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RESEARCH ARTICLE/ARTICLE DE RECHERCHE

# Prosecuting Trafficking: A Critical Comparison of Canada's Anti-Trafficking Legislation

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## Abstract

Only two cases of migrant trafficking have been successfully prosecuted in Canada (*R v. Gonzalez-Valbuena* and *R v. Domotor*). This article considers why by offering a comparison of human trafficking offences defined at section 118 of the *Immigration and Refugee Protection Act* (IRPA) and sections 279.01-279.011 of the *Criminal Code of Canada* (CrC). We also assess the application of these provisions to seven publicly reported cases of migrant trafficking. We demonstrate that the anti-trafficking frameworks fail to capture the offence of migrant trafficking. We also confirm that the prosecution of migrant trafficking is undermined by the promotion of racist and gendered ideas of victimization in judicial decision making. Our analysis offers support for the work of Nandita Sharma (2005) on the existence of "global apartheid" in the Canadian context, which operates to sustain the illegalization, criminalization and removal of specifically racialized female migrants from Canada.

**Keywords:** human trafficking; criminal law; immigration law; global apartheid; race and racism

## Résumé

Seules deux affaires de traite de migrants ont donné lieu à des poursuites menant à des condamnations au Canada (*R c. Gonzalez-Valbuena* et *R c. Domotor*). Cet article cherche à comprendre pourquoi en proposant une comparaison entre les infractions liées à la traite de personnes définies à l'article 118 de la *Loi sur l'immigration et la protection des réfugiés* (LIPR) et celles prévues aux articles 279.01 à 279.011 du *Code criminel* (C.C.). Nous évaluons également l'application de ces dispositions à sept affaires de traite de migrants rendues publiques. Nous démontrons que les cadres législatifs de lutte contre la traite ne parviennent pas à saisir pleinement l'infraction de traite de migrants. Nous confirmons en outre que la poursuite de la traite de migrants est compromise par la reproduction d'idées racistes et genrées sur la victimisation dans les décisions judiciaires. Notre analyse appuie ainsi les travaux de Nandita Sharma (2005) sur l'existence d'un « apartheid global » dans le

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contexte canadien, lequel faciliterait l'illégalisation, la criminalisation et l'expulsion en particulier des femmes migrantes racisées hors du Canada.

**Mots clés:** traite de personnes; droit pénal; droit de l'immigration; apartheid global; race et racisme

## Introduction

Luz Adriana Gonzalez-Valbuena was convicted in March 2023 by the Ontario Court of Justice of multiple charges of human trafficking, withholding travel documents for the purposes of human trafficking and receiving material benefit from human trafficking (*R v Gonzalez-Valbuena*, 2023). The charges against Gonzalez-Valbuena were laid under sections 279.01 to 279.03 of the *Criminal Code of Canada* (1985) (CrC). It was broadly determined that the defendant had recruited Mexican nationals to Canada through promises of work (*R v Gonzalez-Valbuena*, 2023, para 3). According to the court, Gonzalez-Valbuena had counselled the complainants on how to gain entry and status in Canada, including by lying to Canadian authorities (*R v Gonzalez-Valbuena*, 2023, para 61). The court found that Gonzalez-Valbuena had confiscated passports once the complainants crossed the border, thereby ensuring that they remained in her control, and then exploited the complainants, subjecting them to verbal abuse, threats of physical violence and deportation. It was finally determined that Gonzalez-Valbuena had gained financially from this exploitation, specifically by taking from wages earned by the complainants (*R v Gonzalez-Valbuena*, 2023, para 4-11).

*R v Gonzalez-Valbuena* represents only the second case of human trafficking involving migrants that has resulted in conviction in Canada. The first, *R v Domotor* (2012), was similarly prosecuted under the CrC. Notably, and despite the circumstances, neither case was prosecuted pursuant to section 118 of the *Immigration and Refugee Protection Act* (2001) (IRPA), which criminalizes trafficking in persons, defined as the organized entry of persons into Canada via abduction, fraud, deception or use or threat of force or coercion. There are only three[1] publicly reported decisions involving allegations of migrant trafficking charged under the IRPA: *R v Orr* (2016), *R v Ladha* (2013) and *R v Ng* (2007). Prosecution was unsuccessful in all three cases.[2] The fact that there are no convictions under the IRPA is noteworthy given that reports of exploitation, abuse and related conditions from temporary migrant workers in Canada are well documented (Fudge and MacPhail 2009; Bhuyan et al. 2018; Strauss and McGrath 2017; Vosko 2022). Further, there is a frequent emphasis on migrant sex trafficking in political, anti-trafficking narratives, yet victims—in the rare cases in which they are discovered—are deported (Lam 2024). While we do not advocate for the expansion

[1] Note that the decision in *R v T.Y.W.* (2016) states that charges were laid for human trafficking and misrepresentation under the IRPA against Y.W. and his wife by the Canada Border Services Agency. There is no further publicly available information disclosing how these charges were disposed of. As a result, we have not included an analysis of this case herein.

[2] While a conviction under section 118 was achieved in the case of *R v Orr* (2013), this decision was overturned on appeal in *R v Orr* (2015). Orr was then found not guilty of trafficking.

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of the anti-trafficking framework,[3] these insights point to the need for further examination of the application of anti-trafficking law to migrant trafficking cases, which is otherwise under researched.

