

**Picking Up the Pieces:
Protection and Progress for Sexually Trafficked
Women**

A Comparative Analysis of the Protections Afforded to Sexually
Trafficked Women in the United States and Canada

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LIST OF ABBREVIATIONS

- BPFA** Beijing Declaration and Platform for Action
- CAT** Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- CEDAW** Convention on the Elimination of All Forms of Discrimination against Women
- FLO #29** Forced Labour Convention (No. 29)
- ICCPR** International Covenant on Civil and Political Right
- IESCR** International Covenant on Economic, Social and Cultural Right
- Trafficking Protocol** Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime
- UDHR** Universal Declaration of Human Right
- UNHCR Gender Guidelines** UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees
- UNHCR Guidelines on Trafficking and Asylum** UNHCR Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked
- UNHCR Handbook** UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees
- UNSC** United Nations Slavery Convention
- UNSCAS** Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery
- Canadian Gender Guidelines** Women Refugee Claimants Fearing Gender-Related Persecution: Update, Guidelines Issued
- INS Gender Guidelines** Considerations for Asylum Officers Adjudicating Asylum Claims from Women
- TVPA** Victims of Trafficking Victims Prevention Act of 2000

SUMMARY

The United States and Canada are big destinations for immigrants seeking a new life. Despite the glory of the pursuit of the ‘American Dream’, not all people arrive in North America to a better life.

Human trafficking – modern-day slavery, is one of the most systematic and criminally organized forms of human rights abuses. It is estimated that anywhere from 700,000 to 4 million persons worldwide are trafficked across or within national borders every year.

Sexual trafficking is one of the more injurious forms of human trafficking. Victims are left scarred and isolated by psychological, emotional, mental and physical abuse. It is estimated that each year over one million women and girls are surreptitious trafficked for sexual exploitation in sex industries.

The United States and Canada, each deal and address trafficking with different methods. The United States approaches trafficking from through their Trafficking Victims Protection Act, and warrant protection to victims through this act. Canada warrants protection to trafficking victims through their refugee system. Both systems have their benefits and limitations.

This thesis will examine and critique the protection schemes in the United States and Canada, and determine what strengths and weaknesses each system possess, and if the states can learn from one another to create a truly ideal practice when it comes to protecting women persecuted by sexual trafficking.

1 The Reality of Sexual Trafficking and Protection

1.1 Introduction

Human trafficking – modern-day slavery, is one of the most systematic and criminally organized forms of human rights abuses. It is estimated that anywhere from 700,000 to 4 million persons worldwide are trafficked across or within national borders every year.¹ It is a lucrative trade, the third largest and fastest growing criminal industry in the world (with lower risks and costs than the trafficking of drugs or arms), victimizing millions of people and reaping billions in profits. “Virtually every country is affected by trafficking, whether capitalized by traffickers as a source, transit or destination location. Generating roughly \$7 billion to \$10 billion annually, human trafficking is the fastest growing global criminal industry, with high profits, low risks, minimal capital investment, and a “commodity” that can be used over and over again.”²

Sexual trafficking is one of the more injurious forms of human trafficking. Victims are left scarred and isolated by psychological, emotional, mental and physical abuse. It is estimated that each year over one million women and girls are surreptitiously trafficked for sexual exploitation in sex industries.³

Part of recognizing the urgency for addressing trafficking, 120 U.N. member nations adopted the *United Nations Convention Against Transnational Organized Crime*⁴ and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*⁵ The Trafficking Protocol has three main goals: to combat transnational organized crime units that engage in human trafficking, to punish the offenders, and to protect the victims of such trafficking.⁶

Regardless of the human rights violations involved, sexually trafficked persons face particular difficulties in obtaining protection and asylum. While most previous international counter-trafficking conventions and governmental actions have tended to focus on addressing

¹ Be the Cause, “*About Refugees and Human Trafficking*”
<http://www.bethecause.org/refugeeevening/index.php?location=aboutrefugees> (visited on 30.10.05)

² *Ibid.*

³ Donna M. Hughes, “*The ‘Natasha’ Trade: Transnational Sex Trafficking.*” Nation Institute of Justice Journal, January 2001. Taken from http://www.uri.edu/artsci/wms/hughes/natasha_nij.pdf. [visited on January 4, 2006].

⁴ *United Nations Convention Against Transnational Organized Crime*, G.A. Res. 55/25, Art. I, 55 U.N. G.A.O.R Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol.1) 2001).

⁵ *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime*. G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), **entered into force** Sept. 9, 2003. [hereinafter the Trafficking Protocol]

⁶ *Ibid.*

the criminal aspect of trafficking, the primary focus of the Protocol is to address and provide a framework for protecting the victims.

Despite the intentions of the Protocol, the provisions relating to the protection and assistance of victims are softened by permissive language, such as “state parties may,” “thus encouraging rather than requiring minimum levels of guarantees of protection and assistance for victims of trafficking.”⁷ This limits the obligations placed on nation states to bring their domestic laws and practices in accordance with the Convention and Protocol. In effect, this essentially leaves the standard of protection up to the discretion of the nation states and their domestic immigration and refugee policies. The Protocol encourages, but does not require governments to provide assistance to trafficking victims by: ensuring health, psychological, and rehabilitation assistance, issuing temporary visas, permanent residency, as well as, asylum or refugee status to trafficked persons who may have suffered human rights abuses, and have a well-founded fear of suffering continued persecution by traffickers upon returning to their country of origin.

1.2 Aim and purpose of this study

The United States and Canada, each deal and address trafficking with different methods. The United States approaches trafficking through their Trafficking Victims Protection Act, and warrants protection to victims through this act. Canada establishes protection for trafficking victims through their refugee system. Both systems have their benefits and limitations.

This study will compare the two systems of Canada and the United States, and analyze the pros and cons of each system, and what both states can learn from one another to improve their systems.

Chapter Two will describe the elements of trafficking, and how it entails numerous human rights abuses, and how these abuses violate international human rights conventions.

Chapter Three will briefly examine the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (Trafficking Protocol), and review how the United States and Canada complies with Article 6 – 8 outlining protection and assistance for trafficking victims. It will also look at how each state has or has not applied special

⁷ Anne Marie Gallagher, “99 Triply Exploited: Female Victims of Trafficking Networks – Strategies for Pursuing Protection and Legal Status in Countries of Destination.” *Georgetown Immigration Law Journal*, Fall 2004, 19 *Geo. Immigr.L.J.*99, p. 2.

measures and legislation to deal with the intricacies of protection and assistance to trafficked persons.

Chapter Four will examine both the United States' and Canada's refugee systems. It will analyze various cases and they apply and interpret the Refugee Convention with regards to gender persecution and trafficked women.

1.3 Legal approach

This research for this study has consisted of law reviews and journals, case law, human rights instruments; conventions, declarations and protocols, state reports by both governments and non-governmental organizations, news articles, United Nations documents and governmental legislation and policies.

1.4 Limitations

This paper will focus on the sexual trafficking of women. It will not address other forms of trafficking, nor will it discuss the trafficking of children. Although the sexual trafficking of women is meant to include all those of the female gender, it will only focus on the laws that are applicable to adults, as different elements are taken into consideration when processing children's asylum claims.

2 History and Victims of Human Trafficking

2.1 Definition of Sexual Trafficking

According to the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (Trafficking Protocol) ‘Trafficking in persons’:

(a) shall mean 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 organs⁸

Sexual trafficking is one of the more psychologically, emotionally, mentally and physically damaging forms of human trafficking. Sexual trafficking is a form of sexual exploitation, and can be defined as (in conjunction with the Trafficking Protocol’s definition):

the participation by a person in prostitution, sexual servitude, or the production of pornographic materials as a result of being subjected to a threat, deception, coercion, abduction, force, abuse of authority, debt bondage or fraud. Even in the absence of any of these factors, where the person participating in prostitution, sexual servitude or the production of pornographic materials is under the age of 18, sexual exploitation shall be deemed to exist.⁹

Victims of sexual trafficking are forced into a variety of forms of sexual exploitation which includes: prostitution, pornography, stripping, live-sex shows, mail-order brides, military prostitution (such as ‘comfort women’ and ‘bush wives’) and sex tourism.¹⁰ Victims trafficked into prostitution and pornography are usually involved in the most exploitive forms of commercial sex operations.

Sex trafficking operations are everywhere around us, whether we can visibly identify it or not. It can be found in highly-visible venues such as street prostitution, or hidden from

⁸ *Supra* note 5

⁹ Definition of Sexual Exploitation the Global Alliance Against Trafficking in Women www.bayswan.org/traffick/deftraffickUN.html#1 (visited April 26, 2006)

¹⁰ U.S. Department of Health & Human Services, “*Fact Sheet: Sexual Trafficking, Campaign to Rescue & Restore Victims of Human Trafficking*”, www.acf.hhs.gov/trafficking/about/fact_sex.html (visited on April 26, 2006)

sight in more underground systems such as closed-brothels that operate out of residential homes.¹¹ Sex trafficking can take place in a variety of public and private locations such as massage parlours, modelling agencies, spas, strip clubs and other businesses which are just fronts for prostitution.

Sexually trafficked women face particular difficulties and obstacles in obtaining and even applying for asylum or protection. Some state and immigration policies may differentiate between smuggled women and trafficked women. They may view the women as willing participants and not as victims; thereby, treating them as criminals, by detaining them and deporting them. However, “[d]ifferentiating between smuggling and trafficking becomes more difficult when persons who voluntarily migrate become subject to violence or threat of violence under slave-like conditions in their destination country. These victims, deceived about the working conditions and exploited, also deserve protection.”¹² This is how smuggled migrants can often end up becoming trafficking victims.

Another problem for sexually trafficked women is that if they are detained as prostitutes, in states where prostitution may be illegal, the criminal charges they may have obtained can exclude them from obtaining refugee status, as will be discussed in Chapter Four. In addition, because they are illegal immigrants and the traffickers have threatened them with deportation, they may refrain from going to the authorities for help. “Victims of trafficking often face immigration problems; many are illegal immigrants and fear deportation [...] fear makes them reluctant to seek help.”¹³

The temporary visas that require the participation and testimony of the sexually trafficked women can be another obstacle for the women seeking help. They may be fearful of the law, coming from states where the law authorities are complaisant with the trafficking rings. Or they may fear the retaliation of the traffickers against their families or themselves. Thus, these women may be reluctant to participate and testify.

Part of addressing the problem of trafficking is to understand the origins and circumstances that foster a climate for human trade, especially sexual trafficking in women. This section of the paper will describe the nature of trafficking, the victims and the vulnerable groups, and how culture, society and economics impact the lives of women and influence

¹¹ *Ibid*

¹² Joyce Koo Dalrymple. “451 *Human Trafficking: Protecting Human Rights in the Trafficking Victims Protection Act.*” Boston College Third World Law Journal. 25 BC Third World L.J. 451. p.2

¹³ Theresa Barone. “579 *The Trafficking Victims Protection Act of 2000: Defining the Problem and Creating a Solution.*” Temple International and Comparative Law Journal. 17 Temp. Int’l & Comp. L.J. 579. p.2

trafficking. It will describe the various forms of sexual trafficking, and how this illicit trade is a violation of human rights, and a form of persecution.

2.2 Victims of trafficking

Sexual trafficking targets primarily women and children; they are the more vulnerable beings in society. It is one of the most injurious and atrocious forms of human rights abuses, that prey on the vulnerabilities/weaknesses of its victims. Traffickers prey on the young, the uneducated, the poor, and the vulnerable. Among the more vulnerable members of society, women and children are often undereducated, underemployed, impoverished, and thus more susceptible to fraudulent promises made by traffickers. It has been reported that the average age of a trafficked woman is twenty years old.¹⁴ In addition, women and children are more in demand for sexual exploitation, and are specifically targeted as such.

