴

⁹³York Regional Police, *Human Trafficking*, online: YRP <<http://www.yrp.ca/ht.aspx>>.

⁹⁴RCMP, *Human Trafficking is a Crime*, online: RCMP <<http://www.rcmp-grc.gc.ca/ht-tp/video-trafficking-traite-eng.htm>>.

Human Trafficking is a Crime



Human Trafficking is a Crime



[Narration: “Every year in Canada, men, women and children are bought and sold...generating millions of dollars for criminal organizations.”]

Human Trafficking is a Crime



[Narration: Vulnerable people are exploited for the sex trade]

Human Trafficking is a Crime



[Narration: forced labour]

Human Trafficking is a Crime



[Narration: child exploitation]

Experts speaking on behalf of law enforcement and descriptions contained within law enforcement-produced reports also reflect a stereotypical understanding of trafficking. The quote from Yvon Dandurand, above, was one such example, but there are several others we see in media and in publications from law enforcement that speak authoritatively about characteristics and statistics related to trafficking, with little attention paid to the ways in which the methodology of their study produced particular types of results. In 2011, a British Columbia news agency reported on an interview about human trafficking with a local police chief by stating:

Rich said he most became aware of the issue during his two years as a vice squad detective with the Vancouver Police Department. He said he interviewed about 100 young women ***who were working in the sex trade and had come from traumatic backgrounds*** that made them more susceptible. "In 90 per cent of the cases ... someone in their past had sexually abused them, damaged their self-perception and made them more vulnerable."⁹⁵ (my emphasis)

⁹⁵ Vikki Hopes, *Abbotsford police chief part of strategy on human trafficking*, (2011) *BC Local News*, online: BC Local News <<http://www.bclocalnews.com/news/114299814.html>>.

The Criminal Intelligence Service of Canada produced a “Threat Assessment” in 2010 on trafficking and organized crime in Canada, stating

- Human smuggling is often misinterpreted as human trafficking, as both may involve the movement of people across a border; however, they are vastly different offences.
- Police investigations have shown that victims of human trafficking are primarily found in some avenue of the sex trade in Canada.
- Human trafficking investigations have identified domestic workers who were illegally transported and subsequently exploited by their employers. Law enforcement found that these domestic workers were ultimately trafficked into Canada, receiving between \$0 and \$600 per month for their work.⁹⁶

The fact that “most data retained for analysis was gathered from law enforcement files that contained elements of human trafficking even if the cases did not result in charges or convictions of human trafficking”⁹⁷ was not discussed. That human trafficking victims are “primarily found in some avenue of the sex trade” is unsurprising given the focus of the media, law enforcement and other state actors on trafficking for the purposes of sexual exploitation. Law enforcement units devoted to human trafficking are often housed within vice squads or those dealing with sexual exploitation.⁹⁸ But this data is recounted without reference to these limitations and as such reinforces associations between sex work, trafficking, and gendered work.

“Traffickers” are treated similarly in law enforcement-produced media, with descriptions including references to organized crime, references to trafficking being “growing” and thus instilling a fear of unknown quantities, and talk of massive global profits for foreign based criminals. The RCMP’s human trafficking website asks:

Who are the traffickers?

⁹⁶ RCMP Criminal Intelligence, *Human Trafficking in Canada: A Threat Assessment*, (2010) executive summary online: <<http://www.rcmp-grc.gc.ca/pubs/ht-tp/hta-tpem-eng.htm>> at 32.

⁹⁷ RCMP, *Threat Assessment*, *ibid* at 5.

⁹⁸ See for example Peel Regional Police Vice Unit: <https://www.peelpolice.ca/en/aboutus/viceunit.asp> , Eva Hoare, “Halifax Police Target Sex Slavery as part of Nationwide operation”, online: Herald News <http://thechronicleherald.ca/novascotia/1182721-halifax-police-target-sex-slavery-as-part-of-nationwide-operation?from=most_read&most_read=1182721>, and author’s own interviews indicate Vancouver, Winnipeg and other forces place the task of investigating human trafficking within vice and/or sexual exploitation units.

The involvement of transnational organized crime groups in human trafficking is part of a growing global trend. Human trafficking generates huge profits for criminal organizations, which often have operations extending from the source to the destination countries. These transnational crime networks also utilize smaller, decentralized criminal groups that may specialize in recruiting, transporting or harbouring victims. Human trafficking is also known to be perpetrated by small family criminal groups who control the entire operation. Individuals working independently may also traffic persons for profit/personal gain (which can include free labour).⁹⁹

While noting that smaller “family criminal groups” and “individuals working independently” may be involved, the ways in which the paragraph is organized places “transnational organized crime groups” as the primary perpetrators of trafficking and indicates that it is this form of trafficking that is part of a “growing global trend.”

Canada’s Criminal Intelligence Service also speaks of “organized crime networks” in the context of “domestic trafficking”. In its 2008 *Strategic Intelligence Brief*, it notes that control over trafficking victims can be accomplished through physical or emotional forms of coercion, also commenting that some “criminal networks are also known to use pregnancy as a tool to control females”¹⁰⁰ and that “[o]rganized crime networks tend to withhold personal items and documents, in addition to providing the victims with false identification.”¹⁰¹ In this case, the reference to documents is to provision of false identification allowing for underage girls to work as exotic dancers, not the confiscation of passports, but the similarity in the language around phrases such as “document retention” and “organized crime” and “exploitation” end up conflating very different situations. They refer to several types of movement of migrants, organized crime at a sophisticated international level as well as individual “pimps” controlling young girls, and the different situations in which both migrants and residents may find themselves in relation to work in the sex industry. These lead

⁹⁹ RCMP, *Frequently Asked Questions on Human Trafficking*, online: RCMP <<http://www.rcmp-grc.gc.ca/ht-tp/q-a-trafficking-traite-eng.htm>>.

¹⁰⁰ Criminal Intelligence Service of Canada, *Strategic Intelligence Brief*, “Organized Crime and Domestic Trafficking in Persons in Canada” (2008) online: CSIC <http://www.cisc.gc.ca/products_services/domestic_trafficking_persons/document/sib_web_en.pdf> at 3.

¹⁰¹ CISC, *Threat Assessment*, *supra* note 96 at 4.

to the umbrella term “trafficking” being used to identify many different situations and a conflation of the statistics and descriptions relevant to each type.

Statistics and descriptions are further legitimized through references made to them in the media and in Parliamentary speeches, as evidenced throughout this chapter and illustrated in Figure B above. Thus the imagery present in the data collected on law enforcement above can be seen to influence language used in Parliament and in the media, thereby shaping the content and operation of the dominant paradigm.

iv. Non-Governmental Organizations (NGOs)

NGOs at the domestic level in Canada appear to generally mirror the NGOs operating internationally in their approach to anti-trafficking work. Both in their understandings of the issue and their purported approach to combating trafficking, many Canadian NGOs participate in the discourse that supports the dominant paradigm’s existence in Canada. These NGOs are also points of service for migrants or sex workers or both and thus their perception of what trafficking is will necessarily affect their mode of working with those they think may or may not be trafficked.

Data gathered through interviews with NGOs on the topic reveal the ways in which the dominant paradigm is reflected in some NGO members’ understanding of trafficking. For example, in 2004, Jacqueline Martinez and Jill Hanley conducted a study with frontline service providers in Vancouver, Winnipeg, Toronto and Montreal. When asked to define trafficking, some of the respondents in that study who worked directly with sex workers problematized the term “trafficking”, but most indicated an understanding consistent with the dominant paradigm.¹⁰² For example, different NGO representatives described trafficking as follows:

Trafficking is the entire process of transport, sale, purchase of persons, in situations extremely oppressive and exploitive, and in some cases it's comparable to slavery.

¹⁰² This data was gathered in support of a project by Jacqueline Martinez and Jill Hanley, and is being used as secondary data for the purposes of this work. Ethics approval was granted by the University of Ottawa for secondary use of this data, see Annex B. The report resulting from the research and the research methodology can be found at: <http://www.justice.gc.ca/eng/rp-pr/cj-jp/tp/rr06_3/rr06_3.pdf>.

And the other type of trafficking is the slavery type. So they go into slavery, like the bondage type. These people, they have no services, family businesses just wiped out of the family. They don't hear from them. It happens sometimes they succeed to escape with the help of a third party. They do, very rarely, return back home. But sometimes they just disappear from the village, the country.

The practice of selling children who end up in brothels or on the streets is still very prevalent. Unfortunately, many of these children do come from countries that are not privileged, with economic problems, that might be threatened by war, that are living in a state of violence. ... You are also looking, in Canada, at aboriginal women and girls. But you are also looking at women from other communities and most of them, they are visibly racialised girls and women.

From my understanding, people refer to human trafficking to people who come to the country illegally and also being use by some group to do something illegal, such as a group of people who come to Canada by means like a boat or airplane, using false passports. Or a legal passport but using other people's name or something like that to come to do something like working in a massage parlour or underground like some services that are not legal in that country.

I also know that can refer to some instances like in 1999, some boats came to Canada arranged by snakeheads. That can be referred as human trafficking, too.

The way it's coming across my desk, it's pretty much largely exploitation around sex trade or bondage. Either kidnapping, or even in the case of Bountiful, more like a commune, where girls are grown from the time they are born, being on the track of international trafficking scheme that's run by leaders of that community.

See, I've never actually heard that term used too often. Usually, we call them sex trade workers. Human trafficking, I assume, would be the selling of men or women or children, even, for the purposes of some form of sexual work, whether that would be in prostitution or pornography. I'm not quite sure to what extent you're using that term.

While these statements were particularly chosen to illustrate reflections of the dominant paradigm and not to be a representative sample, it is clear that several images and associations consistent with the dominant paradigm are present in the Canadian NGO community's understanding of trafficking. Kidnapping, youth, innocence, and race are significant in these quotes, as well as a strong focus on prostitution. Organized crime, illegal movement across borders and illegal work also feature. In addition, the understandings of trafficking include an extremely wide

variety of situations, ranging from pornography to prostitution to massage parlours and even to life in communes. Given that this data informs research on the issue, and given that the NGO community plays a role in providing services for victims and generating publicity on trafficking, such statements suggest both a reflection of the dominant paradigm and a support or re-creation of it through this particular set of social actors.

Similar to the international arena, there is also a divide in the Canadian NGO community addressing trafficking between those who support anti-prostitution strategies and groups seeking better conditions for sex workers. And while both sides may generally advocate for the continued use of anti-trafficking strategies, their understanding and approach to trafficking can be quite different. Those supporting a prohibitionist agenda tend to produce imagery of trafficked victims more consistent with the dominant paradigm. And although “human trafficking” appears to be the topic being discussed, it quickly gets fused with anti-prostitution rhetoric.

Vancouver Rape Relief has been one of the most vocal NGOs with respect to anti-trafficking work, and they are clear in their approach. In support of a prohibitionist agenda, victims identified in their promotional material are young, racialized and without agency. When describing trafficking in persons nearly all of the stereotypical imagery is used and trafficking becomes fused with all forms of sexual offences, including sexual abuse, sexual assault, exploitation of underage girls and forced prostitution of marginalized Aboriginal and “Asian” women:

Human trafficking of women and girls is fueled by the male demand for the immediate access the bodies of women and girls and is facilitated by the pimping, buying, and selling of women and girls for the explicit purpose of prostitution.

Summer Rain Bentham, collective member of Vancouver Rape Relief and Women’s Shelter: “Prostitution in itself is inherently racist, Aboriginal women and girls are over represented in street level prostitution and Asian women and girls are hidden in massage parlors and brothels all around the city.” Adding that: “The average age of entry in to prostitution in Canada is 12 – 14

years of age, this cannot be called a choice definitely not a free choice and not a choice any child should have to make.”

This case comes at a pivotal time in Vancouver, while the Missing Women Inquiry [sic] hearing evidence regarding the state failure to protect women from Robert Pickton. Also this morning, Martin Tremblay is in court facing the charges regarding the prostituting, sexually assaulting while drugging aboriginal girls, and negligence causing death.¹⁰³

We also see the fears around the ubiquity of trafficking played out in publications by anti-trafficking NGOs. The Canadian NGO Free-Them states:

Human trafficking is the fastest growing crime on our planet today and really no one is talking about it Every person you see in this trade that is being held there against their will, that is somebody's daughter, that is somebody's sister, that's somebody's brother.¹⁰⁴

The Salvation Army also states on their human trafficking webpage:

Modern-day slavery exists. Although it is illegal in Canada, thousands of people every year are being bought and sold. Human trafficking is a hidden evil that The Salvation Army chooses to target.

The Salvation Army's Response

The Salvation Army has been involved in anti-human trafficking efforts since 1884 when it first established a “Rescue Home” for women and girls escaping prostitution on the streets of London, England. Within 30 years Salvation Army rescue homes grew from one to 117.

The Salvation Army seeks to restore dignity and respect to those who are trafficked. In-person submissions made to government committees have helped change laws and gain better protection for victims.

Furthermore, in Winnipeg and other cities, The Salvation Army operates a diversion program whereby men are held accountable for their involvement in pornography or abuse of women, and face the consequences.¹⁰⁵

¹⁰³ Vancouver Rape Relief & Women's shelter, “Women's Groups Calling Attention to the First Case in BC Court of Human Trafficking of Under Age Girls”, online: Raperelief <<http://www.rapereliefshelter.bc.ca/learn/news/women%E2%80%99s-groups-calling-attention-first-case-bc-court-human-trafficking-under-age-girls>>.

¹⁰⁴ Oakville beaver, “Invidiata fights slavery of human trafficking” online: Inside Halton <<http://www.insidehalton.com/community/oakvillebeaver/article/956434>>.

¹⁰⁵ Salvation Army, “Salvation Army Responds to Human Trafficking”, online: Salvationarmy <<http://www.salvationarmy.ca/2011/09/26/salvation-army-responds-to-human-trafficking/>>.

The women the Salvation Army “rescues” have lost their “dignity” and “respect”. They are broken and in need of rehabilitation after having been subjected to this “hidden evil” that ensnares “thousands of people every year”. All of the hallmarks of the stereotypical victim are reflected in this passage. And, as part of the Salvation Army’s “The Truth Isn’t Sexy” anti-trafficking campaign, it claims that it runs diversion programs for men involved in “pornography or abuse of women”. Thus prostitution, sexual abuse, pornography and trafficking all become one.

The website also states:

DID YOU KNOW? There are an estimated 27 million slaves worldwide. 250,000 exist in North America. Many of them in Vancouver, BC. 75-80% of human trafficking is for sex, followed by forced labour and organ harvesting. 80% of those sold into slavery are under the age of 24. Some are as young as 6. Currently only 1-2% of victims are rescued.¹⁰⁶

¹⁰⁶ Salvation Army, “The Truth isn’t Sexy” online: Salvationarmy <<http://www.thetruthisntsexy.ca/>>

Even sex tourism becomes part of the equation in this webpage from the Maytree Foundation¹⁰⁷:

End Modern-Day Slavery

Human trafficking is happening right in your community. What will you do to stop it?

Connect with us on:



HOME INVISIBLE CHAINS TRAFFICKING 101 TAKE ACTION MEDIA CONTACT



Human trafficking in Canada involves the sexual exploitation and forced labour of a diverse array of victims: Canadian citizens and newcomers, adults and children, women and men.

[Actions You Can Take Today to Fight Human Trafficking](#)

STAY CONNECTED

[Find out](#) how you can receive news and updates about human trafficking in Canada, and learn about how to fight this form of modern-day slavery.

LATEST NEWS

Increasing number of Canadians arrested for sex tourism 23/03/2012

At least 73 Canadians have been arrested outside the country for abusing or molesting children or possessing child pornography in the last three years. That number – 73 – only hints at how many Canadians may actually travel abroad to ... [\[Read More\]](#)

Human-traffickers treated men on construction site 'like slaves' 03/03/2012

In mid-2008, Janos Farkas was offered a construction job in Canada, working for a man named Attila Kolompar, an acquaintance from his home village in western Hungary. The work, he was told, would provide enough money to send back \$100 ... [\[Read More\]](#)



¹⁰⁷ Benjamin Perrin, "Adopt a National Action Plan to Combat Trafficking", online: Maytree Foundation <<http://maytree.com/blog/category/human-trafficking/>>.