We address this gap in the literature by comparing the adoption and application of trafficking provisions within immigration and criminal law in Canada. We first offer brief descriptions of the three cases in which charges for migrant trafficking have been applied pursuant to the IRPA (*R v Orr* (2016), *R v Ng* (2007) and *R v Ladha* (2013)) and the two cases charged under the CrC (*R v Domotor* (2012) and *R v Gonzalez-Valbuena* (2023)). We also examine the decisions in *R v Rasool* (2015) and *Attorney General of Canada v Manoukian* (2020), both of which saw charges for migrant trafficking laid under the CrC eventually dropped. Excluding *R v Rasool* (2015), these cases were gathered via a search of CanLii and Quicklaw for decisions published between 2002 and 2023 by using the following search terms: "human trafficking," "migrant trafficking," "trafficking in persons," "section 118 Immigration and Refugee Protection Act," as well as a combination of "trafficking persons" and "foreign national." The decision in *R v Rasool* (2015) was not publicly reported and was sourced through previously conducted research.[4]

We recognize that there are limitations to our analysis given the small number of publicly reported decisions that we were able to access. However, as we have noted, the number of migrant trafficking cases that have been prosecuted in Canada is generally limited, particularly in contrast to domestic sex trafficking cases.[5] Analyzing the available migrant trafficking cases remains important given the escalation in documented cases of the exploitation and abuse of migrant workers, as well as the gap between prosecuted migrant trafficking cases and the substantial and growing numbers of domestic trafficking cases that have gone through the Canadian court system.

Following the review of case law, our paper proceeds in three sections. We begin with an evaluation of section 118 of the IRPA and sections 279.01 to 279.011 of the CrC to demonstrate that these provisions fail to completely incorporate the definition of trafficking provided within the United Nations (UN) *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2000) (henceforth the Trafficking Protocol). Drawing from an analysis of the seven cases noted, we propose that the resultant incomplete definitions of trafficking employed by Canadian anti-trafficking legal regimes are insufficient for capturing the experiences of migrants, thus authorizing the dismissal of complaints. We then move to reveal issues of clarity in the definitions of human

[3] History has repeatedly demonstrated that the addition of legislation, and/or the reform of existing anti-trafficking frameworks, has functioned to authorize the harmful surveillance and criminalization of marginalized and racialized communities. Instead, the solutions we support come from alternative avenues, including the transformation of enforcement practices, the revision of operational directives and guidelines, changes to resource allocation and approaches that focus on decriminalization and decarceration, amongst others.

[4] REDACTED BY AUTHOR.

[5] As of 2018, there have been approximately eighty-four prosecutions and forty-four convictions for domestic sex trafficking in Canada since 2002 (Millar and O'Doherty 2020).

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trafficking adopted within the IRPA and CrC. We suggest through an assessment of the case law that the application of the IRPA and CrC to migrant cases of trafficking is undermined by these issues of definitional clarity. Finally, we offer an analysis of the operation of racist and gendered discourses in the development of the trafficking provisions under the IRPA and CrC. We propose that the promotion of these discourses in the application of the noted legal regimes functions to rationalize the denial of migrant victimhood[6] by constructing these complainants as liars, cheaters and violators of the border. Racialized female migrant complainants are, as a result, specifically denied protection and produced as criminal and illegal through court decision-making.

We ultimately suggest that the denial of victimhood to migrant complainants and their exclusion and expulsion from the nation can be conceptualized as products of (and contributing to) what Nandita Sharma (2005) calls "global apartheid," in which "differential legal regimes are organized within nationalized spaces: one for 'citizens' and another far more regressive for [...] people categorized as 'illegal' who are denied a permanent legal status within the nation space" (89). Sharma contends that these repressive legal regimes are sustained via the promotion of racist and gendered discourses that imagine women and children from the Global South as victims while simultaneously rationalizing the illegalization and removal of these migrants from the nation. While our analysis is not offered as a comprehensive demonstration of a legal regime or of the existence of "global apartheid," it identifies patterns in judicial reasoning that rely on racist and gendered discourses and have significant negative effects for vulnerable, marginalized migrants in Canada.

## I. Migrant trafficking: a review of the case law

The case of *R v Orr* (2016) involved a family who migrated to Canada from Hong Kong. These migrants requested that their children's caregiver (L.S.) accompany them to Canada. Franco Orr (the husband/father) obtained a short-term visitor visa for L.S. and, together, the family and the caregiver relocated. When the visa expired, Orr filed for L.S.'s visa extension but it was refused. L.S. remained in Canada without status; whether she was employed during this time was disputed. L.S. claimed that, after the expiry of her visa, she continued to work seven days per week without overtime pay, earning only $500 and later $700 per month. In 2013, a jury convicted Franco Orr of human trafficking under section 118 of the IRPA—the first conviction for trafficking under immigration law in Canada. He was, however, acquitted on appeal in 2015, with the appeal court finding that evidence of exploitative employment alone does not prove trafficking. Instead,

[6] In this paper, we are intentionally using the term "victimhood" because our analysis focuses on how the state constructs and deploys victimhood as a legal and administrative category within trafficking regimes. The concept is not used to describe the individuals themselves, nor to diminish their agency, but rather to critically examine how state actors label, classify and respond to migrant complainants through this terminology. As such, using the state's own language is analytically necessary for tracing how "victimhood" operates as a mechanism of governance, credibility assessment and border control.

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section 118 of the IRPA requires proof that exploitation is connected to arranging entry into Canada—something that the Crown could not demonstrate in this case. The appellate court specifically determined that L.S. lacked credibility and reliability, and that, without corroborating evidence to substantiate her claims of trafficking, the charge could not be proven beyond reasonable doubt.

In *R v Ladha* (2013), the accused, Mumtaz Ladha, was charged under section 118 of the IRPA for allegedly having tricked the complainant, M.H., into coming to Canada to work as an aesthetician at a hair salon. M.H. alleged that she was then forced to work as a housekeeper for sixteen to eighteen hours per day, seven days per week, over a period of ten months without pay and against her will. Ladha was acquitted of all charges.

In *Attorney General of Canada v Manoukian* (2020), the accused (Mr Manoukian) hired the complainant in Lebanon to work as a live-in caregiver. The complainant then accompanied the Manoukian family to Canada, entering with a visitor visa. This visa eventually expired and an extension was refused. The family was advised by an immigration agent to put a hold on the employment of the complainant until the immigration matter was resolved and to limit her excursions outside the house. The complainant continued to leave the home, however, eventually meeting two women in a supermarket with whom she shared her story. The women reported the matter to the police, which led to the application of trafficking charges under sections 279.01 to 279.03 of the CrC against Manoukian. Despite the case receiving widespread media attention, all charges were withdrawn a few months later.

