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A FRAGILE PROMISE – THE INADEQUACY OF ASSISTANCE MEASURES FOR VICTIMS OF HUMAN TRAFFICKING IN CANADA

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A FRAGILE PROMISE – THE STATUS OF ASSISTANCE MEASURES FOR VICTIMS OF HUMAN TRAFFICKING IN CANADA

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Introduction

The Canadian government criminalized human trafficking in 2002; however, it has yet to develop adequate measures to assist victims of human trafficking. The situation is due to the government's failure to address the influence of the dominant immigration discourse on legislative and judicial decision-making regarding victim assistance measures. In this paper, I undertake a critical analysis of the effect of judicial and legislative discourse on the government's victim assistance program: the Temporary Resident Permit (TRP) program. This analysis relies on the United Nations *Protocol to*

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Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol)[1], to which Canada is a party, to establish the nature and scope of Canada's obligation to assist victims of human trafficking. This analysis also relies on the work of the scholar Philippe Bourbeau, who studies the growth of the apparent focus on security concerns in immigration policies in Canada. It argues that the attendant effects of the focus on security concerns of Canadian immigration policy on legislative and judicial discourse have resulted in barriers to accessing assistance under the TRP program for trafficking victims. This research is important because, as a novel program, the TRP has yet to be critically analyzed to determine whether it fulfills Canada's international law obligations to trafficking victims.

The paper is divided into five parts. First, I review Canada's international law obligations to trafficking victims under the Palermo Protocol. Second, I describe the Canadian government's legislative and policy response to human trafficking after becoming a party to the Palermo Protocol. Third, I identify the influence of the securitization discourse Canada's immigration policy. Fourth, I analyze the effects of the securitization discourse on executive and legislative decisions regarding government-offered assistance measures. The securitization discourse is the tendency to arbitrarily associate migrants with threats to national security that is present across Canadian society. Finally, I evaluate the potential of the judicial appeal process to act as a check on administrative decision-making where humanitarian concerns are at risk of being overridden. I conclude that the structure of the current TRP program is inadequate to meet the needs of trafficking victims because the program enacts significant barriers between trafficking victims and assistance measures. Thus, the promise of assistance for victims of human trafficking represented by the TRP program is a fragile one as victims may not be able to access assistance. There is a compelling need to collect and share data about the interactions of trafficking victims with the TRP program to create a flow of information between policy makers, immigration officials, and the judiciary.

[1] 15 November 2000, 2237 UNTS 319, 2002 Can TS No 25, entered into force 25 December 2003 [Palermo Protocol].

This analysis is necessary to begin to isolate and neutralize the attendant effects of the influence of securitization in Canada on judicial and legislative decision-making on the TRP program.

I. International Instrument

The Palermo Protocol is the first comprehensive international agreement on human trafficking. The Protocol contains provisions to criminalize human trafficking and assist and protect victims of trafficking. The agreement was created in response to an emerging global consensus that human trafficking was not only a human rights issue, but also a growing international criminal issue propelled by the participation of organized crime syndicates.[2] The Protocol was opened for signature in December 2000 in Palermo, Italy and it entered into force in 2003, along with the United Nations *Convention Against Transnational Organized Crime*.[3]

The foundational principle of the Palermo Protocol is a balance between the penal and human rights facets of human trafficking. The Protocol's purposes are, as outlined in Article 2, to prevent and combat human trafficking; to protect and assist its victims, and to promote co-operation among States to meet those objectives.[4] Although it articulates both criminal law and humanitarian aims, at least one critic has suggested that the Protocol's approach bolsters international prosecutorial efforts at the expense of

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[2] Kelly Hyland. "The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children" (2001) 8:2 *Human Rights Brief* 30 at 1.

[3] *Convention against Transnational Organized Crime*, 8 January 2001, 2225 UNTS 209, entered into force 29 September 2003 Article 25.

[4] Natalie Ollus. "*The United Nations Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children: A Tool for Criminal Justice Personnel*" (Resource Material Series 62, United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, February 2004), online at http://www.unafei.or.jp/english/pdf/RS_No62/No62_06VE_Ollus1.pdf at 21.

enhancing human rights.[5] This criticism is particularly valid with regard to the Palermo Protocol's mandatory and permissive distinctions.

The Protocol imposes both permissive and mandatory obligations whether an obligation is permissive or mandatory is determined by the financial implications of undertaking each obligation. The Protocol imposes permissive obligations to assist victims because destination countries are opposed to the financial implications of mandatory assistance measures.[6] The result is watered-down obligations to protect trafficking victims compared to other obligations imposed by the Protocol.