These groups are quoted frequently in media, as seen below, and are extremely vocal in regard to their anti-trafficking campaigns. We also see MPs referencing their work in speeches supporting anti-trafficking legislation:

In addition, honourable senators, the Aboriginal Women's Network has reported that prostituted girls and women in downtown Vancouver have experienced violence, abuse, homelessness and exploitation at disproportionate rates. Eighty per cent had a history of childhood sexual violence; 72 per cent had a history of childhood physical violence; 86 per cent were or had been homeless; 80 per cent had been physically assaulted by johns; 70 per cent had been threatened with a weapon; and 70 per cent had been raped more than five times, and this includes by johns. This is not a pretty picture, not what they had hoped for, not the dream world they were promised by their pimp or trafficker.¹⁰⁸

These references show the interrelation between governmental and non-governmental organizations, and the repetition of unverified statistics supporting anti-trafficking work through different social actors. Combined with quotes from an individual in the sex trade who, though there is no indication of third party exploitation, is taken to be a victim of sex trafficking, there is thus created a chain of equivalence between poverty, Aboriginal women, prostitution, rape and trafficking within the official record of Canada's Senate, based on an NGO campaign.

Included in many of these NGO campaigns are calls for anti-trafficking strategies in relation to sporting events. REED (Resist Exploitation Embrace Dignity) was extremely vocal in its calls for human trafficking strategies around the 2010 Winter Olympics held in Vancouver. They conducted several protests and campaigns, as well as providing information on their website:

Buying Sex Is Not a Sport was a grassroots campaign to raise awareness and effect change around sex trafficking and the 2010 Olympic games. The demand for sexual access to the bodies of women and children fuels human trafficking. Women and children in Metro Vancouver and Whistler are routinely coerced into the flesh trade to meet this demand, and a large sporting event such as the

¹⁰⁸ Lillian Dyck, *Criminal Code*, Debates of the Senate, 38th Parliament 1st Session, March 23, 2010, online: Parliament of Canada: <http://www.parl.gc.ca/Content/Sen/Chamber/403/Debates/009db_2010-03-23-e.htm?Language=E>.

2010 Olympics only furthered exploitation through a rise in the demand for paid sex.¹⁰⁹

It is unclear on what these claims are based. However, the imagery is clear – coercion, force, exploitation and women and children’s bodies are bound up together in the characterization of human trafficking. As women and children are “routinely coerced into the flesh trade”, a call to action is made to take measures around the Olympics to stop prostitution.

The Future Group, Benjamin Perrin’s NGO based in Calgary, was also particularly active in relation to the Olympics. The group’s publication *Faster, Higher, Stronger*¹¹⁰ called for action in relation to the threat of trafficking in anticipation of the Olympics. Although the group notes that: “There is relatively little research on the impact of international sporting events on human trafficking. What is clear is that countries hosting recent, and upcoming, international sporting events have taken the threat seriously.”¹¹¹ In fact, the push to deal with trafficking becomes fused with border integrity and national security in a very clear way, and states that have conducted programs in this manner are noted: “For example, Metropolitan Police Commissioner Sir Ian Blair has appointed a new Assistant Commissioner specifically to act as head of security for the 2012 Olympic Games in London, with a mandate to deal with terrorism threats, human trafficking, illegal construction workers and counterfeit operations.”¹¹² The chain of equivalence is created here, fusing “illegal workers”, “terrorism”, “counterfeit operations” and trafficking.

What is not made clear is any ascertainable methodology distinguishing various activities studied in this document, and where the impetus for the group’s call to action stems from. With respect to the 2004 Olympics in Athens the Future Group stated:

¹⁰⁹ Resist Exploitation Embrace Dignity, “Buying Sex is not a Sport”, online: REED <<http://embracedignity.org/?page=buyingsexisnotasport>>.

¹¹⁰ Benjamin Perrin, *Faster, Higher, Stronger: Preventing Human Trafficking at the 2010 Olympics* (2007), online: The Future Group <<http://ssrn.com/abstract=1578564>>.

¹¹¹ Perrin, *Faster Higher Stronger*, *ibid* at 12.

¹¹² Perrin, *Faster Higher Stronger*, *supra* note 110 at 12.

There was a 95% *increase* in the number of human trafficking victims identified by authorities, between 2003 and 2004. In other words, the number of known human trafficking victims *almost doubled* in the year of the Athens Olympics.

In 2005, the year after the Athens Olympics, the number of known trafficking victims declined by 24%, but was still up 47% from the 2003 figure.

There is no reference to the relatively recent adoption of the Protocol and the heightened awareness around trafficking and sporting events during the Athens Olympics, or other factors such as international police presence or increased police presence during the Games. The increased *identification* of victims of trafficking is supposed to somehow speak for itself. Moreover, with respect to the Germany 2006 World Cup, the evidence is even more equivocal:

What is clear from the available evidence to have taken place at the 2006 World Cup in Germany is that an expectation of increased demand for prostitution did, in fact, take place. However, as a result of the extensive immigration and law enforcement measures taken by the German Government, the majority of the prostitutes were not likely international victims of human trafficking, but from the existing domestic supply of prostitutes from elsewhere in Germany, where prostitution is legalized. Accordingly, while prostitution increased as a result of the 2006 World Cup, the number of reported human trafficking cases likely did not increase substantially. In the context of the 2010 Olympics in Canada, where prostitution is not legalized, it is possible that a similar expected increase in demand for prostitution could be met either by domestic or foreign individuals who are subjected to varying degrees of sexual exploitation. The need to address both domestic and international human trafficking is an existing policy need, even in the absence of the 2010 Olympics. The risk that a short-term increase in demand for prostitution during this event could be filled by domestic and international trafficking victims must be taken seriously.¹¹³

The Future Group cited these findings as somehow supporting the need for Canada to step up anti-trafficking efforts and yet no evidence is provided for this need. Trafficking and prostitution are conflated in many sentences in the paragraph, and even by its own standards, the group states that human trafficking did not likely increase. In the context of Canada, all of the findings are speculative, with phrases used such as “it is possible” that an increased demand for prostitution might arise

¹¹³ Perrin, *Faster Higher Stronger*, *supra* note 110 at 13.

around the Olympics, and that sexually exploited persons might fill this void. And yet the publication goes on to state unequivocally: “Given that Canada lags behind other developed countries in its anti-human trafficking efforts, the risk of human trafficking increasing as a result of the 2010 Olympics is clear. That risk must be taken seriously to ensure that this international event is a success.¹¹⁴ Thus with one fell swoop this publication promotes anti-trafficking work around the Olympics infused with notions of border integrity, terrorism and national security.

In their characterization of trafficking victims and traffickers these NGOs support and reflect the dominant paradigm of trafficking, as played out in the Canadian context. However, not all of the NGO community in Canada relates to trafficking through this paradigm. With respect to the concerns around sporting events, critical voices were heard on the issue, challenging the dominant conception and its ancillary consequences. In 2009, the Vancouver based Sex Worker Industry Safety Action Group (SWIG) published a critique of anti-trafficking programs around sporting events, noting the lack of methodologically sound data on the issue¹¹⁵. SWIG challenged the use of the various statistics put forward by anti-trafficking advocates to support anti-trafficking work in Canada around the Olympics:

Stienfatt (2003) similarly challenges the manner with which estimates of trafficked persons have been formulated by exemplifying the suggestion that up to 100,000 Cambodian women and children have been trafficked in 2002. Through an examination of definitions and methods used by researchers to make these claims, Stienfatt found that the numbers of trafficked persons in Cambodia was actually closer to 20,000. Stienfatt further asserts that these kinds of inaccuracies in measurement as a whole coupled with the lack of understanding of local trafficking contexts leads to anti-trafficking strategies that may contribute to an increase in the prevalence of trafficking. Additionally, there is no distinction made between those who are forced into the sex trade via trafficking and those who work willingly as migrating sex workers (Tavella).¹¹⁶

¹¹⁴ Perrin, *Faster Higher Stronger*, *supra* note 110 at 16.

¹¹⁵ Sex Worker Industry Safety Action Group, *Human Trafficking, Sex work Safety and the 2010 Games: Assessments and Recommendations*, online: CBC News <<http://www.cbc.ca/bc/news/bc-090611-sex-trafficking-report.pdf>> at 42.

¹¹⁶ SWIG, *ibid* at 37.

The Global Alliance Against Trafficking in Women (GAATW) also published critical material about the created “hype” around the issue and suggested a more nuanced approach in their research studying trafficking and the 2010 games:

The vast majority of informants across stakeholder sectors suggested that they had no specific knowledge of or that there was no concrete and verifiable evidence of trafficking in persons for the purposes of sexual or labour exploitation linked to the 2010 Olympic Games. In addition, as of the end of August 2010, no trafficking in persons cases connected to the event had reached the level of investigation. There was also no strong evidence of a significant spike in male demand for paid sexual services during the Olympic Games. In the absence of evidence-based research, which has systematically assessed the fan base of or measured male demand for paid sexual services during mega sporting events, it is unclear whether this was a feature unique to what some interviewees described as a more “family-oriented” event like the Winter Olympics or mega sporting events more generally. Available data suggests, however, that during presumably less “family-centred” international sporting events like the 2006 and 2010 FIFA World Cups, the anticipated or forecasted level of demand did not materialize.¹¹⁷

More generally, many agencies supporting migrants and/or sex workers problematize the dominant paradigm of trafficking, highlighting its failure to address the complexities of the migration experience and of sex work. Often these critiques are accompanied by calls for safer conditions for sex workers and increased rights for migrants rather than more stringent regulations and controls over both. Studies conducted with migrant sex workers in Canada revealed that reliance on third parties to migrate was common, and necessary, and various types of decisions are made throughout the migration endeavour where individuals have more or less “control” over the process.¹¹⁸ These decisions are made from the standpoint of an adult individual seeking to migrate for a variety of reasons, weighing risks and benefits possible within reach of their resources. This undertaking also contains several points of vulnerability, including the possibility of assumed debts, inconsistent

¹¹⁷ GAATW, *2010 Winter Games Analysis on Trafficking*, (2010) online: Public Safety Canada < <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/wntn-gms-2010/index-eng.aspx> >, Executive Summary .

¹¹⁸ See Lesley Ann Jeffrey, “Canada and Migrant Sex Work: Challenging the ‘foreign’ in Foreign Policy” (2005) 12:1 *Canadian Foreign Policy*, 33 at 35-36 and Dr. Annalee Lepp, *Constructing and Regulating the Transnational Female Subject: Cross-Border Movements, Trafficking in Persons, and Stigmatized Labour*, presented at Solidarity: Migrant Workers Conference, University of Ottawa, October 2008 - This article was part of GAATW’s Collateral Damage International Report Project.

assessment of pay and wages, and an inability to negotiate working conditions or pursue legal action because of the criminalization of sex work, irregular migration or informal work and their need to send money home.¹¹⁹ Dr. Annalee Lepp notes with respect to these migrants that

[o]n the one hand, their experiences do not fit prevalent conceptions of who constitutes a ‘trafficking victim’ ... On the other hand, their experiences also do not fit into notions of individual freedom of choice as the women had compelling economic and personal reasons for migrating and were subjected to various human rights violations and abusive labour practices in their sites of work. ... [T]his disjuncture between dominant conceptions of the trafficking ‘victim’ and the complexities of the women’s experiences has been one primary factor used against the women, in that evidence of knowledge or agency in the labour migration process has been interpreted as complicity, rendering them ‘undeserving victims’ and justifying their treatment by the state – arrest and deportation as illegal migrants and prostitutes.¹²⁰

Additionally, some key informants from sex worker advocacy agencies who were interviewed for the purposes of this study also problematized the trafficking paradigm, noting the tendency to conflate all forms of sex work under one trafficking umbrella. For example, NGOs in Vancouver working directly with women engaged in massage parlour work indicated that most women in these venues were permanent residents or citizens of Canada, but deemed trafficked because they are of Asian descent. Similar to the studies discussed above, participants spoke primarily of women who were permanent residents who found themselves in difficult economic situations due to a paucity of labour market options, low wages in service sector positions, barriers to accreditation of credentials and a lack of employment commensurate to education and training. One participant noted that economic situations lead some immigrant women into working in massage parlours and that working conditions were not always optimal, but the kinds of coercion that would be necessary to find that owners were “trafficking” are not present. Some exploitative conditions were noted but, given individuals’ permanent status in Canada, fear was expressed more with respect to administrative authorities’ surveillance of the

¹¹⁹ Lepp, *supra* note 118 at 21.

¹²⁰ Lepp, *supra* note 118 at 22.

parlours rather than employer conduct. Some key informants from migrant serving agencies indicated that raids conducted in licensed parlours in 2006 in the Lower Mainland¹²¹ were thus based on racial stereotypes rather than effective means of identifying exploited workers. Participants also highlighted significant distinctions between massage parlour work and venues specifically used as “brothels”, indicating that these are often conflated because of the stereotype around “Asian” women working in both kinds of places.

The exotic dance industry has also been a popular subject of discussion for purposes of supporting anti-trafficking regulation, as seen by the introduction of discretion for visa officers to exclude migrants seeking to work in the field. However, with the elimination of blanket issuance of visas for exotic dancers in 2004, fewer and fewer new visas have been issued, with only 12 new individuals granted visas for the industry in 2011.¹²² Furthermore, there are significant differences in the industry throughout Canada. Key informants interviewed from sex work advocacy agencies, some of whom were formerly engaged in the industry, noted significant differences between central and western Canada. One key informant from this group indicated that working conditions were better in BC and thus the supposed “labour market shortage” propelling the hiring of foreign workers to fill the positions in Ontario and Quebec was not as prevalent.¹²³ Additionally, several key informants interviewed from this group indicated there was not a significant overlap between the issues facing exotic dancers and those relevant to massage parlours, brothels, escort agencies or street based prostitution. The Dancers Equal Rights Association has indicated unsafe and unsanitary working conditions, risk of sexual assault including risk of date rape drugs, forcible payment of fees to work, human rights violations such as limiting the number of non-Caucasian girls who can work on a particular evening,

¹²¹ See Kim Bolan, “Police raid suspected brothels”, (2006) online: Canwest News <<http://rmc76.com/Ard.htm>>.

¹²² Time newsfeed, “Canada Stripping Visas for Foreign Strippers”, online: <<http://newsfeed.time.com/2012/07/08/canada-stripping-visas-for-foreign-strippers/>>.

¹²³ A recent magazine article on the topic also noted that “the cardinal missing fact is that there’s actually no stripper shortage and there probably never was. Strippers and clubs in not-Ontario provinces get perplexed at the mention of a shortage”: Maisonneuve, “The War on Strippers”, online: <<http://maisonneuve.org/article/2013/02/27>>.

and lack of occupational health and safety and employment standard protections as primary concerns.¹²⁴

With respect to prostitution, one key informant interviewed who had formerly been involved in the escort business, now working with a sex worker advocacy agency, noted: “We didn’t all end up on the farm”, referencing Robert Picton’s murder of dozens of sex workers from Vancouver’s Downtown East Side. In that vein, indoor sex work was noted as coming in a variety of forms, each of which generated its own specific working conditions and corresponding protection requirements. Participants described well-publicized and high income generating “escort” agencies, individuals working at a variety of income levels out of their own home or a rented space through online advertising or client-referral, “micro-brothels” where third parties were involved in arranging clients, and “trick pads”, which denoted low income-generating exchanges in unstable or revolving sets of premises. Individuals discussing each segment indicated differing needs of those working in these conditions, given the differing racial make-ups, income levels and job-change opportunities in each. A full canvas of the differing characteristics of each segment is well beyond the scope of this work. However, for purposes of anti-trafficking programming it is relevant that participants indicated significantly different opportunities for workers in the different areas of sex work, such that conflating them made little sense with respect to advocacy.