The case of *R v Domotor* (2012) resulted in Canada's first major labour trafficking conviction under the CrC—an exception rather than the norm in the generally low success rate of migrant trafficking prosecutions. The case involved two families (the Domotor and Kolompar families) who moved to Canada from Hungary and started a construction company. They subsequently recruited other male Hungarian workers to Canada with promises of a good job and high salary. Upon arrival, the men were made to work long hours on a construction site, given little time off and had their salary held back and their passports confiscated. The men were also made to apply for Ontario Works, with the Domotor and Kolompar families collecting the benefits. The migrants lived in squalor in the basements of the Domotor and Kolompar family homes. Fifteen members of the two families were eventually arrested and charged with a variety of offences, including trafficking under sections 279.01 to 279.03 of the CrC. All but one pleaded guilty to trafficking or trafficking-related charges.

In *R v Ng* (2007), the accused met complainant #1 in China and invited her to come to Canada to work in his restaurant. She agreed and entered Canada using false travel documents. Upon arrival, she was told that the restaurant had closed and that she was expected to work in a massage parlour, for which the accused would pay her $1,500 per month. In turn, she claimed she was expected to pay him $11,000 per month. Complainant #1 arranged for her sister-in-law (complainant #2) to travel to Canada via a fake marriage, promising her a job in a restaurant earning $1,500 per month. When complainant #2 arrived, she was

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told by Ng that she would work in a massage parlour for $1,500 per month and pay him $9,500 per month. When complainant #2 refused, Ng became angry. Fearing potential physical repercussions from Ng, complainant #2 asked a friend to pick her up. Charges against Ng were then laid under section 118 of the IRPA but were ultimately dismissed.

In *R v Rasool* (2015), charges under sections 279.01(1) and 279.03 of the CrC were laid against Rasool based on allegations made by a housekeeper and nanny who was brought to Canada from Indonesia. The complainant reported that she worked long hours, seven days per week without pay for two years and without being allowed to leave the house. She alleged that her passport and other documents were taken and she was made to sleep on a mattress in the basement of the family's home. The charges were ultimately withdrawn by the Crown on the condition that the accused would enter into a one-year peace bond and a promise to not contact the complainant.

Finally, in *R v Gonzalez-Valbuena* (2023), the defendant recruited sixty Mexican nationals to work in Canada. The workers had their passports withheld by the accused and were verbally abused and threatened, made to live in subpar conditions, and were either underpaid or had their income withheld. Given the large number of complainants, the Crown was able to rely on numerous testimonies to support its case. Gonzalez-Valbuena was charged and convicted of trafficking under sections 279.01 to 279.03 of the CrC.

The factual circumstances across the seven cases of migrant trafficking charged in Canada are clearly varied. The migrants involved entered Canada both legally and through unauthorized means. They then worked in a myriad of positions across a variety of industries. They all allege being subjected to exploitative conditions after entrance, although the specifics of their experiences differ. Yet, charges were laid against their accused traffickers under both the IRPA and the CrC, without clear explanation as to why a particular legislation was applied and not another. Convictions were again only achieved under the CrC. In what follows, we examine the development of the two anti-trafficking regimes and connect the limits in the legislation to the outcomes in the prosecution of these cases.

## Defining trafficking: the act, means and purpose of trafficking

### *Incorporating the UN Trafficking Protocol*

Neither section 118 of the IRPA nor sections 279.01 to 279.011 of the CrC completely capture the offence of trafficking defined within the UN Trafficking Protocol. Passed in October 2000, the Trafficking Protocol identifies three elements of the offence of human trafficking at Article 3, namely: a) *the act* of recruiting, transporting, transferring, harbouring or receipt of persons; b) using defined *means*, including threat or use of force; c) for the purpose of *exploitation.* All three elements must be present for an activity to be defined as trafficking (Gallagher 2011).

Canada was one of the first countries to ratify the Trafficking Protocol, in May 2002. The Canadian Parliament has since adopted a piecemeal approach to

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incorporating the UN Protocol into domestic trafficking legislation. Section 118 of the IRPA, enacted in 2002, defines trafficking as follows (emphasis in original):

> 118(1). No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion.
>
> (2) For the purpose of subsection (1), ***organize***, with respect to persons, includes their recruitment or transportation and, after their entry into Canada, the receipt or harbouring of those persons.

Section 118 captures only two elements of trafficking defined in the Trafficking Protocol, namely the act and the means. These elements are both specifically reflected in the requirement that an accused must "organize" the entry of one or more persons into Canada through a variety of means listed. Section 118(2) of the IRPA then clarifies that "organizing" for the purposes of section 118(1) includes the recruitment or transportation of a person into Canada, as well as the receipt or harbouring of the persons after entry, thereby further capturing the act of trafficking defined by the UN. Critically, exploitation is *not* a part of the definition of trafficking under the IRPA, thus omitting a crucial element of the trafficking offence defined in international law. As a result of this omission, the IRPA does not capture cases where migrants are subject to exploitation after entry to Canada, if entrance was not otherwise organized through the defined means.

Trafficking provisions were introduced through the addition of sections 279.01 to 279.011 to the CrC in 2005. Trafficking is now defined in section 279.01 of the CrC as: "Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation."

Only exploitation and the act of trafficking defined under the UN Protocol are incorporated into section 279.01 of the CrC. The means of trafficking are comparatively listed as *considerations* offered to the court in determining whether trafficking took place, namely under section 279.04(2–3) of the CrC. The legislation additionally does not require movement across a border (or within Canada) (Roots 2013, 2022; Ferguson 2012). This is not necessarily prohibitive for addressing the trafficking of migrants. However, migrant trafficking (by definition) often involves border crossings. Failure to distinguish between domestic and international trafficking facilitates an absence of the necessary nuance to effectively respond to migrant-specific situations, such as closed work permits, precarious immigration status, problematic recruitment practices, etc. This can (and has) lead to the increased regulation of migrants, particularly in low-wage labour and sex work, resulting in their deportation and detention under anti-trafficking frameworks.