As those affected by sexual trafficking are predominantly women and girls,¹⁵ it can also be identified as a form of gender based persecution as identified by the Convention for the Elimination of Discrimination against Women (CEDAW). CEDAW was one of the first international instruments to recognize the rights of victims of trafficking for prostitution. It was the first international agreement recognizing that women's rights are human rights and that discrimination against women "violates the principles of equality of rights and respect for human dignity."¹⁶ The Convention also recognizes that discrimination is worse in impoverished countries, where, women have less access than men to food, health, education, and training, and opportunities for employment. The risk of women being trafficked for sexual exploitation also increases in states where employment opportunities and rates are low.¹⁷

2.3 Causal Factors Contributing to Trafficking

Trafficking flourishes among the vulnerable aspects of society; states characterized by dire poverty, the lack of economic opportunities for women, low levels of education for women, financial dependence on men, and a failure to educate men not to victimize women

¹⁴ Tala Hartsough, "77 Asylum for Trafficked Women: Escape Strategies Beyond the T-Visa" Symposium on Sexual Slavery: The Trafficking of Women and Girls into the United States for Sexual Exploitation. *Hastings Women's Law Journal*, Winter, 2002, 13 *Hastings Women's L.J.* 77, p.2

¹⁵ "Human Trafficking 101", HumanTrafficking.Com, The Research and Training Centre of Polaris Project, http://www.humantrafficking.com/humantrafficking/trafficking_ht3/trafficking_101_main.htm [visited on January 5, 2006]

¹⁶ see CEDAW preamble

¹⁷ Kathryn E. Nelson. "551 Sex Trafficking and Forced Prostitution: Comprehensive New legal Approaches" *Houston Journal of International Law*, Spring 2002, 24 *Hous. J. Int'l.* 551, p.5

whom are unable to provide adequately for themselves.¹⁸ Some frequently mentioned factors contributing to trafficking are: poverty and unemployment, globalisation of the economy, feminisation of poverty and migration, development of strategies e.g. tourism, armed conflict situations, gender-based discrimination, restrictive laws and policies on migration and migrant labour, laws and policies on prostitution, corruption of authorities, high profits – involvement of organised crime, cultural and religious practices.¹⁹

The social and cultural structure of the country of origin can impact women so direly, that it marginalizes them, and pushes them into the arms of traffickers. When preferential treatment is given to males, women are left marginalized and dependent. Where women cannot obtain an education, learn a trade, or work to support themselves, their only survival may be on the dependency of men. Migrating to another state is a chance for survival and a “better” life. When opportunities are dismal there are only a few and extreme options that such desperate people pursue to ensure survival; migration in poorer countries is an avenue sought after which grows out of desperation for survival. Traffickers prey on such desperation. Smuggling and trafficking can facilitate this dream and determination for a better life but can also result in dire consequences when migrants fall into the wrong hands. “Thus, sex trafficking [becomes] a natural extension of the desperate lifestyle that many women in some cultures are forced to lead because their governments will not enact or enforce human rights laws to protect them.”²⁰

Governments are also to blame for women being susceptible to sexual trafficking; the survival of sexual trafficking can be directly linked to a state’s failure to grant, ensure, and protect women with the same basic human rights that are afforded to men. A state is in the business of ensuring and guaranteeing its citizens with human rights. While human rights are an issue of contention in most developing nations, the human rights situation can be even worse for women; especially when they may not even be recognized as rights deserving citizens. “Many women are deprived of their rights because some societies consider women inferior to men and deny them access to justice, participation in political life and the ability to make personal life decisions.”²¹ When women have been denied the right to education and

¹⁸ Susan Tiefenbrun. “107 The Saga of Susannah A U.S. Remedy for Sex Trafficking in Women: the Victims of Trafficking and Violence Protection Act of 2000.” Utah Law Review. 2002 Utah L. Rev. 107. p.2

¹⁹ Elaine Pearson, “Human Rights and Trafficking In Persons: a Handbook”, Global Alliance Against Traffic in Women, Bangkok Thailand, 2000. p.33 available at www.gaatw.org

²⁰ *Supra* note 18 at 13

²¹ *Supra* note 19 at 9

the legal rights to control their own lives they are rendered unskilled and unable to be economically independent; such women are especially vulnerable to trafficking.²²

Poverty also plays a huge role in contributing to condition ripe for trafficking. Women may be sold by their own family to traffickers due to poverty; there becomes one less mouth to feed and house, and a little extra money from the sale. As well, they may be forced to migrate, to find employment in order to provide financial support for their families²³ and may then find themselves in compromising situations of which they did not anticipate.

Another factor that helps trafficking flourish, is when countries of destination have restrictive immigration and refugee protection policies which intend to prevent illegal migration, smuggling and trafficking, but however, unintentionally fosters an environment that in fact increases trafficking. “Restrictive immigration policies that tighten up border controls and are used to harass vulnerable migrants often have little effect on traffickers. When borders are closed, traffickers [and smugglers] become the only players who are able to facilitate international migration for women and children.”²⁴ Thus, these desperate women may seek out the aid of a smuggler or trafficker to bring them to a ‘better life’, and pay to migrate illegally. However, as they pursue this ‘better life’, they do not always anticipate the harm that may come to them should they fall into the wrong hands of traffickers and become trafficked. “Migrants are forced by restrictive and complicated immigration laws to rely upon third parties to help them travel. If they are lucky, the person is honest; if they are unlucky the person is a trafficker who will use all means necessary to ensure the submission of the victim to his/her will.”²⁵

2.4 Smuggling and trafficking

Trafficking should be distinguished from smuggling. Both can involve illegal migration over borders. However, trafficking differs from smuggling in that a smugglers’ role ends with the transportation and subsequent payment. Trafficking consists of a more dynamic role, such as: threats or physical force, deception, fraud, intimidation, isolation, debt bondage, threats of deportation, as well as threats of harm to family members. “The traffickers’ goal is

²² *Ibid.*

²³ *Supra* note 12 at 4

²⁴ Submission to the House of Commons Standing Committee on Citizenship and Immigration Bill C-11, p4 <http://action.web.ca/home/catw/readingroom.shtml?x=13428> [visited on January 4, 2006]

²⁵ *Supra* note 19 at 9

to control the victim for labour exploitation purposes, manifested as slavery, involuntary servitude, peonage, debt bondage, or commercial sex acts.”²⁶

A smuggled migrant may actually find themselves as a trafficked person, when, say the smuggler retains that person in debt-bondage, confiscates their identification and passports, and forces them into involuntary servitude to ‘pay off’ their debt. “The transport of trafficked persons is inextricable linked to the end purpose of trafficking [...] with the intent to subject the victim of the coerced transport to additional violations in the form of force labour or slavery-like practices.”²⁷ It is the combination of the transport and the coerced end practice that distinguishes trafficking from smuggling.

2.5 Methods of trafficking

Traffickers use a variety of methods to obtain their ‘profit making commodities’. Such strategies include: enticement, false promises, coercion, violence, fraud, kidnapping, selling a loved one, the illegal use of legitimate travel documents, the use of impostor passports, and entry without inspection.

Traffickers often lure women with false promises of ‘good jobs’ and a ‘better life’. “They recruit women abroad through advertisements and employment, travel, modelling, or matchmaking agencies.”²⁸ Traffickers prey on a woman’s dreams, selling these women a fantasy, and taking advantage of their hopes and aspirations. Some women are even ‘recruited’ by friends and acquaintances, lured in by a false sense of security. It is a common occurrence for the woman to be deceived into believing she will find prosperity, or simply a better life, by taking a fraudulent offer from a trafficker in disguise.

The traffickers arrange for the women’s passports and work visas, and transit. However, when the women arrive in the destination country, their passports and all identification is confiscated, and they are told that they owe exorbitant amounts of money, for all the ‘expenses’ incurred. The women are duped or forced into paying exorbitant amounts for identification documents and visas to gain their entry into the destination country. The victim is then forced to remain in debt bondage until she repays the ever-increasing debt.²⁹

The internet has even made it easier for traffickers, providing them with an outlet to recruit and promote the global trafficking of women and children. Traffickers may find women under the guise of a marriage broker website, where they arrange marriages or

²⁶ *Supra* note 12 at. 2

²⁷ *Supra* note 19 at 9

²⁸ *Supra* note 18 at 7

²⁹ *Ibid.*

advertise for the sale of brides. “Many of these bridal schemes are sex trafficking operations in disguise, just as massage parlours are notorious fronts for forced prostitution.”³⁰

Sex traffickers use a variety of methods to get the trafficked women to submit to their will, by stripping the women of their dignity. Starvation, confinement, beatings, physical abuse, rape, gang rape, threats of violence to the victims and the victims’ families, forced drug use and the threat of shaming their victims by revealing their activities to their family and their families’ friends, are all techniques persistently used “against trafficked women to ‘condition’ them for forced sex work.”³¹

Trafficking victims are further kept ‘in line’ by threats of deportation if they go to the authorities for help. They are kept separated from society; either forcibly physically confined, or socially and culturally isolated; forced to live in foreign communities where they may not speak the language and be able to communicate. Traffickers make sure these women are “cut off from their families and sometimes their language, and thus, rendered even more dependent upon the traffickers for food, shelter, information, and ‘protection’ from authorities.”³²

2.6 Trafficking = Human Rights Abuses

Trafficking alone violates a long list of human rights abuses; sexual trafficking compounds the human rights violations entrenched in numerous internationally ratified conventions. Many of these conventions, ranging from the ICCPR to CEDAW to CAT, reiterate the same entrenched fundamental human rights.

The victims of sexual trafficking work under some of the most inhumane conditions. “Most must work ten to eighteen hours a day, for at least twenty-five days each month. They cannot leave the brothels, or even their rooms; often they are chained to their beds. Women are forced to service about ten customers per day, without the privilege of negotiating which clients they will take and which acts they will perform.”³³

The elements involved in trafficking entail some of the most atrocious forms of human rights abuses such as: torture, rape, beatings, threats of violence can constitute psychological and mental torture, force drug and substance abuse, forced abortion, denial of a woman’s rights of reproduction and control of her body, deprivation of food, lack of medical and health services, forced physical confinement (also by confiscating passport/identity

³⁰ *Ibid.*

³¹ *Supra* note 14 at 6

³² *Supra* note 19 at 29

³³ *Supra* note 17 at 2

papers, overwork, long hours, bad working conditions, slavery, forced prostitution, and debt bondage.³⁴

These human rights abuses are covered by: the right not to be tortured or submitted to cruel and/or degrading inhuman treatment³⁵, right to be free from physical violence (rape, sexual assault, domestic violence, forced prostitution, trafficking)³⁶, right to personal autonomy³⁷, right to enjoy psychological, physical, and sexual health³⁸, freedom of choosing residence and moving with own country³⁹, right to work – freedom from forced labour⁴⁰, right to safe and healthy working conditions⁴¹, freedom from slavery⁴², and the right to be free of imprisonment for debt or failure to fulfil a contract obligation⁴³.

Sexual trafficking of women is a form of gender-based persecution, and violates a number of non-derogable human rights: slavery, involuntary servitude, torture, cruel and inhuman or degrading treatment, and rape, which has been recognized by the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) as a crime against humanity, a war crime and a form of genocide.⁴⁴ “Sex trafficking, like slave trade, is a universal crime prohibited by the principle of *jus cogens* provided in Articles 53 and 64 of the Vienna Convention on the Law of Treaties.”⁴⁵

When human rights violations occur, the government should step up to protect its own citizens. When that protection system fails or is faulty, then other states may be needed to grant refuge to these women in need. When it comes to human trafficking, it is a transnational crime which has many international ramifications, impacting both states of origin and destination. This is where states and international organizations need to create legal measures to protect and ensure universal human rights. As trafficking creates a unique situation for its victims, combining both elements of human rights abuses and transnational crime, governments need to use legal instruments (such as the Refugee Convention), or even resort to implementing special legal measures to ensure proper protection for victims of trafficking.

³⁴ *Supra* 19 at 42

³⁵ Article 5 UDHR, Article 7 ICCPR, CAT (entire convention)

³⁶ Article 3 UDHR, Article 6 ICCPR, CEDAW (entire convention, especially Articles 2, 5, 15 & 16)

³⁷ Article 12 UDHR, Paragraph 97 BPFA (Beijing Platform for Action)

³⁸ Article 12 ICESCR, Article 25 UDHR

³⁹ Article 13(1) UDHR, Article 12(1) ICCPR

⁴⁰ Article 8(3) ICCPR, ILO Convention No. 29 – entire convention

⁴¹ Article 23(1) UDHR, Article 7 ICESCR, Article 11(f) CEDAW

⁴² Article 4 UDHR, Article 8 ICCPR, UNSC entire convention, UNSCAS entire convention

⁴³ Article 11 ICCPR

⁴⁴ *Supra* note 18 at 20

⁴⁵ *Supra* note 18 at 10

3 The Trafficking Protocol: Approaches by the United States and Canada

3.1 Overview of the Trafficking Protocol

The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (Trafficking Protocol) was adopted on November 15, 2000, and came into force on December 25, 2003.⁴⁶

This internationally recognized treaty provides the most comprehensive and used definition of the term trafficking in persons and states that consent of the victim to be trafficked is irrelevant:

(a) ‘Trafficking in persons’ shall mean 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;⁴⁷

With 117 signatories, one of the Protocol’s main objectives is to protect and assist trafficking victims, with full respect for their human rights. These provisions, Articles 6 to 8, deal with the protection of victims of ‘trafficking in persons’, impose various international obligations on the states which have signed and ratified the Trafficking Protocol.

Articles 6 – 8 of the Trafficking Protocol are essentially the articles that outline standard levels of protection and consideration for trafficked persons. This is particularly important for sexually trafficked women, for the Articles urge states to take the victims’ experiences and human rights into consideration.