Finally, with respect to street-based prostitution, “pimps” who move women and girls throughout specific prostitution “circuits” are frequently referred to as primary perpetrators of “trafficking” in Canada:

The movement of children from BC into the US is well known to service providers and police, and has been occurring for some time - but until recently it was not considered as trafficking. Instead it was understood that these children were placed on what was commonly referred to as the 'sex circuit' or the 'sex triangle', that is, the route between Vancouver/Seattle, to Los Angeles/Las Vegas and Hawaii. The route included these cities because of the

¹²⁴ From key informant interviews, and see also Susan Bouclin, “Exploited Employees or Exploited Entrepreneurial Agents? A look at Erotic Dancers” 2004 (25:3,4) *Canadian Woman Studies* 132-133.

large sex trade found within conferences, resort (gaming) hotels, and military towns. Often children are then moved on to other parts of the US as they follow conferences.¹²⁵

This particular type of trafficking is identified as targeting “middle-class females between the ages of 12 and 25”, where promises of “affection” are the “primary tool” to attract victims.¹²⁶ It also speaks to “females trafficked in the sex trade” who are controlled by organized criminal networks that use “direct force (abductions, rape, forcible confinement, assault) and indirect forms of coercion, such as controlling where they live, work, with whom they associate, and threatening family members.”¹²⁷

However, reports discussing lower income-generating street-based sex work discuss the term “pimp” more loosely. Those involved in this form of “survival sex” alluded generally to intimate relationships that have the characteristics of pimping:

A pimp will be somebody that takes your money away from you after you get it. But then you know, my boyfriend, I consider him a pimp now. Because I don't consider him a boyfriend anymore. It's past that. Because you know he's just there, waiting, pipe in hand, and then if you want to go home because you're tired, he's like, well maybe we should [wait for] the ugly blue van, he'll be by real quick, we can get another fifty bucks and we can go home. But then, I'm standing out there in the cold on the corner. While he's sitting, comfy [and] cozy in the bank machine watching me. And. it's like he's not a boyfriend any more. It's like a pimp.¹²⁸

And despite the fact that these two relationships may be extremely different, all third party involvement in prostitution proceeds have become conflated under the rubric of “pimping”, which then becomes associated with trafficking.

Given this diversity of venues and the differing geographic and demographic factors associated with each, some participants from the NGO community showed frustration at the “homogenizing” effect of the term “trafficking” as not being reflective of the

¹²⁵ Renata Aebi, “The Trafficking in Children for the Purpose of Prostitution: British Columbia, Canada,” paper prepared for the National Judicial Institute International Instruments and Domestic Law Conference, Montreal, Quebec, November 2001 at 6.

¹²⁶ CSIS, *Threat Assessment*, *supra* note 96 at 1.

¹²⁷ CSIS, *Threat Assessment*, *supra* note 96 at 3.

¹²⁸ Kate Shannon, “Social and Structural Violence and power relations in mitigating HIV risk of drug-using women in survival sex work” 2008 (66) *Social Science & Medicine* 911 at 915.

complexity of the various sectors of sex work. Some noted that Aboriginal women and girls, a group frequently deemed “at risk” of being trafficked, are over represented in some aspects of the sex trade, particularly street-based survival sex and low income-generating indoor sex work, and not in others such as exotic dance or escort work. Thus the use of statistics relevant to Aboriginal overrepresentation in the sex trade may not be indicative of their susceptibility to particular forms of exploitation deemed to be “trafficking”. Others noted that women who were involved in “survival” prostitution were not likely to move or be moved across international borders or even through the sex “circuit” in Canada because of heavy addiction issues and/or their “perceived value”. And while such observations do not provide verifiable data about each sector of the sex trade, what can be seen is the diversity of situations encompassed within the term “prostitution”.

In addition, foreign workers brought to Canada to work in areas outside the sex trade have faced particular types of hardships, some of which may overlap with individuals working in various sectors in the sex trade, but many of which do not. Individual foreign workers have been charged exorbitant fees by recruiting agencies, often unbeknownst to employers, sometimes requiring the acquisition of extreme debt loads in their home countries.¹²⁹ Upon arrival in Canada, the jobs described on their visas may not be available, placing them in a situation of illegality, unable to return home without the possibility of paying those debts.¹³⁰ Some are faced with threats of deportation by their employers or recruiters¹³¹ if they complain about exploitative working or living conditions and some simply express fear of deportation generally.¹³² There are reports that employers in some circumstances have withheld

¹²⁹ Fay Faraday, *Made in Canada: How the Law Constructs Migrant Workers' Insecurity* (Toronto: Metcalf Foundation, 2012) at 62.

¹³⁰ See Alberta Federal of Labour, *Entrenching Exploitation*, (2009) online: AFL <<http://www.afl.org/index.php/Reports/entrenching-exploitation-second-rept-of-afl-temporary-foreign-worker-advocate.html>> at 24; see also Faraday, *Made in Canada*, *ibid* at 62 and United Food & Commercial Workers Union, *The Status of Migrant Farm Workers in Canada 2010-2011*, online: UFCW <http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf> at 16.

¹³¹ Alberta Federation of Labour, *Temporary Foreign Workers: Alberta's Disposable Workforce*, (2007) online: AFL <<http://www.afl.org/index.php/View-document/19-Temporary-Foreign-Workers-Alberta-s-Disposable-Workforce.html>>.

¹³² Alberta Federation of Labour, *Entrenching Exploitation*, *supra* note 130 at 17.

documents, including work permits, social insurance cards and health care cards, making the accessing of services extremely difficult.¹³³ In other cases wages were not fully paid or even paid at all. Many workers report significant undesired overtime work, insufficient sanitary facilities and undue health and safety risks.¹³⁴ Extremely sub-par housing conditions of workers have also been reported, with employers charging exorbitant rent to employees for inadequate accommodations.¹³⁵ Workers may be subjected to any one or a combination of these various conditions, and in some cases the numerous infractions, if considered cumulatively, could give rise to a finding that the worker was trafficked.¹³⁶ However, their primary concern was regularizing status through attaining alternate employment, and the dearth of resources for placing exploited foreign workers in new positions was impugned. Unlike what is deemed to be required for trafficked victims under the dominant paradigm, these individuals are not seeking Temporary Residency Permits (TRPs), their fear of deportation is not linked to the criminal nature of their activity and they do not require “rehabilitation” or counseling. They are seeking new visas for new employment in order to leave exploitative conditions, some of which may or may not be considered as rising to the level of “trafficking”.

Through this review of NGO data we see that the blending of not only all forms of sex work, but also the experiences of all other exploited foreign workers under the rubric of “trafficking” combines what may be vastly differing experiences. The use of statistics or imagery from one sector to support anti-trafficking work as a whole is also accordingly disingenuous. And yet, as discussed at length above and seen through Figure B, such conflation are frequent occurrences and help to shape the overall paradigm of trafficking in Canada.

v. Media

¹³³ Alberta Federation of Labour, *Entrenching Exploitation*, *supra* note 130 at 7; Faraday, *Made in Canada*, *supra* note 129 at 63.

¹³⁴ Outrage, *supra* note 66 at 37-38.

¹³⁵ Alberta Federation of Labour, *Entrenching Exploitation*, *supra* note 130 at 13.

¹³⁶ See for example *R. v. Domotor*, [2011] O.J. No. 6357.

The media in Canada plays a number of different roles in upholding and impacting the characteristics of the dominant paradigm. It can be seen to reflect already-existing paradigms around trafficking, it provides a forum for particular types of anti-trafficking work, and it directly influences decisions made around implementation of anti-trafficking programs. Numbers of victims and traffickers are often recycled without reference to the methodology that determined the original statistics, and airtime is given to the most sensationalized accounts of trafficking provided by anti-trafficking advocates. The sensationalism and lack of accountability with respect to statistics and presumptions reinforce the understanding of trafficking as consistent with the dominant paradigm and allows other actors, including NGOs and parliamentarians, to subsequently re-recycle statistics and descriptions proffered in these media articles and programs.

Firstly, there are literally hundreds of news articles available online describing human trafficking in Canada, many of which are focused on describing the “victim”. And this victim is usually involved in the sex trade, possessing all of the qualities consistent with the dominant paradigm, as described in this W5 broadcast from 2012:

When you hear about human trafficking in the sex trade, most people have an image of women being smuggled into Canada from abroad and forced to work in seamy brothels.

But there's a thriving trafficking trade right here at home and it's run by pimps who prey on the naïve and innocent. It could be a young woman from your neighbourhood, maybe the daughter of a friend, or the girl next door. And her entry into the sex trade is rarely by choice. ...

In reality, that charming boyfriend is a pimp who uses threats, beatings and rape to force the girl into prostitution.

"He beat me up so bad that my hotel room looked like a murder scene," said Jasmine, a former sex trade worker, who drifted into prostitution when she was a university student.

"My face was so mangled I didn't even look like myself anymore," she said.

"They're crying for help," said Det. Sgt. Henry De Ruiter, the head of York Regional Police Drugs and Vice Unit. "So if we can get in there and can establish

that rapport and hope for them to finally come forward and talk to us, that's what it's all about."¹³⁷

These girls are naïve and innocent, the “girl next door”. They are forced into the sex trade by a wolf in sheep’s clothing and are patiently awaiting rescue by law enforcement. Furthermore, this activity is fused with acts occurring across international borders under the label of “human trafficking in the sex trade”. Their lack of agency is apparent in their naiveté and those who devote their lives to rescuing them are the world’s current heroes:¹³⁸

"The victims of human trafficking are like desert roses," Benjamin Santamaria says as rain pours down outside his modest office, set up on the second floor of an old Toronto house. "Beautiful souls, beautiful hearts in the desert, where there is nothing for them, like many youth or teens would say, in this cruel, cruel, lonely world."

Hence the name of the organization he set up to combat human trafficking: Project Desert Roses. Some victims Santamaria has met arrive under these big city lights thinking, as artists like 50 Cent suggest, that it's cool to have a pimp.

Soon enough, they have one of their own.

He'll promise her love and riches. She'll buy it. He'll offer her drugs. She'll get hooked. Then there's no turning back, because a wasted teenaged girl is easy to manipulate. Controlled, cheated and sold, the girls may not identify themselves as victims. They will be given little gifts here and there. Maybe go to Las Vegas to work for a while. They may think they are like Julia Roberts in *Pretty Woman*. "They see these guys like saviours. 'He's my john!' some of the girls say. Because he is their saviour in one way. He is saving them from the cruel, sad situation at home," Santamaria says. "They don't know they are changing one hell for another hell"¹³⁹

And, the references to trafficked Aboriginal women placed next to statistics about missing Aboriginal women abound, as seen in this Toronto Sun article:

¹³⁷ Garret Dwyer-Joyce, “W5: Rescuing 'the girl next door' from the sex trade” online: CTV News <<http://www.ctvnews.ca/w5-rescuing-the-girl-next-door-from-the-sex-trade-1.773424#ixzz2aH2P01jv>>.

¹³⁸ The U.S. Department of State literally nominates trafficking heroes in its annual Trafficking in Persons Report. In 2009 Benjamin Perrin was awarded this honour: Embassy of the United States, *TiP Report Heroes, Canada*, online: <<http://canada.usembassy.gov/key-reports/trafficking-in-persons-report/2009-tip-report-heroes-canada.html>>.

¹³⁹ Tamara Cherry, “Canada’s blind eye, Exposing our nation’s dirty, dark secret”, (2008) online: Toronto Sun <<http://www.torontosun.com/news/canada/2008/09/28/6907976-sun.html>>.

On the street corners of Canada's largest cities, thousands of women are bought and sold every night. Most of them, experts say, are aboriginal and an alarming number are trafficked. "There's a total myth that Aboriginal women either consent to or are born into the sex trade," says Jo-Ann Daniels, interim executive director for the Metis Settlements General Council in Edmonton. "The average age of Aboriginal girls who are human trafficked is between seven and 12 years old."

...

Given the total lack of statistics gathered on domestic trafficking in this country, it is no wonder there is nothing to accurately illustrate exactly how many Aboriginal people are being trafficked. But this is what is known:

- More than 500 Aboriginal women have gone missing or been murdered in Canada over the last few decades.
- According to research conducted by gang expert Michael Chettleburgh, 90% of the teenaged, urban prostitutes in Canada are Aboriginal.
- About 75% of Aboriginal girls under 18 have been sexually abused, says Anupriya Sethi, who has researched the issue. Of those, half are under 14 and nearly a quarter are younger than seven.

"According to the Department of Justice and other witnesses, Aboriginal girls and women are at greater risk of becoming victims of trafficking within and outside Canada," notes the February 2007 report on human trafficking from the Standing Committee on Status of Women.¹⁴⁰

Where labour outside the sex trade is talked about, which is relatively rare, only the most harrowing experiences are recounted, such that the imagery is still consistent with the dominant paradigm. Despite the numerous reports outlining the complexities of the circumstances and control mechanisms used to exploit migrant workers, media discussions around cases of forced labour trafficking focus on situations that include complete control, slave-like conditions and physical abuse. Describing such a case, a *Globe and Mail* article state:

But the reality of his new life was harsh, a court heard. Made to live with two other men in a cramped basement room of Mr. Kolompar's house in a quiet residential area in Hamilton, he worked 14-hour days plastering stucco in a Burlington subdivision. In the evenings, he and his co-workers scrubbed floors, cleaned toilets and washed dishes for his boss. They subsisted off scraps

¹⁴⁰ Tamara Cherry, "flesh trade targets natives", (2008) online: Toronto Sun <<http://www.torontosun.com/news/canada/2008/09/29/6916776-sun.html>>.

from the table. When he became weak and had trouble working, he said Mr. Kolompar hit him several times.¹⁴¹

Furthermore, in the Canadian media individuals from the academic and government sectors are given a venue in which to air their views on trafficking. And those who reflect and support the dominant paradigm provide for the most sensationalized viewing or reading. We see again hundreds of articles and news programs referring to the most well-known of these individuals from each group.

For example, M.P. Joy Smith is featured frequently in Canada's national newspapers, promoting her work and her findings as relatively unquestioned. While some debate ensues in these articles with respect to the prohibitionist perspective on prostitution, the ways in which articles are worded promote the dominant paradigm as espoused by Smith, both in descriptions of victims and potential solutions. For example, in an article discussing M.P. Smith's views on the issue of decriminalizing prostitution, it states:

"My goodness we would have the nation as the pimp and that's wrong and we can't afford that," she said in an interview Wednesday morning before going into caucus.

Ms. Smith is a bit of an expert on these issues. Just before the Senate rose for the summer, it passed her private member's bill calling for a five-year minimum sentence for traffickers of minors.

Sex trafficking and prostitution are linked, she argues, noting studies she says show that where prostitution is legalized there is a significant increase in the expansion of human trafficking and sexual exploitation. For example in Amsterdam, Ms. Smith says there is an influx of human trafficking victims and some brothels have had to be closed down as a result.

...

"We have to protect our women and children. We can't afford [to decriminalize prostitution]"

¹⁴¹ Adrian Morrow, "Human Traffickers Treated men on Ontario Construction Site like Slaves", (2012) online: Globe and Mail < <http://www.theglobeandmail.com/news/national/human-traffickers-treated-men-on-ontario-construction-site-like-slaves/article2356170/>>.

Indeed, Natasha Falle, the head of Sex Trade 101, an organization based in Toronto that represents victims and survivors of the sex trade, refers to Ms. Smith as an "angel." Ms. Falle knows of what she speaks, having worked as a prostitute for 12 years, beginning at age 14 and then being "trafficked across the country" by her pimp, who she married at 17.

"We are so happy to have her voice," Ms. Falle told CTV of the Conservative MP. "It's only been in the last few years since all those missing and murdered aboriginal women turned up dead did anybody care about us. So to have her speak out the way she is against this - what this means is so empowering."¹⁴²

Even though the article was initiated in response to a ruling around adult prostitution, the quotations from M.P. Smith and her supporter focus to a significant extent on children – Smith's bill on trafficking of minors, the need to "protect our women and children" and the supporter's young age when she entered into prostitution. Where adults are referred to, it is the "missing and murdered Aboriginal women" who take focus and further entrench the vulnerability and lack of agency of all people in the sex trade. Prostitution and trafficking are fused, and infused with notions of youth, vulnerability and racial marginalization, and M.P. Smith's work is promoted rather than analysed.

Similarly, an interview conducted on a national news program in 2010 touts Benjamin Perrin's advocacy around trafficking, including his characterization of trafficked victims and the fusing of international trafficking and domestic sexual exploitation:¹⁴³

(I) 1.25: "Benjamin Perrin is someone who's been working hard to expose the harsh world of human trafficking in Canada. His new book ...is a shocking expose, he sheds light on some of those cases"

¹⁴² Jane Taber, "Tory MP sees 'the nation as the pimp' if prostitution ruling stands" (2010) online: globe and mail <<http://www.theglobeandmail.com/news/politics/ottawa-notebook/tory-mp-sees-the-nation-as-the-pimp-if-prostitution-ruling-stands/article1380391/>>.

¹⁴³ The interview may be found at: *Tories Target Human Trafficking Campaign*, online: CBC <<http://www.cbc.ca/news/canada/story/2010/09/07/toews-human-smuggling-tamil-ship.html>>. The text was the author's transcription of the interview as viewed on this link. The numbers preceding each piece of text indicate the time of the dialogue during the interview. (I) indicates interviewer, (B) indicates Mr. Perrin's comments

(B) 2:17: “We’re talking about a 14 year old girl sold out of a hotel room in Toronto. Advertised on Craigslist and sold month after month”

(B) 3:08: “This girl is in there day in and day out, why isn’t she in school? Why aren’t these questions being asked?”