Article 5 of the Palermo Protocol obliges States parties to criminalize trafficking. It states: "Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally." This obligation is accompanied by mandatory minimum sentences for those convicted of human trafficking, which are illustrated in the UNODC Model Law on Trafficking in Persons.[7] Note that a model law is just a model and does not bind states. In contrast, the articles to assist victims of trafficking are framed permissively and do not impose standards and requirements.

Article 6 states that:

> "Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in per- sons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:
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> (a) Appropriate housing;

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[5] Jennifer Chacon. "Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement" (2010) 158 *University of Pennsylvania Law Review* 1609 at 1619.

[6] *Supra* note 4 at 25.

[7] *Model Law on Trafficking in Persons* (Vienna: United Nations Office on Drugs and Crime, undated), online at: http://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_ Persons.pdf at 27.

> (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
>
> (c) Medical, psychological and material assistance; and
>
> (d) Employment, educational and training opportunities

Thus, Article 6 requires states parties to consider implementing measures to provide for the physical, psychological and social recovery of victims. Article 7 states that:

> "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."

Thus, Article 7 merely requires States to consider adopting measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases. It should be noted that the *Convention Against Transnational Organized Crime* does contain a provision on mandatory, general assistance to victims of transnational crime; however, Articles 6 and 7 do not create any obligations for States parties to assist victims of human trafficking beyond considering the need for assistance measures.[8]

This system of permissive obligations means that national immigration policies influence the development of victim assistance measures. In the absence of specific requirements and standards imposed by the Protocol, each State party's national government must develop its own victim assistance measures. Inevitably, the measures adopted by each government will be aligned with the government's immigration policies. This results in discrepant standards of assistance available across nations. Indeed, the leading criminologist David Nelken argues that the differences across the legal cultures of States parties and the various readings of the Protocol engendered by these differences are responsible for the success or failure of a State party's anti-trafficking measures. He states: "It is not enough to apply universal prescriptions based on the goal of extending human rights for the outcomes to be

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[8] *Supra* note 3.

automatically positive."[9] Thus, legal culture and national immigration policies have a constitutive role in each State party's victim assistance measures.

II. Canada's Obligations and Commitments Under the Palermo Protocol

Canada gave its consent to be bound by the Palermo Protocol in 2002. In preparation for the Protocol's entry into force in 2003, Canada would have reviewed its legislation and policy. Canada, in preparation for the coming into force of its international obligations, amended its domestic laws. The Canadian government amended the *Immigration and Refugee Protection Act* (IRPA) in 2002 to criminalize the trafficking of persons.[10] Since the IRPA provisions only prohibited trafficking persons internationally, Parliament also amended the *Criminal Code* in 2005 to criminalize human trafficking within Canada's borders.[11] According to the RCMP, as of 2013, fifty cases have ended in convictions using these provisions.[12] However, the government's success in carrying out its treaty obligations occurred at the cost of victim assistance.[13] While the government did eventually adopt a program to provide victim assistance measures, it delayed doing so for four years until, in 2006, the Department of Citizenship and Immigration (CIC) extended the TRP program to victims of international human trafficking.

a. Background to the Temporary Residence Permit Program

TRPs are generally issued to a foreign national who is inadmissible or does not meet the requirements of IRPA to enter or remain in Canada but the individual's need to enter or remain in Canada is compelling

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[9] Nelken, David "Human Trafficking and Legal Culture" (2010) 43 Israel Law Review 513 at 513.

[10] *Immigration and Refugee Protection Act*, SC 2001, c 27, ss. 118.

[11] *Criminal Code*, RSC 1985, c C-46, ss. 279.01 - 279.04

[12] Royal Canadian Mounted Police "Human Trafficking National Coordination Centre", February 19, 2014, online: <http://www.rcmp-grc.gc.ca/ht-tp/index-eng.htm>.

[13] Estibaliz Jimenez. "La place de la victime dans la lutte contre la traite des personnes au Canada" (2011) 44:2 Criminologie 199 at 199; Barnett, Laura. *Trafficking in Persons*. (Ottawa: Legal and Legislative Affairs Division, Library of Parliament, 2013), at 8, online at: http://www.parl.gc.ca/content/lop/researchpublications /prb0624-e.htm at 8.

and does not pose a risk to Canadians.[14] The authority to grant a TRP stems from section 24(a) of IRPA. Section 24(a) states that "a Citizenship and Immigration Canada (CIC) officer who is satisfied that it is justified in the circumstances may issue the foreign national a TRP."[15] As a ministerial delegate, the immigration officer must follow guidelines issued by the Minister. However, the officer exercises his or her discretion in determining whether an applicant qualifies under the guidelines.[16]