Article 6 primarily addresses the concept of assistance to and protection of trafficking victims regarding legal, social and medical assistance measures. One particular clause of importance to this study is Article 6.5 which states: “Each State Party shall endeavour to

⁴⁶ *Supra* note 5
⁴⁷ *Ibid.*

provide for the physical safety of victims of trafficking in persons while they are within its territory.”⁴⁸ Taken in conjunction with Article 7, this is a clear urging by the Protocol, for states to offer legal protection to trafficked victims, either by granting asylum or temporary protection. Article 7, the status of victims of trafficking in persons in receiving, states:

1. In addition to taking measures pursuant to article 6 of this Protocol, 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.
2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.⁴⁹

It has been widely recognized that the protection of victims is made nearly impossible if trafficked women first and foremost are punished as illegal aliens. Article 7 obliges parties to consider permitting victims to remain in the territory, temporarily or permanently, in appropriate cases, as well to consider humanitarian and compassionate factors when dealing with these women.

While Article 8 addresses the issue of repatriation of victims of trafficking in persons, and what the states should take into consideration, Article 9.1, goes on to reiterate the need for state parties to develop comprehensive policies, programmes and other measures, in order to “prevent and combat trafficking in persons; [and to] protect victims of trafficking in persons, especially women and children, from revictimization.”⁵⁰

Although the language of the Protection elements of the Trafficking Protocol is more encouraging than enforcing, the heart of these elements are to encourage state protection to those victimized by trafficking and warranting need.

Yet, how are states matching up with the purpose of the Trafficking Protocol? This chapter will analyse how Canada and the United States, both having ratified the Trafficking Protocol, have fared in implementing their obligations of the Protocol, with regards to Articles 6, 7 and 8. As well, how their current legal protection mechanisms for sexually trafficked women compare and embrace the purpose of the Trafficking Protocol.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

3.2 Canadian and American practices regarding the Trafficking Protocol

Both Canada and the United States have signed and ratified the Trafficking Protocol.⁵¹ By signing and ratifying the Trafficking Protocol, these states undertook in good faith to implement and adhere to the provisions outlined in the Trafficking Protocol. While states have often placed more emphasis at working to prevent, suppress and punish the trafficking of persons within their borders, few, if any countries have laws that adequately protect victims of trafficking, and few provide social and mental health services that will help these women recover and lead normal lives.⁵²

In a recent study, “*Falling Short of the Mark: an International Study on the Treatment of Human Trafficking Victims*”⁵³, Canada, along with the United Kingdom, have been slammed and singled out for failing to meet their obligations for the protection of victims of human trafficking under the U.N. Trafficking Protocol and ‘international best practices’⁵⁴. This international study evaluated the progress made by various developed countries towards implementing their international obligations to protect victims of human trafficking, and to assess the treatment given to these victims by comparing international best practices.

The grades were awarded on the basis of analysis of the states’ law and practice of selected jurisdictions with respect to their compliance with Articles 6-8 of the Trafficking Protocol.⁵⁵ The overall grades break down as follows: United States B+, Australia B, Norway B, Sweden B, Italy B, United Kingdom D, Germany B, Canada F.⁵⁶ For the purpose of this study, we will focus on the reasons behind the discrepancy of grades between the United States and Canada.

⁵¹ Canada signed the Trafficking Protocol on 14 December 2000 and ratified on 13 May 2002. The United States signed the Protocol on 13 December 2000 and recently ratified the Trafficking Protocol on the 3 November 2005. Data current to 22 February 2006, see Trafficking Protocol Status, *Supra* note 5. Cited in The Future Group, March 1, 2006 – For Immediate Release. “Falling Short of the Mark: An International Study on the Treatment of Human Trafficking Victims” P.14 available at www.thefuturegroup.org, p.2 released March 2006

⁵² *Supra* note 18 at 21

⁵³ The Future Group, March 1, 2006 – For Immediate Release. “Falling Short of the Mark: An International Study on the Treatment of Human Trafficking Victims” P.14 available at www.thefuturegroup.org

⁵⁴ International best practices is the notion of what should be ideally instituted and practiced when it comes to treating trafficking victims, it is also used as a benchmark comparison with current state practice.

⁵⁵ The Future Group, March 1, 2006 – For Immediate Release. “Falling Short of the Mark: An International Study on the Treatment of Human Trafficking Victims” P.14 available at www.thefuturegroup.org, p.2

⁵⁶ The Future Group, March 1, 2006 – For Immediate Release. “Falling Short of the Mark: An International Study on the Treatment of Human Trafficking Victims” P.14 available at www.thefuturegroup.org, p.2

3.3 United States: Trafficking Victims Protection Act a B+

The United States has fared considerably better than Canada in implementing the Trafficking Protocol's recommendations for treatment and protection of victims of trafficking. Such a good grade is likely due to its commitment to implementing its Trafficking Victims Protection Act (TVPA).

The TVPA is a framework act that attempts to combat trafficking by addressing the needs of trafficking victims: such as health, social and legal assistance, repatriation, integration, and even legal protection. The TVPA provides a clear framework for supplying and recognizing the need to establishing: informative hotlines; Task Forces for rescuing victims of trafficking; educational programs for law enforcement and social workers, so they know how to identify and assist trafficking victims; as well as funding for the Non-Governmental Organizations that work with these women, to provide them with the infrastructure to meet these trafficked victims' needs.

The United States, has even added a provision to the TVPA, of an automatic granting trafficking victims a "30-45 day period immediately after a trafficking victim is rescued during which they are legally entitled to remain in the country and receive basic support (i.e. medical, psychological, social and legal) without any obligation whatsoever to assist law enforcement."⁵⁷ This reflection period also contributes to the victims' ability to choose to be repatriated to their country of origin and properly weigh their decisions, as outlined in Article 8 of the Trafficking Convention.

The Trafficking Act has been praised for decriminalising victims and giving them lawful immigration status in the United States. This change in legal status of trafficking victims rightfully recognizes that it is not the trafficked but the traffickers who still are the 'problem'.⁵⁸ The TVPA also grants 'recognized victims' the same civil rights afforded to legal immigrants by issuing them temporary residence and protection through the T-visa.

3.3.1 The Ups and Downs of T-visa protection

The T-visa is a provision the Trafficking Victims Protection Act adds to the Immigration and Nationality Act. The T-visa was specifically designed for trafficking victims "to strengthen the ability of law enforcement personnel to detect, arrest, and prosecute trafficking perpetrators and to enable law enforcement personnel to offer protection for

⁵⁷ The Future Group, March 1, 2006 – For Immediate Release. "Falling Short of the Mark: An International Study on the Treatment of Human Trafficking Victims" P.32 available at www.thefuturegroup.org

⁵⁸ *Supra* note 12 at 2

trafficked victims.”⁵⁹ The T-visa permits victims to stay in the United States, at least through the duration of their captor’s prosecution and, perhaps even permanently, if they are willing to assist in the prosecution of their perpetrators. “After three years of having T-Visa status, victims may apply for permanent residency. Victims may, in some cases, also apply for non-immigrant status for their spouses and children; or, in the case of victims under 21 years old, their parents.”⁶⁰ During this temporary residence period, lasting from 6 months to several years, the victim may benefit from the full range of support provided for in Article 6.3 of the Trafficking.

The TVPA makes T-visas available to people who have suffered what Congress terms a ‘severe form of trafficking in persons’. Victims of severe forms of trafficking are defined as people held against their will for “labo[u]r or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”⁶¹ Though there is a definition of what constitutes severe forms of trafficking, a strict interpretation of ‘severe’ can often leave victims, who are misidentified or not trafficked with enough force, to be treated as criminals, detained, and deported.⁶²

While the Trafficking Act allows certified trafficked persons to receive benefits equivalent to those of refugees, victims must meet stringent requirements to be certified to receive benefits under the TVPA. In addition to being a victim of a severe form of trafficking, a T-visa applicant must also demonstrate that she has been physically present in the United States or its territories; the Attorney General must determine that the continued presence of the victim in the United States is necessary to prosecute the traffickers; has complied with reasonable requests for assistance in the investigation or prosecution of her trafficker by law enforcement; and showed that she would suffer “extreme hardship involving usual and severe harm upon removal from the United States.”⁶³

⁵⁹ Susan W. Tiefenbrun. “317 Sex Slavery in the United States and the Law Enacted to Stop it Here and Abroad.” William and Mary Journal of Women and the Law, Spring 2005. 11 Wm. & Mary & L. 317. p.6

⁶⁰ U.S. Department of Justice, .Department of Justice Issues T Visa to Protect Women, Children and all Victims of Human Trafficking., 24 January 2002, online: U.S. Department of Justice <http://www.usdoj.gov/opa/pr/2002/January/02_crt_038.htm>; U.S. Government, *Assessment of U.S. Government Efforts to Combat Trafficking in Persons in Fiscal Year 2004*, September 2005, online: U.S. Department of Justice <http://www.usdoj.gov/ag/annualreports/tr2005/assessmentofustipactivities.pdf> [U.S. Assessment Report . 2004].

⁶¹ See Trafficking Protocol

⁶² *Supra* note 12 at 4

⁶³ Victims under the age of 18 are automatically eligible for the benefits and assistance of the TVPA without having first to be certified. Additionally, victims under fifteen years of age can be granted the T-visa if they would suffer extreme hardship involving unusual and severe harm if forced to leave the United States. See Trafficking Protocol

One has to question though, what becomes of those victims who cannot demonstrate unusual and severe harm but may face genuine danger and hardship upon removal regardless. Trafficked women warrant just as much human rights protections as asylum seekers, whom, if they can demonstrate a well-founded fear of persecution, can be granted refugee protection. There has even been some suggestion that the TVPA should model its standard after the criteria that asylum seekers must meet to stay in the United States and trafficking victims would qualify for residency if they have a well-founded fear of retribution upon removal.⁶⁴

The requirements for certification have been criticised as being too restrictive and stringent, often deterring victims from coming forward or denying relief to those who have not been trafficked with enough force.⁶⁵ Unless they qualify as victims of a ‘severe form of trafficking’, they risk deportation. Furthermore, because the T-visa is essentially a deportation stay, the victims must decide immediately whether she will cooperate with investigators. The law does not allow the victims much time to delay or even properly reflect on her choice to assist in the prosecution. “She must agree to cooperate in order to be given ‘continued presence’ [support and assistance on the same basis as refugees, as well as the ability to work].”⁶⁶ Furthermore, because of the human rights abuses involved, sometimes the victims may not be in the right psychological state of mind to make a rational and balanced decision regarding testifying. “Though swift action can be critical when prosecuting traffickers, the trauma of the trafficking experience can leave victims unfit to assess their own interest.”⁶⁷ They may require medical, psychological and social support, safe shelter, legal advice and time to heal, before they can consider the options available to them, and agree to participate with law enforcement. Assistance should not be contingent on a victim’s willingness to participate with authorities. Medical, social, legal, psychological attention should be readily available to these women, regardless of their participation, for they may only be able to make an informed and appropriate decision once they have had their basic needs met. By giving these women an ‘assistance first’ instead of a ‘participation first’ approach, it provides the women with the physical and mental strength and assistance needed

⁶⁴ *Supra* note 12 at 4

⁶⁵ *Ibid.*, at 2

⁶⁶ Susan W. Tiefenbrun. “317 Sex Slavery in the United States and the Law Enacted to Stop it Here and Abroad.” *William and Mary Journal of Women and the Law*, Spring 2005. 11 *Wm. & Mary & L.* 317. p.7

⁶⁷ UNHCR, “The State of the World’s Refugees 2006 - Chapter 1 Current dynamics of displacement: Box 1.3 Protection for victims of trafficking” available at <http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.htm?tbl=PUBL&id=4444d3c119>

to participate in prosecuting their traffickers. Ultimately this approach can lead to improved cooperation and prosecution rates with the authorities.⁶⁸

Another one of the more criticised and stringent requirements in order to obtain the T-visa, is the notion that victims must cooperate with law enforcement officials, in order for victims to continue to remain in the United States, their participation must be necessary in the prosecution of their traffickers.⁶⁹ This not only means that victims must participate with law officials in the prosecution process, but that the information and assistance they provide to law enforcement must be the information and assistance the victims provide must be effective. However, “[i]n many cases, the trafficking victim may not have the ‘essential’ information necessary for conviction or the trafficker. She may be privy only to general information that the police already have in its possession.”⁷⁰ Hence, the government may be placing excessive emphasis on the need for trafficking victims to cooperate with investigators in order to obtain assistance.⁷¹ This then leaves the victims without the protection of continued presence in the United States, because they do not have the relevant information, they will not be allowed to remain, and subsequently deported.