(I) 3:20: “How prevalent is this problem in Canada?”

[(B)] We know that human trafficking is taking place across the country. Over the last three years we documented cases from Vancouver/Victoria all the way across to Halifax. It’s not only a crime that is of egregious, life altering devastation to the victims, but it’s allowing for criminal organizations to profit lucratively, the same groups that traffic in drugs and weapons in many instances traffic in girls.”

(I) 4:08: “Well wait a minute, you say it’s not just girls from other countries it’s Canadian girls as well. Presumably, I mean I can see in parts of rural Thailand or China or whatever, people, you wouldn’t hear about these missing girls but presumably in Canada you would hear about missing girls.”

(B) Well the real irony here is I started working on this issue in Cambodia, in rural Cambodia educating parents on the warning signs of traffickers, now I find myself 10 years later here in Canada, in my own country, trying to get the word out, with victims’ groups from across this country, and the warning signs are not clear to most people. ...

(I) 6:09: “Benjamin you make it sound like there are gangs of people out there and you say the same groups that are responsible for drugs and illegal money and whatnot, that are stalking Canadian girls, foreign girls, so they can sell them into the sex trade.

(B) They are, and we name names. Invisible Chains is coming out next month, it’s a book that took us three years to document, and we name the names of these street gangs. We’ve already provided that information to the police agencies”

(I) 7:13 : “who are the gangs that are dealing in girls and women?”

(B) Well many of these are not household names. They are local gangs which start typically in very crime-ridden, poor areas of major cities, and then begin to develop an expertise in selling women.”

This nationally-televised interview conducted by Carole MacNeill from the CBC both perpetuates the focus on children in anti-trafficking rhetoric and fuses domestic and international concerns in the context of trafficking. No issue is raised as to whether the same kinds of concerns arise with respect to Cambodia and Canada, or the types

of activities going on in the two places. The entire interview is spent describing the situation of young Canadian girls forced into prostitution by pimps, through a grooming process and luring methods. Yet the reference to Cambodia and “missing” girls keeps the issue connected to the international realm. Thus through this “chain of equivalence”, anti-trafficking activity aimed at smuggling, illegal migration and sex tourism can actually take its policy basis from concerns raised regarding domestic youth sexual exploitation. Although the two issues may be entirely unconnected in terms of perpetrators, causes and solutions, they become fused in the dialogue and thus evidence of one becomes support for addressing the other.

This is also apparent in a corresponding interview on the same site with Public Safety Minister Vic Toews. Evan Solomon from the CBC interviewed M.P. Toews with regard to the “Blue Blindfold” campaign, designed to raise awareness of human trafficking:

(E) The government wants you to help stop human trafficking ... working with Crimestoppers and the RCMP the government says it needs to protect women and children who are sold into the sex trade or as cheap labour even right here in Canada. So, is Canada really a haven for human traffickers and smugglers?

(E) 00:54: How serious a problem is human trafficking?

(VT): I think it’s an issue that has come to the forefront as we welcome more and more people to Canada as also at the same time individuals take advantage of Canada. We are a democracy, we generally have very open policies towards people coming in. And there are individuals who are taking advantage of this particular situation. The trafficking issue is a much more significant one than smuggling in terms of the day to day impact here in Canada. Trafficking of course essentially leaves people in servitude, in fact modern day slavery, and these are situations that are occurring around us, we may not be knowledgeable about the particular facts, whether that be individuals in the sex trade or other economic domination, workers in the domestic field or in restaurants.¹⁴⁴

On the CBC webpage on which this interview is reproduced, the text reinforces what is said during the interview:

¹⁴⁴ The interview may be found at: *Tories Target Human Trafficking Campaign*, online: CBC <<http://www.cbc.ca/news/canada/story/2010/09/07/toews-human-smuggling-tamil-ship.html>>. The text was the author’s transcription of the interview as viewed on this link. The numbers preceding each piece of text indicate the time of the dialogue during the interview. (E) indicates interviewer Evan Solomon, (VT) indicates Minister Toews comments.

The federal government is partnering with Crime Stoppers to enlist the Canadian public's help in detecting and reporting signs of potential human trafficking.

The announcement Tuesday by Public Safety Minister Vic Toews comes in the wake of last month's arrival of the MK Sun Sea, a ship carrying hundreds of Tamil migrants, in British Columbia.

...

While Toews acknowledged the Sun Sea was a case of human smuggling, not trafficking, he noted that smuggling sometimes turns to trafficking if those being transported are unable to make payment.

While human smuggling involves the illegal movement of people across international borders for payment, trafficking includes an additional element of exploitation — usually in the form of forced labour, prostitution and other forms of servitude — and usually involves threats or the use of force.

Toews said most human trafficking victims are women and children from Asia, who are often forced into the sex trade.

"Most are women and children and their cases often go unnoticed and unreported due to threats from offenders, language barriers or mistrust of authorities," he said.

In this interview we see all of the fears typically engendered through use of the dominant paradigm at work. Toews somehow associates immigration with democracy, evoking patriotic sentiment, but repeatedly turns that patriotism to nationalistic fears, reminding us of how individuals "take advantage of Canada." Thus an interview on trafficking becomes a plea for heightened border security measures. Smuggling and trafficking become fused, and the vision of hordes of Tamil migrants from the Sun Sea is further evoked. And somehow these all become part and parcel of a discussion of a campaign devoted to protecting innocent, helpless Asian women and children from the sex trade.

It is not the case that alternative imagery does not exist in the media – sex worker rights groups and individuals questioning the legitimacy of anti-trafficking programs

have had some exposure in the Canadian national media.¹⁴⁵ However, there is a significant amount of print and television media upholding what is already the dominant conception of trafficking, further entrenching the stereotypes through its own language and through quoting and interviewing those with the most sensationalized and stereotypical accounts of trafficking without critique. State actors, academics, law enforcement and NGO representatives thus get airtime through various forms of media, further supporting the dominant paradigm, and giving public credence to the vision of trafficking proposed by these various social actors. And conversely, journalists and media articles are given airtime in academic writing and through speeches and publications made by state actors. Parliamentarians frequently refer to media and investigative reports in their speeches, thereby solidifying the findings in those reports and giving credence to potentially methodologically suspect material. For example M.P. Pat Martin reinforced the stereotype of the Eastern European and Asian sex slave in his speech on the *Criminal Code* trafficking provision:

We recently saw a documentary on one of the news magazine programs in Canada. Some very good investigative journalism has been done showing how vulnerable young people are being seduced off the streets in places such as eastern Europe and some of the Asian countries with offers of opportunities, sometimes being misled and offered legitimate jobs in their destination country, and sometimes being overtly kidnapped and forced into this. This used to be the stuff of dime store novels where we would hear this kind of thing happening. It is to our shock, horror and dismay to have to admit that in the year 2005 it is commonplace and in fact it is growing in practice.¹⁴⁶

And former Minister of Public Safety Vic Toews gave credence to Victor Malarek's interpretation of the issue of trafficking, using his findings to support increased law enforcement:

I would like to quote Canadian journalist, Victor Malarek, who has written and researched extensively on the global sex trade. He said, "If a country is to be

¹⁴⁵ See for example SWIG, supra note 115.

¹⁴⁶ Pat Martin, Bill C-49 *An Act to amend the Criminal Code (trafficking in persons)*, Sept 27, 2005, 38th Parliament, 1st session, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=125&Parl=38&Ses=1&Language=E&Mode=1&DocId=1988380&File=0>>.

judged on how it deals with this scourge, that judgment must be based on the action it takes to eradicate it. The only thing that will send these thugs scurrying back into the rat holes is the full force of the law – unwavering prosecution, heavy prison time and confiscation of all profits amassed on the backs of these women”.¹⁴⁷

These interactions take place not only between Parliament and the media but, as discussed, between all of the different social actors. Figure B above illustrates these connections. Through these interactions the dominant paradigm becomes reinforced and findings and observations become a matter of public record. This archetype is then translated into practice through governmental and non-governmental programming, identifying victims with characteristics defined by the dominant paradigm, and supporting a law enforcement and border security agenda.

C. IMPLEMENTATION

Several authors and NGOs have also indicated concern around the laws relating to trafficking and the programmes and operations implementing those laws. Some allege that these laws and policies are based on faulty categorizations, homogenization of various forms of exploitation or a concern for regulation rather than rights of victims. The activities thus provide for measures that are ineffective at best, and detrimental to rights of victims at worst. The Canadian Council for Refugees (CCR) was particularly vocal in 2012 around the allocation of discretionary power to visa officers under the Omnibus Crime Bill, discussed in Chapter Three. The CCR notes that the interception powers now given to visa officers to deny persons entry have been conferred “without having provided any proof of efficacy for this approach.”¹⁴⁸ It observes that these measures “empower visa officers to decide which women should be kept out of Canada for their own good, while failing to protect the rights of trafficked persons already in Canada. They do not address the root problem

¹⁴⁷ Vic Toewes, Bill C-49 *An Act to amend the Criminal Code (trafficking in persons)*, Sept 26, 2005, 38th Parliament, 1st session, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Hansard&Doc=125&Parl=38&Ses=1&Language=E&Mode=1>>.

¹⁴⁸ Canadian Council for Refugees, *Report of National Networking Meeting on Trafficking and Workshop, 23-24 November 2011*, (2012) online: CCRWeb <http://ccrweb.ca/files/trafficking_meeting_report2012.pdf>.

of the existence of jobs that humiliate and degrade workers in Canada.”¹⁴⁹ Donald Galloway, professor of immigration law at the University of Victoria, also criticized these provisions for having as their “primary target ... not the smuggler but those who seek Canada’s protection including those who are entitled to it.”¹⁵⁰ Similar issues have been raised with policies that are carried out by government officials to address trafficking in Canada, and the understanding of trafficking that underlies their implementation.

As illustrated in Figure B and in section 1 of the current chapter, the various social actors, through their interaction with each other, create a public language and conception of what trafficking is and how it is to be appropriately addressed. This conception then influences the ways in which anti-trafficking activities are carried out. These activities and the means by which they are undertaken then further influence the conception of trafficking, and so on. In particular, this section focuses on state policies regarding trafficking, applications of anti-trafficking laws and policies, “operations” undertaken to combat trafficking and cases from the Immigration and Refugee Board and criminal courts in Canada. These activities were chosen particularly because they are created and carried out to enforce and supplement the anti-trafficking legislation discussed in Chapter Three. Thus the ways in which these activities are undertaken speak not only to the agents engaging in the activity, but also to the ways the legal structure is being implemented in practice.

i. Programming

In Canada, there are a number of areas in which the state has become involved in anti-trafficking programming. Most notably, the federal government recently launched the *National Action Plan to Combat Human Trafficking*, which includes comprehensive

¹⁴⁹ CCR, *Report, ibid.*

¹⁵⁰ Quoted by Peter Julian, Bill C-49, *Preventing Human Smugglers From Abusing Canada’s Immigration System Act*, Nov 29, 2010, 40th Parliament, 3rd session, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=40&Ses=3&DocId=4826703>>

measures to be taken by various government agencies in addressing trafficking.¹⁵¹ The former Inter-departmental Working Group on Trafficking, led primarily by the Department of Justice, has now been changed to a Public Safety-led Human Trafficking Taskforce responsible for implementing the *National Action Plan* and coordinating the federal anti-human trafficking response.¹⁵² This places investigation squarely at the forefront of the federal government's agenda. The "Dedicated Integrated Enforcement Team", a coordinated body of federal, municipal and/or provincial law enforcement agencies is also jointly headed by the Canada Border Services Agency (CBSA) and the RCMP, receiving more than \$2 million under the program, more than any other activity in the action plan. Activities designed to address trafficking through enhanced understanding or enforcement of workers' rights within the Temporary Foreign Worker program are allocated only \$140,000 under the plan.¹⁵³ While it does incorporate awareness raising around the program and training for federal labour inspectors¹⁵⁴ to specifically enhance the detection and prevention of trafficking, the minimal amount of funds allocated for this purpose reflects the low level of commitment dedicated to this area in comparison to law enforcement activities.

We see this commitment to law enforcement responses and a corresponding perpetuation of the dominant paradigm of trafficking in persons in the policies and programs generated through these state actors. For example, in line with characteristics identified in the dominant paradigm, the policy for determining the allocation of Temporary Residency Permits states that "VTIPs¹⁵⁵ may be physically and/or sexually assaulted, confined, restrained and/or subjected to psychological

¹⁵¹ At a provincial level, British Columbia's Office to Combat Trafficking in Persons coordinates the province's strategy with respect to anti-trafficking programming. It arose out of specific concerns around unaccompanied minors arriving in Canada and is currently housed in the Ministry of Community Safety and Crime Prevention Branch of the BC Ministry of Justice. It is the only official and permanent provincial body addressing trafficking issues. In Alberta, the Action Coalition on Human Trafficking is a coalition of government agencies working on the issue, and in Manitoba the Human Trafficking Response Team is an organized coalition of NGOs and government bodies addressing trafficking. In Quebec, the Comité interministériel sur la traite des femmes migrantes, chaired by the Ministry of Justice, coordinates anti-trafficking work.

¹⁵² National Action Plan, *supra* note 64 at 9.

¹⁵³ National Action Plan, *supra* note 64 at 10.

¹⁵⁴ National Action Plan, *supra* note 64 at 30 and 36.

¹⁵⁵ Victims of Trafficking in Persons.

abuse. Fear for one's own personal safety, and the safety of loved ones can cause additional emotional trauma and stress. VTIPs may also experience shame, low self-esteem and a sense of powerlessness. Many VTIPs suffer from post-traumatic stress disorder, and may fear or mistrust authorities.”¹⁵⁶ The corresponding “checklist” provided in the manual for CBSA officers in determining whether or not an individual is a victim of human trafficking speaks to the dominant paradigm and the consequences it generates.¹⁵⁷ While relatively innocuous, pointed questions regarding legal requirements are also included in the mix, a number of the suggested interview questions are geared towards determining victimhood in accordance with stereotypical imagery. For example:

- Did anyone help you enter Canada?
- How did you obtain the documentation used to enter Canada (if person entered Canada with documentation)?
- What did you come to Canada to do?
- What sort of work did you actually perform, once you arrived in Canada?
- Did you have to pay any of your earnings toward a debt?
- Were you allowed to keep any/all of your earnings?
- Do you believe that you still owe your employers anything?
- Were you allowed to communicate with family members?
- Did you live and work at the same place? If so, were you permitted to leave the premises as you wished?
- Were threats made to you, your family members or others close to you?
- What happened to your identification documents after you arrived?
- What did you believe would happen if you attempted to leave?

We also see the dominant paradigm being acted out through “awareness-raising” tools promoted by the federal government. For example, the *National Action Plan* supports the “I’m Not for Sale” campaign developed by the RCMP.¹⁵⁸ Raising awareness in this context involves the use of the term “sale”, thus conjuring imagery of purchase and sale, bodies as goods and a lack of agency. The image from the

¹⁵⁶ CIC, *Inland Processing*, *supra* note 78 at 24.

¹⁵⁷ CIC, *Inland Processing*, *supra* note 78 at Appendix H.

¹⁵⁸ National Action Plan, *supra* note 64 at 12.

campaign is a sorrowful looking part of a female face with blood-stained backdrops for the text:



This campaign has been launched in conjunction with the RCMP video discussed above "Human Trafficking is a Crime". Typical imagery emerges in these campaign materials, urging the public to keep an eye out for bruising, branding, and displays of fear. And while other more subtle coercive tactics are also raised, such as restricted freedom of movement and unreasonable working conditions, the picture reinforces the messaging about physical violence, young women as victims, and prostitution, producing associations consistent with the dominant paradigm.

In the *National Action Plan* itself we also see policies based on reference to stereotypical imagery of trafficked persons. Within the body of the plan, it is stated:

Because women and girls are most often victims of trafficking for the purpose of sexual exploitation, the Government will invest in initiatives to end violence against women and girls. For example, Status of Women Canada's programming priority area, "Ending violence against women and girls", includes project funding to support female victims of human trafficking.¹⁵⁹

¹⁵⁹ National Action Plan, *supra* note 64 at 14.