According to the guidelines, the purpose of the human trafficking TRP is to help the victim to legalize their status in Canada. It also provides them with the right to apply for a work permit and a source of treatment for the physical and psychological injuries that they have suffered as a result of their trafficking through access to healthcare services under the Interim Federal Health Program (IFHP).[17] A TRP may be issued to a trafficking victim to allow them to recover from their experience, to provide a reflection period to consider their options, or for any other protective purpose.[18] There are two types of TRPs available to trafficking victims: short-term (up to 180 days) and long-term permits (varying lengths but not more than 3 years).[19] An immigration officer will issue a short-term permit if the official makes a preliminary assessment that the individual may be a victim of trafficking.[20] If, during a subsequent assessment, the officer confirms that the individual is a victim of trafficking, the officer may issue a long-term TRP. The guidelines indicate that the officer will consider factors including whether it is reasonably

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[14] Barnett, *ibid* at para 5.8.

[15] *Immigration and Refugee Protection Act*, SC 2001, c 27, ss. 24.1.

[16] Information on guidelines is found at note 17.

[17] Citizenship and Immigration Canada, "Operational Manual IP 1: Temporary Resident Permit" (16 June 2007) [Operational Manual] at paras 16.1 & 16.5.

[18] *Ibid* at para 16.3.

[19] Benjamin Perrin. *Invisible Chains: Canada's Underground Network of Human Trafficking* (Toronto: Viking Canada, 2010) at 144.

[20] The permits duration was extended in 2007 from 120 days to 180 days.

safe and possible for the victims to return to and to re-establish a life in the country of origin or last permanent residence, whether the victims are willing to assist authorities in criminal proceedings, and any other factor.[21] Once the TRP expires, victims of trafficking may apply for another residency permit that would allow them to legalize their status until they are eligible for permanent residency after three or five years or make a refugee claim.[22] However, neither is recognized as a generally viable option and removal from Canada is the likely result of such a claim.[23]

b. The Temporary Residence Permit in Practice

According to the Government of Canada's National Action Plan, 212 human trafficking TRPs were issued to 89 foreign nationals between May 2006 and December 2012.[24] This figure includes subsequent permits issued to the same victim in order to maintain legal status in Canada. A review of the annual reports for Citizenship and Immigration Canada indicates that the number of TRPs issued per year is as follows: four in 2007, 20 in 2008, 37 in 2009, 55 in 2010, 53 in 2011, and 53 in 2012.[25] Despite a general increase in the number of permits issued, the program's youth and the relatively limited number of

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[21] *Supra* note 14 at para 16.3.

[22] *Immigration and Refugee Protection Act*, SC 2001, c 27, ss. 64-65. These sections specify that TRP holders may become permanent residents if they have continuously resided in Canada for a period of three years under the permit even if they are foreign nationals who are inadmissible on health grounds.

[23] Udara Jayasinghe & Sasha Baglay. "Protecting Victims of Human Trafficking Within a 'Non-Refoulement' Framework: Is Complementary Protection an Effective Alternative in Canada and Australia?" (2011) 23:3 Int'l J Refugee L 489 at 506.

[24] *National Action Plan to Combat Human Trafficking: 2012-2013 Annual Progress Report* (Ottawa: Public Safety Canada, 2013), online at: http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2013-ntnl-ctn-pln-cmbt-hmn/index-eng.aspx.

[25] Citizenship and Immigration Canada, *Annual Report to Parliament on Immigration 2013* (Ottawa: Citizenship and Immigration Canada, 2013); Citizenship and Immigration Canada, *Annual Report to Parliament on Immigration 2012* (Ottawa: Citizenship and Immigration Canada, 2012); Citizenship and Immigration Canada, *Annual Report to Parliament on Immigration 2011* (Ottawa: Citizenship and Immigration Canada, 2011); Citizenship and Immigration Canada, *Annual Report to Parliament on Immigration 2010* (Ottawa: Citizenship and Immigration Canada, 2010); Citizenship and Immigration Canada, *Annual Report to Parliament on Immigration 2009* (Ottawa: Citizenship and Immigration Canada, 2009); Citizenship and Immigration Canada, *Annual Report to Parliament on Immigration 2008* (Ottawa: Citizenship and Immigration Canada, 2008).

permits issued means that there is a dearth of information, including statistics and testimonials, available for study. In light of this limitation, it is appropriate to study the structure of the TRP program for its potential to meet the needs of trafficking victims. The outcome of this study suggests that the apparent focus on security concerns in national immigration policies hinder the humanitarian aims of the TRP program.

III. Securitization Discourse and Immigration Policy in Canada

As discussed above, the decision to enact victim assistance measures is a matter of national immigration policy. Canada's national immigration policy has been significantly influenced by the apparent focus on security concerns. The attendant effects of a securitized immigration policy on legislative and judicial decisions have created structural barriers for trafficking victims seeking assistance measures. In particular, trafficking victims may face presumptions of criminality and deviance operating within immigration policy when seeking to obtain a TRP.