The close mirroring of sex work and trafficking legislation under the Criminal Code has further resulted in almost exclusive focus on trafficking via the domestic sex trade. Canada's trafficking laws were brought into alignment with sex-work laws with the 2014 passage of Bill C-36, the *Protection of Communities and Exploited Persons Act.* The new sex-work laws prohibit the purchase of sexual services, criminalize third-party activity within the sex trade and position

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(some) sex workers as victims. As scholars have pointed out, Canada's trafficking laws are "eerily similar in intent and wording to laws against procuring [another to enter the sex trade]" (Roots, De Shalit, and van der Meulen 2024, 11). Further, while exploitation is built into the CrC definition of trafficking, sex-work offences including procuring and purchasing are assumed in popular discourse and case law to be inherently exploitative, again erasing the distinction between the two (Roots, De Shalit, and van der Meulen 2024). As such, while trafficking laws are intended to capture a broader scope of exploitation, they remain focused on the sex trade.

Altogether, while the IRPA captures the act and the means of the offence of trafficking as defined by the Trafficking Protocol, this legislation fails to capture exploitation. The CrC comparatively captures exploitation but does not require the establishment of the means for the purposes of conviction. The piecemeal incorporation of the UN Protocol across these legal regimes might suggest that capturing the full offence of *migrant* trafficking into and within Canada requires the simultaneous application of the CrC and the IRPA. Ultimately, the establishment of two anti-trafficking regimes that fail to clearly and completely define migrant trafficking perpetuates global apartheid, namely by leaving migrant complainants without legislation that effectively addresses their complex experiences, thus contributing to the denial of their victimhood.

### Charging under the IRPA and CrC

Our analysis of the case law confirms our review of legislation, demonstrating that, despite the existence of two anti-trafficking regimes, neither set of provisions clearly or effectively addresses migrant situations in which conditions typically associated with trafficking are alleged. As noted, there is a lack of clear coherence between charging decisions and the factual circumstances of cases charged under the IRPA versus the CrC. More fundamentally, the migrant trafficking cases examined could not be distinguished based on specific evidence of the act and the means (for charging pursuant to section 118 of the IRPA) versus evidence of exploitation (for charging under section 279.01 of the CrC). Our case-law analysis confirmed, for example, that complainants in all four cases charged under the CrC *were* moved across borders. This includes both *R v Domotor* (2012) and *R v Gonzalez-Valbuena* (2023), in which it was determined that the defendants had advised and assisted the complainants in crossing the border into Canada. Yet, as noted, the CrC does *not* require organized entry into Canada to establish the act of trafficking. At the same time, cases charged under the IRPA included circumstances that would arguably be considered exploitative, which is the central focus of the CrC trafficking provisions but is *not* an element of the offence defined within the IRPA. For example, the complainants in each of *R v Orr* (2016), *R v Ladha* (2013) and *R v Ng* (2007) alleged to have been subjected to exploitative working conditions that mirror the circumstances in cases charged under the CrC, including *R v Rasool* (2015). As such, it is unclear why charges were laid under the CrC. These insights further support our observation that decisions around which legislation should be applied are seemingly inexplicable and random.

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## Conceptualizing trafficking: migrant illegality and exploitation

### *Definitional clarity under the IRPA and CrC*

The applicability of the IRPA and CrC to cases of migrant trafficking is further undermined by the lack of clarity in key legal terms employed within the noted provisions. Beginning with the IRPA, the reach and scope of the offence of trafficking as defined in section 118 are contested. Both scholars and practitioners have claimed that this legislation specifically criminalizes the transportation of migrants into the nation *illegally* (i.e., where a migrant is not in possession of a visa, passport or other document required by the Act). According to Julie Kaye and Bethany Hastie (2015, emphasis added):

> the IRPA offence is limited in its applicability to only one possible population of trafficked persons: *foreign nationals who have been brought into Canada through unauthorized means.* Where a foreign national was brought to Canada through legitimate means, and later exploited, such as individuals arriving under the Temporary Foreign Workers Program (where specific concerns have arisen in relation to labour trafficking, see RCMP, 2010; Sikka, 2013; Hastie, 2012), the IRPA offence will likely be of limited use (91).

Here, Kaye and Hastie hold that section 118 would not apply in cases in which migrants enter Canada via legal means and are subsequently subjected to conditions typically associated with trafficking (e.g., exploitation, coercion, force) once within the nation (see also Hastie 2015).

We propose a distinct reading of the legislation. It is our position that section 118 does *not* limit the offence of trafficking to migrant cases involving unauthorized movement. Our interpretation is based on a close reading of section 118 together with the preceding section 117 of the IRPA, which defines the offence of human smuggling as follows: "117(1). No person shall knowingly organize the coming into Canada of one or more persons who are not in possession of a visa, passport, or other document required by this Act."

From the above, we find that the organization of movement into Canada is a component of both offences, with each beginning "no person shall knowingly organize the coming into Canada." Unlike section 117, however, the definition of trafficking in section 118 does not delimit the offence to the movement of persons into the nation without authorization (namely via the possession of a visa, passport or other document required by the Act). Instead, section 118 states only that the movement of the migrant into Canada must be organized by means of abduction, fraud, deception or use or threat of force or coercion. We suggest that the specific failure to mention legality of movement under section 118 was purposeful, reflecting the view that unauthorized movement of a migrant into Canada is *not* a critical component of trafficking. Section 118 would thus be applicable to cases in which migrants were authorized to enter, so long as their movement was organized through the identified means. The adoption of this more expansive approach to defining human trafficking is particularly important given the complexity of migrant experiences and their relationships with employers, exploiters, intimate partners and/or those who assist in their

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movement, which may shift during migration and following arrival into Canada, resulting in the migrant's subjection to conditions typically associated with trafficking. Still, and despite the potential serious negative consequences of a restricted definition of human trafficking, the ambiguity in reading section 118 of the IRPA remains unresolved.