The dominant paradigm is put into action here through government policy and project funding. In addition, “awareness-raising” on the part of immigration officials focuses on “vulnerable foreign nationals” bound for the sex trade. The presumption inherent in this activity is that trafficked persons are utterly duped into entering Canada and if provided with information about their situations they would certainly not come. This activity also prioritizes border security and prostitution as areas of concern, seeking to assess the “genuineness” of individuals’ status in Canada:

Canada Border Services Agency will undertake efforts to raise awareness with vulnerable foreign nationals at ports of entry. Also, in order to better protect vulnerable persons who are at risk of being trafficked into Canada to work in situations where they could be subject to exploitation, Human Resources and Skills Development Canada and Citizenship and Immigration Canada will explore options to prevent the sex trade from accessing the Temporary Foreign Worker Program. The Government of Canada will also work with provincial/territorial partners to ensure that foreign nationals entering Canada under the International Student Program are genuine and attending quality educational institutions throughout their period of stay.¹⁶⁰

Jason Kenney, Minister of Citizenship and Immigration, noted in 2012 that “The problem is, under the current [IRPA] we don’t have the legal authority to deny people visas based on the industry they’re working in ... Now we have the power, which we’ll begin using as soon as those regulations are done this summer.”¹⁶¹

The upshot of this programming is to exclude individuals on the basis of the “genuineness” of their student status, or their “destination” in the sex trade rather than address individuals who are exploiting workers or creating unreasonable conditions of work in the sex trade or other venues. The article quoting Mr. Kenny noted that existing visas to foreign-born “strippers” will be cancelled, new applications denied and those individuals on visas allowing them to work in any industry will be barred from working in adult entertainment. Given that women predominantly make up this category of workers, the law disproportionately affects

¹⁶⁰ National Action Plan, *supra* note 64 at 15.

¹⁶¹ Andy Radia, “Bill C-38 to strip foreign strippers of work visas”, online: yahoo <<http://ca.news.yahoo.com/blogs/canada-politics/bill-c-38-strip-foreign-strippers-visas-152010699.html>>.

their ability to migrate and earn a living, a policy carried out in the name of preventing trafficking.

ii. Operations

Ignoring the complex realities of migratory pushes, pulls and trajectories also generates activities that may be ineffective, and implementation of the laws in a particularly harmful manner. Dr. Annalee Lepp refers to booklets published by the Canadian government cautioning “potential victims” about the dangers of trafficking. She notes that “[t]hese strategies are based on the assumption that reducing or stopping the flow of female labour migration, without considering the root causes of cross-border movements, will solve the problem of trafficking in women.”¹⁶²

Many law enforcement operations have also been conducted to “disrupt” trafficking rings, and these have been lauded far and wide by law enforcement authorities, media and various government entities. And yet, they produce few “victims”. Instead, sex workers are targeted for criminal charge and deportation. In her work, Dr. Lepp specifically refers to the raids of 18 massage parlours in BC’s Lower Mainland believed to be connected to “the sex trade, organized crime and human trafficking operations.”¹⁶³ In these raids 108 people were arrested, including 78 women, 72 of whom were Canadian citizens. However, they were all arrested. Conditions imposed upon individuals after “raids” include detention, being disallowed from associating with friends or other sex workers and being forbidden from working in the sex trade, including massage parlours, measures which place individuals in situations of economic hardship.¹⁶⁴

Dr. Lepp questions the public relations motivations behind the raids, observing that these highly publicized types of raids in fact detract from larger concerns about exploitation and migration:

¹⁶² Lepp, *supra* note 118 at 19.

¹⁶³ Lepp, *supra* note 118 at 28.

¹⁶⁴ Bruckert and Parent, *Tracing perceptions*, *supra* note 89 at 44.

Indeed, the narrow focus on trafficking seems in many countries to act as a justification for not taking action to end **all** the abuse to which migrant workers in the informal sectors of the economy are subjected. A curious question, then, is why the governments who agreed to the UN Trafficking Protocol chose to put most of their focus on efforts to stop individuals being moved into situations in which they would be exploited, rather than putting more of their energy into stopping cases of exploitation from occurring at all.¹⁶⁵

The RCMP's *Threat Assessment* lists a number of these operations and their results. With respect to raids conducted on "bawdy houses" in Vancouver and Edmonton, there appears to be a faith in the continued reliance on such raids to unearth victims of trafficking despite not having been able to thus far:

Exploitation occurring in bawdy houses operated by criminal organizations with Asian associations has been an increasing concern to law enforcement in recent years. ... Disruptive investigations have located bawdy houses staffed by women of Asian ethnicity who may or may not have legal status in Canada. ... To date, very few investigations were able to successfully identify victims of human trafficking involving bawdy houses operated by Asian organized crime. However, these types of cases were exemplified by investigations conducted by police in British Columbia and Alberta.¹⁶⁶

The raids in question were identified as producing few "victims" in the eyes of law enforcement and prosecution, and disrupting business operations specifically where individuals were of "Asian" descent. Based on a purported need to identify victims of trafficking, prostitution and organized crime are targeted and the raids are hailed as great efforts by law enforcement:

In 2006, a series of investigations were jointly executed by multiple RCMP units to examine the illicit "body rub" massage parlours, spas and "health clubs" operating as fronts for bawdy houses in British Columbia's Lower Mainland. Massage parlour employees were allegedly pressured by management to engage in sex acts with clients. In late 2006, the investigation led to a coordinated raid of suspected bawdy houses executed in the Lower Mainland municipalities with the arrest of several business operators. ... The investigation resulted in the review or suspension of business licenses and examination of by-law violations, but was insufficient to

¹⁶⁵ Lepp, *supra* note 118 at 28.

¹⁶⁶ RCMP, *Threat Assessment*, *supra* note 96 at 14.

proceed with criminal prosecution. Sex workers were uncooperative and investigators believed them to be working in prostitution voluntarily for financial gain. Ultimately, there were no indications that workers were trafficked to work against their will.¹⁶⁷

In 2008, the RCMP in British Columbia investigated an organization allegedly trafficking Asian women in a bawdy house operation in various Lower Mainland municipalities. ... In March 2009, the investigation led to the location of seven adult female Hong Kong (China SAR) nationals engaged in prostitution while on visitor status. The extent of which the women were forced into the sex trade was varied. ... Despite some elements of human trafficking, a reliable witness testimony was critical to substantiate the charges. Repeated attempts by police to gain cooperation from the victims to speak about their experience were unsuccessful. ... Without victim cooperation, human trafficking charges were unable to proceed and the investigation resulted in prostitution-related charges.¹⁶⁸

In the past several years, Edmonton Police Service investigations into prostitution led to a number of takedowns of bawdy houses operated by Asian organized crime, with an incident resulting in human trafficking charges in September 2009. ... In September 2009, the investigation led Edmonton Police Service to locate victims forced into prostitution after being lured with legitimate employment prospects from other parts of Canada. The victims were of Asian ethnicity but had permanent resident status or Canadian citizenship.¹⁶⁹

The victims were described as uncooperative, not conforming to the characteristics required of a legitimate victim in need of rescue. Thus none were considered to be victims of trafficking, and yet the raids appear to be deemed useful tools. Similar raids were conducted in the late 1990's and early 2000's in Toronto,¹⁷⁰ prior to the creation of the trafficking offence in the *Criminal Code*. Similar outcomes resulted. These operations are discussed below in the section on critiques.

Additionally, border management operations have been couched in anti-trafficking language from the start. Perrin notes in *Invisible Chains* that:

The border between British Columbia and Washington State has also been made less porous thanks to the efforts of IBET officers, including those who

¹⁶⁷ RCMP, *Threat Assessment*, *supra* note 96 at 15.

¹⁶⁸ RCMP, *Threat Assessment*, *supra* note 96 at 16.

¹⁶⁹ RCMP, *Threat Assessment*, *supra* note 96 at 1.

¹⁷⁰ Annalee Lepp, *Trafficking in persons and irregular border movements in Canada*, *supra* note 118.

participated in the foiled transit trafficking case at Osoyoos ... Keeping up with the changing routes used by these criminal networks is a constant effort requiring extensive co-operation between Canadian and American authorities.¹⁷¹

And with respect to interdiction:

Internationally, the CBSA Migration Integrity Officers network is trying to reduce illegal migration to Canada from over forty countries, including smuggling and human trafficking. The increased vigilance has led to a substantial increase in undocumented or illegal migrants with aspirations to come to Canada being intercepted in their native countries.¹⁷²

Border management operations adopt similar approaches to the law enforcement operations, putting the dominant paradigm into practice. Through reliance on stereotypical imagery and chains of equivalence, the state is able to find support for border security operations, raids of suspected bawdy houses and interdiction of potential migrants at their source, regardless of any ostensible effects on even the stereotypical trafficked victim.

iii. Case Law

The effect of the dominant paradigm can also be seen through an analysis of the case law on the topic. A search of all Canadian cases was conducted using the *Criminal Code* offence and refugee or immigration claims based on trafficking heard by the Immigration and Refugee Board (IRB). Additionally, from the data search conducted, a number of cases were extracted from the various governmental and non-governmental reports, including both guilty pleas and indictments. Given that reported cases from the IRB are all derived from second-instance proceedings, where an initial decision by a visa officer or board member is appealed, the cases retrieved had all received negative first-instance decisions. Thus data was also obtained from the Immigration and Refugee Board of Canada of first-instance decisions that positively found victims to be trafficked. The small number of both criminal

¹⁷¹ Perrin, *Invisible Chains*, *supra* note 4 at 183.

¹⁷² Perrin, *Invisible Chains*, *supra* note 4 at 183.

prosecutions and TRPs is an interesting point of discussion, and has been discussed at length as to its causes. However, more interesting is the reasoning that can be seen in many of the cases that *are* brought before the courts, particularly with reference to the ways in which individuals are defined or not defined as “trafficked”.

For point of reference, it may be useful to briefly outline the numbers of cases that have been identified within the Canadian criminal justice system. Most recently the RCMP noted that, in total, there have been 32 cases in which human trafficking convictions were secured and 54 individuals in total were convicted of human trafficking offences and/or “related offences”, identified as “forcible confinement, sexual assault, procuring, conspiracy, participating in a criminal organization.”¹⁷³ As of April 2012, a total of 25 cases were reported, as quoted in the *National Action Plan*, not including any related offences. Three additional charges were laid under section 118 of IRPA but no convictions were secured. The *National Action Plan* document also notes that as of April 2012 there were 56 cases currently before the courts, involving 136 victims, and over 90% of the cases involved domestic human trafficking, with only 10% relating to people being brought in from another country.

Perrin, in *Invisible Chains*, notes that between May 2006 and November 2008 the Citizenship and Immigration Canada had “flagged” fifty suspected foreign victims of trafficking in Canada, with 74 percent being women and only 6 percent involving minors.¹⁷⁴ There is no analysis conducted on why these particular individuals may have been “flagged” as victims and why others were not. The RCMP’s *Threat Assessment* breaks down the “characteristics” of the victims identified during this period, particularly in Nova Scotia, Ontario and Quebec:

Nova Scotia, Ontario, Quebec

All human trafficking cases before the courts in Nova Scotia, Ontario and Quebec exhibit similar criminal elements. Victims were lured into the sex trade, with most being coerced to prostitute in exotic dance clubs, some into escort services or both. While most females consented to enter the sex trade

¹⁷³ RCMP, *Human Trafficking National Coordination Centre*, online: <<http://www.rcmp-grc.gc.ca/ht-tp/index-eng.htm>>.

¹⁷⁴ Perrin, *Invisible Chains*, supra note 4 at 45.

and were subsequently forced to provide sexual services, others were forced to provide sexual services from the outset. Extreme control tactics were employed by traffickers to manipulate victims. Intimidation and brutal violence were used to maintain submission, especially after victims expressed their wish to quit sex work. Most victims were physically assaulted and were in constant fear of being beaten. All victims complained that they had no freedom of movement, with their traffickers requiring them to report their every move. In one case, traffickers withheld the identification of the victim to ensure her compliance.¹⁷⁵

These are identified as being the “elements” identified in the cases being prosecuted. However, given the understanding of trafficking as *having* specific characteristics - such as lack of freedom of movement, physical brutality from employers and work in the sex industry - the “flagging” of these particular cases may in fact have been influenced by those assumptions. Thus the “elements” taken from these cases purported to *describe* instances of trafficking in Canada may essentially be describing the methods used by CIC to flag certain cases. Yet once these elements are extracted, they are further used as “indicators” to be used to flag other cases and thus the dominant paradigm is perpetuated.

Perrin also notes that between April 2007 and 2009 approximately 30 individuals were charged with trafficking, with 5 convicted, 11 withdrawn and 14 awaiting trial. Those withdrawn include individuals who entered guilty pleas for lesser offences. Again, the “majority of accused human traffickers are alleged to have engaged in domestic sex trafficking (71 percent), while the rest were involved in cases of international sex trafficking (23 percent) and international forced labour trafficking (6 percent)”.¹⁷⁶ In September 2009, all of the human trafficking convictions had been based on guilty pleas and involved domestic sex trafficking.¹⁷⁷ Perrin notes that “[n]one were associated with international human trafficking, *despite the ongoing discovery of such victims in Canada.*”¹⁷⁸ [my emphasis]

¹⁷⁵ RCMP, *Threat assessment*, *supra* note 96 at 20.

¹⁷⁶ Perrin, *Invisible Chains*, *supra* note 4 at 121.

¹⁷⁷ Perrin, *Invisible Chains*, *supra* note 4 at 122.

¹⁷⁸ Perrin, *Invisible Chains*, *supra* note 4 at 122.

The lack of identification and prosecution of individuals involved in transnational trafficking is automatically taken, by Perrin, to be an indicator of the lack of action taken on the basis of cases essentially *known* to be in existence, the overwhelming lack of evidence of this fact notwithstanding. “Domestic trafficking”, formerly forced prostitution or underage prostitution, is essentially the only activity for which convictions are secured. We also see nearly all of the indicators of the stereotypical image of the “trafficked victim” emerge in the description of the “elements” in cases that went forward for prosecution. Convictions on the basis of the same activities (forced prostitution or underage prostitution) were formerly secured under statutes relating to “living off the avails”¹⁷⁹ or criminal harassment and assault provisions or underage procuring.¹⁸⁰ The re-naming of these acts as trafficking, the conflation of these acts with international movement and exploitative work, and the using of such statistics to thus bolster anti-trafficking programming and law enforcement operations relating to migrants and adult sex workers is disingenuous at best.

A scan was conducted of cases through the CANLII Immigration and Refugee Board database, with terms “trafficking” and “human trafficking”. The top 100 cases sorted in terms of relevance were extracted for purposes of analysis, and the subsequent cases specifically made determinations on whether or not an individual would be considered to be a victim of trafficking, regardless of whether or not protections were extended on refugee or other grounds. Additionally, the Criminal Law database of Quicklaw was searched using the terms “human trafficking” and through a section search of 279.01 of the Criminal Code. Reported cases identified through media and through academic writings were also used. The IRB was also contacted to provide first-instance decisions positively identifying individuals as trafficked, given that those cases would not have been appealed or reviewed, and thus would be unreported in publicly accessible databases. Only two first-instance positive decisions were recorded and these two decisions are on file with the author. However, it is also the author’s understanding¹⁸¹ that numerous other positive

¹⁷⁹ *Criminal Code*, R.S.C., 1985, c. C-46, section 212(2) and 212(1)(j).

¹⁸⁰ *Criminal Code*, R.S.C., 1985, c. C-46, section 212(2).

¹⁸¹ Discussion with key informant specialized in immigration law and policy.

decisions have been made in IRB hearings throughout Canada which are not recorded. And, given the nature of these decisions, Minister's counsel is unlikely to have appealed or sought review of such positive decisions. The cases thus gleaned from reported decision databases were likely more heavily weighted towards first-instance decisions that made negative inferences against those claiming to be victims of trafficking. This may act as a limitation on the data gathered.

Positive Decisions

Various decisions were found identifying individuals as having been "trafficked". In some cases these individuals were not granted protection in Canada given the potential for protection in their home countries. However, for purposes of this work what is of most interest are the types of individuals considered victims and the characterization of those persons. The following are details of histories of claimants who were determined by the IRB to be victims of trafficking, each case is preceded by a distinct number:

Bruckert and Parent outline two cases in their work *Tracing Perceptions*

Case #1. The first successful case (Y.C.K.) was that of a 21-year old Ukrainian woman who asserted that she had come to Canada under the understanding that she would be employed as waitress; however upon landing and being met by 'Mafia types' she came to the realization that she would be compelled to work in the sex trade. She fled and thereby "narrowly avoided being forced into prostitution." The CRDD deemed her to be a conventional refugee based on her belonging to a particular social group ... specifically, "impoverished young women from the former Soviet Union duped into the sex trade."¹⁸²

Case #2. The second successful case (G.V.P.), ... involved a 22-year old citizen of Thailand who had been in debt bondage in France and, prior to resolving her financial commitment, was forced to return to Thailand after which she entered into further debt by coming to Canada. In Canada, after having been charged and sentenced to one year probation, she applied for refugee status and was found by Justice Bousfield to be a convention refugee on the basis of "her well-founded fear of persecution by reason of her membership in a particular social group - women and/or former sex trade workers."¹⁸³

¹⁸² Bruckert and Parent, *Tracing Perceptions*, *supra* note 89 at 18.

