



International Centre for  
Criminal Law Reform

# The Implementation and Impact in Canada of the United Nations Convention Against Transnational Organized Crime and its Protocols

Civil Society Inputs on Cluster I of Canada's UNTOC Review

Jessica Jahn & Yvon Dandurand



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## Civil Society Inputs on Cluster I of Canada's UNTOC Review

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### Authors

**Jessica Jahn**

Associate

**Yvon Dandurand**

Fellow and Senior Associate

**With assistance from**

Kia Neilsen & Cody McIntee

The **International Centre for Criminal Law Reform (ICCLR)** is a Vancouver-based research institute affiliated with the United Nations Programme Network of Institutes. Founded in 1991, ICCLR promotes the rule of law, democracy, human rights, and good governance in criminal law and the administration of criminal justice – domestically, regionally, and internationally. As a registered charity, it develops tools and manuals, delivers technical assistance programmes, and conducts research and policy analysis to support international cooperation against serious crimes. ICCLR is the product of a joint initiative with the Government of Canada, the University of British Columbia, Simon Fraser University, the International Society for the Reform of Criminal Law, and the Province of British Columbia.

For more information about ICCLR or this report, please visit [www.icclr.org](http://www.icclr.org) or contact us:

**icclr@allard.ubc.ca**

1822 East Mall, Vancouver

Canada V6T 1Z1

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## Executive Summary

In November 2021, Canada embarked on a multi-year process to review its implementation and application of the *United Nations Convention Against Transnational Organized Crime* (UNTOC) and its Protocols on human trafficking and migrant smuggling. The UNTOC Review Mechanism, managed by the Conference of the Parties (COP), aims to assess States parties' performance on meeting their obligations under the international instruments, gather information on good practices and implementation challenges, and help States parties to identify specific needs for technical assistance. To do so, the Review Mechanism is divided into four clusters, each covering different articles of the Convention and its Protocols. As part of each review cluster, Canada and other States parties are required to complete self-assessment questionnaires to review the progress achieved in implementing the instruments to which they are party. With a focus on criminalization and jurisdiction, the self-assessment questionnaire for Cluster I of the review contains a series of questions on whether States parties have criminalized certain acts, how they exercise jurisdiction over relevant offences, and the type of technical assistance that States parties require to further implement the instruments, among others.<sup>1</sup>

The present report contains Canadian civil society's responses to the relevant self-assessment questions for Cluster I of the UNTOC Review Mechanism to support the Government of Canada in completing and submitting its questionnaire to the COP in May 2022.<sup>2</sup> It also captures civil society's views on whether and to what extent Canada is preventing and countering transnational organized crime, including firearms trafficking, even though Canada is not a party to the *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition* (henceforth referred to as the "Firearms Protocol"). To collect inputs on the self-assessment questionnaire, the International Centre for Criminal Law Reform (ICCLR) conducted a national consultation in January and February 2022, in which a total of 37 civil society organizations and individuals participated. In support of the consultation, the Canadian Bar Association organized two focus groups with its members in February 2022, involving 13 legal professionals. This report reflects the inputs provided by various stakeholders, but does not necessarily represent a consensus of opinions or the views of the Government of Canada.

Frontline workers, researchers, lawyers, and others involved in the fight against transnational organized crime and the protection of victims provided key insights into whether Canada has implemented the relevant criminalization and jurisdiction articles of the Convention and its Protocols. Results reveal that participants are somewhat divided on the implementation and impacts in Canada of the international instruments, including whether Canada's response to organized crime in its various manifestations has improved since 2002 when the Convention and two of its Protocols were ratified.

On the one hand, some participants suggested that becoming a party to the UNTOC enhanced Canada's organized crime laws and generated greater public awareness of the problem. With a couple exceptions, respondents generally perceived that the Convention's relevant articles have been satisfactorily transposed into Canada's legal framework, particularly the provisions against participation in activities of criminal organizations, obstruction of justice, migrant smuggling, and firearms trafficking. In fact, participants in

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<sup>1</sup> In particular, the first cluster addresses Articles 2, 5, 6, 8, 9, 10, 15 and 23 of UNTOC; Articles 3 and 5 of the Trafficking in Persons Protocol; Articles 3, 5 and 6 of the Smuggling of Migrants Protocol; and Articles 3, 5 and 8 of the Firearms Protocol.

<sup>2</sup> For the complete list of questions to which States parties must respond, see: <https://bit.ly/3BCIDg8>

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the focus group suggested that some of Canada's criminal laws are internationally recognized as best practices. Respondents also felt that the prevention and control of human trafficking remains a political priority in Canada.

On the other hand, they observed that Canada's cooperation with other countries for the investigation and prosecution of organized crime has not necessarily improved since ratifying the Convention, even though the UNTOC's stated purpose is to promote cooperation. Other respondents expressed concern with the conflation of human trafficking with sex work and migrant smuggling, stressing that the ongoing conflation adversely affects law enforcement, vulnerable communities, and public understanding of the nature and scope of the problem. Issues with the enforcement of money laundering laws were also widely noted by respondents, emphasizing that the findings from British Columbia's [Commission of Inquiry into Money Laundering](#) (henceforth referred to as the "Cullen Commission") will be useful when released in May 2022.

Most respondents observed that, since 2002, transnational organized crime in or involving Canada has continued to expand, in some cases exponentially, with traditional suppression measures unable to keep pace with the adaptive tactics employed by organized criminals. Although Canada is internationally acknowledged as highly resilient to organized crime (GI-TOC, 2021), respondents suggested that organized criminal syndicates continue to permeate across the country in part due to shortcomings in proactive law enforcement, inter-agency cooperation, and the deferred prosecution agreement scheme. Consequently, one participant concluded that the growing prevalence of organized crime "shows the importance of revisiting how we understand organized crime and adequately address the complexities."

In general, participants tended to agree that criminal justice practitioners are aware of Canada's organized crime laws, although one expert found that "extended" or "qualified" jurisdiction is poorly understood by practitioners. Yet, some participants concluded that the practical impact of the criminal provisions has demonstrated somewhat problematic in part because criminalization itself often perpetuates illicit markets and fails to produce a satisfactory deterrent effect. Overwhelmingly, respondents reported that organized crime ranks low on Canada's list of political priorities, except in British Columbia (BC), where the Cullen Commission was established by the provincial government. Results show that there is a pressing need for a national strategy against organized crime, corruption, and money laundering, as well as more investigative tools and resources to deal with organized crime gangs, including to better respond to changes in technology and case law.

As a manifestation of organized crime, human trafficking is recognized as one of the world's most pervasive illicit markets, alongside the cannabis trade, arms trafficking, and migrant smuggling (GI-TOC, 2021), prompting the mobilization of considerable resources at the global and national levels. Respondents pointed to several anti-human trafficking initiatives as some of Canada's successes in countering human trafficking and protecting victims. In particular, participants referenced the Canadian Human Trafficking Hotline, the Temporary Resident Permit, and the employer compliance inspections conducted by Immigration, Refugees and Citizenship Canada, as well as the *National Strategy to Combat Human Trafficking 2019-2024* and the *National Action Plan to Combat Human Trafficking*.

However, many respondents expressed concern with how Canada has implemented the Human Trafficking Protocol. Respondents were also divided on whether ratifying that Protocol improved Canada's ability to

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counter human trafficking and protect victims. On the one hand, some participants noted that the Protocol has helped Canada adopt common language, increase public awareness of human trafficking, and be held accountable for its actions. On the other hand, respondents were reticent to comment on the impact of the Protocol in Canada or observed that the approach adopted from the Protocol has produced adverse effects. Among other things, respondents cited issues with Canada's legal definition of human trafficking, a lack of understanding of anti-trafficking laws among practitioners, evidentiary challenges, and the low conviction rate for accused traffickers as examples of how Canada continues to encounter implementation challenges.

Compared to the number of responses received on Canada's implementation of the Human Trafficking Protocol, the questionnaire on the Migrant Smuggling Protocol generated less interest from participants. What emerged from the consultation is the view that Canada has put in place the necessary laws for the prosecution of migrant smuggling and has effectively criminalized the conducts targeted by the Protocol. However, it was also agreed that migrant smuggling continues to be a serious problem in Canada and that law enforcement efforts against this crime are both notably insufficient and unsatisfactorily proactive, as demonstrated by the low numbers of successful investigations and prosecutions. Border control measures are often not enough to disrupt the practices of migrant smuggling networks as they quickly adapt to and defeat law enforcement strategies. It was noted that Canada has a national Migrant Smuggling Prevention Strategy, but participants did not comment on it or its implementation.

The prevention and control of migrant smuggling is an area where international cooperation is absolutely crucial, including specifically law enforcement cooperation, and Canada has made some sustained efforts to develop cooperation with key sources countries. However, such cooperation is not always forthcoming because of the asymmetry of goals and means between countries of origins and Canada. Rampant public sector corruption in some of these countries is also seen as an impediment to effective counter measures against migrant smuggling. It was also noted that the Safe Third Country Agreement between Canada and the United States (US) had complicated the application of the law and made migrant smuggling even more difficult to detect and counter.

Canada has not ratified the Firearms Protocol to date, although respondents were unanimous in their view that Canada would benefit from becoming a party to that instrument. While respondents observed that Canada is able to prevent and counter firearms trafficking with its current laws and additional funding, they felt that ratifying the Protocol may help to "elevate firearms trafficking as a priority for federal agencies," while also enhancing Canada's cooperation in combatting various forms of firearms trafficking and providing opportunities to focus on evidence-based approaches to the issue. Indeed, all respondents indicated that firearms trafficking is a concern for Canadians, stressing the need for enhanced enforcement capacity and evidence-based responses that target the illicit firearm market.

Taken together, the results of the consultation show that Canada has adopted extensive legislative and other measures to help satisfy the requirements of the Convention and two of its Protocols as they relate to criminalization and jurisdiction. The outcomes of the Review Mechanism remain to be seen, but part of its success arguably lies in States parties' willingness to welcome inputs from civil society. In supporting and welcoming this consultation, Canada has demonstrated how civil society's input can enrich its self-assessment process and ensure that the review process meaningfully identifies lessons from which Canada and other States parties can learn.

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## Introduction

The *United Nations Convention Against Transnational Organized Crime* (UNTOC or Convention) and its three protocols on human trafficking, migrant smuggling, and firearms trafficking are the main legally binding international instruments to promote cooperation against transnational organized crime. Canada actively engaged in the negotiations of all four international instruments and represents one of 190 States parties to the treaties, having ratified the Convention and its Protocols on human trafficking and migrant smuggling in 2002. More than twenty years after the Convention came into force, the Conference of the Parties (COP) adopted a resolution at its ninth session in 2018, establishing a formal mechanism to review States parties' implementation and application of the instruments to which they are party.

The Review Mechanism is an intergovernmental process that entails a general review undertaken by the plenary of the COP to allow for the exchange of experiences and challenges in implementing the Convention and the Protocols thereto. Each State party must undergo a country review, on which the entire review process relies, involving a self-assessment, followed by a desk-based peer review by two other States parties. For Canada's review, New Zealand and Djibouti have been assigned to conduct the peer-review and will prepare a list of observations on Canada's strengths and areas for improvement. To facilitate the country reviews, the Review Mechanism is divided into four clusters, each addressing different articles of the Convention and its Protocols. Cluster I, with which this report is concerned, covers the articles related to criminalization and jurisdiction. In the years ahead, Canada and other States parties will review the remaining articles under the following clusters: prevention, technical assistance, protection measures, and other measures (Cluster II); law enforcement and the judiciary (Cluster III); and international cooperation, mutual legal assistance, and confiscation (Cluster IV). In May 2022, Canada is required to complete and submit a self-assessment questionnaire for Cluster I of the review. This will be followed by a review of Cluster IV in November 2023, if 70% of Cluster I is completed. Cluster II is to be completed in November 2025 and Cluster III in November 2027.

To support the Government of Canada in responding to the questionnaire, the International Centre for Criminal Law Reform conducted a multi-stakeholder consultation to collect inputs on how Canada has implemented and applied the criminalization and jurisdiction provisions of the Convention and its Protocols on human trafficking and migrant smuggling. During the consultation, civil society was also invited to share views on whether and to what extent Canada is preventing and countering firearms trafficking, even though Canada has not ratified the Firearms Protocol. In total, 24 civil society organizations and individuals submitted questionnaires and 13 legal professionals participated in two virtual focus groups hosted by the Canadian Bar Association. This report reflects the inputs provided by various stakeholders, but does not necessarily represent a consensus of opinions or the views of the Government of Canada.