This threat of deportation and urging to testify puts unnecessary pressure on a victim and can create mistrust between the victims and the authorities. Such a mistrust and uncertainty about their immigration status may make it more difficult for a victim to agree to testify. “It is important to note that encouraging victims to testify – rather than putting pressure on them to do so – has not adversely affected prosecution of traffickers.”⁷² States should refrain from placing conditionality clauses between protection mechanisms and counter-trafficking investigations; this then gives victims a real opportunity to decide and choose what the best solution is for them, without the pressure of governments, law officials, and immigration concerns trying to sway their decision. “Trafficking is a modern form of

⁶⁸ *Ibid.*

⁶⁹ *Supra* note 12 at 3

⁷⁰ Anne Marie Gallagher. “99 Triply Exploited: Female Victims of Trafficking Networks—Strategies for Pursuing Protection and Legal Status in Countries of Destination.” *Georgetown Immigration Law Journal*, Fall, 2004. 19 *Geo. Immigr. L.J.* 99. p. 11

⁷¹ U.S. Department of Justice <http://www.usdoj.gov/opa/pr/2002/January/02_crt_038.htm>; U.S. Government, *Assessment of U.S. Government Efforts to Combat Trafficking in Persons in Fiscal Year 2004*, September 2005, online: U.S. Department of Justice <http://www.usdoj.gov/ag/annualreports/tr2005/assessmentofustipactivities.pdf> [U.S. Assessment Report . 2004].

⁷² UNHCR, “*The State of the World's Refugees 2006 - Chapter 1 Current dynamics of displacement: Box 1.3 Protection for victims of trafficking*” available at <http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.htm?tbl=PUBL&id=4444d3c119>

slavery. Freedom to choose is thus a vital element of rehabilitation for victims of trafficking.”⁷³

There is a cap on the number of T-visas that may be issued every year, 5,000.⁷⁴ When the number of trafficking victims is in the tens of thousands every year, 5000 seems a rather disproportionate. Despite the cap of 5,000 T-visa per year and the amount of trafficking persons per annum, very few visas have actually been issued. During the first year after the adoption of the T-Visa, 150 applications were made of which 23 resulted in the issuance of a T-Visa (a 15% approval rate).⁷⁵ “In the most recently completed fiscal year report, 450 applications were made of which 136 T-Visas were issued (a 30% approval rate) and 484 extensions were made. These determinations were made by a specialized adjudication committee.”⁷⁶ A slight increase in approval rating is promising results on behalf of the United States’ Trafficking Victims’ Protection Act. However, the results are still disproportionately low compared to the number of persons, especially women, trafficked every year, and the statistics only go to prove that in fact very few are actually approved for the T-visa. It also speaks to the fact that the requirements that need to be met in order to qualify for the T-visa may be too stringent.

Furthermore, while the number of human trafficking investigations and prosecutions in the U.S. has been increasing slightly, NGOs have long indicated that the government’s inability to provide long-term residency status for victims for some time has meant some victims have been forced to apply for asylum; a long process that may ultimately not be successful for many of them. While applying for asylum status, victims cannot work.⁷⁷ In order for the T-visa to be thoroughly effective, meeting and assisting all the trafficked victims, instead of a select few, there needs to be an increase in the number of T-visas issued, and the number of women that are assisted under the Trafficking Victims Protection Act. Upon evaluation, the T-visa statistical numbers could amount to a wake-up call for the United

⁷³ *Ibid.*

⁷⁴ Jennifer M. Wetmore, “*The New T Visa: Is the Higher Extreme Hardship Standard too High for Bona Fide Trafficking Victims?*” (2002) 9:1 New Eng. J. Int.l & Comp. L. 159 at 167.

⁷⁵ U.S. Department of Justice, *Fact Sheet: Accomplishments in the Fight to Prevent Trafficking in Persons*. 25 February 2003, online: U.S. Department of Justice <http://www.usdoj.gov/opa/pr/2003/February/03_crt_110.htm>.

⁷⁶ U.S. Department of Justice <http://www.usdoj.gov/opa/pr/2002/January/02_crt_038.htm>; U.S. Government, *Assessment of U.S. Government Efforts to Combat Trafficking in Persons in Fiscal Year 2004*, September 2005, online: U.S. Department of Justice[U.S. Assessment Report . 2004].

<http://www.usdoj.gov/ag/annualreports/tr2005/assessmentofustipactivities.pdf> Cited in: The Future Group, “*Falling Short of the Mark: An International Study on the Treatment of Human Trafficking Victims*”, March 1, 2006, available at www.thefuturegroup.org (visited on April 2, 2006) p.2

⁷⁷ *Ibid* at 2

States to reassess their current approach and system, and relax the stringent requirements needed to qualify for the T-visa.

Perhaps the United States could amend and model its TVPA system after Italy's, which has been touted as being the 'best practice' and most effective protection for trafficked persons. In Italy, assistance and temporary residence permits are offered to all victims, regardless of whether they choose to cooperate or not. Italy provides a six-month residency permit, which can be renewed after the six months for those victims who cooperate, are deemed to be at risk, attending an education programme or are employed when the permit expires.⁷⁸ Victims also have full access to social services and are permitted to find jobs. Another factor of the Italian model is the requirement for victims to attend social-assistance and reintegration programmes run by local organizations, which works to rehabilitate victims and help to prevent revictimization and re-trafficking of these women.

3.4 Canada: A Failing Grade – Where Has Canada gone wrong?

Canada, unlike the United States, does not have a comprehensive system in place for protecting and assisting trafficked women. Canada has primarily left the notion of protection for sexually trafficked women to be determined within its refugee system. While Canada excels at recognizing gender based persecution claims, even granting asylum to some women victim to trafficking or at risk of being trafficked, there is no national system in place to address the specific needs and concerns of trafficked women.

In terms of its commitment to the Trafficking Protocol, Canada has systematically failed to comply with its international obligations under the Trafficking Protocol related to the protection of victims of human trafficking, Article 6- 8. NGO's have even gone as far to state that "Canada's record of dealing with trafficking victims is an international embarrassment and contrary to best practices."⁷⁹ It is a dismal opinion, despite being one of the first states to ratify the Trafficking Protocol almost four years ago on May 13, 2002.

While Canada has been making an effort to persecute and prevent trafficking, they have fallen short of the mark on ensuring protection for trafficked women. With minor exceptions, victims of human trafficking have been routinely detained as illegal migrants and

⁷⁸ see "*Decreto Legislativo 25 luglio 1998, n. 286 "Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero" pubblicato nella Gazzetta Ufficiale n. 191 del 18 agosto 1998 - Supplemento Ordinario n. 139*" English translation, "Article 18 – Decreto legislativo 25 luglio 1998, n.286 Residence permits for social protection grounds" available at <http://www.aretusa.net/V-english/02areadocumenti/02library0104ITA.php>

⁷⁹ *Supra* note 76 at 14

frequently deported from Canada. The United States gives trafficked women a reflection period to decide their future actions, however, Canada's lack of policies to deal with trafficking victims, does not allow for any reflection period, and the victims are often deported quite rapidly. Canada's lack of laws to specifically address the needs and protection to victims of human trafficking has resulted in their routine deportation. "This is neither in the interests of the trafficked person, who may be re-trafficked, or of the police, who will lose the opportunity to gather valuable information and possible witness testimony, which would help them combat trafficking in the long term."⁸⁰

In addition to the reflection period being a chance to assess and address a trafficked person's mental, physical and emotional state, it is also crucial to being able to "evaluate whether a trafficked person's life is in danger if deported or whether they may be subjected to rape, torture or some other form of punishment."⁸¹ This is especially important when the trafficked persons are at risk of being retaliated against by the traffickers "for cooperating with the authorities, as a warning to others, as a punishment for getting caught, or for not paying back the money they owe."⁸² Another arguing point is that fact that various country studies have even demonstrated that a reflection period for people suspected of having been trafficked has helped increase the number of prosecutions against traffickers.⁸³

Canada primarily deals with victims of human trafficking on a case-by-case basis and there is no specific legal guidance offered on their protection in domestic law.⁸⁴ They are dealt with at the discretion of law enforcement and immigration officials; which, discussed in Chapter Four, can often result in contradictory determinations. Canada allows through the refugee determination process, the opportunity for trafficking victims to remain in Canada, despite this opportunity they are not eligible for refugee status simply based on their condition as a trafficking victim. Rather, they must meet general criteria for applying as a refugee. As we will see, trafficking victims frequently face difficulties in their refugee determination due to difficulties with establishing the nexus criteria.

There are also several other outlets in Canada, through which trafficking victims may seek temporary residence, although these avenues are not specifically designed to meet the

⁸⁰ Beth Herzfeld, et al., "*Trafficking: immigration or human rights concern?*" Forced Migration Review 25, People and Trafficking: Upholding Rights and Understanding Vulnerabilities, May 2006, P.39 available at <http://www.fmreview.org>

⁸¹ *Ibid.*

⁸² *Ibid.*, Norway, the Netherlands and Belgium have implemented a reflection period, and have shown that prosecution rates have increased by having this reflection period in place.

⁸³ *Ibid.*

⁸⁴ *Supra* note 76 at 13

needs and concerns of trafficking victims. One option is applying for residency based on humanitarian and compassionate grounds. However, the *Immigration and Refugee Protection Act* requires Ministerial approval for a trafficking victim to be exceptionally permitted to remain in Canada; this is only granted on an extremely rare basis.⁸⁵

The Federal Government had created an Interdepartmental Working Group on Trafficking in Persons (IWGTIP)⁸⁶ to develop a national strategy to combat human trafficking. Despite several years in existence, the IWGTIP has failed to announce a national strategy to improve the treatment of victims of human trafficking. “Its only public accomplishments to date in this area have been producing a pamphlet, poster, and hosting a conference or two.”⁸⁷ In fact, much of the work concerning research, assistance and protection for trafficked women has been by “*ad hoc* cooperation between law enforcement and private charities, but without formal government support, funding or a legal framework.”⁸⁸ In Canada, trafficking victims are not provided with any governmentally funded medical, psychological or counselling assistance. The only possibility for trafficking victims to receive any such assistance is through private and publicly funded NGOs. Critics have described the situation in Canada as being so bad, with respect to a failure to provide basic support to trafficking victims, that individual law enforcement officers have taken to approaching local hospitals and NGOs to drum together funding to provide the most basic medical assistance for these victims in major Canadian cities.⁸⁹

Until recently, trafficking victims were treated by law enforcers as criminals and deported, in violation of the Trafficking Protocol⁹⁰. It wasn't until Canada needed to keep seven women involved in unresolved prosecutions in the country that the RCMP went out of its way to secure agreements from a range of federal, provincial and non-governmental agencies, providing and guaranteeing everything from health care, visas, training and housing.⁹¹ Two of these women are witnesses against Wai Chi Ng, the first man to be charged with human trafficking and is facing 22 counts that include human smuggling,

⁸⁵ Immigration and Refugee Protection Act (Canada), S.C. 2001, c. 27, s. 25.

⁸⁶ Department of Justice, Interdepartmental Working Group on Trafficking in Persons., online: Department of Justice <<http://canada.justice.gc.ca/en/fs/ht/iwgtip.html>>.

⁸⁷ *Ibid.*; see also U.S. Department of State, *Human Rights Report: Canada (2004)*, 28 February 2005, online: <<http://www.state.gov/g/drl/rls/hrrpt/2004/41752.htm>>.

⁸⁸ *Supra* note 76 at 14

⁸⁹ *Ibid.*

⁹⁰ see Trafficking Protocol Article 8

⁹¹ Steve Weatherbe, “*Cracking Down on Sex Trafficking*” available at: www.canadianchristianity.com/cgi-bin/na.cgi?nationalupdates/060323trafficking

prostitution offences and offences against the *Immigration and Refugee Protection Act*; Ng is currently in trial in the province of British Columbia.⁹²

The Crown alleges Ng deceived two women into coming to Canada and then forced them into prostitution at his massage parlour, subjected them to debt-bondage, rape, sexual violence, and threats against themselves and their families if they did not cooperate.⁹³ One of the witnesses claims that entered Canada under a false name and was forced to work in the massage parlour seven days a week from 11 a.m., sometimes until 2 a.m. the next morning in order to meet Ng's financial demands. In addition, due to her illegal immigrant status in Canada, she was afraid of going to the police for help, for fear of being thrown in jail.⁹⁴

By needing these women to testify, this process spurred the call and creation of a pilot project in the province of British Columbia, headed up and created by The Royal Canadian Mounted Police (RCMP, federal law enforcement). The RCMP and their border integrity unit, are on the verge of establishing a victim protection program which will not only allow the women to stay, but will provide opportunities to train, to work and to immigrate.⁹⁵ Announced as recently as March 2 2006, this project is a set of agreements which will apply to all victims of human trafficking. It has been described it as part of a comprehensive approach of 'prevention, protection and prosecution'.⁹⁶ Canada is finally realizing that in order "to make charges stick against the traffickers, and deter future offences, the police need the women's testimony. Deportation won't get it."⁹⁷ Furthermore, they are acknowledging that if the women deported and sent back, they are being at a huge risk of being re-trafficked.⁹⁸ In order to prevent that, and protect them in Canada, they also have to work with the women to rehabilitate them, give them the social, health, and legal assistance they need to establish a new life.