¹⁸³ Bruckert and Parent, *Tracing Perceptions*, *supra* note 89 at 18.

The Board member in this case also noted:

This claimant's youth, lack of education, and isolation in her ongoing condition of sex trade debt bondage provide a plausible enough explanation for the delay [in making her claim]¹⁸⁴

From searches using CANLII and Quicklaw the following cases were extracted:

Case #3. The more contentious factual questions are in regards to the particulars of her working conditions and whether Ms. Sarmiento was the victim of exploitation. In that regard, I note that the Crown did not lay charges under s. 279.01 of the *Criminal Code*¹⁸⁵, ...

I find that she had access to her passport when in Canada. I find that she attended at and opened an account at the PNB. The doors to the Orr home were not controlled by an electronic keypad. A person did not need a key to leave the Orr home. Ms. Sarmiento knew she was in Canada illegally long before she left the Orr home. Ms. Sarmiento called the Philippines from the Grant Street residence on a regular basis.

... I cannot find beyond a reasonable doubt that Ms. Sarmiento was treated as a virtual slave. While her working conditions were not the same as in Hong Kong, I cannot accept her evidence that that she was forced to work 16 hours a day, seven days a week. She was not forced to work in humiliating and degrading conditions. The Crown has not proven the aggravating facts concerning her employment.

Case #4. In our view, the claimant has the history and demeanour of a severely-abused child, abuse much beyond the range of the typical claimant's experience. He testified that his father subjected him to physical, emotional, and psychological degradation over a long period of time when he was young. The father's actions appear to have been designed to create an unquestioning, obedient son. But the claimant has emerged from the experience having only the weakest conception of his own individuality and interests. Only under the protection of Ministry caregivers has he attained the strength of will to resist his parents' ongoing wish that he reconnect with the snakeheads and continue on to America, as they originally planned.¹⁸⁶

¹⁸⁴ X (Re), 1999 CanLII 14662.

¹⁸⁵ Note this is the only case decided under IRPA s.118 where an individual was convicted of trafficking – the reasons provided in this decision relate only to sentencing under s.118 which does not require “exploitation” as a requisite element for conviction unlike the Criminal Code. It requires only “knowingly organiz[ing] the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion.” Instead, exploitation acts only as an aggravating factor relevant to sentencing. The victim in this case was determined to be trafficked in accordance with s.118 of IRPA but was not found to be exploited. *R v Orr* [2013] B.C.J. at 31, 43-44.

¹⁸⁶ *X v. Canada (Immigration and Refugee Board)*, 2001 CanLII 270001.

Case #5. In XXXX¹⁸⁷ 2005, the claimant came to Canada by arrangement of XXXX in Ukraine, using the name she used for her original refugee claim. She was to be a XXXX making \$80 a day. She was told she would make a refugee claim. She was young at the time. She was told what to say in her refugee claim, her original story. XXXX picked her up next day, and told her she was to be an XXXX to pay off the debt, and would make \$50 per day. He threatened to kill her, and reminded her she was here under a false name, knew nobody in Canada, and the police wouldn't help because they were corrupt like in Ukraine. For three months he threatened to kill her and her family in Ukraine if she left. She was watched by XXXX, his girlfriend, with whom she lived.¹⁸⁸

Case #6. When the claimant was fourteen years of age, the claimant's parents told her that she was going to another country to study because they were having problems. The claimant was taken on a plane with an Arab man. She learned that she was in XXXXX, Lebanon, only after it was announced on the plane that they were landing.

The claimant was taken by the man to a private home where she was locked up and forced into slavery. She worked twenty hours a day without pay. Once she learned to speak Arabic, she was told that she would never be returning to Ethiopia.

Through a Sudanese guard who worked at the same home, the claimant connected with the Ethiopian community but she could never leave to meet them as she was locked in the house.

After one year, the claimant was left in the house with a relative. She managed to leave the house to meet the guard. The guard called two Syrians who came to get the claimant and smuggled her out of the country.¹⁸⁹

Case #7. In XXXXX 2004, the claimant violated a tradition in her home village and was sentenced by the village elders to death. With the help of her father, she escaped to XXXXX where she met XXXXX XXXXX who helped her flee the country in XXXXX 2005 in exchange of agreeing to the payment of 50,000 Euros once in Italy. The claimant was later forced into prostitution in order to repay this debt. In XXXXX 2005, she was arrested by the police and upon providing information against Mr. XXXXX, was subsequently provided status in the country along with shelter services. In XXXXX 2007, Mr. XXXXX retraced the claimant, seeking payment of the debt and uttering threats to her. In XXXXX that year, she contacted XXXXX, a client/boyfriend, and sought his assistance in leaving the country, which she did in XXXXX 2008 with the help of a false Italian passport. She arrived in Montreal by airplane on XXXXX and immediately requested asylum.¹⁹⁰

¹⁸⁷ Extracts reproduced exactly from Canlii website. Canlii does not provide names of claimants in some decisions.

¹⁸⁸ X (re), 2010 CanLII 98070 at para 2.

¹⁸⁹ X (Re) 2006 CanLII 52155.

¹⁹⁰ X (re), 2010 CanLII 98066.

Case #8. Ms. Streanga's life history is sad. She grew up in a small city in Romania as the daughter of a Hungarian mother and thus identified as Hungarian or foreigner in Romania. She had a limited high school education and was raped by a gang of thugs while pursuing that education. She and a girlfriend were lured by unscrupulous persons to work just over the border in Hungary in what they thought would be waitress jobs. Instead, they were placed in an exotic club to work as dancers and prostitutes. There was little realistic prospect of escape except back to the Romanian city where she had been molested and preyed upon in the first place. Given this background it is not surprising that the Applicant has had many personal difficulties to cope with.¹⁹¹

Case #9. The recruits were met at the airport in Canada, assisted in dealing with the Canadian immigration authorities, and then transported to houses owned by the accused and lodged in Spartan quarters in basements in those houses. The recruits, none of whom spoke any English, had been relieved of all of their travel and immigration documents by their Canadian hosts. They were then taken to various banks to open bank accounts and to obtain access and debit cards. ...

Although the recruits were housed and fed, it appears that they were subjected to intimidation and that their ability to move within the community was controlled. Their inability to speak or understand English contributed to their isolation.

When some of the recruits seized an opportunity to leave and to contact the local police, they were threatened with physical violence and death. Members of the enterprise in Hungary contacted relatives of the recruits in Hungary with the message that unless the recruits recanted and withdrew their complaints against the accused, it would "not end well" for them.¹⁹²

The following two cases were extracted from the IRB database of first-instance, unreported decisions.

Case #10. Now, as I said previously, because of her age and because of the confused circumstances of her participation in this project, she can hardly be held responsible. However, what counts is the perception and what would the perception be to the police if she went for protection from the snakeheads. And I agree with her proposition that she would be seen as someone who had participated voluntarily with the snakeheads and she would then be lucky if the only thing that happened to her was that the police refused their protection. They might be more enthusiastic than that and they might even charge her. So I accept that argument.¹⁹³

¹⁹¹ *Streanga v. Canada (Citizenship and Immigration)*, 2007 FC 792 (CanLII).

¹⁹² *Domotor*, *supra* note 136, paras 7-11.

¹⁹³ Decision on file with author. Retrieved through IRB search of internal database.

Case #11. Ms. **XXXXX XXXXX** testified that the claimant was under her care and that the Ministry has made steps to secure and protect the claimant from being discovered or located by the snakeheads. She described the claimant as naïve, very trustful and not sophisticated at all. ...

Ms. **XXXXX** description of the claimant was evident in her demeanour at the hearing. She appeared very innocent and not fully aware of the magnitude of her problems if the snakeheads succeed in locating her. She testified her mother told her by telephone that the snakehead boss was blaming her for the failure of the smuggling attempt. The boss wanted her mother to give him the claimant's address and telephone number in Canada.¹⁹⁴

Negative Decisions

In the following cases individuals were deemed not to be victims of trafficking:

Case #1. Counsel also argued that what had occurred was an instance of human trafficking by organized crime. While the fraudulent arrangement was "organized" and perhaps four or five people (if the school secretary and driver are counted in) were involved, the panel finds the arrangement to have been local in nature and small-scale in extent. The fraud does not appear to have involved a "ring," "family" "triad," "mafia" or any other trans-national criminal or human-trafficking syndicate. The claimant testified that she was not physically or sexually abused. What she described, in the panel's view, was an arrangement to import free Mexican domestic help, which at least some of the participants, as witnessed by the testimony of CBSA Enforcement Officer Jack Avery, willingly agreed to. The claimant states that the **xxxxx xxxxx** fraudulently characterized it as "home-stay." The panel notes that the claimant did not agree to the arrangement. But it also notes that the claimant was not locked in the home and that for many hours of the day the two **xxxxx xxxxx** were at work, leaving the claimant free to leave if she so desired. The panel notes that the claimant did leave the home on numerous occasions and visited medical staff and community workers without telling anyone of her alleged plight. She did not, she testified, because she felt fear and shame. Asked for more details, she could not supply them.¹⁹⁵

Case #2. There are other difficulties with the claim of ignorance. While according to Dr. Szonyi's evidence and other evidence submitted by counsel, many rural Fuzhounese are poor, and ignorant as to the risks associated with illegal emigration and as to life in North America, there is other evidence before us that suggests that many of them are not so ignorant nor so poor. In this regard, the first claimant testified she didn't know it was common for young Fujianese to leave and go abroad. When asked whether she saw older children leave China, she testified, "I didn't know at all." Furthermore, we infer from these disingenuous

¹⁹⁴ Decision on file with author. Retrieved through IRB search of internal database.

¹⁹⁵ *D.U.Z. (Re)* [2006] R.P.D.D. No. 15 paras 7-8.

responses that the first claimant and her family are probably some of the rural Fuzhounese who are not so ignorant and not so poor. Our inference in this regard is bolstered by the first claimant's testimony that her family has a television and sufficient access to financial resources to enable her to travel to Canada by plane, the most expensive method of migration.¹⁹⁶

Case #3. There is no evidence that she has been curtailed in her movement in Canada, living arrangements or educational pursuits by anyone. There is no evidence that she has been required (by anything other than market conditions) to work at any particular job. Therefore, the respondent submits that the Protocol has no application to this applicant and subsequently the officer was not required to refer to it in this case. I agree.¹⁹⁷

Case #4. Our understanding of the documentary evidence before us is that victims of snakehead smuggling contracts are not promised to a particular employer and do not become the "property" of that employer. They are obliged to pay back a staggering debt, and due to circumstances (usually working illegally and with no English skills) are forced into low-wage jobs. In our view they are not, however, kept in "slavery" or similar practices.¹⁹⁸

Case #5. The world of exotic dancing and strip clubs is not only notoriously linked to prostitution and common bawdy house criminality but also to an underworld of individuals, usually predatory males, who recruit and control by fear the women engaged in these ventures. For these working women, the lines between freedom of choice, dependency, coercive control and exploitation are often blurred. This is such a case. ...
Mr. Johnson is small in stature and in weight. There is no realistic suggestion that he posed a menacing physical presence in any way. The evidence of his lawful self-employment was uncontradicted. There was no evidence at trial that the accused owned assets or lived a lifestyle beyond the means of a person operating a small business. In any event, tricking or stealing money from exotic dancers is not necessarily the same as criminal exploitation or the commission of prostitution-related crimes.¹⁹⁹

Case #6. Mr. Dandurand [quoting an RCMP officer who created a law enforcement toolkit on trafficking] said victims of trafficking are often young and single with no ties to community or family. He said controlling money was an important means of maintaining control over the trafficked person. It would be unusual for a victim to have independent access to her own bank account. Money would provide the victim a means of escape. Mr. Dandurand said it would be unusual for the trafficker to allow the victim freedom of movement within a

¹⁹⁶ *T.Z.U. (Re)*, [2000] C.R.D.D. No. 249.

¹⁹⁷ *Chu v. Canada* [2006] F.C.J. No. 968 para 25.

¹⁹⁸ *A.F.W. (Re)*, [2001] C.R.D.D. No. 215 para 25.

¹⁹⁹ *R. v. Johnson*, [2011] O.J. No. 317 paras 2 and 171.

community of similar language and background. He agreed it would be unusual for the victim to have regular contact with family.

Taken as whole, Mr. Dandurand's evidence does not support the Crown's theory that Ms. W. and Ms. T. were victims of trafficking. Few of the hallmarks of trafficking applied to either Ms. W. or Ms. T.'s circumstances. They had access and control over significant amounts of money. They had keys to the massage parlour and the house. There appeared to be few, if any, restrictions on their movements. They socialized and had the freedom of movement within the Chinese speaking community in Vancouver. There was no denial to medical or dental care. Both had cell phones. Ms. W. had regular contact with her family who knew where she was, who she was with and the name she was using. They were not denied the food, clothing or the necessities. Ms. W.'s purchase of a very expensive purse attests to her financial freedom. Considering all of the evidence including that of Mr. Dandurand, it does not support the Crown's theory that Ms. W. and Ms. T. were victims of trafficking.²⁰⁰

While there are clearly some exceptions, and some extremely nuanced understandings coming from the IRB regarding migration, sex work and stigma, we see an extraordinary amount of evidence throughout these decisions illustrating how the “deserving victim” is identified and the ways in which those not conforming to the stereotypical understanding of victimhood are not deemed worthy of protection. Those deemed victims were “impoverished young women from the former Soviet Union duped into the sex trade”, they had the countenance of “youth” or that of “a severely-abused child.” They were isolated, uneducated and subjected to physical threats to themselves and their families. Where individuals weren’t physically forced, their naiveté was played upon such that they were entirely duped into entering their situations, lacking the agency or education to find their way out. The Board members make frequent allusions to individuals’ “demeanour” regarding their innocence or youth, and this demeanour of humility and innocence assisted the adjudicators in determining their victimhood.

Conversely, those who were not found to be victims display agency and ingenuity. They took steps to enter into and extricate themselves from circumstances in their life that were more or less desirable. Extremely stereotypical frameworks for deciding whether or not individuals are trafficked can be seen to be employed both

²⁰⁰ *R v. Ng*, 2008 BCCA 535 para 107.

by the IRB and criminal judges in the negative decisions. Individuals were deemed “not trafficked” because they did not show that they were “ignorant and poor” enough to be classified as victims of trafficking, one individual being identified as coming from a family who “has a television.” Their captors were also not organized enough, not having been “involved in a ‘ring,’ ‘family’ ‘triad,’ ‘mafia’ or any other transnational criminal or human-trafficking syndicate.” They were not “property” nor were they “slaves” and thus they were not trafficked. And in one criminal case on trafficking, “expert” law enforcement officer Yvon Dandurand provided the judge with a handy guide for identifying victims: young and single, without any control over money and no bank account, and without freedom of movement in a community of similar language. Unfortunately for the migrant women in this case they simply did not possess the requisite qualities, and it was these qualities rather than the circumstances of the employment activities that were the focus of analysis. While there are no specific guidelines for identifying victims of trafficking in immigration cases unrelated to charges under s.118 of the IRPA, these descriptions appear to supply characteristics entirely superfluous to the elements in any of the legal definitions that may be relevant to the decision. Neither the Protocol, IRPA or s.279.01 of the Criminal Code require that these characteristics be present²⁰¹, and yet they appear to be taken quite seriously as part of the decision making process.

In *Tracing Perceptions*, Christine Bruckert and Colette Parent note that in these types of cases, “[t]he focus on the ‘is versus does’ distinction ignores the ongoing stigma experienced by workers – once a woman works in the sex trade her ascribed identity is that of an ex-sex trade worker.”²⁰² She is referring in this context to determinations about states’ willingness to protect former sex trade workers if they are denied refugee status in Canada, the context in which many determinations of trafficking take place. However, this concept is equally applicable to determinations of victimhood itself. In the cases described above, it is less the activities surrounding the work that are addressed or the legal requirements to establish trafficking under

²⁰¹ See *supra* Chapter Three.