The present report is structured in four parts. First, it briefly explains the methods used to collect and analyze stakeholders' perceptions. It then provides a contextual analysis by reporting the views of respondents on Canada's response to organized crime, incorporating findings from Canadian scholarly literature as referenced by respondents.<sup>3</sup> In particular, the report captures participants' comments on, *inter alia*, whether Canada has effectively implemented the international instruments, to what extent ratifying the Convention

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<sup>3</sup> The report does not purport to be an exhaustive review of the literature and explains findings from research cited by respondents.



and two of its Protocols has affected Canada's ability to suppress organized crime, and whether Canada should ratify the Firearms Protocol. Thereafter, it outlines Canadian civil society's responses to the questions for Cluster I in UNODC's self-assessment questionnaire for States parties. Lastly, the report concludes by offering some overall reflections on the importance of Canada's UNTOC Review, including civil society's participation.

## Methods

To collect respondents' views, ICCLR adapted questionnaires from those already developed by the Global Initiative Against Transnational Organized Crime (GI-TOC), which were designed to engage civil society in the UNTOC Review Mechanism. In adapting GI-TOC's questionnaires for Canadian civil society, ICCLR aimed to maintain consistency with UNODC's self-assessment questionnaire for States parties, while tailoring the civil society questionnaires to enhance accessibility. Noting that civil society is not a monolithic group, the research team decided to follow GI-TOC's approach of dividing the questionnaires by topic to give respondents a choice of which area(s) they wanted to comment without being overwhelmed by one long questionnaire. The civil society questionnaires were divided as follows: (i) the UNTOC itself; (ii) the Human Trafficking Protocol; (iii) the Migrant Smuggling Protocol; (iv) firearms trafficking; and (v) Article 15 of the Convention, specifically on jurisdiction. As questions on jurisdiction are quite technical and legal in nature, the research team separated those questions from the main questionnaire on the UNTOC, although the main questionnaire contained two general questions on Canada's jurisdiction over relevant offenses. All questionnaires and related information were available in both French and English.

Ahead of the consultation, various Government of Canada agencies provided ICCLR with lists of civil society stakeholders who participated in past consultations, which were compiled into one database and used to contact prospective participants.<sup>4</sup> In total, the database contains 326 individuals, all of whom received emails addressed to them by name, inviting them to participate in the consultation. Additionally, ICCLR advertised the consultation on its website and social media accounts, reaching more than 2,500 views of and 200 engagements with the relevant posts on Facebook and Twitter, as well as more than 359 webpage views (an average view time of 3:56). To properly record and credit participants, ICCLR welcomed interested individuals to complete a short, one-page registration form, asking for their language preference, area(s) of interest, and whether they were completing the questionnaire(s) in a personal or organizational capacity. Upon receipt of the registration forms, ICCLR immediately sent participants the questionnaire(s) that matched their area(s) of interest.

Of the 55 individuals who submitted a registration form:

- 46 requested the human trafficking questionnaire, of which 16 were submitted;
- 35 requested the UNTOC questionnaire, of which 8 were submitted;
- 17 requested the migrant smuggling questionnaire, of which 1 was submitted;
- 16 requested the firearms trafficking questionnaire, of which 3 were submitted; and

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<sup>4</sup> Special thanks to Global Affairs Canada, the Canada Border Services Agency, Public Safety Canada, Employment and Social Development Canada, and the Department of Justice Canada for providing the lists of stakeholders.

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- 2 requested the jurisdiction questionnaire and both were submitted.

In total, 24 individuals submitted 30 questionnaires. For the list of individuals/organizations that submitted questionnaires or otherwise participated in the consultation, please refer to page seven of this report.

Of those who submitted registration forms but not questionnaires, most cited time constraints and the depth and technical nature of the questions as the main reasons for not completing the questionnaire. In an effort to increase its response rate, ICCLR offered registrants an extended deadline and suggested alternative ways for them to share comments. A couple of participants who are familiar with the UNTOC Review Mechanism informally mentioned that their interest and experience lie more in Cluster II, covering prevention, technical assistance, and protection measures, although they still submitted questionnaires for the present consultation.

Despite the technical nature of the questions to be addressed during this first cluster of the Review Process, civil society organizations responded quite enthusiastically to ICCLR's invitation to participate in the consultation. However, it quickly became apparent that the time constraints imposed on the process made it very difficult for some organizations to respond as much as they would have liked to.

Alongside the questionnaires, the Canadian Bar Association organized two virtual focus groups to allow its members to share views relevant to the consultation. All participants received the questionnaires ahead of the focus groups and were invited to complete the questionnaires if they felt they had additional comments following the meeting. Hosted on 10 February 2022, the first focus group addressed the human trafficking and migrant smuggling protocols, while participants in the second focus group discussed the UNTOC and firearms trafficking. In total, 13 legal professionals with varied specializations, from immigration and labour law to criminal and competition law, shared their views.

Following the focus groups, the discussions were transcribed. Additionally, all questionnaire data were compiled into a response grid. To analyze the data, the research team loosely used the method of thematic analysis, in part because thematic analysis is not as "linguistic-oriented" as discourse analysis, but still allows researchers to search for deeper meaning in a way that content analysis does not. In using the thematic approach, the researchers remained cognizant of the ways in which participants likely identify with transnational organized crime, especially human trafficking and migrant smuggling. Instead of assuming particular categories or conceptions, the data were summarized and analyzed using an open and reflexive approach, weaving participants' voices into the report as much as possible.

However, to our knowledge, few if any victims of transnational organized crime participated in the consultation, including victims of human trafficking. Although the lack of participation by self-identified victims is a limitation of the consultation, the inputs received nonetheless capture key insights from civil society on the implementation and impacts in Canada of the Convention and two of its Protocols.

## Consultation Results

### Analysis of Stakeholders' Inputs

#### Transnational Organized Crime

In assessing the effectiveness of Canada's implementation of UNTOC for Cluster I of the review, ICCLR sought civil society's inputs on several questions. Chief among them were how Canada has transposed the Convention's relevant articles into national legislation, including the impact of the laws; to what extent the Convention has helped Canada improve its criminal justice cooperation with other States parties; and whether Canada has suppressed transnational criminal organizations since ratifying the Convention.<sup>5</sup> Participants were also directly asked about Canada's successes in its fight against transnational organized crime over the past two decades and whether practitioners are aware of Canada's organized crime laws.

Overall, some respondents suggested that becoming a party to the Convention improved Canada's ability to prevent and counter transnational organized crime, particularly to the extent that Canada's organized crime laws have flowed from the Convention and greater public awareness of transnational organized crime was generated. Yet, other respondents identified issues with the approach reflected in the Convention and by extension, the practical impacts of Canada's criminalization of organized crime, including international cooperation to enforce criminal laws.

According to Article 1 of UNTOC, the purpose of the Convention is to "promote cooperation to prevent and combat transnational organized crime more effectively," in part by encouraging the harmonization of national criminal definitions and laws on which cooperation is based. In fact, the Convention itself can be used by States parties as the basis for cooperation in extraditing fugitives, transmitting information, and otherwise (UNODC, 2021). Accordingly, a principal measure of the Convention's success is whether the fight against transnational organized crime was strengthened by the kind of cooperation it promoted.

Since ratifying the Convention, a participant observed that Canada has "participated in a number of large international joint force operations, including some involving encrypted communications technology used by gangs," citing Operation Trojan Shield/Greenlight as an example.<sup>6</sup> However, Professor Robert Currie, author of the forthcoming edited book entitled *Transnational and Cross-Border Criminal Law: Canadian Perspectives*, questioned whether Canada's "cooperation (extradition, mutual legal assistance, policing cooperation) has improved at all," adding that "our extradition practice still proceeds almost exclusively under bilateral treaties; I recall perhaps one case where UNTOC was used as the basis for extradition."<sup>7</sup>

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<sup>5</sup> The Convention establishes five offences: (i) participation in an organized criminal group; (ii) money laundering; (iii) corruption; (iv) liability of legal persons; and, (v) obstruction of justice. Additionally, the Convention includes articles on international cooperation, namely extradition, mutual legal assistance, the confiscation of proceeds of crime, the transfer of sentenced persons, and law enforcement cooperation such as joint investigations.

<sup>6</sup> See, for instance, EUROPOL. (2021). *Criminals Arrested in Biggest Ever Law Enforcement Operation Against Encrypted Communication*. The Hague: <https://www.europol.europa.eu/media-press/newsroom/news/800-criminals-arrested-in-biggest-ever-law-enforcement-operation-against-encrypted-communication>

<sup>7</sup> A cursory review of case law shows that at least two extradition requests have been received by Canada on the basis of article 16 of UNTOC in the absence of bilateral treaties with Poland and Slovenia. In *Poland v. Grynia*, Poland sought Canada's extradition of Mr. Miroslaw Grynia for allegedly committing robbery, participating in the activities of a criminal organization, and commissioning an indictable offence for a criminal organization, all of which are offences in Canada's *Criminal Code*. Ultimately,

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Indeed, the challenges posed by the mutual legal assistance process for the surrender of evidence necessary for criminal investigations and prosecutions are well documented (see Barton, 2018; Woods, 2017; Swire & Hemmings, 2017; Osula, 2015; Woods, 2015).

More generally, existing international cooperation mechanisms have been largely regarded as inefficient in light of the ever-growing volume of digital data and the uptake in technology, the movement of criminals, and constant shifts in criminal patterns (Dandurand & Jahn, 2021). In one participant's view, "it is notoriously known that if a case turns out to have transnational elements, police will quickly give up on it in favour of the more low-hanging fruit of purely domestic offences. Much the same is true of the Crown prosecutors. In part, this is because inter-state criminal cooperation is often ineffective and certainly slow-moving."

Whether international, regional, or national, all forms of cooperation are dependent on reciprocity, trust, and mutual respect. Participants in the focus group suggested that Canada's international cooperation in criminal matters has been affected by a perceived loss of credibility. While participants observed that other states trust Canada's judicial process, they specifically cited the scope of disclosure laws as an issue for Canada's credibility and states' willing to share sensitive information.

In the absence of publicly available data on Canada's international criminal justice cooperation, empirical assessment by civil society of whether UNTOC enhanced international cooperation is difficult. To further improve transparency, the Government of Canada might consider releasing aggregated data on the support Canada provided and received to advance investigations or prosecutions of transnational organized crime, thereby helping to demonstrate the degree to which the general approach encouraged by the Convention is bearing fruit. Indeed, Cluster IV of the UNTOC Review Mechanism deals specifically with international cooperation, including mutual legal assistance and confiscation, allowing States parties to further explore the matter in the years ahead.

Respondents generally perceived that the Convention's relevant articles have been, at least in principle, satisfactorily transposed into Canada's legal framework. In fact, participants in the focus group suggested that Canada's provisions are internationally recognized as examples of best practice. Additionally, one respondent wrote "I believe the *Criminal Code* provisions are sufficient to address the problem."

However, Mr. Bjarni Sigursteinsson pointed out that, in his view, "Canada's criminalization of participation in an organized crime group is not entirely in line with article 5 of the Convention". More specifically, in Canadian law, a "criminal organization" is defined differently than an "organized criminal group" under article 2(a) of the UNTOC. He explained that section 467.1(1) of the *Criminal Code* "omits the term "structured group" and part of its definition under article 2(c). Under the Convention, a structured group is defined as one that "... does not need to have formally defined roles for its members, continuity of its membership or a developed structure."<sup>8</sup> The Canadian legal framework omits this clarification of a structured group. Furthermore, formally defined roles for members, continuity of membership, and a developed structure are among the criteria Canadian courts have examined to determine if a group is a

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the Supreme Court of British Columbia held that the accused was to be surrendered in 2013. Likewise, in *Slovenia v. Soba*, Canada was requested by Slovenia to extradite Mr. Soba in 2011 for breach of trust by a public officer, forgery, and fraud.

<sup>8</sup> *United Nations Convention Against Transnational Organized Crime*, Article 2(c).

“criminal organization.”<sup>9</sup> Moreover, Canadian organized crime cases show how authorities present extensive expert evidence to establish that groups have formally defined roles for members, formal and continuous membership, and developed structure. Consequently, the Canadian legal framework criminalizes participation in more narrowly defined groups than the UNTOC.

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### Canada’s *Criminal Code* Definition of a Criminal Organization

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#### s. 467.1(1)

A criminal organization is defined as a group, however organized, that is

- (a) composed of three or more persons in or outside Canada; and
- (b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

Additionally, Mr. Sigursteinsson observed that the *Criminal Code* definition of a criminal organization influences the implementation of other legislation. The definition has influenced decisions where authorities decided “if a person should be found inadmissible to Canada under the [Immigration and Refugee Protection Act, SC 2001](#), s 37(1)”, “if a person should be denied a firearms license under section 5 of the *Firearms Act*... section 467.1(1)”, and “whether a person should be denied a license to sell liquor under the *Liquor Licence Act*.”<sup>10</sup>

Another respondent observed that the definition of a criminal organization and related provisions are “rarely used in British Columbia, and when used, they are targeting street-level gangs rather than the transnational organized crime groups for whom it was intended.” More specifically, the participant pointed to [R. v. Payne, 2007 BCCA 541](#) as compared to [British Columbia \(Director of Civil Forfeiture\) v. Angel Acres Recreation and Festival Property Ltd., 2021 BCCA 128](#).