Unfortunately, this is only a pilot program in the province of British Columbia⁹⁹, to assess this new program and approach to trafficking victims. Despite its infancy, this is a step in the right direction that will finally bring Canada in accordance with the obligations of the Trafficking Protocol. It will be interesting to see in the future how Canada's policies fair in

⁹² *Ibid.*

⁹³ Gerry Bellett, "Woman 'tricked' into sex slavery Young Chinese says man promised her waitress job, made her work at massage parlour" Vancouver Sun, Vancouver, Canada, Thursday, March 30, 2006. Available at <http://www.canada.com/vancouvernews/news/westcoastnews/story.html?id=3a1d1c7f-28c8-4537-b648-9f20e206c536&k=84454> [visited on April 17, 2006]

⁹⁴ *Ibid.*

⁹⁵ Weatherbe. *Supra* note 91.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

comparison to some of the international best practices regarding the treatment and protection of trafficked women.

4 Asylum and Protection for Sexually Trafficked Women

4.1 Introduction to asylum and the Refugee Convention

At the heart of the concept of asylum is the notion of human rights protection. Asylum, in layman's terms, is "a place offering protection and safety; a shelter" or "the protection afforded by a sanctuary."¹⁰⁰ In a legal sense, asylum generally refers to the granting of safe haven by one state to individuals seeking sanctuary from pursuit, seizure, or persecution within the territory of another state. "The concept of "safe haven" embraces humanitarian migrants. It covers those who may not meet the legal definition of refugee but are nonetheless fleeing potentially dangerous situations."¹⁰¹

If only the granting of state protection to someone in need were that simple. Due to the complexity of sexual trafficking, it is often quite difficult for sexually trafficked women to be identified as refugees and/or as persons warranting protection. The criminal aspects involved with human trafficking, such as illegal migration and prostitution fosters dilemmas for the governments creating immigration legislation, and for the arbiters determining refugee status. There has been much debate over whether these women are to be treated as victims deserving protection, or as violators of immigration and labour laws. As a result, sexually trafficked women tend not to be viewed and treated as traditional refugee claimants.

The challenge for states has been to strike a balance between punishing the criminals and protecting the trafficked women. To date, the focus has mostly been on the preventative and punitive aspects of human trafficking, with the aspect of protection being more of an after thought. Despite the emphasis on preventing human trafficking and punishing the perpetrators of these human rights violations, there have been great movements in the international sphere to address the need for more protective measures for people subject to trafficking. The push for the need to focus on protective measures, by NGO's and the United Nations, has caused states to rethink their policies regarding legal protection mechanisms for trafficked persons; be it granting asylum through the Refugee Convention, distributing temporary visas, or considering humanitarian protection under the mandate of the Convention Against Torture.

Although the UNHCR has issued clear guidelines for interpreting the Refugee Convention, the granting of asylum protection is primarily left up to individual state

¹⁰⁰ Asylum definition taken from Answers.com. <http://www.answers.com/topic/asylum> [visited on January 7, 2006]

¹⁰¹ Ruth Ellen Wasem. "Temporary Protected Status: Current Immigration Policy and Issues" CRS Report for Congress Received through the CRS Web Order Code RS20844 Updated November 4, 2004. <http://fpc.state.gov/documents/organization/41113.pdf> [visited on January 6, 2006]

discretion. Some states use more liberal interpretations of the refugee definition, while other states are more restrictive in their interpretations. This can prove to be problematic for sexually trafficked women, especially when it comes to establishing a nexus on the grounds of ‘membership in a particular social group’; as states vary greatly in the application of the social group ground.

Furthermore, states vary greatly in how they treat and grant protection to sexually trafficked women. Some states, like Canada, have left protection to be determined within the ambit of the Refugee Convention or rarely to be considered under the scope of the Convention Against Torture and humanitarian asylum. Other states, such as the United States, have created separate legislation to deal with victims of trafficking, providing a framework of assistance and the opportunity for them to obtain temporary visas and protection in exchange for their participation in prosecuting the traffickers, such as the T-Visa.

However, are these differing individual state practices sufficient enough in protecting sexually trafficked women from past and future persecutions? This Chapter will briefly outline the Refugee Convention and will examine the United States’ and Canada’s practice of granting refugee protection with respect to sexually trafficked women. It will also debate the merits of Conventional refugee protection, and if asylum alone provides sufficient protection for women subject to sexual trafficking.

4.1.1 Overview of the Refugee Convention in Respect to Sexually Trafficked Women

In order for sexually trafficked women to qualify for refugee status and protection, they must meet the criteria outlined in the *1951 Convention Relating to the Status of Refugees and its 1967 Protocol Relating to the Status of Refugees*. According to the Convention a refugee is defined as any person who,

[o]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁰²

¹⁰² The 1967 Protocol expanded the refugee definition by removing restrictions as to the timing and location of the persecution 1967 Protocol Relating to the Status of Refugees Article 1(2). 1951 Convention

However, meeting the refugee criteria can prove problematic for victims of trafficking. For any number of reasons, trafficked persons may be excluded from receiving asylum due to: the criminal aspects involved, lack of a recognized persecution ground, a lack of a causal link to a recognized ground. Though on the surface trafficking victims may not seem to qualify for refugee status, upon examination and a full analysis of their cases, a trafficking victim's experiences "may reveal a number of interlinked, cumulative grounds"¹⁰³ that can culminate to become a legitimately recognized refugee claim.

Since there has been an identified difficulty in recognizing trafficked women's claims, the UNHCR has as recently, as of April 2006, issued new guidelines on trafficking of persons in relation to asylum, *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*.¹⁰⁴ These guidelines outline how trafficking asylum claims should be analysed, and how trafficked victims can fit within the refugee criteria to be eligible for refugee status.

One of the main requirements of the refugee convention is the notion that the persecution incurred must be linked to one of the Convention grounds, race, religion, nationality, membership of a particular social group and political opinion; the causal link may be established to any one single ground or a combination of the grounds. For the most part, trafficking victims are usually identified under the 'membership in a particular social group' Convention ground. However, they can also fit under the other five grounds, in fact, the UNHCR identifies that people may be specifically targeted and trafficked because of their race, nationality, religion, membership in a particular group, and/or political opinion.

With regards to the grounds of race and nationality, a person may be trafficked because they are of a certain racial, ethnic, linguistic and/or cultural group, civil conflicts and social upheavals augment their persecution. They can be victimized and exploited for various means, and a combination of outcomes, ranging from genocide to financial gain. "Where trafficking serves the sex trade, women and girls may also be especially targeted as a result of market demands for a particular race (or nationality)."¹⁰⁵ Likewise with race and nationality,

Relating to the Status of Refugees Article 1 Paragraph 2, Guy S. Goodwin-Gill, *The Refugee in International Law 2nd Edition*, Oxford University Press, Oxford, United Kingdom (1996) p.392

¹⁰³ UNHCR, "*Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*" Distr.GENERALHCR/GIP/06/07 Date: 7 April 2006, para.33 [herein UNHCR Guidelines on Trafficking and Asylum]

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.* at para. 34. As the Special Rapporteur on trafficking has noted, such demand 'is often further grounded in social power disparities of race, nationality, caste and colour'

trafficking may also be a method chosen to persecute members of a particular faith. The same may also be the case for individuals who hold a certain political opinion or have an imputed political opinion.

More often than not, women who are trafficked for sexual exploitation are placed under the ‘membership in a particular social group category’. The social group ground was meant to be a ‘catch all’ for groups that are persecuted, but may not fit under the other categories. The membership in a particular group ground is most commonly used in asylum cases concerning gender persecution, as well with trafficking asylum cases. ‘Membership in a particular social group’ is comprised of a shared characteristic, which will often be one that is innate, unchangeable or otherwise fundamental to identity, conscience or the exercise of one’s human rights. “The fact of belonging to such a particular social group may be one of the factors contributing to an individual’s fear of being subjected to persecution, for example, to sexual exploitation, as a result of being, or fearing being, trafficked.”¹⁰⁶

There are a number of reasons which people can be targeted for, aside from commercial/criminal/economic gain. Immigration judges need to fully examine the circumstances of each trafficking case to determine the reasons fuelling the persecution of trafficking, and not just perceiving the criminal/economic aspects as the only mitigating factors, thereby excluding the victims from refugee protection. Where the primary motive of the trafficker is financial gain, a variety of justifications may come into play; someone’s race, nationality, religion, sex (gender), political opinion, and/or social group could very well result in them being more vulnerable to trafficking. “Thus, even if an individual is not trafficked solely and exclusively for a Convention reason, one or more of these Convention grounds may have been relevant for the trafficker’s selection of the particular victim.”¹⁰⁷ Trafficking in persons is a lucrative industry; the primary motive of the traffickers is for profit rather than for persecution on a Convention ground. Despite the economic motive of trafficking, it does not preclude the possibility that there may be Convention-related grounds in the targeting and selection of victims of trafficking. Nor does it reduce the trauma of persecution experienced and felt by the trafficked victims.

With the introduction of the UNHCR’s Guidelines on Trafficking and Asylum we can hope that states will heed and approach trafficking claims from the educated and open-minded perspective of the UNHCR’s Guidelines on Trafficking and Asylum.

¹⁰⁶ *Supra* note 105 at 38
¹⁰⁷ *Ibid.*, at 42

4.1.2 Gender and gender persecution

Another way to have their claims properly considered is to recognize that a person's gender may influence the type and reasons why they are persecuted. While 'sex' and 'gender' are not enumerated categories in the Convention, women who suffer gender-based violence/persecution, such as trafficking for sexual exploitation, may fit under any of the five categories and most often fit under the ground of 'membership of a particular social group'. The UNHCR has long stressed that:

[e]ven though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted, therefore covers gender-related claims. As such, there is no need to add an additional ground to the 1951 Convention definition.¹⁰⁸

Although, the UNHCR interpretive papers greatly assist states in defining and interpreting persecution and gender related claims, essentially, there is a wide margin of appreciation for the states to decide what acts warrant persecution. Therefore, certain acts considered persecution in one state may not be seen as amounting to persecution in another state. In regards to sexual trafficking, some states may view the women simply as prostitutes, and therefore, not having been subjected to persecution; other states may recognize that sexual trafficking entails a variety of human rights abuses and is a form of persecution. These differing interpretations are very detrimental and inconsistent for victims of gender based violations, especially sexually trafficked women.

International law has been evolving to codify some serious human rights abuses as amounting to persecution. Some scholars have identified persecution as being consistent with 'serious violations of human rights' or the 'sustained or systematic violation of basic human rights'.¹⁰⁹ These human rights usually involve the non-derogable rights such as the right to life and integrity of person,¹¹⁰ no one shall be subject to torture or other cruel, inhuman, or degrading punishments and treatments,¹¹¹ and no one shall be subject to slavery or

¹⁰⁸ See UNHCR *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees GENERAL HCR/GIP/02/01 7.05.2000*, http://cgrs.uchastings.edu/documents/legal/unhcr_gender-guidelines.doc

¹⁰⁹ James C. Hathaway. *The Law of Refugee Status*, Toronto: Butterworths Canada Ltd., 1991. p.104 -105, Taken from Vigdis Vevstad. *Refugee Protection: A European Challenge*. AiT Enger AS, Otta, Norway. 1998. p. 68

¹¹⁰ See UDHR Article 3, ICCPR, Article 6.

¹¹¹ See UDHR Article 5, CAT Article 7, and ICCPR Article 7.

servitude.¹¹² “A violation, or fear of violation, of these norms protecting life and liberty of the person and the right not to be subjected to torture and other cruel treatment, sexual violence included, amount to persecution.”¹¹³

In 1996, in a joint report with the World Health Organization, the UNHCR formally identified sexual violence as a form of torture¹¹⁴; and in 2002 the UNHCR Gender Guidelines suggested that trafficking for the purpose of sexual exploitation may provide a basis for a refugee claim:

Some trafficked women or minors may have valid claims to refugee status under the 1951 Convention. The forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender related violence or abuse that can even lead to death. It can be **considered a form of torture and cruel, inhuman or degrading treatment**. It can also impose serious restrictions on a woman’s freedom of movement, caused by abduction, incarceration, and/or confiscation of passports or other identity documents. In addition, trafficked women and minors face serious repercussions after escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination. **In individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation could therefore be the basis for a refugee claim where the State has been unable or unwilling to provide protection against such harm or threat of harm.**¹¹⁵ [emphasis added]

Inherent in the trafficking experience are such forms of severe exploitation as abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, the deprivation of medical treatment. Such acts constitute serious violations of human rights which will generally amount to persecution.

4.2 Asylum in the United States and Canada

Both the United States and Canada have relied on case law to interpret the Refugee Convention. Sexual trafficking cases present some of the most complex issues for

¹¹² See UDHR Article 4, ICCPR Article 8

¹¹³ Vevstad. *Supra* 112 at 69

¹¹⁴ UNHCR/WHO, *Mental Health of Refugees*, Geneva Switzerland (2002). Taken from Suzanne B. Seltzer. *Comparative Report on the Application of Asylum Standards to Protect Women Trafficked for Sexual Exploitation: Analysis of the Laws of the United States, France, Canada, Luxembourg and the United Kingdom*. (2004) p.4.