²⁰² Bruckert and Parent, *Tracing perceptions*, *supra* note 89 at 28.

applicable documents, but rather the demeanour, intellect and capacity of the migrant that is scrutinized. Bruckert and Parent note with respect to certain negative decisions that “we might consider that the dramatic presentation in the media of ‘sexual slavery’ may actually work to the disadvantage of the majority of irregular migrant sex trade workers whose situations or characteristics position them as outside of the discourse and hence outside of protection.”²⁰³ To that end, these representations also exclude non sex trade workers, particularly those not displaying characteristics consistent with the dominant paradigm.

D. COMPLEXITIES AND CONSEQUENCES

Ultimately the images, writings and speeches from the various social actors described above combine together to support and bolster an understanding of trafficking in accordance with the dominant paradigm. The classic attributes of victimhood, the ubiquity of the trafficker and the criminality of the enterprise are ever-present in representations related to trafficking in Canada. “Rescue” by law enforcement is deemed the appropriate method of intervention, and individuals that don’t fit this mould are taken to be suspect. Victims are required to display these attributes in order to be classified as trafficked and to receive whatever benefits might be accorded someone with that status in any particular case. Those who are deemed “not trafficked” are thus excluded from this specific programming.

As described in Figures A and B, the interrelation between the various actors can also be seen to reinforce a view of trafficking consistent with this paradigm, leading to programming and decision-making made in accordance with it. We also see images and statistics recycled through the various actors as support for that programming. The questionable motivations behind particular programming and operations, combined with the various assumptions built into the dominant paradigm, appear to generate programming built on rescue, rather than rights. The implicit requirement that trafficked persons lack agency, that they display characteristics of helplessness

²⁰³ Bruckert and Parent, *Tracing perceptions*, *supra* note 89 at 24.

and innocence, and that they be duped by organized criminal enterprises into slave-like conditions result in anti-trafficking programming designed around “rescuing” these individuals from their fate and rehabilitating them in order to make them whole.

In addition, conflation of various activities under the rubric of trafficking has allowed for concerns around one activity to be used as support for programming designed to address something entirely different. As discussed above, even within the sex trade the variety of venues and levels of income associated with different types of work necessitate different forms of programming – regardless of whether that programming comes in the form of sex worker rights advocacy or “anti-trafficking” work. As discussed above, statistics around missing Aboriginal women are used as support for anti-trafficking programming, as are statistics around women in the sex trade or sexually exploited youth. These are put forward to bolster anti-trafficking programming which then, as we see in the section on operations and programming, focuses on border security or “raids” of residences suspected to have “Asian women” trafficked therein. Yet data gathered in this study revealed the vastly different nature of the various kinds of activities classified as trafficking, and the complexities of the experiences of individuals involved. Under the guise of “rescue”, individuals who become involved in sex work are categorized as “trafficked” or “not-trafficked” depending upon the characteristics they display and the complexities of individuals’ experiences are thus reduced into checklist format for easy classification. Yet participants in the author’s study, including law enforcement authorities, told significantly different, multifaceted stories of sex work, migration and forms of exploitation and control,. In addition, foreign workers brought to Canada to work in areas outside the sex trade have faced particular types of hardships, some of which may overlap with individuals working in various sectors in the sex trade, but many of which do not.

In the creation and implementation of these activities the complexities in individuals’ experiences of migrating to Canada are minimized. The Global Alliance Against Trafficking in Women periodically publishes work critical of anti-trafficking

campaigns, revealing the “collateral damage” caused by this specific form of advocacy. And part of this critique focuses on the reduction of migrants’ identities into simple categories:

Migrant women, who might also be trafficked, combine multiple identities. They experience victimisation during the moment of their trafficking, but as migrants they continue to be agents, devising resistive strategies individually or collectively as subaltern subjects. Factored into their consciousness and identities is the global divide along lines of nationality, citizenship, religion, class, caste and race. Evicted from their own landscape due to a host of reasons, the transnational migrant subjects are constant visitors to a vanished geography but there is no break in their memories or experiences, and more importantly, in their perceptions. These transnational global citizens and resistive subjects carrying with them their postcolonial angst are anything but victims. Hence, tools of the postcolonial analytical framework which better encapsulates the multi-tiered realities, subjectivities and identities of this migrant subject, need to be actively brought and employed to the anti-trafficking terrain in order to fully ‘centre’ the migrant and trafficked woman in all her complexity.²⁰⁴

The various international and domestic actors have contributed to a concept of trafficking that ignores this complex reality and attempts to neatly categorize human experience. In so doing, the laws around trafficking and the activities developed to implement the laws have been created in ways that serve primarily to exclude people from the “trafficked” category rather than provide exploited individuals with redress. Anti-trafficking advocates have consistently called for increased training, expanded definitions of “victim” and more sensitive law enforcement responses to trafficking. It is suggested that these changes will improve the situation of trafficked people in Canada. However, these changes continue to uphold the binary of “trafficked” versus “not-trafficked” and the focus remains on identifying victimhood. The suggestion from GAATW and a number of other critics of the paradigmatic anti-trafficking movement is to instead employ a framework that more adequately addresses individuals as individuals, with varied histories and migratory experiences and as

²⁰⁴ Global Alliance Against Traffic in women, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the world*, (2007) online: GAATW <http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf> at ix.

such, varied personalities and strategies for responding to their own exploitation. This framework also includes an analysis of the contexts in which those histories are created, including the various global factors that shape those migratory paths, and responses to the exploitation of migrants cognizant of their specific needs and desires. The current approach to anti-trafficking programming in Canada has failed to be informed by these concerns and as such has failed to address exploitation in any significant way. Changing the definition of trafficking is insufficient to provide redress either to migrants or sex workers who face exploitative circumstances. So long as the binary continues to exist between trafficked and not-trafficked, the dominant paradigm will serve to circumscribe the boundaries and characteristics of each.

CONCLUSION – BEYOND TRAFFICKING

Viewing discussions around “trafficking” through the framework of Critical Legal Pluralism (CLP) allows us to see the particular ways in which this phenomenon has been given life and substance. We see how the different social actors on the trafficking stage interact with each other and with laws and policies to shape what is designated as “trafficking”, and who is defined as “trafficker” and “trafficked”. Analysing the legal language alone cannot provide us with the full picture of what is or is not considered to be “trafficking” either at an international or domestic level. The background against which such legal language is drafted and the context in which it is applied ultimately determines who benefits from the laws and who suffers harm as a result.

The data reviewed in Chapters One and Two reveal how various intergovernmental (IGOs) and international nongovernmental organizations (NGOs) set the stage for international determinations of what is to be considered trafficking. In Chapter One we see how the international community, responding to historical concerns around women’s sexuality and migration but mired in disagreements about the nature of prostitution and the willingness to regulate it, started to shape the term “trafficking” into its modern-day form and thus how the dominant paradigm was born. In that chapter we further see how, through the development of trafficking agreements within conventions on transnational crime, the United Nations and other IGOs have emphasized particular trafficking activities as being more worthy of attention, such as those involving border security issues and organized crime, despite crafting definitions ostensibly having broad application¹. Anxieties around border integrity and criminality pervaded international discussions around the UN Protocol and thus while seemingly responding to concerns around exploitation of migrants, the agreement actually reflects very particular law-and-order interests.

It is against this backdrop that the international community has been responding to trafficking, and thus the dominant paradigm became clearer, and has been solidified into the primary interpretations of what “trafficking” *is* within Canada’s legal framework. Replete

¹ Protocol, art. 3.

with notions of innocence and betrayal, criminality, foreignness, rescue and rehabilitation, through the review of data in Chapter Two we see how the dominant paradigm came to be what it is today through the interaction of nongovernmental organizations, intergovernmental organizations, academics in the field, media and state level actors with each other and with international texts on the topic. These actors feed into the dominant paradigm by adding characteristics to it, shaping those characteristics, and reflecting the overall notion back to each other through “chains of equivalence”, as well as by creating laws and policies at a domestic state level. It is here we see the “is” turning into an “ought”, the descriptive shifting to the normative, where characteristics formerly used to *describe* trafficked victims turn into checklists used to determine *whether or not* someone is trafficked. It is also here then that the checklists and characteristics become entrenched as a means to exclude those who do not fit the mould.

These same issues can be seen at a domestic level in the Canadian context through the debates and extrinsic sources used to develop Canadian legislation and the social actors who influenced it. In Chapters Three and Four the data reviewed reveals the ways in which the dominant paradigm plays out in Canada. In the debates around criminal anti-trafficking legislation I show the influence of the dominant paradigm in the speeches and the sources used, with parliamentarians frequently quoting unverified statistics, international organizations and media reports. In this way the influence of the already existing dominant paradigm of trafficking is brought directly into a Canadian legislative context. We also see these actors further shaping that international paradigm by adding concerns highlighted by Canada, particularly around youth sexual exploitation and Aboriginal women. This revised paradigm is then reflected back through imagery and discussions from Canadian social actors who echo these concerns.

Finally, through a review of operational policies, operations conducted by law enforcement and border security agencies as well as case law, the tangible effects of the operation of the dominant paradigm can be seen. In Chapter Four the data reveals the ways in which the dominant paradigm operates through the use of checklists or assumed characteristics of victims to exclude those who do not appear meek enough, broken enough or innocent enough from receiving various benefits accorded to trafficked persons. We also see

trafficking operating as a hindrance to both Canadian and migrant women's rights, particularly in the area of sex work. There is extensive evidence of sex workers being subjected to raids of their workplaces, invasions of privacy, and further criminalization based on the potential that they are trafficked or are participating in trafficking activities. Foreign women deemed unilaterally by border authorities to be *potential* victims may even be barred from entering the country when they otherwise meet all necessary criteria. The Canadian context shows itself to mirror and go even further than international contexts in upholding and entrenching the dominant paradigm, and we see throughout the data the ways in which that paradigm does not accurately reflect the complexity of migration or sex work. In Canada it is clear that the paradigm acts as an exclusionary force to the detriment of most migrants and sex workers, the lives of whom belie a complexity not accounted for in this mode of understanding. Heightened border security concerns, prosecution and a law-and-order approach to addressing trafficking thus take precedence in Canada, leaving aside concerns directly expressed by migrant workers and Canadian sex workers regarding exploitative or unsafe working conditions.

Frustrations have been expressed about this approach from several groups in Canada and abroad. Some critique the definitions used to characterize victims, some critique the racist implications in anti-trafficking campaigns, and other focus on the problems with the law-and-order approach to anti-trafficking programming. One of the most visible and recognizable forms of resistance to the trafficking movement appears to come from sex workers seeking to distinguish consensual sex work from trafficking. The debate between sex worker rights advocates and prohibitionists that raged in the negotiations to the trafficking Protocol, discussed in Chapter One, can still be clearly seen in current discourse. In an open letter responding to the Salvation Army's "The Truth isn't Sexy" anti-trafficking campaign, a coalition of Vancouver sex worker advocates wrote:

Dear Salvation Army:

Vancouver's sex workers are distressed and angry over your "The Truth isn't Sexy" anti-trafficking campaign.

...

You wrongly conflate trafficking with sex work. ... Conflating sex work and trafficking leads to policies and enforcement strategies that endanger workers and violate their

rights. We note that this is already happening in Canada. For example, there have been recent raids in Halifax, Ottawa, Grand Prairie, Vancouver, Winnipeg, London, Hamilton, Barrie, and Calgary. In most cases, these raids have resulted in very few “rescues” of trafficked women because the majority of those arrested in the raids turn out to be legal Canadian citizens or permanent residents. We believe these raids have both a racist and anti-immigrant character because they target vulnerable minorities and immigrant workers, who have limited resources or are subject to visa restrictions.

...
The “rescued victims” are frequently treated as criminals—they are arrested, detained, and even deported, and few are provided with support services.²

The frustration expressed by this Vancouver-based group relates to the conflation of all forms of sex work, the undermining of sex workers’ agency and the negative effects anti-trafficking operations have had on sex workers and immigrants, as described in previous chapters. However, implicit in even this response is an assumption that there *are* means by which to identify those who are trafficked and those who are not that avoid those pitfalls. UN Women’s “Note on Sex Work, Sexual Exploitation and Trafficking”³ poses the same problems:

The issues of sex work, sexual exploitation and trafficking are complex issues which have significant legal, social and health consequences. Due to such complexity, it is important that we do not conflate these three issues which deserve to be considered in their own right. We cannot consider sex work the same way we consider trafficking or sexual exploitation which are human rights abuses and crimes.

While this note focuses on *all* sex workers’ rights to safety, adequate working conditions and freedom from forms of coercion, lists several recommendations for achieving those goals, and identifies complexities within the sex work industry similar to those described in Chapter Four of this work, it still maintains the distinction between “trafficked” and “not-trafficked”, thereby still allowing for the dominant paradigm to flourish within that category of “trafficked”. Although the goal of the UN Women document was to benefit all sex workers and shift discourse towards viewing sex workers as rights-holders, the continued

² FIRST, “Open letter to the Salvation Army”, online: FIRST <<http://www.firstadvocates.org/rights-not-rescue-open-letter-salvation-army>>.

³ UN Women, *Note on Sex Work, Sexual Exploitation and Trafficking*, online: Global Network of Sex Work Projects <<http://www.nswp.org/sites/nswp.org/files/UN%20Women%27s%20note%20on%20sex%20work%20sexual%20exploitation%20and%20trafficking.pdf>>.

preservation of the dichotomy lends itself to programming and policies that exclude rather than benefit sex workers or migrants, or both. It upholds the notion that there is a distinct form of suffering that is “trafficking” and that through clearer definition or training programs or other tactics this unique phenomenon may be revealed.

As discussed in previous chapters, in maintaining this opposition individuals who migrate and/or are involved in sex work are divided into neat categories of “trafficked”, “refugee”, “prostitute” or “illegal” and these constructs are deemed more or less worthy of protection and assistance. Innocence or guilt is attributed according to the level of agency, and their worthiness as rights-bearers becomes bound up with that culpability. Those who are “trafficked” in accordance with the dominant paradigm are worthy of receiving benefits and assistance in whatever form is deemed appropriate. Accordingly, refugees are allocated a similar but slightly different set of benefits. As a consequence, those who fall outside these categories, “prostitutes” or “illegals”, are thus able to be viewed as outside the realm of concern. Bruckert and Parent echo this sentiment in the context of Canadian case law on trafficking, noting that

... the documents are interpreted in a manner that renders the majority of claimants outside the discourse and hence not entitled to the consideration afforded ‘victims’. In particular the extrajudicial and potentially moral question of whether the women knew they would be working in the sex trade is rendered significant. It would appear that embedded in the sex slave/sex worker dichotomy is another dualism – innocent/culpable. Therefore women who are unaware that they will participate in the trade are potentially protected while women who experience severe labour abuse are held accountable for their situation regardless of the exploitation they may experience. In short the ‘sex slave’ discourse may operate against the interests of many irregular migrant sex trade workers by obscuring their exploitation at the same time as it renders exploitation the defining characteristic of others.⁴

The operation of the dominant paradigm within the trafficked/not-trafficked discourse supports a narrow construal of the category of those who receive benefits, while still

⁴ Christine Bruckert and Colette Parent, *Organized crime and human trafficking in Canada: Tracing perceptions and discourses*, (Ottawa, ON: Royal Canadian Mounted Police, 2004) online: Canadian Police College <<http://cpc.phippsinc.com/cplib/pdf/58773e.pdf>> at 2.

allowing for increased border integrity measures and restrictive immigration policies. The focus of programming is placed on measures addressing trafficking perpetrators through immigration and criminal laws, in Canada resulting in deployment of funds towards the law enforcement agencies addressing trafficking. However, justification for such policies has thus far been levied through references to victims and tales of horrifying stories of innocents being raped, beaten and enslaved. As discussed in Chapters Three and Four both Parliament and various branches of the civil service put forward horrific tales of sexual enslavement as support for legal sanction and programming around trafficking in persons. The reliance on such victim imagery to pursue a law and order-focused agenda seems somewhat disingenuous.