Respondents also tended to agree that Canadian criminal justice practitioners are well aware of laws criminalizing participation in activities of a criminal organization, money laundering, corruption, and obstruction to justice, although Professor Currie observed that “extended” or “qualified” jurisdiction appears to be poorly understood by practitioners. Yet, some participants concluded that the practical application and impact of the organized crime laws in Canada have been somewhat ineffective, with the main problems residing in insufficient law enforcement and inter-agency cooperation, as well as challenges with the deferred prosecution agreement scheme. Others argued that the general approach has been problematic in part because criminalization itself often perpetuates illicit markets and fails to produce a satisfactory deterrent effect.

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<sup>9</sup> In his questionnaire, Mr. Sigursteinsson referenced *R v Lindsay*, 2004 OJ No 845; *R. v Wagner*, 2008 ONSC No 669; *R. v Jeffrey*, 2008 ONSC, 31 October 2008; *R. v. Ward*, 2008 ONSC, 12 December 2008; *R. v. Pink*, 2008 ONSC 12 December 2008; *R. v. Drecic*, 2009 ONSC 8 October 2009; *R. v. Bodenstein*, 2010 ONSC 13 July 2010; and, *R. v. O’Reilly*, 2017 QCCA 1283.

<sup>10</sup> In his questionnaire, Mr. Sigursteinsson referenced *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58; *R. v. Borchuk*, 2016 ONCJ 258; *Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon’s)*, 2013 ONCA 157.

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For Dr. Stephen Schneider, a Professor of Criminology, the overall strategy of criminalization promoted by the Convention raises questions of whether we can realistically expect it to help suppress transnational organized crime. In his words, we cannot assume:

*that the criminalization of certain goods, activities, and services will have a positive effect on the scope and harms of organized crimes. Some say the opposite is true. When governments pass laws prohibiting or heavily restricting the sale and consumption of a particular good or service in demand by the public, this inevitably drives supply to underground markets. In other words, public policies that criminalize certain goods and activities actually create and perpetuate illicit markets, many of which are ostensibly supplied by (transnational) organized criminal groups. The alternative question is: to what extent have efforts to control organized crime and illicit markets in Canada been hindered by the UNTOC?*

In any review of criminal laws or criminal justice practices, there will remain the unavoidable fact that prohibiting certain activities and services, and thereby making some markets illegal, creates opportunities for organized crime. Such prohibitions also lead to unrealistic public expectations about the role of law enforcement in enforcing them or eliminating the resulting illicit markets. Accordingly, Professor Robert Currie referenced Canada's "decriminalization of cannabis" as an indirect success in Canada's fight against transnational organized crime, particularly because it "at least took away some of the market that was being supplied by OC."

Participants also casted doubt on the deterrent effect of Canada's organized crime offences. For instance, Mr. Bjarni Sigursteinsson explained that prosecutions for organized crime offences are relatively few, considering anecdotal evidence of a much higher number of investigations into crimes committed by organized crime groups. Mr. Sigursteinsson suggested the need for research to uncover how often and why organized crime charges are dropped before the cases come before the courts. It is important to understand if and why many investigations utilized funding and judicial authorizations to investigate organized crime without these cases leading to prosecution for organized crime. Moreover, it is critical to know how many charges are dropped during plea bargaining and if prosecutors prefer a plea for substantive offences rather than prosecuting organized crime offences. Such research might provide necessary guidance on how to improve the legal framework and practices for tackling organized crime. If the legal framework is only used to acquire judicial authorization and for plea bargaining, the broader effect of deterring and guiding the public is lost.

Most participants recognized regulatory and law enforcement as crucial elements of effective action against organized crime, yet they suggested that the actual impact of law enforcement is usually quite limited. For instance, Dr. Schneider stated that "quite frankly I cannot think of any significant or lasting enforcement successes." The most immediate impact of police "disruption activities," for instance, is usually crime displacement from one place to another. For instance, a report prepared for Public Safety Canada found that that none of the disruption strategies seemed to have a lasting impact on illicit drug markets and very few of them seemed to have an impact on organized crime groups and networks that exploit and profit from these markets (Dandurand, 2020). Part of the challenge, as some participants noted, is that law enforcement agencies hardly share information.

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Another respondent observed that police resources have not been sufficiently allocated to satisfy parameters set by past case law. In particular, the respondent referred to a study by Dr. Irwin Cohen and colleagues (2021), which examined whether and how law enforcement personnel have adapted to certain Canadian judicial decisions, especially *R. v. Jordan* and *R. v. Stinchcombe*. Results from Dr. Cohen’s research revealed that drug investigations have increasingly become more complex and time-consuming, in part because “the requirements of disclosure set out by *R. v. Stinchcombe*... have not adapted to the enormous volumes of information and digital evidence that had become available because of innovations in technology” (p. 6).<sup>11</sup> Likewise, since 2016, when “Jordan’s rule” came into effect, so-called “catch-and-release” practices have reportedly become common in drug investigations. Although the presumptive ceiling set by *R. v. Jordan* intended to improve procedural justice, Dr. Cohen and his team found that law enforcement has not received the necessary resources to comply with the ruling, which appears to impact public safety.<sup>12</sup>

The Canadian Centre for Excellence on Anti-Corruption (CCEAC) observed that “international anti-corruption investigations take on average between 3 to 7 years to complete,” adding that “the burdensome regulatory framework, especially around privilege, makes these types of investigations very lengthy and costly.” CCEAC further referenced comparative experience in identifying a shortcoming of Canada’s approach:

*Canada does not have the option of having ‘failure to prevent’ obligation, similar to section 7 of the [UK Bribery Act](#), that provides an ‘adequate procedure’ defence for those charged who can demonstrate that they have a robust compliance program. Such an omission in addition that Canada does not publish any guidance document leaves many companies unable and unwilling to voluntarily disclose wrongdoings because of the uncertainties and risks of such disclosures in terms of prosecutions. Although Canada does have Remediation agreements, the absence of a Section 7 like mandate and the absence of guidance of what is expected leaves too many organisations and their layers unwilling to take a chance.*

In fact, several focus group participants explained that Canada’s deferred prosecution agreement (DPA) regime is hardly used and questioned whether any agreements had been reached in five years. Although all participants generally agreed that the DPA system is “critical to dealing with transnational crime” and is useful to encourage disclosure, particularly by corporations, it was observed that Canada’s system “never got off the ground.” Overall, there appears to be limited incentives to encourage corporations and others to cooperate with legal proceedings against major crimes, such as crimes against the environment. Like the CCEAC, focus group participants referenced the *UK Bribery Act* as a best practice from which Canada could learn.

Relatedly, the CCEAC and Professor Marc Tassé both emphasized the importance of a publicly accessible beneficial ownership registry to counter corruption, tax evasion, and money laundering in Canada. Likewise, in his independent review of money laundering in BC, Dr. Peter German wrote “requiring

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<sup>11</sup> In *R. v. Stinchcombe*, 1995 130 SCC, the Supreme Court of Canada unanimously decided that Crown Counsel has a legal duty to disclose all evidence to defence, regardless of whether the Crown intends to call that evidence at trial or not.

<sup>12</sup> In *R. v. Jordan*, 2016 SCC 27, the Supreme Court of Canada established a presumptive ceiling of 18 months for cases tried in provincial court from the charge to the actual or anticipated end of trial or 30 months for cases in the superior courts (or cases tried in the provincial court after a preliminary inquiry).

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beneficial owners to be identified for all properties (including those held through nominees) would make money laundering in B.C. a much less desirable business” (2019, p. 13). In its 2021 Budget, the Government of Canada proposed to “provide \$2.1 million over two years... to support the implementation of a publicly accessible corporate beneficial ownership registry by 2025.” Similarly, in 2018, the Federation of Law Societies of Canada amended subsection 6(7) of its *Model Rules* to “require legal counsel to ‘make reasonable efforts’ to obtain the names and addresses of persons who own or control 25% of more of an organization.”

Of the different offences established in the Convention, Canada's implementation and application of its money laundering provisions arguably garnered the most attention by participants, many of whom emphasized that Canada is an offshore destination for so-called “snow-washing.”<sup>13</sup> For Dr. Michelle Gallant, a Professor of Law, the greatest challenge in countering transnational organized crime is the “financial piece.” Indeed, most organized crime operations involve laundering the proceeds of criminal activity, which itself involves legitimate and regulated businesses.

In 2019, the Government of British Columbia established the [Cullen Commission](#) to, *inter alia*, make findings of fact on the acts or omissions of regulatory agencies and individuals, and whether those have contributed to money laundering or corruption in the province.<sup>14</sup> Several respondents, including Mr. Sigursteinsson, observed that the inquiry is “exposing how domestic and transnational organized crime thrives from departmentalization and lack of cooperation.” In the Asian Women for Equality's view, information provided to the Commission has shown how “the same criminal gangs” are often involved in human trafficking, weapons smuggling, and money laundering. The Commissioner's final report is due in May 2022, which will likely contain useful information not only for BC, but Canada more broadly.

In further explaining some of the issues with Canada's anti-money laundering scheme, Mr. Sigursteinsson referenced Dr. German's 2019 report for the Attorney General of British Columbia, warning that lawyers are “the ‘black hole’ of real estate and of money movement generally.” In particular, Dr. German found that:

*Lawyers are at a high risk of being targeted by money launderers, not only because they are exempted from financial reporting but by the very nature of the risks inherent in dealing with real estate transactions, the formation of corporations and trusts, and most of all because they can hold funds in a trust account.*

However, Mr. Sigursteinsson reiterated that lawyers are exempt from reporting suspected money laundering committed by their clients, referencing a successful court challenge brought by the Federation of Law Societies of Canada in which the court decided that reporting obligations “would violate solicitor-client privilege as protected by the Charter.”

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<sup>13</sup> According to James Cohen and Sasha Caldera (2021), “snow washing” is a term discovered by journalists at the Toronto Star and the Canadian Broadcasting Corporation who investigated the Panama Papers. In Cohen and Caldera's words, “the term allegedly comes from the intermediaries at Mossack-Fonseca, the law firm at the heart of the Panama Papers, where they essentially sold Canada with the idea of bringing dirty money to Canada and it will be cleaned like pure white snow; hence, ‘snow-washing’ entered the Canadian anti-money laundering lexicon” (p. 379).

<sup>14</sup> See, for instance, the Introductory Statement from Commissioner Cullen: <https://cullencommission.ca/introductory-statement/?ln=eng>



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For Dr. Gallant, another issue is how money laundering is described in mainstream media and elsewhere, suggesting that generally more emphasis should “be placed on identifying that money laundering offences are not just about drugs and the drug crisis, nor about casinos and real estate but about human trafficking, proliferation, corruption and thefts of public goods.” By better explaining the severity of the underlying crimes, Dr. Gallant believes that more political and public will could be generated to strengthen the enforcement of money laundering offences.

Since 2002, when Canada ratified the Convention, most respondents observed that transnational organized crime and illicit markets in and involving Canada have continued to expand, in some cases exponentially, with traditional suppression measures unable to keep pace with the adaptive tactics employed by organized criminals. In 2007, for instance, the Criminal Intelligence Service Canada (CISC) estimated there were 950 known organized crime groups in the country, an increase of nearly 20% over the previous year. By 2020, CISC reported more than 2,000 organized crime groups operating in Canada, of which 73% were suspected of engaging in violent activities, including extortion, assaults, and homicides. For Professor Robert Currie, “it is notable that federal authorities have recently taken the view that transnational organized crime activity amounts to a national security threat, which suggests that it has become a greater problem since this view was not taken back in 2002.”

Likewise, Dr. Schneider observed that “[s]ince the UNTOC was adopted, all available metrics indicate that the problem of drug trafficking has worsened in Canada.” In particular, Dr. Schneider explained that:

*The volume of drugs smuggled across Canadian borders has soared, the payloads of individual shipments have progressively become larger, there is a wider variety of drugs being illegally brought into the country, and there has been an increase in poly-drug trafficking (the handling of numerous kinds of illegal drugs by criminal groups and networks) (Dauvergne, 2009; Schneider, 2022; Public Safety Canada, 2019; Canada Border Services Agency, 2021).*

Taking the Hell’s Angels (HA) Motorcycle Club as a case in point, Mr. Bjarni Sigursteinsson cited anecdotal evidence indicating that the HA “has only grown more powerful and extended its criminal operations since the group was found to be a criminal organization” by Canadian courts. In fact, Dr. Schneider referenced a 2018 RCMP memo showing that criminal organization’s chapters and support clubs have risen more than 35% in the past three years, “effectively enhancing the HA’s presence on the East and West coasts” (RCMP, 2018, p. 1). Dr. Schneider further explained that the expansion has occurred despite enforcement successes:

*Project SharQc in Quebec, for example, culminated with the arrest of almost every full-patch member of the HA in the province; it effectively crippled the motorcycle club, leaving most chapters without the minimum number of members required by the HAMC charter. By June 2015, 101 of the accused had pleaded guilty to various charges. Despite this enforcement achievement, the Quebec HA has regrouped and even reopened chapters that had been closed due to the jailing or death of its members. The HA continues to be involved in traditional organized crimes, like drug trafficking, and have supplemented this with a new business model – the use of Mafia-style “private protection” tactics in which independent drug dealers are*

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*“taxed” for operating in criminal markets or jurisdictions controlled by Hells Angels members (Criminal Intelligence Service Canada, 2021: 13; Le Soleil, Dec. 20, 2020).*

As a result of the reported surge in transnational organized crime in recent years, Dr. Gallant suggested that the over-inflated real estate in different parts of Canada is “attributable to criminal dollars and organized crime” and less a reflection of the “lawful market exchanges.” Indeed, organized crime produces a range of harmful impacts, affecting essentially every aspect of daily life whether directly or indirectly.