The CrC similarly suffers from problems of definitional clarity that undermine application of the legislation to migrant trafficking cases, namely with respect to the actions captured by the concept of "exploitation." Section 279.01 of the CrC again states that defined acts must be undertaken for the purposes of exploitation. Section 279.04 further clarifies what is meant by "exploitation" for the purposes of the CrC, as follows:

> A person exploits another person if they cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service.

Read alongside section 279.01, the establishment of exploitation requires that an individual causes, through their conduct, a complainant to believe that their safety or the safety of their loved ones is at risk if they do not provide the labour or service requested.

While seemingly straightforward, critics have argued that the anti-trafficking provisions adopted within the CrC remove any requirement that exploitation should actually occur, instead placing an emphasis on the accused's *intention* to exploit (reference to "for the purposes of exploitation" at section 279.01 suggests that exploitation need not occur) and on the complainant's *belief* that the accused presents a risk to their own or a loved one's safety (via the inclusion of "could reasonably be expected to cause the other person to believe" in section 279.04). It is further contended that such a loosening of requirements has allowed the legislation to be applied expansively to sex-work cases and contributed to the conflation of sex work and trafficking, given the widespread belief that no person would enter the sex trade voluntarily (Roots 2022; Silbey and van der Meulen 2023). This belief facilitates the application of trafficking provisions to sex work via the assumption that entry into the sex trade must be, for the most part, due to pressure from a third party and a fear for safety, thus meeting the requirements for the establishment of exploitation under section 279.04.

The focus on sex work is further facilitated via the examination of preexisting vulnerability factors identified by various domestic and international organizations when assessing exploitation for the purposes of trafficking (International Labour Office 2009; United Nations Office on Drugs and Crime 2017). These factors include age, gender, poverty, illness, substance use and mental health. Engaging in sex work while young, Indigenous, a woman, impoverished, suffering from any illness and/or using substances is, as a result, easily recognized as "exploitation." Yet, importantly, these vulnerability factors seem to only apply in *domestic* sex-work cases (Roots 2022) and not to migrant cases in which

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conditions typically associated with trafficking are present. As a result, sections 279.01 and 279.04 of the CrC have again contributed to a focus on trafficking via the domestic sex trade over international cases of migrant trafficking, including exploitative work outside of the sex-trade industry (Roots 2022; Roots, De Shalit, and van der Meulen 2024).

### *Interpretation of key legal concepts*

Our analysis confirms that the migrant complainants in all three cases charged under section 118 of the IRPA were authorized to enter Canada, thus confirming our interpretation of this legislation. Definitional confusion remains, however, in interpretation of "exploitation" when applying the CrC in migrant versus domestic trafficking cases. Our review suggests that novel assessments of exploitation are adopted in migrant trafficking cases as compared with cases of domestic trafficking, which in turn functions to deny migrant victimhood. The importance of legal application and interpretation in determining who becomes legitimized as a victim has previously been observed Julietta Hua and Holly Nigorizawa (2010), who explain that "[t]he courts, government officials and law enforcement create a dominant narrative of victimization that helps to define who is 'genuinely' trafficked (and who is not)" (402). In cases of migrant trafficking, the adoption of unique approaches to assessing exploitation functions to dismiss migrant claims of victimization.

The distinct interpretation of key legal concepts in court decision-making is evident in the case of *Attorney General of Canada v Manoukian* (2020). In ruling on whether exploitation had taken place, the appeal court in this case referenced novel vulnerability factors for assessing claims of trafficking that differed from the approach typically seen in domestic trafficking cases. There are two types of factors that make a complainant vulnerable to exploitation: 1) preexisting vulnerabilities that include self-esteem issues, poverty, substance use, involvement in sex work, age, mental health, etc. (as discussed above); and 2) trafficker-created vulnerabilities, such as lack of language skills, removal of passports, unfamiliarity with surroundings, violence, false promises, etc. Victims experiencing trafficker-created vulnerabilities are seen as less blameworthy for their victimization due to these vulnerabilities being outside of their control (Roots 2022).

However, when we examine the decision in *Manoukian*, we find a divergence from this approach to vulnerability and exploitation. The court in this case wrote that "the elements they [the RCMP] relied upon for purposes of exploitation, such as Ms. Manaye's vulnerability, were *external circumstances beyond the Manoukians' control*" (para 50, emphasis added). The vulnerability factors identified included the complainant's lack of education, inability to speak English or French and their worry about being deported. What is noteworthy here is that these factors are interpreted by the court to be external vulnerabilities that are outside the control of the accused and thus do *not* contribute to trafficking. This is a clear divergence from the assessments in domestic cases.

Critically, this novel approach to the interpretation of vulnerability factors in the prosecution of migrant cases under the CrC was not consistently adopted

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across the cases analyzed. Indeed, in *R v Domotor* (2012), in which White European men were deemed as legitimate victims of trafficking, the court made a contradictory observation, noting that "[t]heir inability to speak or understand English contributed to their isolation" (para 11) and (presumably) their vulnerability. Thus, in contrast to *Manoukian*, in which language deficiency was seen as being outside the control of the accused, here, it factored into the accused's guilt and aligned with interpretation of vulnerability factors in domestic cases. This suggests that the interpretation of key legal concepts in migrant trafficking cases employed by courts is varied and inconsistent. We propose below that this distinction is, at least in part, related to the identity of the victims, suggesting an alignment with "global apartheid."

A secondary deviation in the interpretation of key legal concepts, namely "control," between migrant and domestic trafficking emerged in our review of *R v Ng* (2007). The court dismissed the complainants' claims by contending in part that the "hallmarks of trafficking"—specifically the restriction of physical movement—were *absent* in this case (para 111). It was determined that, because the complainants were able to move freely in the community and had access to money and a cell phone, they also had avenues to find their way out of their "situation" and therefore were not victims of trafficking (paras 109–111). This decision is interesting, for two reasons. First, *R v Ng* (2007) was charged pursuant to the IRPA and control of movement is *not* a requirement of the offence of trafficking under this legislation. Second, the absence of physical control does *not* result in the denial of victimhood in domestic sex trafficking cases pursued under the CrC. Instead, in domestic trafficking cases, there is a consistent recognition of psychological methods of control and manipulation. Control thus *does not* need to be physical to establish the offence of trafficking under the CrC. Most domestic sex trafficking cases analyzed by Roots (2022), for example, involved complainants who had access to a cell phone, some money and the ability to move freely in the community, and yet these factors were not used to deny their victimhood. Rather, the discussion of victimhood involved the consideration of a wide range of psychological methods of control. The failure to apply similar assessments of victimhood in migrant cases ultimately supports the dismissal of claims of trafficking and, in turn, the removal of migrants from Canada.