The immigration policies of Western nations have been heavily influenced by securitization discourse in the years after the end of the Cold War. The scholar Philippe Bourbeau, who has expertise in the field of migration studies and international security, offers a definition of the securitization discourse. His work should be looked at in considering Canada's TRP program because it offers a contemporary analysis of Canada's immigration policy. Bourbeau defines securitization as the "process of integrating migration discursively and institutionally into security frameworks that emphasize policing and defence".[26] Western nations adopted securitized immigration policies in response to a surge in population movement at the end of the Cold War. Governments were especially fearful that cultural differences brought by immigrants would lead to social and political instability. Governments moved to exclude

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[26] Philippe Bourbeau, *The Securitization of Migration: A Study of Movement and Order* (Oxon: Routledge, 2011) at 43.

immigrants and refugees by relying on common strategies in political discourse such as assuming organic connections between criminal groups and foreigners to criminalize immigrants and refugees or presenting foreigners as abusers of the system to cast them as "other".[27]

Maggie Ibrahim, a contemporary UK-based scholar, traced the Canadian government's espousal of securitization over the past fifty years. Ibrahim's study represents one of the most in-depth analyses of the Canadian government's legislative and policy responses to its international obligations under the Palermo Protocol. She argues that the IRPA, which was passed in 2002, represents the culmination of securitization in Canada's immigration policy. With the IRPA, the government codified a new impetus of risk management to counter the perceived threats posed by migrants. According to Ibrahim, the government's approach is made clear in the overview of the Act, which reads:

> "[Canadians] want legislation that … deal[s] firmly with those who would abuse our systems and processes. They want to preserve our safe society and uphold respect for our values and norms of social responsibility. The proposed legislation will give Canada the tools to say 'no' more quickly, in order to remove serious criminals…"[28]

For Ibrahim, this passage demonstrates an essential component of the securitization of migration in Canada – the presumed criminality and deviance of immigrants. These presumptions are essential to justify emphasizing deterrence over competing humanitarian concerns, thereby facilitating governance measures, such as the denial of admission, detention, and deportation, that circumscribe the liberties of immigrants.[29]

I agree with Ibrahim's argument. Ibrahim studied many sources, including the overview and the organized crime provisions of the IRPA, the immigration and refugee process, and statements made by

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[27] Myron Weiner, "Security, Stability, and International Migration" in Myron Weiner, ed, *International Migration and Security* (Boulder, Co: Westview Press, 1993) at 12.

[28] *Supra* note 22.

[29] Maggie Ibrahim, "The Securitization of Migration: A Racial Discourse" (2005) 43:5 International Migration at 163.

the Canadian press and politicians, for a complete picture of the securitization of migration in Canada. Despite the apparent risk of overstating her case in reaching such an audacious conclusion about an unspoken “migrant-as-a-threat” narrative, she demonstrates that her conclusion has solid footing across the variety of sources that she studied. For this reason, I rely on Ibrahim’s analysis of the securitization of Canada’s immigration policy to inform my analysis of the effect of securitization on the efficacy of the TRP program for providing assistance to victims of human trafficking. The definition of the securitization of Canada’s immigration policy that I adopt in this paper is based on her analysis. Securitization is simply the tendency to arbitrarily associate migrants with threats to national security present across Canadian society.

IV. Securitization and Administrative Decisions

It is my view that the attendant effects of securitization in political practice have curtailed the assistance measures offered by the government to victims of human trafficking. The absence of mandatory provisions in the Palermo Protocol facilitates the transmission of the securitization discourse to the Canadian government’s anti-trafficking measures because the Palermo Protocol does not provide nations with guidance as to the appropriate national action. In particular, the association of immigrants with criminality and deviance that underscore the IRPA overcomes the humanitarian focus of the TRP program.

The translation of the presumption of immigrant deviance from the Canadian government’s immigration policy into the TRP program was evident from the program’s outset. In 2006, the Minister of Immigration, Monte Solberg, announced government measures to provide assistance to trafficking victims. Specifically, the TRP program was expanded to issue permits to trafficking victims as well as to provide victims with medical support and counseling services. In his announcement, Solberg assured the public that “the new measures have been carefully designed so that only *bona fide* victims of human

trafficking will benefit from them."[30] The expectation in Solberg's statement that some individuals in the immigration system will abuse the TRP program mirrors IRPA's aim to deal with such abusers efficiently. Solberg's statement signals the adoption of cautious approach, recognizing that at least some of applicants to the TRP program will abused the system.