For Mr. Sigursteinsson, the growing prevalence of organized crime “shows the importance of revisiting how we understand organized crime and adequately address the complexities of it.” Another respondent suggested that “Canada needs to be more responsive to changes in technology and case law in order to keep up with sophisticated organized crime groups.”

However, respondents overwhelmingly perceived that the suppression of organized crime ranks low on Canada's list of political priorities, except in BC, where the Cullen Commission was established by the provincial government. More broadly in Canada, most focus group participants agreed that federal leadership and political will to prevent and counter organized crime is largely absent, emphasizing the urgent need for a national strategy against organized crime, corruption, and money laundering.

In particular, Dr. Stephen Schneider observed that “political parties, public officials and governments tend to *react* to high-profile problems, as opposed to *proactively* developing long-term goals and solutions.” Likewise, Professor Robert Currie suggested that “there is a pressing need for more investigative tools and resources to deal with organized crime gangs, but successive governments have not made it a priority.”

As a participant noted, one testimony in BC before the Cullen Commission alleged that a minister in the provincial government tried to influence senior police leaders not to pursue investigations into money laundering in the province's casinos (Trichur, 2022). Consequently, Mr. Sigursteinsson observed “the laundering of proceeds of crime will frequently go unnoticed or be ignored because the practitioners involved lack motivation to pursue a money-laundering line of inquiry.” It was also suggested that Canada does not appear to have the political will to introduce legislation to address unexplained wealth.

For the Canadian Centre of Excellence for Anti-Corruption, the low priority of organized crime can be partly explained by a generally uninformed populace, stating:

*Whereas Canada is a party to the UNTOC and there has been some enforcement action in this area, the public knows very little about it and are woefully uninformed about the true cost and impact of TOC activities. The lack of public awareness and education has placed TOC issues on the backburner as a political priority simply because people don't know enough about it.*

To improve its response to transnational organized crime, Professor Currie recommended that Canada “make more use of extraterritorial jurisdiction over the UNTOC offences, as much is available both under the treaty and under customary international law, but little to none is exerted.” In fact, Professor Currie observed that there is “no reason not to; the failure to do so is just a product of the Canadian government's

historical reticence to exert extraterritorial jurisdiction generally, which is frankly too old-fashioned and fussy in a world filled with mobile criminals and globalized criminal activities.”

Several respondents also recommended that a more effective DPA regime would be useful. So, too, would be a robust beneficial ownership registry. Relatedly, allowing lawyers to report suspected money laundering in the trusts they manage would be an important step in improving Canada's capacity to address corruption related issues.

### Human Trafficking

Human trafficking is recognized as one of the world's most pervasive illicit markets, alongside the cannabis trade, arms trafficking, and migrant smuggling (GI-TOC, 2021), prompting the mobilization of considerable resources at the global and national levels. During the consultation, respondents pointed to several Canadian anti-human trafficking initiatives that have directly or indirectly contributed to the implementation of the Human Trafficking Protocol.

Since 2002, for instance, Canada has introduced criminal and immigration provisions against human trafficking, subsequently amending its criminal law three times in 2010, 2012, and 2014.<sup>15</sup> In introducing additional amendments, Canada increasingly broadened the scope of human trafficking and made lengthier sanctions more available. In 2014, for example, the *Criminal Code* was amended to criminalize the receipt of material benefit from trafficking in children (s. 279.02(2)) and criminalize the act of withholding or destroying documents to facilitate trafficking in children (s. 279.03(2)). The amendments also imposed mandatory minimum penalties on the main human trafficking offence (s. 279.01) and all child trafficking offences (s. 279.011, 279.01(2), 279.03 (2)). In that same year, Canada introduced Bill C-36, the *Protection of Communities and Exploited Persons Act*, which harmonized the penalties imposed for human trafficking offences and prostitution related conduct.<sup>16</sup> Additionally, Canada's *Immigration and Refugee Protection Act* (IRPA) prohibits cross-border trafficking committed not only by organized criminal groups, but also by individual traffickers.

Starting in 2019, the Government of Canada committed to investing \$75 million over six years in a suite of anti-human trafficking initiatives. Many respondents, including the Canadian Criminal Justice Association, mentioned that Canada's response to human trafficking is well articulated in the *National Strategy to Combat Human Trafficking 2019-2024* and the *National Action Plan to Combat Human Trafficking*.<sup>17</sup> According to the Canadian Centre to End Human Trafficking (CCTEHT), “the coherent approach... has helped launch a series of new initiatives, including funding for the creation of the Canadian Human Trafficking Hotline.” Likewise, Family Services of Peel cited the Hotline as a promising initiative and pointed to its pilot project called the Mobile Sex Trafficking Prevention and Counselling Services Clinic, which provides trauma-informed health care to trafficking survivors.

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<sup>15</sup> See Ibrahim, D. (2021). *Trafficking in Persons in Canada, 2019*, at page 3: <https://www150.statcan.gc.ca/n1/en/pub/85-005-x/2021001/article/00001-eng.pdf?st=7zeMHdT5>

<sup>16</sup> See Bill C-36, *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*: [https://laws-lois.justice.gc.ca/PDF/2014\\_25.pdf](https://laws-lois.justice.gc.ca/PDF/2014_25.pdf)

<sup>17</sup> See the *National Strategy to Combat Human Trafficking 2019-2024*: <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2019-ntnl-strty-hmnn-trffc/index-en.aspx> and the *National Action Plan to Combat Human Trafficking*: <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ntnl-ctn-pln-cmbt/ntnl-ctn-pln-cmbt-eng.pdf>

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Several respondents, including the Christian Legal Fellowship, SWAN Vancouver, and Aura Freedom International, spoke to how their activities raise public awareness of anti-trafficking efforts. For its part, the Joy Smith Foundation offers educational resources under its Nation Human Trafficking Education Centre, providing training to law enforcement practitioners to “understand and fight human trafficking.” Similarly, CCTEHT acknowledged the establishment of Human Trafficking Awareness Day (February 22 in 2021) as an opportunity to deliver communications campaigns and enhance media attention on human trafficking. In helping to increase people’s understanding of human trafficking, Le Phare des AffranchiEs recognized the reports published by Statistics Canada as useful resources.

To help identify labour trafficking victims, Canada introduced regulations in 2013 to conduct employer compliance inspections of workplaces where foreign nationals are employed to assess whether the employer has met the conditions required by the *Immigration and Refugee Protection Regulations*. A lawyer who participated in one of the focus groups noted that “in my experience, the government conducts a lot of inspections... they will send inspectors to farms with broad rights to interview employees and the consequences can be a fine if found non-compliant.” In general, the participant observed that Canada’s inspection regime is an effective way to identify and deter exploitative practices, cautioning that “the only problem... is that they take forever... and in the process, if the employer is penalized, the employee ends up with nothing.”

At the provincial level, the Government of Ontario announced in July 2021 that it would require all Ontario school boards to include human trafficking within the curriculum. The province indicated that all school boards must put in place protocols to train administrators, educators and students about human trafficking by January 31, 2022, with the goal of implementing the curriculum by fall 2022. In Quebec, as Le Phare des AffranchiEs highlighted, the protection regime for victims of criminal acts was reformed in October 2021 to include human trafficking victims, who were previously omitted from the list of crimes for which a victim could be entitled to compensation.

Owing in part to the initiatives described above, the majority of respondents felt that the prevention and control of human trafficking remains a political priority in Canada. However, many respondents expressed concern with how Canada has implemented the Protocol. Respondents were also divided on whether ratifying the Protocol improved Canada’s ability to counter human trafficking and protect victims. On the one hand, some respondents observed that the Protocol has helped Canada adopt common language, increase public awareness of human trafficking, and be held accountable for its actions. On the other hand, respondents were reticent to comment on the impact of the Protocol in Canada or stressed that the approach adopted from the Protocol has produced adverse effects. Among other things, respondents cited issues with Canada’s legal definition of human trafficking, a lack understanding of human trafficking laws among practitioners, evidentiary challenges, and the low conviction rate for accused traffickers as examples of how Canada continues to encounter implementation challenges.

For instance, Dr. Rosemary Nagy, a Professor of Gender Equality and Social Justice, observed that “Canada does not sufficiently follow the Protocol definition of trafficking because the *Criminal Code* leaves out the ‘means’ of trafficking, that is, the threat or use of force, coercion, deception or fraud.” In this regard, several respondents cited research by Dr. Hayli Millar and Dr. Tamara O’Doherty. In their empirical review of

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human trafficking provisions and prosecutions in Canada, Millar and O’Doherty (2020) found that neither Canada’s criminal nor immigration anti-trafficking laws fully align with the definition of human trafficking pursuant to Article 3(a) of the Trafficking in Persons Protocol, in part because Canada defines human trafficking more broadly than the internationally agreed legal definition.

Whereas the Protocol requires the presence of all three constituent elements – *the act, means, and purpose* – for an act to legally constitute human trafficking, Canadian laws only require two of the three elements (Millar & O’Doherty, 2020). Under section 279.01 of the *Criminal Code*, for instance, the *means* element is not required, although the court *may* consider, in determining if exploitation occurred, whether the accused (i) used or threatened to use force or another form of coercion; (ii) used deception; or (iii) abused a position of trust, power or authority. Where the victim is under the age of eighteen, the international legal definition deems the *means* element irrelevant, and thus section 279.011 of the *Criminal Code* appears consistent with the Human Trafficking Protocol. However, the absence of coercion and other means as a constituent and core element of Canada’s criminal legal definition creates challenges in distinguishing human trafficking from migrant smuggling and may be viewed as inconsistent with the intentions of the Human Trafficking Protocol.

<b>s. 279.01</b>	<b>Elements of Canada’s Main Human Trafficking Provision in the <i>Criminal Code</i></b>
Act Element	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
Means Element	<p><b>s. 279.04(2)</b></p> <p>In determining whether an accused exploits another person under subsection (1), the Court may consider, among other factors, whether the accused</p> <ul style="list-style-type: none"> <li>(a) Used or threatened to use force or another form of coercion;</li> <li>(b) Used deception; or</li> <li>(c) Abused a position of trust, power or authority.</li> </ul>
Purpose Element	For the purpose of exploiting them or facilitating their exploitation
Procedural Matters	Evidence that a person who is not exploited lives with or is habitually in the company of a person who is exploited is, in the absence of evidence to the contrary, proof that the person exercises control, direction or influence over the movements of that person for the purposes of exploiting them or facilitating their exploitation.
Mental Element	<p><b>s. 279.04(1)</b></p> <p>For the purposes of sections 279.01 to 279.03, 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.</p>
Penalty	<p>Guilty of an indictable offence and liable to</p> <ul style="list-style-type: none"> <li>(a) Imprisonment for life and to a minimum punishment of imprisonment for a term of five years if they kidnap, commit an aggravated sexual assault against, or cause death to, the victim during the commission of the offence;</li> <li>or</li> </ul>

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- (b) Imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of four years in any other case.
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Likewise, section 118 of *IRPA* contains the *act* (“knowingly organizing the coming into Canada”) and the *means* (“abduction, fraud, deception or use of threat of force or coercion”); however, *exploitation* is not a core element to legally constitute human trafficking. Instead, “sexual exploitation” and “humiliating or degrading treatment, including with respect to work” represent aggravating factors that the court, in determining the penalty to be imposed, shall take into account.