## Denying trafficking: race, gender and victimhood

### *IRPA, illegality and migrant trafficking*

Fundamentally, and as alluded to in our above discussion of *R v Domotor*, it is the claims of trafficking from racialized female migrants that are specifically dismissed in practice. This is consistent with the work of Julie Ham, Julia Gheorghiu and Eni Lestari (2022), in which they have contended that "the contours of anti-trafficking are shaped by the deployment of racist logics in the management of migration" (253). These logics are built into the anti-trafficking apparatus (Beutin 2022; Durisin 2022).

We can trace the reliance on racist and gendered discourses during the drafting of the IRPA. This includes a 1998 report produced by Citizenship and Immigration Canada (CIC 1998, 46), entitled *Building on a Strong Foundation for the*

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*21st Century: New Directions for Immigration and Refugee Policy and Legislation* (namely, where we write: which held that "the trafficking of women and children for sexual exploitation" was a highly profitable offence. The report then called for cooperation amongst "Western industrialized countries" in the implementation of comprehensive strategies to address "illegal migration"). The call for Western cooperation suggests that trafficking, and illegal migration more broadly, was emerging from non-Western nations, namely those in the Global South (Razack 1998). The attribution of unauthorized movement to migrants from the Global South is reinforced via evocation of the victimization of "women and children." This reflects one[7] prominent rationale that imagines women and children from the Global South as equivalent—thus infantilizing women—and as oppressed, abused and trafficked across borders through irregular pathways for sexual exploitation, often by men from the Global South (Okyere and Olayiwola 2022; see also Doezema 1998; Kempadoo 1998; Sharma 2005). This discourse ignores other sectors in which exploitation can and often does take place, while also denying non-Western women the agency to consent to migration (even if illegally), including into what can otherwise be described as exploitative working conditions.

Ironically, recommendations from the CIC to address the issue of trafficking included a need for the "enhanced interdiction" of unauthorized migrants before arrival, the expansion of inadmissibility classes to include people smugglers (but not traffickers) and the creation of new immigration offences to "enhance Canada's ability to take action against those who would aid or abet persons in contravening the Act" (Citizenship and Immigration Canada 1998: 47–48). No measures to assist victims of trafficking were recommended (Canadian Council for Refugees 2003). Adoption of the proposed legislation would thus place women and children migrating via irregular pathways at greater risk of exclusion from Canada.

These observations on the potential criminalizing and exclusionary effects of anti-trafficking legislation are not new and have by now been well established in scholarship (Kapur 2005; Kaye 2017; O'Connell Davidson 2015). We follow these authors, proposing that the interweaving of racist and gendered discourses with narratives of trafficking ultimately rationalizes recommendations for exclusionary legislation that would contribute to the perpetuation of global apartheid through interdiction and/or migrant illegalization.

Calls for enhanced interdiction of irregular migration escalated in 1999 following the arrival of four boats carrying approximately 600 unauthorized Chinese migrants to Western Canada. Discourses of race and gender describing the threat of irregular migration abounded in response. As explained by Sharma (2005, 92), media reporting characterized the arrivals as "invasions," writing that "floods of migrants" were landing on Canadian shores without authorization—a characterization that more closely resembles a description of pests or bugs rather than people. Migrants aboard the boats were also described as threatening, being imagined as "capable of spreading contagious deadly diseases and other forms of

[7] Contemporary anti-trafficking discourses have a wide scope and include concerns over domestic sex work, migration from non-Western countries, sex work, sexual violence, intimate partner violence, organized crime, Blackness, Indigeneity and historical fears of "White slavery"; see Roots 2022; Kempadoo and Shih 2022.

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mayhem into Canadian society" (Sharma 2005, 92). These discourses rely on race-based epistemologies that described Chinese nationals as uncivilized and impure, and which were promoted in the late-nineteenth and early twentieth centuries in Canada to rationalize various legislative measures restricting the entry of migrants from China (Backhouse 1999). These historically significant racist ideas parroted by the media were used to justify calls for increased border securitization.

The then minister of citizenship and immigration, Elinor Caplan, further described the women and children aboard the boats as victims of trafficking, albeit without any evidence of their victimization (Sharma 2005). Caplan contended that jailing the women in Canada would protect them from the traffickers who had forced their migration. This effectively produced the criminalization of not only Chinese men, who were imagined as traffickers, but also Chinese women and children, who were subjected to punitive conditions despite their suggested victimization. As explained by Sharma (2005): "conceptualizing the process of clandestine migration as the *cause* of people's exploitation not only denies the agency of women migrants but creates and legitimates punitive state measures aimed at punishing traffickers (and smugglers) rather than assisting migrants in their survival strategies" (96, emphasis in original).

The IRPA was tabled in the House of Commons in February 2001. We again find the employment of racist and gendered discourses of migrant trafficking employed in debates of this legislation. This includes in statements made by Gunilla Ekberg, intervenor on behalf of the Coalition Against Trafficking in Women to the Standing Committee on Citizenship and Immigration in April 2001. Ekberg was intervening to contest the failure to provide protections to migrant complainants under the IRPA. They argued for the adoption of a new form of "Ministerial permits"[8] for victims of trafficking, stating:

> The bill criminalizes the traffickers but has no provisions that set out protection mechanisms for the victims of trafficking, contrary to the UN Convention on Transnational Organized Crime and both protocols. *It's essential that the committee ensures that women and children who are victims of trafficking are accorded the protection in the system that is their right, whether or not they testify against the trafficker.* (Standing Committee on Citizenship and Immigration, 30 April 2001, emphasis added)

Ekberg here relies on gendered ideas of victimization to rationalize their call for the inclusion of protective measures in the IRPA for migrants who have experienced trafficking.