This cautious approach introduced by Solberg is actualized in the structural language of the TRP program. As discussed above, Immigration Officers exercise a wide degree of discretion. An officer may grant a short-term permit if he or she suspects that the applicant is a trafficking victim or a longer-term permit once he or she confirms that the applicant is a trafficking victim. The most meaningful distinction between the permits is the length of time for which they are issued. It is my view that this distinction arises for strategic reasons. A long-term permit, if issued for a sufficient duration to satisfy the requisite period of residency in Canada, may result in the permit holder's eligibility to apply for permanent residence. This two-stage process gives officers the opportunity to verify the applicant's story, and thereby acts as a check to ensure that fraudulent applicants do not obtain permanent residency through TRP program.

The extent of Parliament's concern about fraudulent TRP applicants is demonstrated in their reluctance to curtail officer discretion to issue permits that emerged in the debate around Bill S-223 during a meeting of the Standing Senate Committee on Human Rights.[31] Bill S-223 was introduced in 2009 as a private members bill. The Bill proposed to legislate a "Protection Permit" under section 24 of IRPA. The permit would be issued for a period of three years to allow a victim to legalize their status in Canada until he or she were eligible to apply for permanent residency. Furthermore, the permit holder would

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[30] Citizenship and Immigration Canada, News Release, "Assistance for Victims of Human Trafficking" (11 May 2006) online: http://www.cic.gc.ca/english/department/media/releases/2006/0602-e.asp.

[31] Minutes of the Proceedings of the Standing Senate Committee on Human Rights, Issue 14, Evidence, November 23, 2009.

not be inadmissible for permanent resident status by virtue of any circumstance that was caused by their being a victim of human trafficking, including criminality.[32]

Bill S-223 was a major step towards meeting the permissive assistance measures contemplated by the Palermo Protocol and, in particular, Article 7, which provides that a State Party shall consider adopting measures to permit trafficking victims to remain in its territory. However, the Bill became mired in debate over a provision that gave immigration officials authority to cancel the permit at any time. On the one hand, the potential to cancel at any time creates uncertainty for victims over their status in Canada and the potential for procedural unfairness. On the other hand, the Bill's sponsors argued that the officer's authority to cancel is an essential safeguard against fraudulent applicants, without which the permit should not be created. Indeed, the bill's sponsor, Senator Sharon Carstairs, explained that this form of official discretion was necessary because some individuals who would seek the permit

> "are part of the problem…If [officials] can identify that something is not a genuine case of trafficking, that in fact this person is the trafficker and not the person who has been trafficked, they want to know that they can eliminate this… to preserve the integrity of the immigration and refugee system."[33]

The insistence on the cancellation provision documents the concern of parliamentarians that illegitimate or fraudulent applicants pose a threat. It shows that Canadian legislators perceive the further protection of trafficked individuals poses a risk to the integrity of the immigration system.

The debate around Bill S-223 also demonstrates how the second essential component of securitized migration, the presumption of criminality of individuals inside the immigration system, operates in the TRP program. The Department of Immigration spoke out during the debate against Bill S-223 on the basis that the "Protection Permit" would "create a blanket amnesty for victims of trafficking… [which]

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[32] Bill S-223, An Act to amend the Immigration and Refugee Protection Act (victims of trafficking in persons), 2nd Sess, 40th Parl, 2009, cl 1(2).

[33] *Supra* note 31.

could include any criminal offence committed by the victim" because it would allow long-term permit holders to apply for permanent resident status despite any circumstances caused by or related to their being trafficking victims.[34] Although officials from the Department of Immigration acknowledged that victims are vulnerable and may be coerced into committing a crime, they argued that the current policy that allows a case-by-case analysis of inadmissibility is necessary for Canadian security.[35] Although Bill S-223 did not become law, it engendered the officials at the Department of Immigration's belief that the threat to Canadian society is not limited to illegitimate or fraudulent applicants, but includes confirmed trafficking victims. If there is indeed a generalization endemic to the Department of Immigration that confirmed trafficking victims pose a threat to Canadian security, trafficking victims will have greater difficulty securing government assistance measures because they must either convince immigration officials that they are not criminals or undergo heightened scrutiny of their criminal history. This presumption of criminality adds another roadblock to between victims of human trafficking and government assistance measures.

These presumptions may be particularly detrimental to trafficking victims because the burden of proof belongs to the applicant to demonstrate his or her right to a TRP.[36] The promise of government assistance is a fragile one because the victim must convince the officer first, that he or she is a legitimate victim of trafficking and second, that he or she does not pose a criminal risk to Canadian society. The deck is already stacked against the victim because of circumstances related to the experience of being trafficked, including serious health problems which is grounds for inadmissibility, fraudulent documents or no documents, language barriers, or lack of understanding of their rights. Furthermore, as an

[34] *Supra* note 31.