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<b>s. 118</b>	<b>Elements of Canada’s Human Trafficking Provision in <i>IRPA</i></b>
Act Element	Knowingly organize the coming into Canada of one or more persons
Means Element	By means of abduction, fraud, deception or use or threat of force or coercion.
Purpose Element	<p><b>s. 121</b></p> <p>The court, in determining the penalty to be imposed under section 120, shall take into account whether</p> <ul style="list-style-type: none"> <li>(a) Bodily harm or death occurred, or the life or safety of any person was endangered, as a result of the commission of the offence;</li> <li>(b) The commission of the offence was for the benefit of, at the direction of or in association with a criminal organization;</li> <li>(c) The commission of the offence was for profit, whether or not any profit was realized; and</li> <li>(d) A person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence.</li> </ul>
Penalty	<p><b>s. 120</b></p> <p>A person who contravenes section 118 is guilty of an offence and liable on conviction by way of indictment to a fine of not more than \$1,000,000 or to life imprisonment, or to both.</p>

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Dr. Katrin Roots, who studied anti-human trafficking practices in Canada for her doctoral degree, further emphasized that “instead of addressing the exploitation of vulnerable groups across industries, Canada’s anti-trafficking efforts have focused on targeting the sex trade, criminalizing third party actors, and criminalizing and deporting migrant sex workers.” Of the 123 human trafficking cases Dr. Roots examined for her doctoral research, 106 (88%) involved charges of sex trafficking, whereas 17 (14%) were for labour trafficking. For her, the findings suggest that “trafficking laws have been aligned with procuring laws rather than being treated as separate offences” (Roots, 2018, p. 87).

Such matters are further complicated by the “precedent setting decision by the Ontario Court of Appeal in *R v. A.A. (2015)*,” deciding that “exploitation does not even have to take place, all that needs to occur is the *intent to exploit*.” Although the meaning of “exploitation” in the context of human trafficking has been challenged several times in Canada’s courts, the “legal ambiguity and discretionary flexibility” around the term appears to create confusion among criminal justice authorities, in part leading to the criminalization of sex work as human trafficking. Yet, as SWAN Vancouver put it, “sex work is not human trafficking.”

Several respondents also suggested that the legal and practical conflation of human trafficking and migrant smuggling is similarly a cause for concern in Canada and abroad. For instance, respondents pointed to a chapter by Dandurand and Jahn (2019), who observed that the legal definition in the Human Trafficking Protocol assumes that States parties would be able to sufficiently reserve the claim of victimhood to human trafficking victims, while denying such claims to smuggled migrants, even though many are subjected to violence and exploitation by their smugglers and often evolve into trafficking situations. In Dandurand and Jahn's (2019) view, the criminalization approach underestimated the prevalence of mixed migration, including the challenges it poses for immigration control and anti-trafficking interventions, and appears to have the unintended effects of reinforcing migrants' vulnerability to exploitation and helping to facilitate human trafficking.

Accordingly, some participants suggested that criminal justice practitioners frequently misunderstand human trafficking criminalization provisions. Referencing studies by Dr. John Winterdyk and others, the Canadian Criminal Justice Association found that "practitioners' knowledge has been deemed insufficient to perform their duties or responsibilities to the fullest." Likewise, Dr. Maria Mourani of Mourani-Criminologie cautioned that "it is still difficult for some [practitioners] to distinguish between trafficking and prostitution or even to know that trafficking is not only an international phenomenon." From SWAN Vancouver's experience in training police officers from across the country, they have "yet to encounter a police officer who can articulate the difference between sex work and human trafficking, yet police enforce sex work and trafficking laws."

Such challenges are further revealed by trends in prosecutions of human trafficking in Canada. For example, analysis conducted by Statistics Canada showed that Canada's anti-trafficking laws have produced limited prosecutions, raising questions about whether the laws have deterred "organized criminal groups" from committing human trafficking. Of the 697 human trafficking cases that were processed in Canadian adult criminal courts from 2008-2019, Statistics Canada found that two-thirds of the charges were stayed, withdrawn, dismissed, or discharged (Ibrahim, 2021). More narrowly, in 2019, less than 10% of human trafficking charges resulted in a guilty outcome. In their responses, participants pointed to several issues that may partly explain the low conviction rate of human trafficking in Canada.

Referring to the evidentiary challenges in proving human trafficking, CCTEHT stated that "since 2002, it has become clear that the ability to prosecute human traffickers rests chiefly on victim testimony," which has "rarely led to successful convictions." As Le Phare des AffranchiEs noted, the process is often very traumatic for victims, requiring them to confront their trafficker and relive their victimization. Indeed, victims may be deterred from assisting with a legal case out of fear of testifying against their trafficker.

Similarly, the Centre to End All Forms of Exploitation (CEASE) suggested that "Canada's criminalization approach may suffer from the mandatory minimum sentences," referring to sections 279.01(1)(a) and 279.01(1)(b) of the *Criminal Code* in which minimum imprisonment terms are required. On the other hand, the Joy Smith Foundation attributed the mandatory minimum sentences for trafficking in children as "Canada's greatest success." Nevertheless, Dr. Roots observed:

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*Ontario courts have begun acknowledging the broad nature of the offence, striking down mandatory minimum sentences due to trafficking laws capturing an extensive range of conduct, the moral blameworthiness of some of which does not warrant a mandatory minimum sentence of 4 years' imprisonment (5 years' for the trafficking of a young person) (see: R.v. Reginald Louis Jean 2020; R.v. Ahmed et al. 2019; R.v. Finestone 2017).*

The Joy Smith Foundation further noted that the length of human trafficking trials is considerably long, affecting victims' rights and the possibility of a conviction. In Canada, for instance, the median length of a human trafficking prosecution is 358 days, "roughly twice as long as the median for all violent offences" (Cotter, 2020). Evidence suggests that human trafficking charges are often accompanied by other charges, such as prostitution, violent, or drug offences (Millar & O'Doherty, 2020), rendering the court cases more complex and time-consuming.

As a result, the Canadian Centre for Child Protection explained that human trafficking charges are often withdrawn if an accused pleads guilty to a lesser offence (Perrin, 2010), sometimes a non-violent offence. In fact, a 2020 Statistics Canada report found that "nearly half of the cases that successfully linked to an incident of police-reported human trafficking did not involve any charges of human trafficking" (Cotter, 2020, p. 3). In some instances, the accused will be charged with offences such as procuring a person under eighteen (s. 286.3(2)) and advertising sexual services (s. 286.4).

Beyond its criminal justice response, the Government of Canada continues to fund and administer support services for victims of human trafficking. As an example, Canada facilitates a temporary resident permit (TRP) scheme to provide trafficking victims of a foreign nationality pathways for support and legal status, which aligns with Article 7 of the Human Trafficking Protocol. In Dr. Katrin Roots' view, the TRP was a "positive step," but "the Government of Canada does not appear to encourage their issuance." In explaining her point, Dr. Roots referenced research by the Canadian Centre for Refugees, finding that victims "face difficulties obtaining TRPs due to inconsistencies in the decisions made by immigration officials... and TRPs are not generally issued unless there is a police investigation or criminal prosecution under way," which has deterred some trafficking victims from even applying for a TRP. Echoing Dr. Roots' points, Le Phare des AffranchiEs further added "[i]n addition to being difficult and expensive, the renewal of the TRP is a slow process sometimes lasting several months, thus causing some victims to find themselves in a period without legal status, which exposes them to detention and deportation." While the TRP aligns with the Human Trafficking Protocol, respondents noted that it might be enhanced if a more accessible approach is adopted.

Where respondents expressed a favourable view of Canada's implementation of the Protocol, they generally pointed to legislation as examples of how Canada has met its international anti-trafficking obligations. In particular, the Asian Women for Equality and the Christian Legal Fellowship both referred to the *Protection of Communities and Exploited Persons Act* (PCEPA), 2014. For instance, the Christian Legal Fellowship wrote that "Canada's current approach to criminalizing human trafficking is generally strong," describing how, in their view, the PCEPA helps Canada in meeting its commitments in at least two ways:

*First, it directly prohibits—and therefore reduces—forms of trafficking that may otherwise be difficult for authorities to prosecute. These may include cases where a person appears to be*



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*“consenting” to prostitution, but whose position of vulnerability was abused by another to recruit them, or cases where a person feels unable to depart prostitution due to persistent and longstanding—but visibly subtle—forms of coercion... Second, PCEPA’s provisions help reduce the demand for prostitution, pursuant to Canada’s obligation under Article 9(5) of the Protocol to “discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.”*

In 2014, the PCEPA was enacted in response to a landmark Supreme Court of Canada decision in *Attorney General of Canada v. Bedford* in which the former sex work laws were struck down as unconstitutional. As it stands, the primary objective of PCEPA is to “eradicate prostitution” (Lam & Lepp, 2019: 93) in part by creating offences that prohibit purchasing sexual services, communicating in any place for that purpose, and advertising sexual services, among other acts. At the time of writing, the House of Commons Standing Committee on Justice and Human Rights has initiated a review of the PCEPA.

In her submission to the Standing Committee, for instance, Nancy Brown (a former pastoral counsellor at Covenant House) concluded that the “PCEPA is a law that needs to be kept and fully enforced” (2022, p. 4), arguing that “decriminalizing prostitution leads to increased sex trafficking” (p. 3). Similarly, the Vancouver Collective Against Sexual Exploitation acknowledged the PCEPA as the “gold standard” (2022, p. 1), suggesting that “you must never separate prostitution and trafficking... Trafficking for sexual exploitation is prostitution” (p. 5).

In contrast, Dr. Kate Shannon and Dr. Chris Bruckert’s submission to the Standing Committee outlined results from their independent empirical study on the impact of the “end demand criminalization framework ushered in by the PCEPA” (p. 1). Among other things, their findings revealed that “80% of sex workers reported that work-related violence has increased or stayed the same compared to violence under the previous laws” (2022, p. 2). The researchers further explained:

*Sex workers were asked if they had been “forced to do sex work under threat to your safety or the safety of people you know” (the legal definition of trafficking) in the past 12 months. In total, 2.5% of respondents said they had.*

Results from Shannon and Bruckert’s (2022) study show that the sex work provided by nearly all the participants would not necessarily meet the definition of exploitation in the context of human trafficking set by section 279.04 of the *Criminal Code*. Under that criminal provision, exploitation is “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.”

Speaking further to the impact of the PCEPA, Dr. Roots observed that it “re-framed sex workers as victims and anyone benefiting from the sex trade as exploiters. In effect, anyone who works as a third-party actor in the sex trade (including as web designer, manager, administrative assistant, security etc), can be seen as an exploiter and be charged with procuring (s. 286.3), material benefits (s. 286.2) and human trafficking (s. 279.01) offences.”

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Likewise, Elene Lam (Executive Director of the Asian and Migrant Sex Workers Support Network) and Dr. Annalee Lepp (Professor of Gender Studies) documented how the PCEPA has further contributed to the conflation of sex work as human trafficking and adversely affected vulnerable communities, writing:

*Three years after [PCEPA] was enacted, based on sex workers' reports across the country, the Canadian Alliance for Sex Work Law Reform confirmed PCEPA's endangering effects, with Indigenous, transgender, racialised, and im/migrant sex workers as the most negatively impacted. The laws have continued and intensified the displacement and isolation of sex workers; increased targeted violence, stigma, and discrimination against them; and enhanced police profiling and surveillance (p. 93).*

In brief, consultation respondents and others remain divided on the practical implications of the PCEPA, including how it has affected Canada's implementation of the Human Trafficking Protocol. Even so, results from the review currently underway by the House of Commons Standing Committee on Justice and Human Rights might help to provide more context.

To further gauge respondents' views on the effectiveness of Canada's anti-trafficking measures, they were asked whether they perceive human trafficking as a greater problem in Canada since it ratified the Human Trafficking Protocol. Results revealed that, since 2002, the majority of participants perceive human trafficking as a stable or greater problem, especially since the onset of the COVID-19 pandemic, while cautioning that data collection challenges, misidentification of trafficking by law enforcement, and the under-reported nature of human trafficking can undermine reliable estimates of its prevalence in Canada. As explained below, only a couple respondents observed that human trafficking has not become a greater problem since 2002.

For instance, the Canadian Centre for Child Protection noted that “[s]ince 2002, Canada has experienced an increase in the trafficking of persons, including the trafficking of children for the purpose of sexual exploitation (“sex trafficking”).” Likewise, CCTEHT suggested that data from the Canadian Human Trafficking Hotline may “support the notion that trafficking may have increased during the COVID-19 pandemic,” adding that “[u]nfortunately, Canada does not yet have a comprehensive, longitudinal dataset that can indicate whether human trafficking has increased since the adoption of the Protocol in 2002.”

Referring to an additional complexity in estimating human trafficking trends, Aura Freedom International wrote:

*[T]here has been anecdotal evidence at the grassroots level that shows a failure of following the non-punishment principle of the protocol. Forced criminality is a common experience of survivors, yet many are not recognized as survivors of human trafficking and end up being criminalized for their actions while under the coercion of their trafficker.*

In the absence of proper victim identification and protection policies, including the implementation of the non-liability principle, survivors may come to law enforcement's attention as offenders for crimes they were forced to commit by their traffickers, receiving criminal sanctions rather than support. In fact, a prior consultation on labour trafficking in Canada found that traffickers make “their victims more vulnerable and complicit by placing them in a situation of illegality” (Chin & Dandurand, 2014). In most instances, victims

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are dependent on their trafficker(s), whether out of fear of being accused of committing illegal activity, fear of retribution against them or their families, fear of deportation, debts owed to their trafficker, or many other reasons, all of which affect the veracity of data on the prevalence of the problem.