Furthermore, as discussed in Chapter Two, this form of “law and order” approach takes particular note of the means of “rescue” of victims, being suspect of those who were not “freed” by police through their identification techniques and raids. This requirement not only places even more people outside of the realm of the “trafficked” but provides justification for sex workers’ rights to be compromised in the name of discovering trafficked “victims.” In the debates leading up to the Supreme Court of Canada’s decision in *Bedford*⁵, a case questioning the constitutional validity of a number of Canada’s laws around prostitution, there was a significant amount of discussion regarding the “links” between trafficking and prostitution⁶. In the wake of the Supreme Court’s striking down of many of these provisions as detrimental to sex workers’ security interests⁷, there was some hope that debates around prostitution could be reframed so that the neat categories of “trafficked” and “prostitute” could be problematized. However, in recent days a spate of raids on prostitutes’ homes and businesses have taken place in the name of locating underage victims of trafficking, without any apparent justification for choosing these particular places to search. An article from the January 28, 2014 edition of the *Globe and Mail* reported on the raids and sex workers’ concerns and fears:

⁵ *Canada (Attorney General) v. Bedford*, 2013 SCC 72.

⁶ See for example Toronto Sun, “Prostitution laws to be decided by Supreme Court on Friday”, online: Sun Media <<http://www.torontosun.com/2013/12/19/prostitution-laws-to-be-decided-by-supreme-court-on-friday>>.

⁷ *Bedford*, *supra* note 5 at para 168.

Det. Constable Dick said the visits to prostitutes made by the Halton police were about human trafficking, not the sale of sex.

But prostitutes in Ottawa say the police inspections in this city were both intrusive and intimidating and leave them vulnerable to the same types of risks that were highlighted in the Supreme Court ruling.

Emily Symons of POWER, an advocacy group for Ottawa-area prostitutes, said massage parlours, agencies and independent sex workers were targeted indiscriminately. In all cases, she said, the visits were conducted by four male officers, one of whom arranged an appointment on the pretext of wanting sex for money.

POWER distributed the account of one sex worker, identified as Quinn, who said the officers ignored her when she said they did not have the right to search her apartment and threatened her with assault charges when she tried to block them from opening a closet.

“When they asked why I was so upset, I told them that as a woman, as a woman who has experienced sexual assault, and as someone who was not fully clothed or expecting police officers, that I was feeling harassed and intimidated,” Quinn said. “One of the officers laughed.”

Inspector Paul Johnston of the Ottawa police said his force conducted 29 of the visits, all targeting human trafficking, and received just one complaint.

“We’re not doing it as an enforcement-driven initiative, we’re doing it to ensure that the women are actually safe,” said Insp. Johnston. And “we’re here to help them as well. If there’s any issues, it’s an opportunity for them to speak to us.”

When the Supreme Court struck down the prostitution laws, it suspended its ruling for one year to give Parliament time to respond. Alan Young, the lawyer for the sex workers who successfully challenged the prostitution laws, says that has created a chaotic situation in which the law remains in place but cannot be enforced because it has been declared unconstitutional.

Human trafficking is a serious crime and should be treated as such, Mr. Young said Monday. “But, if it’s going to be the panacea for addressing the gap that has been caused by this case, then a great disservice has been done to both the public and to sex workers,” he said “It trivializes real trafficking and it simply criminalizes activity which the court said needs to be reviewed by Parliament.”

Ms. Symons said the Ottawa police don’t seem to understand that, “if they want to help sex workers and help stop violence and help stop exploitation, then they have to work with sex workers, not against sex workers.”

As noted, a single complaint was received from all of their efforts, and sex workers interviewed reiterated the need to collaborate with people in the industry to stop exploitation rather than undertake these invasive and offensive tactics. Thus while the distinctions made between trafficked and “not-trafficked” are hailed as useful from a criminal justice and border security standpoint, the utility of the distinction does not enhance its ability to help “identify” more victims and provide assistance. Rather, as seen

here and in Chapter Four it instead allows intrusive tactics to be employed in the search for “victims” both inland and at the border.

With the myriad of venues in which sex work takes place, including street work, escort, “micro-brothels”, exotic dance and sex work collectives, and the variety of types of individuals involved in the different venues, a clear split between “trafficked” and “not-trafficked” seems incongruent. Where third parties may be involved they may play supportive roles (driver, agent, administrator) and/or be in complex emotional relationships with sex workers. With respect to migration the use of third parties as liaisons to better lives is equally as complex and the decision to migrate may be based on dozens of considerations, some which may be accurate and others inaccurate, and involve different direct and indirect pressures. Focusing on a “trafficked/not-trafficked” binary allows for the dominant paradigm to operate in determining which of these individuals is worthy of support, ignoring these complexities and the differing needs that may accompany each individual.

Given these complexities the traditional “multi-sectoral” approach to victim assistance, such as that contained in Canada’s *National Action Plan*,⁸ seem to miss the mark. Exploited migrants of many types may be seeking residency status in order to work, perhaps to pay off debts incurred in the process of migration, or to make up for low (or no) wages provided during periods of exploitation. Some may require physical protection from recruiters or employers, while others fear authorities more than individuals they have contracted with. Child labourers require social service intervention and both criminal and administrative mechanisms may be available to address perpetrators and provide redress. Sex workers of all types seek security and safety, regardless of the venue, but some may be seeking physical protection from third parties and others seeking decriminalization of those third parties’ status. Some may be seeking training programs to leave sex work altogether, facing a world in which women’s sexual services are often far more highly compensated than women’s non-sexual work, and others may derive a sense of empowerment from the work, having simply

⁸ Government of Canada, *National Action Plan to Combat Human Trafficking*, (2012) online: Public Safety Canada <<http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-ctn-pln-cmbt/index-eng.aspx>>.

contracted with an abusive or exploitative individual in one circumstance. Children involved in sexually exploitative circumstances require social service interventions that adults do not, and perpetrators of offences against children may be held accountable for individual sexual abuse, sexual assault, procuring of minors, or receiving benefit from minors' prostitution, all of which will involve different solutions by social services depending upon the child's family structure, geography and options. Yet despite the widely disparate needs of these various individuals engaged in exploitative work, their sites of work and modes of migration, these "multi-sectoral" approaches attempt to bring together different agencies to anticipate all forms of trafficking and deal with them appropriately. Naturally, they fall short and ultimately focus on victims reflecting the dominant paradigm. These approaches necessarily presume some form of homogeneity amongst trafficked victims, sufficient to be able to determine an appropriate integrated response. Complexities are thus necessarily dispensed with, as trying to anticipate numerous variations is not feasible. This further allows for the operation of the dominant paradigm in reducing the trafficked victim to a clear, understandable caricature suitable for description across all agencies.

David Turton, writing for the UNHCR, provides an extremely relevant analysis on a similar issue with reference to the category of "forced migrants" and moves to assist/rescue them. Turton argues that scientific inquiry into migration that did not presuppose already existing categories such as "refugee" or "internally displaced person" would be unlikely to generate these categories.⁹ The similarities between individuals placed in these different categories are exaggerated to provide practical bases on which to form policy and politic.¹⁰ Similarly with trafficking, the dominant paradigm operates as a homogenizing force that allows for the reduction of widely disparate individuals into the group "trafficked", and given the significant differences between these individuals the resulting policies fall short of the mark.

[W]hile forced migration is certainly a subject worthy of academic research, when we try to separate out a class of forced migrants from migrants in general, we are faced with a problem ... [I]t proves impossible to apply the term 'forced migration' to the real world in a way that enables us to separate out a discrete class of migrants.¹¹ [And]

⁹ UN High Commissioner for Refugees (UNHCR), *Refugees, forced resettlers and 'other forced migrants': towards a unitary study of forced migration*, (2003) online, REFworld <<http://www.refworld.org/docid/4ff2afa93b8.html>> at 13-16.

¹⁰ UNHCR, *ibid* at 13-16.

¹¹ UNHCR, *supra* note 9 at 7.

... while we should be interested in the factors that limit choice ... we should not lump people together into categories, according to the extent of choice open to them. Different forced migrants, however they are categorised, have different areas of choice and different alternatives available to them, depending not just on external constraining factors but also on such factors as their sex, age, wealth, social connections and networks. This means that we have to understand the point of view and experiences of the people making the decision to move¹².

The use of “trafficking” as a concept in research implicitly assumes a cohesive phenomenon that can be studied, analysed and addressed. This assumption then drives the research and systemic solutions to underlying issues are ignored in favour of narrow, “multi-sector” fixes to the “immediate bureaucratic problem”.

Turton proposes rather the use of the “ordinary person” as a concept when addressing forced migration and I suggest that this concept be applied in the specific context of anti-trafficking research, analysis and programming.

In other words, we should be focusing on forced migrants as ‘purposive actors’ or ‘ordinary people’ The practical reason is that this is how migratory processes actually work.¹³ ... The ethical reason ... is that by emphasising ... “their capacity for agency against all odds”, we increase our imaginative ability to identify with the suffering of others, to see them as potential members of our own moral community. ...In short, the more we are able to see the forced migrant as an ordinary person, embedded in a particular set of local circumstances, the more difficult it becomes to ignore his or her plight - to become, and remain, a bystander.¹⁴

The data reviewed in this work draws us to the conclusion that the trafficked/not-trafficked dichotomy cannot address the complexity of the various individuals, groups, and sectors of work that might face exploitation at the hands of Canadian employers and thus programming based on these connotations is not able to address the various problems experienced by them. This dichotomy cannot comprehend the victim as “the ordinary person”. Is an individual a refugee? A smuggled person? A trafficked person? Or all at the same time? All of these may fit individuals at any given time during their process of migration and they may simultaneously fit several categories at once. As discussed throughout this work, several categories of quite disparate people are included under the umbrella term “trafficking” and

¹² UNHCR, *supra* note 9 at 9.

¹³ UNHCR, *supra* note 9 at 9.

¹⁴ UNHCR, *supra* note 9 at 11.

this ignores the complexities of individuals' migratory and employment histories. It seems apparent that the work thus far undertaken to address the suffering of "victims of trafficking" has had little effect on the groups of individuals who might be legally classified within its realm. I suggest, therefore, that the time has come to take a different approach.

The "ordinary person" is not viewed in terms of inclusion in a category, but in terms of his or her individual needs. What is required in order to address exploitation, even the extreme forms highlighted by NGOs, media and parliamentarians as "trafficking", is in fact the opposite of a "multi-sectoral" approach. Employing the "ordinary person" approach, individuals can be seen in their socio-historical contexts and services can be tailored accordingly. Instead of focusing on identifying and providing services to the "trafficked", providing relevant services to different sectors or groups is key. Furthermore, in lieu of focusing on the human rights of "trafficked victims", the "ordinary person" would possess rights under any number of human rights documents, including those relating to gender, labour and migrant workers.¹⁵ By using and bolstering the existing human rights mechanisms applicable to the "ordinary person", states and communities can more concretely respond to the various kinds of individuals who face exploitation in the migratory process and the intersection of their human rights.

The "ordinary person" approach would also respond more accurately to the explicitly expressed needs of various individuals engaged in sex work, without the need to categorize them as "trafficked" or "not-trafficked". For example, as discussed in Chapter Three, current criminal provisions exist to address the sexual exploitation of minors,¹⁶ and violence in general – including violence perpetrated against sex workers.¹⁷ And labour and employment standards legislation exists to address exploitation in the context of non-sexual and non-criminalized labour.¹⁸ These laws could be more consistently implemented and their application could be broadened. Providing safe pathways to access these protections without fear of deportation or criminalization would allow for individuals' particular concerns and needs to be addressed. The trafficking umbrella has not served, thus far, to

¹⁵ See Chapter Three, subsection (C)(i) for a non-exhaustive list of relevant human rights instruments.

¹⁶ *Criminal Code*, R.S.C., 1985, c. C-46, section 153.

¹⁷ See for example "Assault": *Criminal Code*, R.S.C., 1985, c. C-46, section 265.

¹⁸ See Chapter Three, section (C)(ii) for a list of relevant labour-related Canadian legislation.

provide useful remedies for the various kinds of exploitation many anti-trafficking proponents have actually invoked as a basis for promoting anti-trafficking work. In fact, I maintain that the trafficking term has been used to exclude, and to further marginalize many who are already in positions of great vulnerability, simply because they do not fit the model of the trafficked person and never could.

Basing services on the needs expressed by different groups and individuals allows those who are exploited to find redress for exploitation that fits the concept of “trafficking” in accordance with the dominant paradigm, while also allowing those seeking other rights-based remedies to do so. Children may thereby be treated differently from adults, their ability to understand and take part in activities being mitigated by their age. Sex workers from different fields of sex work, different economic backgrounds, and different educational backgrounds may be addressed in different ways depending on what *they* identify as keeping them safe and secure. Behaviour of third parties involved in migration could be analysed through more than a “smuggling/trafficking” dichotomy and their relationships to the desires and circumstances of individual migrants could be recognized.

By using legislation targeted at particular sectors, a more comprehensive set of programs can be adopted to provide sorely needed benefits to different groups, thereby decreasing levels of vulnerability. We have at our disposal a myriad of international human rights mechanisms *not* focused on trafficking but providing rights-based redress for women, sex workers, migrants, exploited workers, children and other vulnerable groups. We have domestic legislation providing criminal sanction for individuals defrauding, coercing, or luring people into various types of exploitative circumstances. We have labour, employment and occupational health and safety laws geared towards the problems faced by workers in the workplace. All of these various existing mechanisms can be shored up, agencies funded and policies built to address exploitation as identified by those who are involved in exploitative work. The term “trafficking” has now become so laden with associations that it is no longer useful in terms of providing positive benefits to individuals who are exploited.

The focus thus needs to turn back to the individuals, the workers, with all of their histories and personal stories and complexities. We can no longer continue to base approaches on

what others *think* to be the desires of these groups or what is determined *should* be their requirements as this approach has proven ineffective and, in some cases, even detrimental to their well-being. Rather it is time to shift focus, energies and budgets to meeting the specific needs each of these groups has made clear time and time again, and particularly those that have been heretofore ignored in favor of combatting the evil scourge that is “trafficking”.

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Annex A – List of Questions

All participants:

1. What role do you play in the investigation or prosecution of human trafficking?
2. Where have you most often come in contact with people you think might be trafficked?
– on the street, through raids? Brothels?
3. What types of coercion have you come across – situations which you think maybe look like trafficking but don't fit into the legal definition?
4. What are you counting as a victim of trafficking and where are you getting the information? –Do you think it's appropriate given the types of situations going on now?
5. Any thoughts as to a definition of coercion or exploitation? Any thoughts as to provision of assistance for irregular migration where there is exploitation but no coercion in the first place (e.g. live-in caregivers)?
6. Is there an identified provincial network of assistance providers?
7. Are there plans to create a referral mechanism for victim assistance?
8. What are the major challenges right now?
9. **Specific to aboriginal populations*:** Are there specific ways in which aboriginal women and girls are trafficked, and why do you think that is? What efforts have been made in your area to address the issue?

For CIC/CBSA/Police:

10. What has been your procedure for interviewing someone you think might have been trafficked? What did you ask and when? Medical assistance? Psychological assistance? Was assistance provided before her first interview?
11. Statistics that they have for trafficking. Where do they get the stats? Any plans to do a thorough data-collection of all suspected cases or near-cases?
12. Any place else I might go to get stats?
13. Does the ministry of labour ever get involved? Do they ever find victims that way?

14. Who exactly in your agency knows about trafficking or has been trained on trafficking?
What training?
15. What links do you have with victim assistance providers? Have they designated a shelter? Would they be willing to designate a shelter? Who decides? Who decides provincially?

For CIC/CBSA only:

16. In what ways are they trained regarding temporary residency permits and implementation of the directive?
17. What standards are they using to determine whether someone needs a reflection period or not? What toolkits are being used and how many people are getting them?
18. What definition of trafficking do they use to determine if someone has the right to a permit? What happens if she says she came of her own free will – what are you using to try to find out if that's true or not?
19. Who is deciding – CIC or CBSA? Where do they come across victims?
20. How does it work exactly? What is the procedure – what is asked at the first interview to decide on the permit? What exactly are you asking and how long does the interview last? Do you provide medical, psychological or victim advocates before embarking on the interview? How many people would be present? Interpreters?
21. What happens if someone is identified – who do you send them to? Designated shelters? Would they be willing to designate shelters in conjunction with the police? Are there networks of shelter and assistance providers ?
22. Stats – how many people applied for the TRP and how many were refused/granted?
23. Where do you keep statistics? Do you record refusals and why you refused? Is this information publicly available? Does each office keep stats or is there a national registry somewhere?

For Service Providers only:

24. Where have you most often come in contact with people you think might be trafficked?
– referrals? Have you gone to find them? Anonymous tips? Common sense?
25. What types of coercion have you come across – situations which you think maybe look like trafficking but don't fit into the legal definition?
26. Do you ever accompany victims to interviews with the police? Have you been allowed to do that?