[35] *Supra* note 32

[36] Jimenez, *supra* note 13 at 205.

exceptional permit, an applicant is required to demonstrate "compelling reasons" why a permit should be granted. Even if the individual's inadmissibility or violation is relatively minor, a permit may be unwarranted in the absence of compelling need.[37] Trafficking cases are complex and varied and, without training, the Immigration Officer may not grasp the nuances of the victim's situation such that he or she would consider the victim's reasons compelling. Thus, a trafficking victim is not guaranteed assistance and many factors must align in the victim's favour in order for him or her to receive a TRP.

Failure to convince an officer of either their status as a victim or that they do not pose a threat may cause the victim to be confounded with "simple" irregular migrants who do not receive special assistance measures.[38] The consequences may be dispossession of vital assistance measures or subjection to a removal order. It is now even more necessary for trafficking victims to be recognized as such because, as of 2012, access to supplemental health benefits available under the Interim Federal Health Plan (IFHP) was ended for all except victims of trafficking with TRPs.[39] As a result, trafficking victims seeking to receive or renew a TRP occupy a precarious situation until they receive the permit.

The influential NGO, the Canadian Council of Refugees, has commented that the TRP program represents an important step towards recognition of the protection needs of trafficked persons; however, based on their experience, they have seen inconsistencies in the issuing of permits across the country, which causes the treatment of victims to vary greatly across regions. The Canadian Council of Refugees, notes that the current TRP program has significant deficiencies. [40] The decisions of

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[37] Barnett, *supra* note 13 at para 5.8.

[38] Jimenez, *supra* note 13 at 205.

[39] *Order Respecting the Interim Federal Health Program*, 2012, SI/2012-26 (15 December 2012) at 6.1.

[40] Canadian Council for Refugees, Media Release "Temporary Resident Permits: Limits to protection for trafficked persons" (June 2013) at 5, online: http://www.ccrweb.ca at 5.

immigration officers could be affected by the desire to balance the delivery of services with measures to prevent abuse. Therefore, the influence of securitization could create barriers that override the humanitarian concerns articulated in the Palermo Protocol. Although the Canadian government is not obliged to adopt victim protection measures, those that it has adopted do not satisfy the Palermo Protocol's aim to protect and assist victims of human trafficking.

V. Securitization and Judicial Decisions

The judicial system provides a venue for recourse in the event that the CIC makes an improper decision to deny a request for a TRP. An individual that is denied a TRP has a right to apply for judicial review under section 72 of IRPA. Section 72 provides that "Judicial review by the Federal Court with respect to any matter – a decision, determination, or order made, a measure taken or question raised – under this Act is commenced by making an application for leave of the Court." As is evident from a review of the IRPA, Immigration Officers exercise a high degree of discretion, however; they have a duty to act fairly and to account for and appropriately weigh all relevant factors before making a decision.[41] If, upon appeal, the Federal Court finds that the officer failed to do so, the Court may overturn the decision and send the issue back for re-assessment by another official. The purpose of the appeal process is to provide a check on administrative decision-making. In this section of the paper, I will determine whether the process of judicial review provides an effective safeguard for humanitarian concerns with regards to the CIC approval process for TRPs. Both the structure of the appeal process and judicial precedent will be reviewed.

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[41] Officers are directed to consider the following factors in deciding whether to issue a longer-term temporary resident permit: whether it is reasonably safe and possible for the victims to return to and to re-establish a life in the country of origin or last permanent residence; whether the victims are needed, and willing, to assist authorities in an investigation and/or in criminal proceedings of a trafficking offence; and any other factor that in the opinion of the officer justifies, in the circumstances, issuing a temporary resident permit. *Supra* note 17 at Appendix G.

As professor Catherine Dauvergne has noted, one notable trait of strong executive control over immigration law is a marked deference of the judiciary to executive decision-making.[42] The standard of review, or the amount of deference given by the court in reviewing the administrative decision, is reasonableness, provided that the officer did not breach procedural fairness standards.[43] The task of the court is to determine "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[44] Courts are generally loath to interfere in administrative decisions based on the principle of non-interference, which recognizes that administrative officials are better equipped than the courts to interpret and implement legislative policy in the public interest. The role of the judiciary is constrained to ensuring that the substance of the administrative decision is based on the correct legal principles.[45] The court's purview is tightly circumscribed by deference owed to administrative decisions.