In explaining why they perceive human trafficking as a growing problem in Canada, many respondents cited greater public awareness and research initiatives of the phenomena, greater access to technology and social media through which traffickers can lure victims, greater market demands, and heightened risks to vulnerable groups prompted by the pandemic.

Unlike the other respondents, Dr. Katrin Roots believes that “[h]uman trafficking has not become a greater problem since the adoption of the Protocol,” observing that the increase in trafficking charges is the result of increased police and prosecutorial attention, as well as the conflation between human trafficking and sex work. Dr. Roots further explained: “This is, in part, because according to the prohibitionist perspective the sex trade is inherently exploitative, therefore anyone who benefits from the sex trade is seen as a trafficker.” Dr. Roots’ research (2018) found that the conflation of sex work as human trafficking is reinforced in practice by specialized anti-trafficking police units, which are “in competition with each other for funding, consequently overzealously charging sex work activities under human trafficking laws in order to demonstrate the prevalence of trafficking, thus justifying their own existence and the need for more financial supports.”

Along the same lines, Dr. Rosemary Nagy noted “there are increased *perceptions* that [human trafficking] is a bigger problem now. However, it is difficult to assess... Amongst critical anti-human trafficking scholars, there is a general consensus that human trafficking statistics are exaggerated or inflated in part due to the inclusion of “related offenses” in RCMP statistics which are not strictly speaking, trafficking.”

Looking ahead, several respondents offered suggestions of how Canada can further enhance its approach to prevent and suppress human trafficking, while ensuring victims are protected. For instance, Le Phare des AffranchiEs and others emphasized the importance of consulting “survivors of trafficking in the process of developing any bill, measure, parliamentary committee, action plan, etc. Their experience and contribution represent an essential contribution to a better understanding of the complex realities and dynamics involved and are currently not sufficiently taken into account.”

In the Canadian Centre for Child Protection’s view, “[w]hat is lacking is a specific strategy that reviews and addresses human trafficking of children – whether it be for sexual exploitation, labour or another form of exploitation. To date discussions, reviews and reports have been about adult and children together which is inadequate and fails to address the unique factors at play for children.” Similarly, the Christian Legal Fellowship observed that “there is a lack of research around the connection between legalized commercial surrogacy and human trafficking, and further research is needed on this subject.”

The Centre to End All Sexual Exploitation recommended that “every province/territory and municipality needs Action Plans that are interconnected.” Referring to municipal bylaws as a case in point, CEASE suggested that bylaws “allow for trafficking businesses to open and operate because municipalities have limited powers to investigate numbered companies.” Equally notable, the Centre suggested “Canada could benefit from appointing a Rapporteur on Human Trafficking.”

## Migrant Smuggling

Compared to the number of responses received on Canada's implementation of the Human Trafficking Protocol, the questionnaire on the Migrant Smuggling Protocol generated less interest from participants. However, some indirect comments were offered by some of them through their responses to the related problem of human trafficking. The consultation with members of the Canadian Bar Association also covered the topic. A questionnaire was also received from the Canadian Criminal Justice Association.

It is sometimes suggested that the migrant smuggling problem is becoming more serious in Canada, in part because of poor enforcement of the law. Migrant smuggling is a highly profitable criminal enterprise. Low risk and comparatively low penalties have attracted both opportunistic criminals and organized crime groups. The current demand for smuggling services is possibly higher than ever.

Smugglers are increasingly organized into loose networks that do not involve strict hierarchies. These networks can be quite sophisticated, with transnational links and the capacity to provide comprehensive and effective smuggling services, including full-service packages (or pre-organized stage-to-stage packages) for migrants who must travel long distances, using multiple modes of transportation. However, many elements of these networks are only loosely connected and cooperate in the smuggling of migrants only if and when opportunities arise. Some of these networks have operated for considerable periods of time.

In recent years, China (PRC) has become a significant source country for irregular migrants and migrants who are smuggled to and through other parts of South-East Asia and to destinations in Canada and the US. Most Chinese migrants smuggled or attempting to gain illegal entry into Canada are transported by air for at least part of the journey, sometimes through a transit country. Indeed, many Chinese nationals are known to have flown to and entered the US before being smuggled into Canada (UNODC, 2015; Dandurand, 2020).

Canada has implemented the protocol and met its international obligations. In principle, Canada has implemented sufficient "respectable" measures for the effective prosecution of migrant smuggling. However, given the low numbers of successful investigation and prosecution, it does not appear that these measures have been sufficient. It is sometimes suggested that the migrant smuggling problem is becoming more serious in Canada, in part because of poor enforcement of the law.

None of the participants provided data on the prevalence of migrant smuggling in Canada. The CCJA suggested that, as a clandestine crime, there is no reliable data on the extent of the "problem". In principle, we have respectable measures for prosecution in place but given the low prosecution rate/numbers, criminalizing and punishing migrant smugglers is not seen to be the most effective...or efficient response protocol.

However, Winterdyck and Dhungel (2018) suggested that the volume of migrant smuggling into Canada, particularly from the USA has been rising, especially since 2014. They also argued that "without a doubt, the Safe Third Country Agreement (STCA) between Canada and the US has empowered smuggled migrants to come to Canada" and increased the number of unauthorized border crossing.

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In recent years, most Canadians seem to be prepared to believe that migrant smuggling is a growing problem but, as Perrin (2013) noted there are little data on the prevalence of migrant smuggling to Canada. Available information on the extent of the problem comes from criminal intelligence reports, immigration records, and high profile publicly reported cases.

There is evidence, however, that migrant smuggling into Canada is significant enough to warrant increased action from the public and enhanced enforcement action.

It is sometimes suggested by civil society that lack of data on the prevalence of migrant smuggling to Canada is due to the weak enforcement of the law.

During the consultation, it was suggested that efforts to date to counter the problem of migrant smuggling to Canada have not been very effective. There have been very few successful investigations and prosecution of this crime. It was also suggested that the situation has been complicated by the Safe Third Country Agreement (STCA) between Canada and the US.

Foreign nationals who enter Canada irregularly between designated ports of entry can make an asylum claim at an inland CBSA or Immigration, Refugees and Citizenship Canada (IRCC) office and make an asylum claim for asylum refugee protection. Once an individual has been determined to be eligible to make a claim in Canada, whether the claim was made at the border or at an inland office, he or she may have access as a refugee claimant to social assistance, education, health services, emergency housing and legal aid while a decision is pending on his or her claim. He or she may also be eligible to apply for a work permit.

In the case of migrants smuggled from the US into Canada, the Safe Third Country Agreement between Canada and the US, which came into effect in 2004, requires that refugee claimants seek protection in the first safe country in which they arrive. The Agreement applies to those making an asylum claim at a land border port of entry between Canada and the US. However, it does not apply to those who arrive from the U.S. by sea, between the ports of entry or an inland port such as an airport. In these cases, their asylum claim can be heard in Canada. In addition, another specific opportunity exists for unaccompanied children and for migrants who have family members in Canada. As would be expected, that opportunity is being exploited by migrant smuggling networks. The opportunity stems from the exceptions stipulated in the Safe Third Country Agreement. The Agreement recognizes the US as a "safe third country" and requires refugee claimants who first arrive in the US to request refugee protection in that country, unless they qualify for one of the following four types of exceptions: family member exceptions; unaccompanied minors exceptions; document holder exceptions; public interest exceptions. The family member exceptions apply when the claimant has a family member who is either a Canadian citizen, a permanent resident of Canada, a protected person under Canadian immigration legislation, or someone who has had his or her removal order stayed on humanitarian and compassionate grounds, holds a valid Canadian work permit or study permit, or is over 18 years old and has a claim for refugee protection that has been referred to the IRB for determination.

One respondent expressed the following view: "(...) in the immigration world, during the Trump era, there was a lot of talk with the Safe Third Country Agreement, and it was always used, but used a lot more in the

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2017-2018 year, and increasingly since then. In Quebec, we talked about the Roxham Road passage, which is still used” The Agreement, it was suggested is still controversial and the issues is likely to be addressed shortly by the Supreme Court (see: Canadian Council for Refugees, et al. v. Minister of Citizenship and Immigration, et al. SCC Case Number 39749). The same respondent added: “But it can certainly give rise to migrant smuggling: When you allow these situations to exist. I am not saying that Canada or the US is to blame, but there are these legal loopholes, whereby migrants have, through an illegal process, claim asylum in Canada as opposed to the US. I am not sure if there has been a lot of research.”

The crime is a clandestine one and it is difficult to detect. Smuggled migrants are unlikely to cooperate with the authorities and therefore the solution resides in more effective and proactive law enforcement. Border control may be relatively effective at preventing irregular migrants from Canada, but apprehending and convicting the smugglers require proactive, sustained law enforcement, as well as effective international cooperation. One of the challenges encountered has been to forge better law enforcement cooperation with countries of origin. Unfortunately, these countries are not always open to and capable of effective cooperation in countering migrant smuggling (and human trafficking).

When it comes to measuring the impact of the Convention, and especially the impact of its Protocol on migrant smuggling, very few countries, including Canada, are in a position to say much about outcomes and results. No doubt, the review process will emphasize the activities undertaken by State parties over the last two decades to implement the Protocol and the measurable outputs in terms of legislative changes and capacity building.

As noted, the purpose of the UNTOC Convention and its protocol is to promote cooperation among State parties, and in the case of the Protocol on Migrant Smuggling, to promote cooperation in order to prevent and combat the smuggling of migrants. However, there is extremely little data available on the nature and extent of international cooperation in preventing migrant smuggling. There is even less data on the results that have been achieved to date through that cooperation. What's worse is that, at the same time as we are missing solid empirical evidence of the effectiveness of international cooperation against migrant smuggling, there is mounting criticism and anecdotal evidence about its many shortcomings.

Unfortunately, we are not really able to judge the strength of international cooperation against migrant smuggling, because there is almost no publicly available data on the number and types of requests for cooperation received or requested by State parties, the countries involved, the cooperation that took place, or the outcomes of these efforts. As noted above, international cooperation is the focus of Cluster IV of the UNTOC review, allowing Canada and other States parties to explore the topic more fully in the years ahead.

The general consensus among the few people who expressed an opinion on whether criminal justice practitioners are aware of migrant smuggling criminalization provisions was that law enforcement efforts were ineffective, in part because the problem of migrant smuggling has not been identified by Canada as an important priority. In principle, countering migrant smuggling is a priority but, as several scholars have noted, there are a number of notable gaps in *the Immigration and Refugee Protection Act*. The problem has not been met with proactive measures and the ongoing poor or slow refugee-determination processes

have been challenges. There is also a general lack of international cooperation. These are points that seem to get repeated year-after-year despite ongoing reactive measures being taken.

The situations in which states find themselves with respect to the implementation of the migrant smuggling Protocol are often quite asymmetrical. There is also a fundamental asymmetry in the means and capacity of states to address migrant smuggling and other transnational criminal activities and to cooperate internationally. This becomes particularly obvious when we consider the divergent interests of states of origin versus transit or destination states with respect to immigration control and combatting migrant smuggling. All these asymmetries will continue to make international cooperation in criminal matters very challenging.

It was noted that Canada has a national Migrant Smuggling Prevention Strategy (MSPS) which takes a whole-of-government approach and coordinates efforts with the objectives of deterring and disrupting international activities of migrant smugglers and their criminal networks. Canada works with source and transit countries to identify and disrupt smuggling networks and organized criminal groups engaged in migrant smuggling targeting Canada as a destination via air, land, and/or sea routes. Also, as part of the MSPS, Canada has established in 2013 a Global Assistance for Irregular Migrants Program (GAIM), which provides transfer payments (in the form of contributions) to international organizations to deliver basic services (e.g., food, shelter) and support the return and reintegration of irregular migrants believed to be destined for Canada and stranded in a transit country following the disruption of a human-smuggling operation. The program also provides funds for the implementation of outreach and awareness activities in order to better manage the consequences of an illegal migration. The program was evaluated in 2015 (Citizenship and Immigration Canada, 1995).

### **Firearms Trafficking**

As noted, Canada has not ratified the Firearms Protocol to date, although respondents were unanimous in their view that Canada would benefit from becoming a party to that instrument. While respondents observed that Canada is currently able to prevent and counter firearms trafficking with its current laws and additional funding, they felt that ratifying the Protocol may help to “elevate firearms trafficking as a priority for federal agencies,” while also enhancing Canada’s cooperation in combatting various forms of firearms trafficking and providing opportunities to focus on evidence-based approaches to the issue.

In Canada, the *Firearms Act* and its related regulations govern the possession, transport, use, and storage of firearms. Additionally, Canada’s *Criminal Code* criminalizes a range of firearms-related offences and lists prohibited firearms in section 84(1), including certain handguns, firearms adapted from rifles or shotguns, and automatic firearms. In 2019, Canada amended the *Criminal Code* to clarify the forfeiture of illicit firearms and amended the *Firearms Act* to remove certain automatic authorizations for transporting prohibited and restricted firearms, among other amendments. Unless specifically exempt by the *Customs Tariff*, firearms are prohibited from entry into Canada.