¹¹⁵ See UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees GENERAL HCR/GIP/02/01 7 May 2002. Available at http://cgrs.uchastings.edu/documents/legal/unhcr_gender-guidelines.doc

determining asylum; often presenting elements which may conflict with a narrow interpretation of the Refugee Conventions criteria. A narrow, restrictive interpretation of the Refugee criteria can be very detrimental to women seeking protection from the abusive elements of sexual trafficking.

Trafficking comprises some of the most systematic forms of sexual abuse, namely sexual exploitation and slavery. The various elements involved in sexual trafficking: violence, forced sexual acts, psychological abuse, threats, debt bondage, confinement, all constitute prime examples of persecution within the definitions recognised by the United States and Canada.

Each state has ruled differently in various sexual trafficking cases, both with positive and negative outcomes. Despite the negative rulings, the more sexual trafficking cases considered for asylum help to establish and expand potential precedent case law to assist in further sexual trafficking cases.

4.3 United States

4.3.1 Introduction

Despite human rights violations by trafficking falling within the recognised definition of persecution, to date there have been no United States' federal court or BIA precedent decisions reached in regards to asylum claims based on alleged persecution in the form of forced prostitution and/or sexual trafficking. "There are five known IJ [unpublished] decisions where the claim involved persecution in the form of forced prostitution. Of the five decisions, there were two grants of asylum, one grant of relief under the Convention against Torture, and two denials."¹¹⁶

The lack of sexual trafficking cases in U.S. immigration law is due largely to the implementation of the Trafficking Victims Protection Act of 2000¹¹⁷. This Act can provide temporary and potentially permanent resident status for those who have been the victims of trafficking and other forms of criminal mistreatment, by issuing a 'T-visa' for those willing to

¹¹⁶ Two of the grants and the three denials have appeals pending at the BIA. Citizenship and Immigration Canada, David A. Martin, Doherty Professor of Law and Weber Research Professor of Civil Liberties and Human Rights, University of Virginia, "*Treatment of Gender-Based Asylum Claims in the United States Memorandum Prepared for the Attorney General of Canada*" March 31, 2003 <http://www.cic.gc.ca/english/policy/asylum-gender-us.html> (visited March 10, 2006)

¹¹⁷ Victims of Trafficking Victims Prevention Act of 2000, Pub.L.No. 106-386 Division A. 114 Stat. 1464 (2000) (codified as amended in scattered sections of 22 U.S.C.)

cooperate in the prosecution of their traffickers.¹¹⁸ The Trafficking Victims Protection Act and the T-visa will be examined in Chapter Four.

Although there have not been many asylum cases of sexually trafficked women adjudicated upon in the United States, case law and numerous decisions provide prime examples of how the issues of gender persecution and social group claims are broadly supported and addressed under U.S. law.

4.3.2 Persecution

In the United States, the Immigration Nationality Act (INA) stipulates that asylum may be granted to claimants who have been persecuted or have a reasonable belief that they will be persecuted on account of race, religion, nationality, membership in a particular social group or political opinion. The claimant must show that she is a member of one of the enumerated groups and that the persecution inflicted upon her was a result of her membership in that group.¹¹⁹

The Board of Immigration Appeals (BIA) used *Matter of Acosta* to define persecution as including, “threats to life, confinement, torture and economic restrictions so severe that they constitute a threat to life or freedom.”¹²⁰

In addition to that definition, they have even officially recognised that rape and other forms of sexual abuse may be considered persecution. In *Lopez-Galarza v. INS*, the court cited the replaced INS¹²¹ Gender Guidelines indicating “that female applicants may face unique ‘gender persecution,’ which includes rape and sexual abuse and provide that ‘rape and other forms of severe sexual violence’ are examples of physical harm that constitutes persecution.”¹²²

¹¹⁸ Suzanne B. Seltzer, *Comparative Report on the Application of Asylum Standards to Protect Women Trafficked for Sexual Exploitation: Analysis of the Laws of the United States, France, Canada, Luxembourg and the United Kingdom*. (2004) p.6.

¹¹⁹ Sonia Akibo-Betts, “105 The Canada-U.S. Safe Third Country Agreement: Why the U.S. is Not a Safe Haven for Refugee Women Asserting Gender-Based Asylum Claims.” Windsor Review of Legal and Social Issues, March 2005. 19 Windsor Rev. Legal & Soc. Issues 105. p.4.

¹²⁰ See *Matter of Acosta*, 19 I.&N. Dec. 211, 222 (BIA1985), overruled by *Matter of Mogharrabi*, 19 I.&N. 434 (BIA 1987). Taken from Suzanne B. Seltzer. *Comparative Report on the Application of Asylum Standards to Protect Women Trafficked for Sexual Exploitation: Analysis of the Laws of the United States, France, Canada, Luxembourg and the United Kingdom*. (2004) p.6.

¹²¹ See INS Gender Guidelines, Considerations for Asylum Officers Adjudicating Asylum Claims for Women, May 26, 1995. On March 1, 2003, the Immigration and Naturalization Service (INS) ceased to exist becoming amalgamated with the Department of Homeland Security (DHS).

¹²² See *Lopez-Galarza v. INS*, 99 F.3d 954 (9th Cir. 1996). See also *Basova v. INS*, 1999 U.S. App. Lexis 15715, 6-7 (10th Cir. July 14, 1999); *Lazo-Majano v. INS*, 813 F. 2d. 1432 9th Cir. 1987). Suzanne B. Seltzer, *Comparative Report on the Application of Asylum Standards to Protect Women Trafficked for Sexual Exploitation: Analysis of the Laws of the United States, France, Canada, Luxembourg and the United Kingdom*. (2004) p.7.

This is important for sexual trafficking claims, in that the harm suffered usually entails extreme forms of rape and sexual violence. Trafficked women are often forced into prostitution and sexual exploitation either by lack of choices, fraudulent means or coercion, and they are forced to perform cruel and degrading sexual acts on a repetitive basis. These human rights abuses involved with sexual trafficking are prime examples of persecution. This recognition of sexual violence as persecution is beneficial for adjudicating on asylum cases involving trafficking.

On a couple of occasions, in extreme cases of trafficking, the States have recognized that extreme forms of trafficking can constitute persecution:

In the case of *Ms. O*¹²³, a Russian woman was abducted by a local crime leader, gang raped by three or four of his friends, forced to perform sexual acts on a nightly basis with them and guests, and raped by the mayor and the chief of police. When O- did not cooperate, she was severely beaten. Eventually, her captor bet her off in a hand of cards to another crime leader that wanted to traffic her to Israel or Turkey. During her transportation, the driver helped her escape; he was eventually murdered for his role in her escape. Afraid for her life, and being recaptured and re trafficked, she fled to the United States and applied for asylum. The Immigration Judge (IJ) found that if returned, “she would either be abducted again and again subject to torture and forced prostitution ..., or, more likely, be targeted for ritualized execution.”¹²⁴ However, the IJ denied asylum, as he “did not find that the persecution O- endured to be ‘on account of’ one of the five grounds for asylum.”¹²⁵

In the case of *Ms. M-J*¹²⁶, a young Chinese woman, who had been working in a hotel, stabbed her manager in the leg in order to defend herself from being raped. The police arrested her, held her for a month, and told her that she was facing three years in jail for assaulting the manager. The police did not investigate M-J-‘s accusations about the manager’s sexual assault upon her. The manager eventually demanded money in exchange for agreeing to drop the charges against M-J. When her family could not afford to pay, the manager said that she, in lieu of paying off a debt or going to jail, could work it off in a hair salon. The hair salon turned out to be a front for a brothel run with the cooperation of the police. She witnessed that if the girls refused to have sex, they were drugged and forced to

¹²³ The Case of *Ms. O*, February 7, 2000. Centre for Gender and Refugee Studies. *Gender Asylum Campaigns*. <http://cgrs.uchastings.edu/campaigns/traffick.php> (visited on January 31, 2006)

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, The BIA granted asylum to *Ms. O* after the DHS withdrew its opposition upon appeal, in April, 2003, however, it does not mention on what grounds they decided to grant refugee status.

¹²⁶ The Case of *Ms. M-J*-, she was granted asylum in April 2001, Centre for Gender and Refugee Studies. *Gender Asylum Campaigns*. <http://cgrs.uchastings.edu/campaigns/traffick.php> (visited on January 31, 2006)

have sexual relations with the brothels' clientele. No one was allowed to leave the brothel. Some women in the brothel took pity on M-J- because she was young and a virgin, so they helped her escape before she had to service any of the clients. She then fled to the United States. In this case the Immigration Judge also referred to corroborating evidence of documentation regarding the pervasive existence of forced prostitution in China. The Justice found that "even if M- had been found guilty of assault, being sent to a brothel to be forcibly prostituted is an inappropriate punishment and as such constituted persecution."¹²⁷

The cases of O- and M-J-, are just two examples of the types of persecution sexually trafficked women may face. Even though, in both cases asylum was eventually awarded, no precedent was set for determining future sexual trafficking asylum claims in the United States. However, it does demonstrate that there is potential for women subjected to sexual trafficking, to have their claims considered under the Refugee Convention.

Though some women in the United States have been granted asylum on the recognition that extreme forms of trafficking may constitute persecution, most women face great difficulty in their claims and establishing that the persecution feared was 'on account of' one of the recognized grounds, primarily 'membership in a particular social group'.

4.3.3 Membership in a particular social group

Despite the UNHCR's recognition that gender can fit within the ground of 'membership in a particular group', practice has shown that states are reluctant to use the term of gender broadly, instead, opting for a more case specific and restrictive definitions. Although "[s]ex-based groups are examples of innate and immutable characteristics which may fall properly within the domain of the social group category"¹²⁸, a US court ruled, that gender alone cannot constitute a 'social group'.

In *Gomez v. INS*, the Court stated "that broad-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group."¹²⁹ Instead, the concept of gender needs to be linked to another instrumental characteristic to be able to establish a persecuted social group concept. Like in the landmark case *In the Matter of Kasinga*¹³⁰, the BIA ruled that "[y]oung women in [...] northern Togo who have not been

¹²⁷ *Ibid.*

¹²⁸ See also UNHCR Handbook at para. 73 with regards to a 'particular social group'. Suzanne B. Seltzer. *Comparative Report on the Application of Asylum Standards to Protect Women Trafficked for Sexual Exploitation: Analysis of the Laws of the United States, France, Canada, Luxembourg and the United Kingdom.* (2004) p.3.

¹²⁹ *Gomez v. INS*, 947 F.2d 660, 665 (2nd Cir, 1991)

¹³⁰ *Matter of Kasinga*, 21 I&N Dec. 357

subject to female genital mutilation, as practiced by that tribe, and who oppose the practice, are recognized as members of a ‘particular social group’.”¹³¹ The concurring opinion by Lauri Steven Filppu, explained that “the applicant’s proposed ‘social group’ definition include[d] an element of personal opposition by the victim.”¹³²

Such restrictive social group definitions create more obstacles for women subject to sexual trafficking and other forms of gender based persecution. For, the burden is upon the women to establish that the persecution feared is a form of gender persecution, and as a result of their gender, they are being persecuted.

In *Matter of Acosta*, the American Board of Immigration Appeals (BIA) stated that “persecution on account of membership in a particular social group, encompasses persecution that is directed toward an individual who is a member of a group’ of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, colour, or kinship.”¹³³ In addition, the members of this social group may share an “immutable characteristic that they cannot change, or should not be required to change.”¹³⁴

While *Kasinga* provided some positive precedence for other gender-based persecution claims ‘on account of membership in a particular social group’, the ‘ping-pong’ controversial rulings in the *Matter of R-A-* upset this achievement.

In *re R-A-*, a domestic violence case, the applicant claimed membership in a group of “married women in Guatemala who are unable to leave the relationship” for fear of persecution by their spouses.¹³⁵ Rodi Alvarado was subjected to daily abuse at the hands of her husband, a member of the Guatemalan army; she was subjected to sexual abuse, violent repetitive rapes, forced confinement, threats to her security and life.

The initial Immigration Judge in 1995 found Alvarado’s testimony credible and granted asylum. However, the Immigration and Naturalization Service (INS) appealed this decision to the Board of Immigration of Appeals, and in the 1999 precedent decision, the Board agreed that Alvarado was credible, but concluded that she was not eligible for asylum and withholding and reversed the IJ’s decision and denied asylum. The Board noted that it struggled to describe how deplorable it found Alvarado’s husband’s conduct to have been.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ See *Matter of Acosta*, 19 I.&N. Dec. 211, 222 (BIA 1985)

¹³⁴ *In re R-A-*, 2001 BIA Lexis 1; 22 I.&N. Dec 906 (BIA 1996)

¹³⁵ *Ibid.*

No decision maker in this case has questioned Alvarado's veracity, the atrociousness of the abuse she suffered from her husband or the reasonableness of her fear that the abuse would continue if she returned to Guatemala. The Board concluded, however, that the harm at issue in this case failed to meet the statutory requirements for asylum.¹³⁶

While the applicant met the basic *Acosta* test of immutable or fundamental characteristics¹³⁷, the BIA determined that:

the abuse in this case was not 'on account of' the applicant's membership in the group asserted [and] concluded the there was no indication that the applicant's husband would harm any other member of this group. In other words, there was no evidence that he would seek to harm other women who live with other abusive partners [and] that it was not because of the respondent's membership in the group that her husband would harm her.¹³⁸

Had this precedent decision stuck, it would have been very detrimental for sexual trafficking and gender-based persecution claims. Especially since this case in particular, contains all the various forms of persecutions suffered by sexually trafficked women: forced sexual acts, rape, sexual violence, physical violence, threats to security, life or well-being, forced confinement, well-founded fear of future persecution, and persecution by non-state agents.