The principle of non-interference creates broad legal parameters within which discretion operates. Criminologist Anna Pratt goes one step further and describes the function of discretion as "productive regulatory power", which, she argues, reflects the fact that discretion is more accurately regarded as a form of positive power that is used by government to constitute a dominant discourse than the traditional view of discretion as operating within boundaries set by law.[46] According to Pratt, official discretionary power over detention and deportation under IRPA has given effect to the discourse of the immigrant as a criminal. Thus, discretion is used to exclude those who are perceived to represent a risk

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[42] Catherine Dauvergne. "Sovereignty, Migration and the Rule of Law in Global Times" (2004) 67:4 Modern Law Review 588 at 591.

[43] *Beyer v Canada (Citizenship and Immigration),* [2009] FCJ 823, at para 69.

[44] *Dunsmuir v. New Brunswick*, 2008 SCC 9 [2008] 1 S.C.R. 190 at para 47.
[45] Lewans, Mathew. "Deference and Reasonableness Since *Dunsmuir*" (2012) 38:1 Queen's Law Journal 59 at 83.

[46] Anna Pratt "Dunking the Doughnut: Discretionary Power, Law and the Administration of the Canadian Immigration Act" (1999) 8:2 Social & Legal Studies 199 at 207.

to the safety and good order of Canadian society, particularly prospective immigrants. The obvious parallels between the uses of discretion to exclude the criminal immigrant identified by Pratt and the presumption of deviance and criminality in legislative and executive decisions identified in this paper warrants further investigation. Of particular interest is the relationship between the discretion exercised by immigration officers to grant TRPs and the judicial review of negative decisions.

A review of the case law does not yield any instances of judicial review of a negative decision to grant a trafficking TRP. At present it is uncertain whether this outcome reflects the relatively few applications for human trafficking TRPs, the youth of the TRP program, the lack of sufficient denials of leave to appeal, or other barriers to appeal. However, it is anticipated that instances of human trafficking will increase in the future so this outcome may change.[47] In these circumstances, it is worthwhile to examine court cases involving non-trafficking TRPs for an understanding of judicial discretion and deference.

With respect to non-trafficking TRPs, the Court in *Farhat v Canada (Minister of Citizenship and Immigration)* has elaborated on the objectives of the TRP program and provided a justification for executive control of the program. In his reasons for judgement Justice Shore explained: “the objective of section 24 of IRPA is to soften the sometimes harsh consequences of the strict application of IRPA which surfaces in cases where there may be “compelling reasons” to allow a foreign national to enter or remain in Canada despite inadmissibility or non-compliance with IRPA.”[48] Justice Shore went on to caution that, since TRPs grant their bearer more privileges than do visitor, student or work permits, TRPs should be issued cautiously. He also acknowledged that Parliament retains a supervisory

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[47] *Human Trafficking in Canada: A Threat Assessment* (Ottawa: Royal Canadian Mounted Police, 2010), online at: http://publications.gc.ca/collections/collection_2011/grc-rcmp/PS64-78-2010-eng.pdf

[48] *Farhat v Canada (Minister of Citizenship and Immigration)* [2006] FCJ 1593, 302 FTR 54 at para 22.

function over the program for this reason.[49] The rationale provided by Justice Shore relies upon the idea that Parliament is better suited to understand the needs of the public, which is a common justification for judicial deference to the executive and legislative branches of government. Deference to government decisions regarding TRPs is especially important given the exceptional nature of the TRP in the immigration system.

The relationship between immigration officers, ministerial guidelines, and judicial review outside of the context of human trafficking has also been discussed in the case law. In the case of *Cheng v Canada (Secretary of State)*, in which the plaintiff brought an application to quash the denial of his permanent residence application, explained that the purpose of issuing guidelines is to ensure consistency across the department's decisions. [50] The Guidelines should be followed for this reason, however, because they are not legislative in nature, the failure of an Immigration Officer to follow the policy expressed in the Guidelines is not an error worthy of referring the matter back for redetermination. Furthermore, in *Ramoutar v Canada (Minister of Employment and Immigration)*, the federal court held, with regard to the policy contained in the Immigration Manuals, that the fact that a policy was set forth by the Department of Immigration does not make it law.[51] Thus, the immigration officer's failure to follow the policy expressed in the Guidelines does not trigger the judiciary's role in ensuring that the substance of the administrative decision is based on the correct legal principles. Review is only triggered when it becomes necessary to determine whether a decision falls within a range of acceptable outcomes that are defensible in respect of the facts and law under the reasonableness standard. The substantial degree of deference articulated in *Farhat* is enacted in the structure of the relationship between immigration officers, the ministerial guidelines, and the process of judicial review.

[49] *Supra* note 48 at para 22.

[50] *Cheng v Canada (Secretary of State)* [1994] FCJ 1318, 25 Imm. LR (2d) 162 at para 7.

[51] *Ramoutar v Canada (Minister of Employment and Immigration)* [1993] FCJ 547 at page 375.