For a person to hold a firearms license in Canada, the individual must meet specific safety training standards and undergo safety screenings as part of the license application. Under the Canadian Firearms Program, a

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Chief Firearms Officer (CFO) is appointed for each province/territory and tasked with issuing, refusing, revoking, and renewing firearms licenses, as well as approving gun show sponsorships.

In 2017, the Government of Canada announced about \$327 million over five years, starting in 2018/19, to establish the “Initiative to Take Action Against Gun and Gang Violence” and tackle the increase in gun-related violence in Canada. Of that funding, \$214 million is allocated to the provinces and territories to deliver gun prevention initiatives, enhance law enforcement capacity, and support the development of strategies to further address gun violence. In March 2018, the Minister of Public Safety and Emergency Preparedness hosted a Summit on Gun and Gang Violence, attracting over 180 experts to discuss best practices in the fight against gun crime (Public Safety Canada, 2021a). A respondent cited the Crime Gun Intelligence and Investigations Group and the British Columbia Provincial Forensic Firearms Laboratory as significant initiatives towards countering firearms trafficking in BC.

Even though respondents indicated that, generally speaking, Canadian law is sufficient to address firearms trafficking, they also agreed that the laws are insufficiently enforced. On occasion, it has been suggested by some civil society organizations that handguns should be banned entirely in Canada, although this idea has not garnered much support. The Canadian Association of Chiefs of Police (CACP), for instance, has not supported that approach.

The CACP's Special Purpose Committee on Firearms was established to study the growing concerns related to gun violence in Canada from a public safety perspective. One of the objectives of the Committee is to assess the effectiveness of existing legislation and identify areas of enhancement or change. On February 8, 2022, Chief Evan Bray, co-chair of the CACP Special Purpose Committee on Firearms, appeared before the House of Commons Committee on Public Safety and National Security to present the CACP submission regarding the committee's study on gun control, illegal arms trafficking, and gun crimes committed by members of street gangs.<sup>18</sup>

The CACP supported initiatives that target the criminal use and diversion of firearms to the illicit market by prohibiting the importation, exportation and sale of ‘replica’ firearms, something the CACP urged the government to do in a resolution passed by our membership back in 2000. It also supported changes to firearms license requirements and the proposed new authorization for police to access information about license holders in the investigation of individuals suspected of conducting criminal activities.<sup>19</sup> The CACP supported any effort to strengthen border controls and impose stronger penalties to combat firearms smuggling and trafficking, thereby reducing the risk that illegal firearms find their way into Canadian communities and are used to commit criminal offences.

The use of the Internet, particularly the dark web, in firearms trafficking offences is creating new law enforcement challenges. It is a problem that requires further attention. It was suggested that increased funding specifically for this area of law enforcement is needed. In particular, one participant mentioned the need to increase the enforcement capacity of CFOs across the country. To counter firearms trafficking,

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<sup>18</sup> Bray, E. (2022). *Presentation to the House of Commons' Standing Committee on Public Safety and National Security. Study on gun control, illegal arms trafficking, and gun crimes committed by members of street gangs*. Canadian Association of Chiefs of Police. [https://cacp.ca/index.html?asst\\_id=2972](https://cacp.ca/index.html?asst_id=2972)

<sup>19</sup> *CACP Statement: Bill C-21 - New Firearms Legislation*, February 17, 2021. <https://cacp.ca/news/cacp-statement-bill-c21-new-firearms-legislation.html>



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CFOs must be able to conduct inspections of firearms storage, conduct thorough background checks for applications of firearms licenses, as well as hold the authority to deny applications based on various criminal indicators. The same participant explained that “the current focus on prohibiting various gun classes does not address these issues, and is unlikely to affect criminal access to ghost guns, 3D printed guns, or smuggled guns. It may affect criminals' ability to steal/divert legally-owned guns and those acquired through straw purchasers.”

Indeed, all respondents agreed that Canadians are very concerned about firearms trafficking, which they view as serious problem related to gang violence and organized crime. The concern is heightened when gang violence occurs in public spaces and threatens innocent bystanders. Trafficking in firearms is frequently raised as an issue in the mainstream media, and media attention increases immediately following violent gang confrontations involving firearms. In one respondent's view, the discourse often includes “assumptions about the sourcing of illicit firearms, with most people assuming they are trafficked over the border with the USA.” Dr. Maria Mourani cited analysis by Public Safety Canada, finding that violent offences involving guns have increased by 81% since 2009 (Public Safety Canada, 2021b). In urban areas, this form of violence mainly involves street gangs and criminal organizations. According to Statistics Canada, the rates of violent and non-violent offences specific to firearms increased for the fifth consecutive year in 2019 (Moreau, Jaffray, & Armstrong, 2020). From 2018-2019, there was a 21% increase in the number of violent offences specific to firearms with increases across all three violent firearm violations, including discharging a firearm with intent (+28% increase), pointing of a firearm (+17%), and using a firearm in the commission of an indictable offence (+14%).

For respondents, Canada's main challenges in preventing and countering firearms relate to enforcement capacity and border control, homemade firearms manufacturing, and the invisibility of the offence. In particular, one respondent referenced the need for greater laboratory capacity “for tracing and analyzing guns,” adding that “without the ability to test and trace seized guns, we do not have good data on how crime guns are used, how they are entering the illicit market, or where they originated (e.g., domestic or foreign).” Mina Moser, a law student at Lakehead University, wrote that “a major challenge is the fact that firearms trafficking does not happen out in the open.” In general, there appears to be a lack of public understanding on control at the Canada-US border with respect to firearms trafficking, pointing to the possible usefulness of future public awareness campaigns.

It was also suggested that there is an urgent need for evidence-based responses that target the illicit firearm market, using law enforcement data to develop effective policies and strategies. Echoing those views, another respondent observed that research efforts can help to create adequate policies and strategies by which enforcement interventions should be guided to maximize the effectiveness of legislation.

## Self-Assessment Questions

This second section presents the results of the consultation with respect to the specific questions that Canada must address in its self-assessment exercise. Some of the questions had been slightly reformulated in the ICCLR questionnaires to tailor them specifically to the Canadian context. The questions are numbered and presented in the same order as they are found in the questionnaire approved by the State parties for the purpose of the review mechanism.

## UNTOC Questionnaire

### Article 2: Use of Terms

**Q1: Does your country's legal framework include the definitions set forth in Article 2?**

Yes, yes in part, no

**Article 2 defines the following terms as:**

*(a)* **“Organized criminal group”** shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;

*(b)* **“Serious crime”** shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;

*(c)* **“Structured group”** shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure;

*(d)* **“Property”** shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets;

*(e)* **“Proceeds of crime”** shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

*(f)* **“Freezing” or “seizure”** shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

*(g)* **“Confiscation”**, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;

*(h)* **“Predicate offence”** shall mean any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 6 of this Convention;

*(i)* **“Controlled delivery”** shall mean the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence;

(j) “**Regional economic integration organization**” shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention and which has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to it; references to “States Parties” under this Convention shall apply to such organizations within the limits of their competence.

The *Criminal Code* contains a definition of “criminal organization”:

**467.1 (1)** “(...) Criminal organization means a group, however organized, that: (a) is composed of three or more persons in or outside Canada; and, (b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group. It does not include a group of persons that forms randomly for the immediate commission of a single offence.”

Section 467.1(1) of the *Criminal Code* defines “serious offence” as follows: “serious offence means an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, or another offence that is prescribed by regulation”.

“Property” is defined in section 2 of the *Criminal Code*.

“Seizure and restraint of property” (section 83.13) and forfeiture (sections 83.14 and 83.8.1) are both defined in the *Criminal Code*.

“Predicate offences” is not defined, but the concept is applied in the definition of proceeds of crime (any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from: (a) the commission in Canada of an offence punishable by indictment; or (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment” (Section 354 (1)).

**Q2: Does your country’s legal framework permit it to implement the Convention without adopting the specific definitions set forth in Article 2?**

Yes, yes in part, no

## **Article 5: Criminalization of Participation in an Organized Criminal Group**

**Q3: Is participation in an organized criminal group criminalized under your country’s legal framework, in accordance with Article 5?**

Yes or no

- (a) **If the answer to question 3 is “Yes”, does participation in an organized criminal group consist of agreeing with one or more other persons to commit a serious crime in order to obtain, directly or indirectly, a financial or other material benefit (art. 5, para. 1 (a) (i))?**

Yes, yes in part, no

- (i) **If the answer to question 3 (a) is “Yes”, does the criminal offence as provided in your domestic law require an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group (art. 5, para. 1 (a) (i))?**

Yes, yes in part, no

- (b) **If the answer to question 3 is “Yes”, does participation in an organized criminal group consist of taking an active part in the criminal activities of an organized criminal group with knowledge of either the aim and general criminal activity of that group or its intention to commit the crimes concerned, or taking an active part in other activities of an organized criminal group in the knowledge that such participation will contribute to the achievement of the criminal aim of that group (art. 5, para. 1 (a) (ii))?**

Yes, yes in part, no

**If the answer to question 3 (a) is “Yes”, please cite the applicable laws and/or other measures, including the applicable sanctions for this offence.**

See Canada's *Criminal Code* (R.S.C., 1985, c. C-46):

- Section 467.11 (participation in criminal organization);
- Section 467.111 (recruitment of members — criminal organization);
- Section 467.12 (commission of offence for criminal organization); and,
- Section 467.13 (instructing commission of offence for criminal organization).

In addition, the *Criminal Code* criminalizes various forms of conspiracies; see Canada's *Criminal Code* (R.S.C., 1985, c. C-46, Section 183), which covers conspiracies or being accessories after the fact 183: “any conspiracy or attempt to commit or being an accessory after the fact in relation to an offence contrary to, or any counselling in relation to an offence contrary to (a) any of the following provisions of this Act (*Criminal Code*), namely:

- Section 354 (possession of property obtained by crime);
- Section 355.2 (trafficking in property obtained by crime);
- Section 355.4 (possession of property obtained by crime — trafficking);
- Section 462.31 (laundering proceeds of crime);

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- Section 467.11 (participation in criminal organization);
- Section 467.111 (recruitment of members — criminal organization);
- Section 467.12 (commission of offence for criminal organization); and,
- Section 467.13 (instructing commission of offence for criminal organization).

Section 117 of Canada’s *Immigration and Refugee Protection Act* prohibits organizing entry into Canada and includes any other offence that there are reasonable grounds to believe is a criminal organization offence.

However, Mr. Bjarni Sigursteinsson, a doctoral candidate at Schulich School of Law in Halifax, observed that “Canada’s criminalization of participation in an organized crime group is not entirely in line with Article 5” of UNTOC, further explaining:

*The definition of a “criminal organization” under section 467.1(1) differs in an important way from that of an “organized crime group” outlined in article 2(a) of UNTOC. Most importantly, the Canadian definition omits the term “structured group” and part of its definition under Art. 2(c). The term ensures that an “organized crime group” “... does not need to have formally defined roles for its members, continuity of its membership or a developed structure;”<sup>20</sup>. Conversely, formally defined roles for members, continuity of membership, and a developed structure are among the criteria Canadian courts have examined to determine if a group is a “criminal organization.”<sup>21</sup> Consequently, the Canadian legal framework criminalizes participation in more narrowly defined groups than does the UNTOC.*

In particular, Mr. Sigursteinsson referenced the following cases:

- *R v Lindsay*, 2004 OJ No 845
- *R. v Wagner*, 2008 ONSC No 669
- *R. v Jeffrey*, 2008 ONSC, 31 October 2008;
- *R. v Ward*, 2008 ONSC, 12 December 2008;
- *R. v Pink*, 2008 ONSC 12 December 2008;
- *R. v Drecic*, 2009 ONSC 8 October 2009;

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<sup>20</sup> UNTOC, Art. 2(c).