However, the controversy and precedent impact of the *R-A* decision, sparked so much debate and outcry; it triggered a reconsideration of the position by INS and a review of the BIA's decision, and with the Department of Justice proposing the 'R-A Rule',

setting forth guidance for deciding gender asylum claims [and to] 'remove certain barriers that the *In re R-A*- decision seems to pose to claims that domestic violence, against which a government is either unwilling or unable to provide protection, rises to the level of persecution of a person on account of membership in a particular social group.'¹³⁹

These proposed rules provide guidance for interpreting the definitions of 'persecution' and 'membership in a particular social group', as well as guidance on what it means for

¹³⁶ *Ibid.*, Department and Homeland Security's Position on Respondent's Eligibility for Relief. United States Department of Justice before the Attorney General, A 73 753 922, San Francisco p. 12.

¹³⁷ See *Matter of Acosta*, 19 I.&N. Dec. 211, 222 (BIA 1985)

¹³⁸ *Supra* note 139 at 15

¹³⁹ *Timeline – Asylum From Gender Persecution*. Available at http://www.humanrightsfirst.org/asylum/pdf/2004_senate_briefing_gender_timeline.pdf. Also see US. Department of Justice, *Questions and Answers: the R-A Rule*, December 7, 2000, <http://uscis.gov/graphics/publicaffairs/questions/RARule.htm> (visited on January 17, 2006)

persecution to be ‘on account of’ a protected characteristic. Although Rodi Alvarado is still waiting to be granted asylum in the United States¹⁴⁰, her asylum case has provided future persecution claims involving ‘social groups’ and ‘gender’, a framework for effective adjudication and protection. This is an important step for gender asylum claims, and should make it easier to adjudicate on complex ‘social group’ asylum claims particularly for women subjected to sexual trafficking.

4.3.4 Nexus: the “on account of” concept

However, despite the new rules and guidance for interpreting ‘persecution’ and ‘membership in a particular social group’, women subjected to and fearing sexual trafficking, still faces challenges in meeting the ‘on account of’ (nexus) criteria.

In the case *Rreshpja v. Gonzales*¹⁴¹, a young Albanian woman sought asylum in United States claiming that she was at risk of being forced into prostitution if she were require to return to Albania. She claimed that an unknown man had attempted to abduct her as she was walking home from school one afternoon. She had managed to escape, but as she was fleeing she heard her attacker say that she should not get too excited because she would end up on her back in Italy, like many other girls. Rreshpja took this statement to be a threat that she would eventually be kidnapped and forced to work as a prostitute. She subsequently fled to the United States.

In this case the Immigration Judge denied Rreshpja’s claim on the grounds that her ‘social group’ of attractive young women who risk being kidnapped and forced into prostitution

is not recognizable under the Immigration and National Act (INA) [and] evening assuming that such a social group exists, Rreshpja failed to demonstrate that her attempted kidnapping [...] or her fear of being forced into prostitution if she is returned to Albania was the result of membership in that social group as opposed to the unfortunate consequences of widespread crime in Albania.¹⁴²

¹⁴⁰ In January 2001, Attorney General Janet Reno overturned the *Matter of R-A* and ordered the BIA to reconsider the case when the new rules are finalized. In February 2003, Attorney General John Ashcroft ordered the BIA to send the *Matter of R-A* to his office for a decision, and in February 2004, the Department of Homeland Security sent a brief to the Attorney General arguing in favour of granting asylum to Rodi Alvarado. January 21, 2005, Attorney General John Ashcroft sent the *Matter of R-A* back to the BIA to be adjudicated upon. As of March 14, 2006 Rodi Alvarado still has not been granted asylum, a decision is still pending.

¹⁴¹ *Rreshpja v. Gonzales*, 420 F.3d 551 (6th Cir. 08/15/2005)

¹⁴² See *Immigration and Nationality Act*, 8 U.S.C. § 1101 (a) (42) (A), *Rreshpja v. Gonzales*, 420 F.3d 551 (6TH Cir. 08/15/2005)

While Rreshpja's social group was not recognized, the emphasis here in this case is the motives of the actor perpetrating the persecution. For many gender asylum cases, difficulty arises when the claimant has to establish that the motives of the persecution were 'on account of' one of the protected grounds. When it comes to sexual trafficking, forced prostitution, and domestic violence, as we saw *In re. R-A*, non-state actors, private and criminal, are often the persecutors. Therefore, it is often more difficult to demonstrate that the motives of these non-state actors are 'on account of' one of the five protected grounds.

As well, as we defined in *Sayaxing v. INS*, 179 F.S3d 515, 519 (7th Cir. 1999)¹⁴³, that poverty, being a victim of crime, and bad luck are not enough to amount to persecution, which was one of the primary reasons for denying asylum to Rreshpaj and "Ann".

In "Ann's"¹⁴⁴ case, another young woman from Albania, who was targeted at the age of 16, for prostitution, kidnapped and raped. She managed to escape to the United States, but was denied asylum because she filed her application one month after the one-year deadline¹⁴⁵ imposed on asylum seekers. At that time she was only 17 years old and was suffering Post-Traumatic Stress Disorder. In addition, the Immigration Judge held that she would be ineligible for asylum even if she had applied on time because her kidnap, rape and threatened sale into prostitution were merely "personal" and "criminal" acts.¹⁴⁶

Although asylum was denied for Rreshpaj, the degree of persecution experienced by "Ann" should be recognized as persecution and her application considered for asylum. Her case is currently being appealed.

4.4 Canada

4.4.1 Introduction

The Canadian system has a more established history of granting asylum to victims and potential victims of sexual trafficking. In 1993 created Canada, the Convention Refugee Determination Division of the Immigration and Refugee Board created *Guidelines on Women*

¹⁴³ U.S. Department of Homeland Security, "Immigration Information"
http://www.uscis.gov/lpbin/lpext.dll/inserts/afm_redacted/afm-95-redacted-491-1/afm-95-redacted-10635/afm-95-redacted-10775?f=templates&fn=document-frame.htm [visited on April 15 2006]

¹⁴⁴ Centre for Gender and Refugee Studies, *Defend Asylum for Victims of Trafficking Current Campaigns Ms. A.M.*
http://www.democracyinaction.org/dia/organizations/cgrs/campaign.jsp?campaign_KEY=1457&t=Backup.dwt (visited March 12, 2006)

¹⁴⁵ One-Year Filing Deadline MUST file application within one year of most recent arrival to the United States, INA § 208(a)(2)(B); 8 C.F.R. § 208.4 (a)

¹⁴⁶ *Ibid.*

*Refugee Claimants Fearing Gender-Related Persecution*¹⁴⁷ to aid the Refugee Division in considering women's asylum claims on the basis of gender. Since the issuance of the Canadian Gender Guidelines, Canada has recognized sexual abuse and violence as persecution in analysis of refugee and asylum claims, even ruling in favor of sex-trade workers and victims of trafficking. Asylum has been granted to both sexually trafficked women, and women fearing being sexually trafficked.

4.4.2 Persecution

In *Canada v. Ward*¹⁴⁸, the Immigration and Refugee Board (IRB) cited that “ [p]ersecution’, for example, undefined in the Convention, has been ascribed the meaning of ‘sustained or systemic violation of basic human rights demonstrative of a failure of state protection’; ... [and] that ‘comprehensive analysis requires the general notion [of persecution] to be related to developments within the broad field of human rights.’”¹⁴⁹

Canada has extensive case history recognizing that the various elements of sexual trafficking can amount to persecution. By linking the persecution to a recognized ground, sexual trafficking victims may be eligible for refugee status in Canada.

One practice sustaining and augmenting the profits in trafficking is the use of debt-bondage. Debt-bondage is the most widely used method of enslaving people. As previously discussed in Chapter two, a person may become a bonded labourer when his or her labour is demanded as a means of repayment for a loan; such as obtaining visas, passports, and the ‘expenses’ to enter another country. The person is then tricked or trapped into working for very little or no pay, often for seven days a week. Bonded labourers are ‘kept in line’ by being threatened with and subjected to physical and sexual violence.¹⁵⁰ For sexually trafficked women, this ‘debt’ is repaid through sexual exploitation.

Some adjudicators in Canada have found that debt-bondage can amount to

¹⁴⁷ *Women Refugee Claimants Fearing Gender-Related Persecution: Update, Guidelines Issued by the Chairperson Pursuant to Section 65 (3) of the Immigration Act*, IRB, Ottawa, November 25, 1996. available at http://www.gisr-irb.gc.ca/en/about/guidelines/women_e.htm

¹⁴⁸ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 1993 CanLII 105 (S.C.C.) Taken from the Canadian Legal Services Immigration and Refugee Board. “*Interpretation of the Convention Refugee Definition in the Case Law.*” December 31, 2002. Available at <http://www.canlii.org/ca/cas/scc/1993/1993scc72.html>

¹⁴⁹ *Ibid.* at 733-34 also cited in Hathaway, and Goodwin-Gill. See also *Cheung v. Canada* (Minister of Employment and Immigration), [1993] 2 F.C. 314 (C.A.), at 324-5. Justice La Forest (in the dissent in *Chan*,) expanded on the definition of persecution, stated that “[t]he essential question is whether the persecution alleged by the claimant threatens his or her basic human rights in a fundamental way.” *Chan v. Canada* (Minister of Employment and Immigration), [1995] 3 S.C.R. 593, at 635.

¹⁵⁰ Bonded labour definition <http://www.antislavery.org/homepage/campaign/bondedinfo.htm>

persecution. In one case involving a Thai woman, T98-06186¹⁵¹, the claimant was a former sex trade worker whom had been trapped in debt-bondage. The claimant had been in sex trade debt-bondage in France. She had not served the agreed upon 350 clients, when the French police had raided the apartment. The claimant was able to escape, and avoided being arrested in France. While in hiding, the trafficker had threatened to sell the claimant to another brothel. The claimant then fled back to Thailand and subsequently entered Canada and was once again held in sex trade debt-bondage. The claimant claimed she owed \$37,000 (USD) to the first trafficker for the 250 clients she had not serviced in France. She owed 5000 French Francs for her return from France to Thailand, and another 30,000 Thai Baht for her trip to Canada, as well owed another \$54,000 (CAD) for the clients she did not serve in Canada.

The Immigration Judge found that “[t]hese debts, in Thai terms, are substantial. Given Thai wages, [he doubted] the claimant could repay the above-mentioned debts except through continued work in the sex trade.”¹⁵² The Justice found, along with state reports of the prostitution rings and debt-bondage in Thailand and the lack of state protection, that the claimant had an objectively well-founded fear of persecution by reason of membership in a particular social group – women and/or former sex trade workers. The Justice argued that “the claimant face[d] a serious possibility of serious harm should she return to Thailand, either in the form of continued sex trade debt-bondage or serious physical reprisals for an attempt to avoid or escape her debts.”¹⁵³

This is an important case for former sex-trade workers and sexually trafficked women enslaved in debt-bondage, for it recognizes that debt-bondage and the reprisals involved with it can amount to persecution and may be grounds for granting some trafficked women asylum and protection under the Refugee Convention.

4.4.3 Membership in a particular social group

Although there is sometimes hair splitting involved in interpreting the Convention, progress had been made in Canada for recognizing that sexually trafficked women and former sex trade workers can constitute a persecuted social group.

¹⁵¹ Immigration and Refugee Board, November 2, 1999, *CRDD T98-06186*, Bousfield and Milliner, available at http://www.irb-cisr.gc.ca/en/decisions/reflex/index_e.htm

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

The Canadian Supreme Court elaborated on the American criteria in defining what constitutes ‘membership in a particular social group’, in the *Canada v. Ward* decision, Justice La Forest, stated:

The meaning assigned to particular social groups in the Act should take into account the general underlying themes of the deference to human rights and anti-discrimination which form the basis for the international refugee protection initiative. The tests proposed in *Mayers, Cheung and Matter of Acosta*¹⁵⁴ provide a good working rule to achieve this result. They identify three possible categories:

- 1) groups defined by an innate or unchangeable characteristic;
- 2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- 3) groups associated by a former voluntary status, unalterable due to its historical permanence.