The IRPA enacted in 2002 did not include provisions to assist victims of trafficking.[9] More disconcertingly, Butterfly: Asian and Migrant Sex Workers

[8] Temporary resident permits issued under section 24 of the IRPA allow a migrant to remain within the nation for a specified, and temporary, period of time.

[9] Temporary resident permits for victims of trafficking in persons (VTIP-TRPs) were eventually introduced in May 2006 through Ministerial Instruction, which directed immigration officers to grant temporary residence to victims of trafficking for a period of 120 days (later extended to 180 days in 2007). No provisions have been introduced allowing migrants to access *permanent* residence in Canada.

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Support Network, an NGO that works with and for migrant sex workers in the Greater Toronto Area, has confirmed the *criminalization* of migrant sex workers even where they are suspected of being victims of trafficking (Lam 2018). Butterfly reports that migrant sex workers suspected of being victims of trafficking have been arrested, detained and deported from Canada (Lam 2018). We suggest that the criminalization of victims advances global apartheid by facilitating removal from the nation.

### *Sexism, racism and complainant unreliability*

The racist and gendered discourses promoted in the development of the IRPA were critically reproduced in the cases analyzed in which migrants' claims of human trafficking were dismissed. Our review of the case law in fact reveals that the fundamental distinction between migrant trafficking cases in which conviction was achieved and decisions in which these charges were dismissed was the demographics of the complainants. There were, for example, no identifiable patterns in the two cases in which a conviction was obtained. Complainants in these cases were of mixed demographic, with those in *R v Domotor* being all White (Eastern European) men while the victims in *R v Gonzalez-Valbuena* were identified as male and female migrants from Mexico. The evidence from victims in both cases appears to have been deemed to be reliable and credible. In contrast, in cases in which charges were dismissed, the complainants were all racialized women from countries in the Global South whose testimony was deemed to be unreliable through the promotion of racist and gendered discourses.

The reliance on ideas of race and gender in denying claims of trafficking is evident in the decision of *R v Orr* (2016). The Supreme Court of British Columbia determined in this case that the prosecution had not proven beyond reasonable doubt that the defendant had engaged in trafficking pursuant to the IRPA. The decision came down to the testimony of the complainant—a single mother of three born in the Philippines—whose evidence the court described as containing significant inconsistencies: "It is natural for there to be some inconsistencies when a witness gives as many accounts of what occurred as L.S. has but if there are significant inconsistencies or shifting versions of events it would be unsafe to convict Mr. Orr absent corroboration of L.S.'s evidence" (para 127).

Similarly, in the case of *R v Ng* (2007), the Honourable Justice MacLean concluded that the complainants were unreliable and not credible. The court contended that the statements from the two complainants with respect to their experiences were inconsistent, contradictory and even illogical (paras 43–52). Based on these determinations, the court dismissed the charges of trafficking under section 118 of the IRPA, holding that there was insufficient evidence to prove beyond reasonable doubt that the defendant had committed the offence of trafficking (paras 124–126).

The court's determination in *R v Ng* (2007) was at least partly informed by the expert testimony of Dr Yvon Dandurand, who made the following statement: "individuals who consented to being smuggled and even consented to some form of exploitation are not victims of trafficking and may falsely claim that they were in order to avoid the consequences for having been involved in an illegal

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immigration scheme" (para 45). The Court's use of this statement reinforces the discourses of border insecurity promoted by government officials and Parliamentarians, and presents migrant complainants as fraudulent, criminal and illegal. The court relied heavily on on this idea in its determination that the complainants in *R v Ng* were not trafficking victims, but irregular migrants trying to bypass Canada's immigration system. Their evidence was recognized through these discourses as unreliable and not credible, contributing to the dismissal of charges of trafficking.

Discourses questioning the reliability of migrant testimony based on allegations of fraud were also promoted in the case of *Attorney General of Canada v Manoukian* (2020). In this case, the complainant from Ethiopia claimed that she did not have access to her identity documents, was threatened by the accused with return to Ethiopia if she told anyone about her situation, was forbidden from using a phone and leaving the house, and was made to work twenty-four hours a day, seven days per week. The Court of Appeal for Quebec found these claims to be "*misrepresented, unconfirmed by evidence or simply untrue*" (para 100, emphasis added). Similarly, in *R v Ladha* (2013), the complainant, who was originally from Tanzania, claimed that she was not allowed to sit at the dinner table with the family, was made to carry heavy equipment while on vacation with the family and was forced to work eighteen to nineteen hours per day for ten months without a single day off. This evidence was also dismissed as being not verifiable or improbable, resulting in the court's conclusion that the complainant was unreliable (paras 64 and 73).

Critically, a UNODC (2017) study found that, while victims of trafficking may appear inconsistent or even dishonest in their testimony, such inconsistencies often stem from factors such as lapses in memory, confusion about the sequence of events and trauma-related responses. Recognizing the unique experiences and suffering of trafficking victims, courts in various jurisdictions have adopted approaches to thoughtfully assess complex testimony. One instructive example is the Canadian case of *R v Urizar* (2013), in which the accused engaged in the sex trafficking of his girlfriend. Although the victim's testimony included omissions, exaggerations, contradictions and inconsistencies, the court did not reject it. Instead, it accepted her account, citing an understanding of the effects of trauma, her lack of motivation to lie, the internal consistency of key details and the overall reasonableness of her testimony. Indeed, the court commented that a detailed and chronological testimony would have been implausible given the traumatic nature of her experience. An important distinction between *R v Urizar* and the migrant cases described is that the complainant was a Canadian resident.