Despite this policy of deference, a negative decision to issue a TRP may been overturned upon judicial review if the officer failed to provide adequate reasons or provided reasons that were so unreasonable so as to constitute an error of law. A brief review of the case law demonstrates that a negative decision to issue a TRP is rarely issued. The case law yielded one case, *Beyer v Canada (Citizenship and Immigration)*, in which the court found that an Immigration Officer failed to provide adequate reasons for her decision.[52] In this case, an immigration officer's decision to refuse to extend a TRP was overturned on the basis that her failure to provide written reasons for her decision gave the appearance of arbitrariness. Otherwise, no instances where the court found the officer's reasons unreasonable could be locate. A cautious interpretation suggests that the courts rarely deem it necessary to interfere with an Officer's decision and send the issue back for re-assessment by another Officer.

These results support Pratt's analysis regarding a "productive regulatory framework" of discretion. The substantial degree of judicial deference given to, and the reluctance to interfere with, the decisions of immigration officers shows how the government could use discretion and deference to constitute the securitization discourse. However, the absence of a body of case law involving human trafficking TRPs makes it is impossible to test this argument. Nevertheless, the structure of judicial review, in which the judicial branch cannot generally review the substance of policy-based decisions, and the deference afforded by the judiciary to administrative discretion in issuing TRP's suggests that judicial review will not provide a meaningful check to the operation of the securitization discourse in the decisions of immigration officials. The presumptions of deviance and criminality operate at the level of policy, which does not trigger legal principles. It is therefore unlikely that their problematic nature as presumptions will be identified and corrected by the courts.

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[52] Beyer, *supra* note 43 at para 81.

In 2007, a single appeal from a case of human trafficking reached the Federal Court. [53] In the case of *Streanga v Canada (Minister of Citizenship and Immigration)*, the applicant, Monica Streanga, brought an application for leave and for judicial review of the decision of a Pre-Removal Risk Assessment (PRRA) Officer, which found that Streanga was not a person in need of protection. Streanga arrived in Canada in 1999. Prior to her arrival she had been trafficked from her hometown in Romania to work in Hungary as an exotic dancer and prostitute. Despite evidence that her traffickers were at large in Romania and had a new and strong reason to cause her harm, the PRRA Officer concluded that was not in need of protection. Streanga appealed the decision. Justice Shore granted a stay of the removal order based on the finding that, if deported to Romania, it was likely that she would suffer irreparable harm.[54]

In the Streanga case, Justice Shore demonstrated a profound understanding of the complexities of trafficking, including those that had eluded the PRRA Officer. He found that the officer failed to consider the scale of trafficking in women and children in Romania, corruption within the Romanian police force, evidence that showed that other Romanian women who have escaped their traffickers are often recaptured by them, and information from Amnesty International that the law against trafficking in Romania had not led to any noticeable improvement in the serious problem of human trafficking.[55] Although the principle of non-interference likely prevents most human trafficking-related appeals from being heard, this case suggests that, in the unusual event that a case does reach the court system, the court is capable of a comprehensive analysis of the relevant humanitarian concerns. More trafficking-related cases must be heard before an assessment is feasible, but this case suggests that the court system may interpret the TRP program purposively to give effect to its humanitarian principles and forestall the influence of the securitization discourse. However, as noted earlier, the structure of

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[53] *Streanga v Canada (Minister of Citizenship and Immigration)* [2008] FCJ 276, 70 Imm. LR (3d) 236.

[54] *Streanga v Canada (Minister of Citizenship and Immigration)* [2007] FCJ 1082 at para 37.

[55] *Supra* note 53 at para 28.

judicial review and judicial deference to administrative discretion means that few such cases will reach the court system. Therefore, judicial review will not provide a meaningful check on the operation of securitization. Instead, attempts to isolate and neutralize the effects of securitization must focus on the operation of the discourse within the structure of the TRP program itself.

VI. Conclusion

Canada's actions in signing and ratifying the Palermo Protocol and adopting a victim protection program are commendable. However, this critical analysis has determined that the TRP program enacts significant barriers between trafficking victims and assistance measures. The barriers risk the well being of trafficking victims and are responsible for the program's failure to meet the Palermo Protocol's aim to protect and assist trafficking victims. The program is relatively young and there is a dearth of information and studies to determine if the program is beneficial overall. It is clear, however, that the presence of the securitization discourse in policy circles undermines the program's ability to offer meaningful assistance to trafficking victims. Therefore, it is necessary to initiate more studies on the TRP program to determine how policy makers, Immigration Officers, and the judiciary can act to isolate and neutralize the attendant effects of the securitization discourse on trafficking victims. Now that eight years have elapsed since the Canadian government adopted victim protection measures, such a review is both timely and essential.

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