The Court gave examples of the three categories as follows:

The first category would embrace individuals fearing persecution on such bases as **gender**, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one’s past is an immutable part of the person.¹⁵⁵ (emphasis added)

The *Ward* ‘membership in a particular social group’ definition has helped lay the ground work for identifying and defining persecuted gender social groups. In a landmark Canadian case, *Litvinov v. Canada (Secretary of State)*¹⁵⁶, the Court used the test outlined in *Ward*, to determine if the applicant was a member of a particular social group, and if the persecution she suffered and feared was on account of such membership.

The applicant was a citizen from Israel, though originally a Christian from Ukraine. She was a qualified massage therapist, but she was forced into prostitution when she began working at what she thought to be a massage parlour. The parlour turned out to be a front for a brothel, with her employer operating a prostitution ring. She was thereby raped by her employer and threatened with death if she did not continue to work as a prostitute. She was also raped by one of her clients. She had gone to the police on a number of occasions but did

¹⁵⁴ *Cheung v. Minister of Employment and Immigration*, (1993) F.C.J. No. 309 (Q.L); *Mayers v. Canada* (1992), 97 D.L.R. (4th) 729; *Matter of Acosta*, 19 I.&N. Dec. 211, 222 (BIA 1985)

¹⁵⁵ *Supra* note 149 at 689

¹⁵⁶ *Litvinov v. Canada (Secretary of State)*, June 30, 1994, IMM-7488-93, at 11. 83 F.T.R. 60, 1994 CarswellNat 711.

not receive any protection, or assistance. She eventually sought the aid of a lawyer, but the lawyer was unable to find effective help for her. She fled to Canada and applied for Refugee Status claiming a well-founded fear of persecution if required to return to Israel on the basis of her religion, nationality, political opinion and membership in a particular social group.

The Convention Refugee Determination Division (CRDD) originally determined the applicant to not be a Convention Refugee on any of the aforementioned grounds. The CRDD did not find any persecution on the grounds of religion, nationality, political opinion or membership in a particular social group. The CRDD's reasoning was that the claimant was not persecuted because she was a Russian Christian woman, but was in fact used and taken advantage of because she had obtained her massage therapist diploma in Ukraine. The CRDD further argued that she was just a victim of crime and was not a member of a particular social group, thus not entitled to Refugee Protection.

In the CRDD's view "[h]er problems began when she was lured into the clutches of a ruthless pimp and forced into prostitution. It was a deplorable act by an individual and the claimant should stay away from such a criminal man."¹⁵⁷ Even though the claimant had sought police help on numerous occasions, and had even sought legal assistance, the CRDD found no failure of state protection and that "the applicant had failed to take adequate steps to obtain the protection of the state against her employer."¹⁵⁸ Furthermore, the CRDD reasoned that if the claimant had "received differential treatment from the law enforcement, it [was] reasonable to suppose that the claimant, in their eyes, was a common criminal and not a so-called upstanding citizen."¹⁵⁹

Upon appeal, the Federal Court of Canada found that the CRDD erred in law in concluding applicant's fear of persecution not based on membership in social group. The Court went on to define *Litvinov's* social group as:

'new citizens of Israel who are women recently arrived from elements of the former Soviet Union and who are not yet well integrated into Israeli society, [...] who are lured into prostitution and threatened and exploited by individuals not connected to the government, and who can demonstrate indifference to their plight by front-line authorities to whom they would normally be expected to turn for protection.' Any other result would be anomalous. I see no sense in a scheme of law that extends protection to women abused by their husbands who cannot rely on the state for support but fails to protect vulnerable women from abuse and exploitation at the hands of other men in a position of power where state protection

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

similarly cannot be relied upon.¹⁶⁰

This was an important benchmark decision for recognizing that women persecuted by criminal elements, such as forced prostitution can be found to constitute a particular social group. This ‘social group’ definition also addresses the role non-state actors (‘private’ individuals) play, and that they can be identified as persecutors and perpetrators of human rights violations. It also recognizes the impact of the state in failing to protect its citizens.

The *Litvinov* decision has provided the authority for further sexual trafficking cases to be adjudicated upon; as well, it has developed and expanded the concept of the ‘membership in a particular social group’ ground.

4.4.4 Nexus: the “on account of” concept

Even though the claimant in case T98-06186 was granted asylum on account of her membership in the social group of ‘women and/or former sex trade workers’, the dissenting opinion argued that there was no nexus between the claim and a recognized Convention ground. The dissenting Justice found that the claimant was a victim of organized crime, and that “victims of organized crime do not constitute a particular social group.”¹⁶¹ Furthermore, the dissenting Judge argued that gender had not prompted her problems, and that her involvement in prostitution was a quality of person that was neither ‘innate or unchangeable’¹⁶².

The dissenting Justice also cited *Ward*, stating that:

a distinction must be drawn between a claimant who fears persecution because of what he or she does as an individual and a claimant who fears persecution because of his or her membership in a particular social group. It is the membership in the group which must be the cause of the persecution and not the individual activities of the claimant. This is sometimes referred to as the ‘is versus does’ definition.¹⁶³

This ‘is versus does’ distinction has also been used in other debt-bondage and sexually trafficking or sex trade cases to deny asylum. In T99-01434¹⁶⁴, a 25 year-old Thai woman claimed her social group as ‘single women involved in the sex industry with an

¹⁶⁰ *Ibid*,

¹⁶¹ *Supra* note 153

¹⁶² *Supra* note 149 at 689

¹⁶³ *Ibid*

¹⁶⁴ Immigration and Refugee Board, August 25, 1999, *CRDD T99-01434*, Morrish and Mora, available at http://www.irb-cisr.gc.ca/en/decisions/reflex/index_e.htm

outstanding debt bond and a fear of persecution at the hands of the first Mafia group to which she was sold’.

The claimant agreed to work in a foreign country as a prostitute as a way to leave Thailand. She was then ‘sold’ to a Mafia group who required her to sleep with 400 clients in Canada in order to pay off her debt. After a few months she learned that she was to be resold and trafficked to Malaysia. Fearing this she escaped with the helps of one of the guards. She was then sold to a second Mafia group, who would keep her in Canada, and required that she service 400 clients in order to pay off her second debt. She fulfilled the second bargain and was freed from her debt-bondage, yet continued to engage in illegal prostitution and was later arrested and criminally charged, prior to making her asylum claim.

The claimant claimed she had a well-founded fear of persecution from the first Mafia group she had escaped from. She believed that they were still angry for her escaping and there were reports that they had come looking for her in her village. She also stated that a woman who escaped was killed by this group; a guard has shown her a newspaper clipping of the death and said the Mafia group was responsible.

Essentially, the Justice argued that “the claimant’s fear of persecution has been created by what she has done, namely worked as a prostitute, as opposed to being a member of any particular social group.”¹⁶⁵ The panel went on to state that “the claimant has been exploited by Mafia groups which the panel considers to be organized crime. As repeatedly established by caselaw, victims of crime cannot generally establish a link between their fear of persecution and one of the five ground in the definition.”¹⁶⁶

This last statement is extremely problematic for women subjected to the various forms of sexual trafficking, because all elements of sexual trafficking are linked to crime, various crime syndicates and criminals. Albeit the victims of crime are not often granted refugee protection just on the basis that they are victims of crime, but with an emphasis on the effects of persecution and trauma on a victim’s life can be an argument for protection within the Refugee Convention and definition. However, a narrow interpretation of the Refugee Convention with regards to sexual trafficking can leave many women without protection.

According to the Trafficking Protocol, Article 9.1b states that “State Parties shall establish comprehensive policies, programmes and **other measures**: [...] to **protect** victims

¹⁶⁵ *Ibid.*, at 3

¹⁶⁶ *Ibid.*, at 4

of trafficking in persons, especially women and children, **from revictimization**”¹⁶⁷ (emphasis added). While T98-06186 was granted asylum, T99-01434 was denied asylum; the inconsistency in the decisions leaves much to be questioned in regards to how states implement and adhere to the Trafficking Protocol in accordance with the Refugee Convention.

As previously discussed in Chapter Two trafficking is a form of servitude and slavery, which is a crime against humanity. Debt-bondage is a method used to exploit people and enslave them. As it is a crime against humanity, it begs the question why a system, having ratified the Trafficking Protocol, would not grant asylum, instead denying asylum on the ‘is versus does’ rule, and the criminal associations involved with trafficking.

4.5 Conclusion Canada United States Asylum

Both Canada and the United States have different mechanisms to deal with legal protection for sexually trafficked women. Canada has done a fairly good job processing trafficking cases through their Refugee Determination Division; evening establishing a solid interpretative base for future trafficking cases to be considered. However, there are some critics that claim that support for foreign trafficking victims is inadequate.¹⁶⁸ Another question that needs to be addressed in the Canadian system is what happens to the women who do not qualify for Refugee status; there is no safety net in Canada to catch the victims that fall through the cracks in the refugee process. This is because Canada, unlike the United States, does not have any specific legislative policies and separate protection mechanisms for dealing with sexually trafficked women.

While the United States has not dealt with many trafficking cases in their Refugee process, the gender persecution cases they have processed have provided ample examples on how to interpret sexually trafficking claims. However, the United States prefers to relegate the trafficking cases to be processed under the Trafficking Victims Protection Act and to provide the trafficked women who are willing to testify in criminal cases against their persecutors with temporary visas such as the T-Visa.

¹⁶⁷ See Article 9.1 of Trafficking Protocol

¹⁶⁸ U.S. Embassy in Canada, *Trafficking in Persons Report 2005 CANADA (TIER 1)*, June 2005 http://www.usembassycanada.gov/content/textonly.asp?section=can_usa&subsection1=AnnReports&document=trafficking_canada_2005

5 Conclusion

Trafficking places governments in a unique position. On one hand they strive to prevent and punish trafficking – battling the criminal aspects of it; on the other hand, they have to deal with the ramifications of trafficking – illegal migrants and victims of human rights abuses. While states are making a strong effort to prevent and punish trafficking, few, if any, have laws that adequately protect victims of trafficking.

States choose different methods to address the needs and forms of protection for sexually trafficked women. Some may have specific legislation enacted to provide assistance and protection and specifically address all aspects of trafficking. Others may opt to addressing a victim's needs and protecting them through their Refugee systems. Both systems have their benefits and limitations, while Refugee Status is ideal, there are always going to be some women that cannot meet the Refugee criteria, and fall through the cracks. On the other hand, temporary protection provided by trafficking acts, may not be enough protection for women who have been horrifically trafficked, and are at risk of being re-persecuted and re-trafficked.

The United States created the Trafficking Victims Protection Act to provide trafficking victims with counselling, health services, temporary protection, and even the possibility of permanent residence status with all the similar benefits afforded to refugees. However, the temporary protection of the T-visa is contingent on a victims' participation with law officials to assist in prosecuting their traffickers. This stipulation has been criticised by various groups as being too strict; putting too much emphasis on getting the victims to assist law enforcement, and not enough emphasis on the real important factor of a victim's protection from retaliation and revictimization, and works towards rehabilitation.

While the US has been commended for its implementation and work regarding the Trafficking Victims Protection Act and the T-visa, there are many critics that suggest that the TVPA and the T-visa is too stringent, leaving many victims to unassisted and unprotected. While the TVPA is good in its intentions, its restrictive language, and stringent criteria often ends up excluding the very people it is meant to protect.

Canada does not have any specific legislation to address the needs and concerns of sexually trafficked women. Canada has primarily left the protection of trafficking victims to be determined through their refugee system. Despite Canada being criticised for its lack of legislation for protecting victims of trafficking, it has excelled in its refugee system. Canada has been at the forefront for recognizing gender-based claims, and granting refugee status on a variety of gender persecution claims, even establishing case law for trafficking victims.

However, it can be very difficult for trafficked women to meet the refugee criteria. Due to the criminal aspects involved, it may be particularly difficult for trafficked women to establish the nexus needed to be granted refugee status. Therefore, more often than not, the women who cannot meet the refugee convention criteria do not receive any protection; and because there is no specific protection legislation for trafficked persons, these women are left without even temporary protection and assistance, and deported, being placed at risk for revictimization.

Canada has addressed this concern being on the verge of establishing a special protective system for trafficking victims. Canada is in the process of implementing a pilot system of protection and assistance for trafficked persons; although this is just a pilot project, Canada is making an effort to address the concerns of trafficking victims, or issues that cannot be met by the refugee system. This pilot program will give Canada a chance to assess the situation for trafficked persons, and how effective a supplementary protection system may be. However, Canada should look to the various states around the world and assess which method works best.

There are no perfect systems. While there are possibilities for ideal best practices, systems that provide the trafficked women with protection, counselling, health services, etc, they may not be economically feasible. While the United States has the T-visa and the Trafficking Victims Protection Act, Canada has its refugee system. The two counterbalance one another. If the two systems could be amalgamated, then victims of trafficking would be given truly efficient protection. Although economically and politically not feasible, having both systems in place to complement one another would give the appropriate amount of assistance and protection to trafficking victims in need; it would give each woman a shot at refugee status, and a cushion to fall back on if they do not meet the Refugee Convention's criteria.

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6.7 Domestic Jurisprudence

6.7.1 Canada

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6.7.2 The United States

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