We wish to affirm here that we are not denying the importance of corroborating evidence to witness/complainant testimony, nor are we suggesting that there were not issues with corroboration or consistency of the evidence provided by complainants in these cases, thus obligating the courts to dismiss, withdraw or stay the charges to protect the due-process rights of the accused. We are also not endorsing a criminalization approach. Nonetheless, our observations remain important given the dismissals of cases in which the evidence was provided by women from the Global South, suggesting that explicit (or at least implicit) racist and sexist undertones may have influenced the decisions in these cases. The

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decisions also demonstrate the fallacy of humanitarian claims of protection for women and children promoted by the Canadian government and Parliament in development of trafficking provisions under the IRPA. This echoes the broader racist and gendered discourses promoted to support the enactment of section 118 of the IRPA that rationalized the securitization of the border. Critically, these discourses reveal themselves in migrant trafficking cases charged under both the IRPA *and* the CrC, providing further support for Sharma's contention that anti-trafficking regimes contribute to the perpetuation of global apartheid. The complainants thus emerge as outsiders who are abusing the Canadian system through false claims of victimization to gain permanent status in Canada.

The dismissal of complainant testimony, and consequently charges, in migrant trafficking cases contrasts with the treatment of White young women legitimized as victims in domestic trafficking cases. As Roots (2022) has found, complainants who are often engaged in the domestic sex trade are pressured by police to take on the victim narrative and give evidence to that effect. This is done under the threat of consequences, including the application of criminal charges and/or withdrawal of existing ones, involvement of the Children's Aid Society for those with children and so on. Thus, while Roots's research on domestic trafficking cases shows that complainants are not just encouraged, but even *pressured* to present themselves as victims, our examination here reveals that migrants who voluntarily come forward as victims of trafficking are quickly dismissed in Canadian courts.

The interpretation of evidence as proof of complainant deceit and trickery in the examined cases forms a part of the continued tendency to view non-citizens—particularly those who are racialized—through discourses of criminalization (Bosworth and Guild 2008). In the cases we examined, courts are white spaces in which criminality, untruthfulness and fraud attach themselves to migrant complainants (Spanger 2022). While victims of trafficking are promised protection, with many governments committing to various supports and specialized visas, the benefit from these promises is only available to those who fall within the narrow framework of the "ideal victim" (Hua and Nigorizawa 2010). More often, Canada is constructed as a victim whose "gentlemanly generosity is taken advantage of" by immigrants (those who enter with authorization and without) and whose sovereignty and borders must be protected (Jeffrey 2004, 41). This is demonstrated most impactfully by the statement of the court in *R v Domotor* (2012):

> this country has a long and strong tradition of respecting human rights and dignity, and a strong tradition of providing assistance to those who require it, and a strong tradition of being welcoming to people from other lands. As Canadians we are proud of these values that are central to our being and when our values are abused, flagrantly, as they were by these three individuals, we are offended and intolerant to those who behave in this fashion. Modern day slavery is disgusting to us and it offends our core values.

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> Abuses to our immigration laws is offensive, as we see those laws as being quite fair and perhaps liberal in many respects, but they become a joke in the hands of people like these three and their co-conspirators. Another evil of their conduct is that it then operates unfairly towards other persons who may want to come from Hungary, or elsewhere, and may be denied as a result of the kind of activity demonstrated by these three, where as they may well be persons who would come here with the right attitude and prove to be very valuable and contributing members of society. (paras 50–51)

Given Canada's colonial history of genocidal actions towards Indigenous peoples, as exemplified by the "sixties scoop," the *Indian Act*, sterilization of Indigenous peoples, residential schools and the starlight tours, to name a few, alongside the hierarchization of Europeans over all others, particularly Indigenous peoples, the statements of the court regarding Canada's supposed tradition of respecting human rights and dignity ring hollow, and can only be understood as deeply hypocritical and demonstrably false. Further, while the above statement was made in reference to the perpetrators' actions (rather than the complainants'), the sentiments apply equally to migrants whose claims of victimhood are deemed unreliable. Following Sharma (2005), we read the court's statement as conveying a need to "be vigilant against 'outsiders' seeking increasingly clever ways to circumvent national border controls" (88). It suggests that the interpretation of evidence from migrant complainants requires a keen eye for lies, deceit and misrepresentations.

The courts in the cases analyzed have arguably been "vigilant" in their assessment of migrant complaints. Through the repetition of racist and gendered discourses promoted in the development of anti-trafficking legal regimes, courts have recognized these complainants as liars and cheaters who are seeking to illegally cross the border and remain in Canada, justifying the dismissal of their claims of victimhood and their expulsion from the nation.

## Conclusion

This paper has demonstrated support for Sharma's contention that anti-trafficking regimes function to sustain global apartheid, with citizens and residents (often young White women) being offered protections while other complainants, including those without status, are illegalized and criminalized. Our analysis shows the incompleteness of legislation for addressing conditions typically associated with trafficking and experienced by migrants via provisions under the IRPA and CrC. We demonstrate that section 118 of the IRPA falls short of the requirements set out by the UN Trafficking Protocol by criminalizing the organized entry of migrants into Canada through enumerated means but failing to address exploitation upon arrival. Section 279.01 of the CrC comparatively criminalizes exploitation and combines it with the act of trafficking, but fails to require the means element. While we again do not endorse the expansion of the law, it remains the case that only the combined application of the IRPA and the CrC would capture conditions typically associated with trafficking experienced

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by migrants as set out by the UN, yet these two legislations are rarely, if ever, applied simultaneously.

Our analysis reveals that migrant trafficking cases with similar circumstances are instead prosecuted by the IRPA *or* the CrC trafficking provisions, with no explanation for why either legislation is applied. The paper further reveals the dismissal of migrant complaints through shifting the legal interpretations of trafficking indicators (when contrasted with those set out by international organizations and domestic trafficking cases) and the promotion of racist and gendered discourses. Altogether, the analysis suggests the prioritization of border security and immigration controls over victim protection, despite the widespread discourse of victim protectionism in the context of trafficking. Racialized female migrant complainants are ultimately denied their victimhood through these legislative and interpretive moves, thereby perpetuating global apartheid.

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