<sup>21</sup> *R v Lindsay*, 2004 OJ No 845 <[https://sherloc.unodc.org/cld/case-law-doc/criminalgroupcrimetype/can/2009/r.\\_v.\\_lindsay.html?lng=en&tmpl=sherloc](https://sherloc.unodc.org/cld/case-law-doc/criminalgroupcrimetype/can/2009/r._v._lindsay.html?lng=en&tmpl=sherloc)> accessed 31 January 2022; *R. v Wagner*, 2008 ONSC No 669 <[https://sherloc.unodc.org/cld/case-law-doc/drugcrimetype/can/2006/r.\\_v.\\_wagner.html?lng=en&tmpl=sherloc](https://sherloc.unodc.org/cld/case-law-doc/drugcrimetype/can/2006/r._v._wagner.html?lng=en&tmpl=sherloc)> accessed 31 January 2022; *R. v Jeffrey*, 2008 ONSC, 31 October 2008; *R. v Ward*, 2008 ONSC, 12 December 2008; *R. v Pink*, 2008 ONSC 12 December 2008; *R. v Drecic*, 2009 ONSC 8 October 2009 <[https://sherloc.unodc.org/cld/uploads/res/case-law-doc/drugcrimetype/can/hells\\_angels\\_motorcycle\\_club\\_html/Drecic\\_Reasons\\_for\\_Judgment.pdf](https://sherloc.unodc.org/cld/uploads/res/case-law-doc/drugcrimetype/can/hells_angels_motorcycle_club_html/Drecic_Reasons_for_Judgment.pdf)> accessed 31 January 2022; *R. v Bodenstein*, 2010 ONSC 13 July 2010 <[https://sherloc.unodc.org/cld/case-law-doc/drugcrimetype/can/2010/r.\\_v.\\_bodenstein.html?lng=en&tmpl=sherloc](https://sherloc.unodc.org/cld/case-law-doc/drugcrimetype/can/2010/r._v._bodenstein.html?lng=en&tmpl=sherloc)> accessed 31 January 2022; *R. v O’Reilly*, 2017 QCCA 1283 <[https://sherloc.unodc.org/cld/case-law-doc/moneylaunderingcrimetype/can/2017/oreilly\\_v\\_r\\_2017\\_qcca\\_1286.html?lng=en&tmpl=sherloc](https://sherloc.unodc.org/cld/case-law-doc/moneylaunderingcrimetype/can/2017/oreilly_v_r_2017_qcca_1286.html?lng=en&tmpl=sherloc)> accessed 31 January 2022; *R. v Howe*, 2018 NSSC 156 (CanLII) <<https://canlii.ca/t/ht387>> accessed 31 January 2022.

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- *R. v. Bodenstein*, 2010 ONSC 13 July 2010;
- *R. v. O’Reilly*, 2017 QCCA 1283; and,
- *R. v. Howe*, 2018 NSSC 156.

Another respondent suggested that the definition of criminal organization (and related provisions) are rarely used in British Columbia, and when used, they are targeting street-level gangs, rather than the transnational organized crime groups for whom it was intended (see, for example, [R. v. Payne, 2007 BCCA 541](#) as compared to [British Columbia \(Director of Civil Forfeiture\) v. Angel Acres Recreation and Festival Property Ltd., 2021 BCCA 128](#)).

**Q4: If your domestic law requires an act in furtherance of the agreement, has your country so informed the Secretary-General of the United Nations, as required under article 5, paragraph 3?**

No response required.

**Q5: Does your country’s legal framework establish as criminal offences the acts of organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group (art. 5, para. 1 (b))?**

Yes, yes in part, no

### Article 6: Criminalization of the Laundering of the Proceeds of Crime

**Q6: Is the laundering of proceeds of crime criminalized under your country’s legal framework, in accordance with Article 6, paragraph 1 (a), of the Convention?**

Yes, yes in part, no

Yes, money laundering is criminalized. However, improvements are required in several areas to close loopholes that have been heavily exploited. This is currently the subject of the [Cullen Commission of Inquiry into Money Laundering in BC](#). The Commissioner’s final report is due in May 2022. The submissions of various experts are available on the website, under “Hearings” and “Exhibits”. Of particular interest in respect of this question will be expert reports on lawyers’ trust accounts, realtors and real estate transactions, accountants and notaries, and the luxury markets. According to a respondent, one could argue that Canada may not fully comply with Article 6 of the Convention because of “the current exemption of trusts managed by lawyers from reporting requirements under the PCMLTFA,” something which is a huge problem that has been identified by FATF and others.

Section 462.31 of the *Criminal Code* makes it an offence to use, transfer, send, transport, transmit, alter, dispose of or otherwise deal with any property or proceeds of any property – with intent to conceal or convert that property or proceeds – knowing or believing that all or part of the property or proceeds was

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obtained or derived from a designated criminal offence. This also applies to acts or omissions taking place outside of Canada, so long as the conduct would have constituted a designated predicate offence.

Section 462.3 of the *Criminal Code* defines "designated offence" to include any potentially indictable offence. The maximum penalty is ten years imprisonment. Sections 354 and 355 of the *Criminal Code* make it an offence to possess property or proceeds derived from an indictable offence. Provisions noted below regarding aiding and abetting, attempt and conspiracy apply to money laundering.

**Q7: Are the acquisition, possession and use of property known at the time of receipt to be the proceeds of crime criminalized under your country's legal framework (art. 6, para. 1 (b) (i))?**

Yes, yes in part, no

Yes, the acquisition, possession, and use of property known at the time of receipt to be the proceeds of crime is criminalized in Canada.

**Q8: Are participation in, association with and conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of a money-laundering offence criminalized under your country's legal framework (art. 6, para. 1 (b) (ii))?**

Yes, yes in part, no

Yes, as mentioned previously, conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of a money-laundering offence is also criminalized (complicity before or after the fact). See offence under subsection 462.31(1) of the *Criminal Code*:

**462.31 (1)** Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that, or being reckless as to whether, all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of: (a) the commission in Canada of a designated offence; or (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.

See section 487.04 of the *Criminal Code* for lists of primary and secondary designated offences.

See also, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. 2000, c. 17, s. 12001, c. 41, s. 48.

**Q9: If the answer to question 6, 7 or 8 is “Yes”, are all serious crimes and the offences covered by the Convention and the Protocols to which your State is a party predicate offences under your domestic law to the offence of money-laundering (art. 6, paras. 2 (a) and (b))?**

Yes, no

Yes. See section 487.04 of the Criminal Code for lists of primary and secondary designated offences.

**Q10: Please provide information on the scope of predicate offences set out in your domestic law, including any list of specific predicate offences that may be set out by your domestic law; indicate, for example, the relevant acts and article numbers (art. 6, para. 2 (b)).**

See section 487.04 of the *Criminal Code* for lists of primary and secondary designated offences.

**Q11: Does your country's legal framework include predicate offences committed outside your country's jurisdiction (art. 6, para. 2 (c))?**

Yes, yes in part, no

**(a) If the answer is “Yes” or “Yes, in part”, please describe the circumstances under which a predicate offence committed in a foreign jurisdiction may be recognized pursuant to your domestic law.**

See definition above. Section 462.31 of the *Criminal Code* makes it an offence to use, transfer, send, transport, transmit, alter, dispose of or otherwise deal with any property or proceeds of any property – with intent to conceal or convert that property or proceeds – knowing or believing that all or part of the property or proceeds was obtained or derived from a designated criminal offence. This also applies to acts or omissions taking place outside of Canada, so long as the conduct would have constituted a designated predicate offence.

**Q12: Has your country furnished copies of its laws that give effect to article 6 and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations (art. 6, para. 2 (d))?**

**(a) If yes, please provide a link.**

**(b) If not, please provide a link.**

This question is not included in the ICCLR consultation as the government of Canada is well aware of whether or not it has furnished copies of its laws.



## Article 8: Criminalization of Corruption

Note that Canada is party to the United Nations Convention against Corruption and does not have to respond to these questions since it already participated in the review of its implementation of that convention.

**Q13: Is the conduct described in article 8, paragraph 1 (a), criminalized in your country's legal framework?**

Yes, yes in part, no

**(a) Please explain briefly.**

**Q14: Is the conduct described in article 8, paragraph 1 (b), criminalized in your country's legal framework?**

Yes, yes in part, no

**(a) Please explain briefly.**

Bribery of public officials is made a criminal offence in various provisions of the *Criminal Code*, depending on the form of the bribery transaction, and includes both active and passive bribery. The definition of official contained in section 118 is broad in scope, and includes persons who perform a "public duty." Bribery of foreign public officials is addressed in the [Corruption of Foreign Public Officials Act](#) (CFPOA). The CFPOA also makes it possible to prosecute a conspiracy or attempt to commit such bribery, as well as aiding and abetting in committing bribery, an intention in common to commit bribery, and counselling others to commit bribery. Amendments to the CFPOA were adopted in 2013 that, among other things, expanded jurisdiction, increased penalties and will eliminate facilitation payments as an exception to the prohibition on bribery.

**Q15: Is the form of corruption described in article 8, paragraph 1, involving a foreign public official or international civil servant criminalized in your country's legal framework (art. 8, para. 2)?**

Yes, yes in part, no

**(a) If appropriate, please explain briefly.**

Yes, that criminalization exists in Canadian law. Note also that, in December 1997, Canada signed the OECD Convention and Parliament passed the CFPOA. See previous response.

**Q16: Is any other form of corruption established as a criminal offence in your country's legal framework (art. 8, para. 2)?**

Yes, **yes in part**, no

**(a) If appropriate, please explain briefly.**

Embezzlement is addressed in Sections 322, 334, 336 and 380 of the *Criminal Code* covering theft and fraud offences. These provisions address embezzlement in both public and private sectors. Section 122 of the *Criminal Code* criminalizes "fraud or a breach of trust" by a public official.

**Q17: Is participation as an accomplice in offences established in accordance with article 8 criminalized under your country's legal framework (art. 8, para. 3)?**

Yes, no

Complicity before or after the fact is also criminalized for all these offences.

### **Article 9: Measures Against Corruption**

**Q18: Has your country adopted measures to promote integrity and to prevent, detect and punish the corruption of public officials (art. 9, para. 1)?**

Yes, no

**If the answer is "Yes," please specify the measures implemented to promote integrity and prevent, detect, and punish the corruption of public officials**

Yes, such measures have been adopted. It should be noted also that civil forfeiture regimes are in place in many Canadian provinces. One respondent also mentioned that the Canadian Centre of Excellence for Anti-Corruption has been established in Ottawa, as a joint initiative of the Royal Canadian Mounted Police and the University of Ottawa.

**Q19: Has your country taken measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions (art. 9, para. 2)?**

Yes, no

**(a) If the answer is "Yes", please specify the measures implemented to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions.**

One respondent referenced the “scandal” surrounding a case involving a large international engineering firm (SNC Lavalin) in 2019: “One of the ways Canada has improved its response to corruption is in relation to broadening the distance between politicians and the prosecution”. (...) In light of that scandal and subsequent to independent investigations, there is now more transparency between prosecution and political decision-making”.

### Article 10: Liability of Legal Persons

**Q20: Is the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences covered by the Convention and the Protocols to which your State is a party established under your country's legal framework (art. 10)?**

Yes, yes in part, no

**(a) If the answer is “Yes, in part” or “No”, please explain.**

Yes, corporations are already subject to the *Criminal Code*, including serious offences. The *Criminal Code* definition (section 2) of “everyone”, “person”, “owner” includes “public bodies, bodies corporate, societies, companies”. Section 22.2 of the *Criminal Code* extends liability to legal persons, including public bodies, for offences committed on their behalf by their senior officers or representatives. These officers and representatives are further defined in Section 2. Such liability does not prejudice the criminal liability of natural persons who commit the same offence.

**Q21: If the answer is “Yes”, is this liability:**

- |                     |                    |
|---------------------|--------------------|
| (a) Criminal?       | Yes, no            |
| (b) Civil?          | Yes, no            |
| (c) Administrative? | Yes, no (possibly) |

There is a criminal liability, but it can also lead to a civil liability for the legal entity.

**Q22: What kind of sanctions are provided for in your country's legal framework to implement article 10, paragraph 4, bearing in mind article 11, paragraph 6, of the Convention?**

Punishment includes fines or other monetary penalties. In addition to the imposition of a fine, a sentencing court may also make a probation order against an organization, which may include conditions (Section 732.1).

## Article 15: Jurisdiction

**Q23: Are there any circumstances under which your country does not have jurisdiction over offences established in accordance with articles 5, 6, 8 and 23 of the Convention and the Protocols to which it is a party committed in its territory (art. 15, para. 1 (a))?**

Yes, **no**

**If the answer is “Yes”, please specify the circumstance(s) under which your country does not have jurisdiction over the offences committed in its territory.**

Some respondents believe that there were no such circumstances. However, one respondent offered a detailed explanation for a different view:

*To be more precise, the answer is "sometimes." "Committed in its territory" in international law has two meanings: 1) committed completely within Canada's territory (territorial jurisdiction); or 2) committed partially within Canada's territory and partially outside, but sufficiently linked to Canada's territory to say that Canada has territorial jurisdiction ("extended" or "qualified" territorial jurisdiction. Under [R. v. Libman](#), Canada can assert territorial jurisdiction where the offence in question has a "real and substantial link" to Canada and where "the interests of international comity" would not be offended. Properly applied, this should allow for Canada to have jurisdiction over offences that are committed only partially in Canada. The issue is that the Crown and the courts struggle with the application of the Libman test. E.g. [R. v. Oler, 2018 BCCA 323](#), and see generally Currie & Rikhof, *International & Transnational Criminal Law*, 3d ed (2020), chapter 8. Moreover, it has been documented that Canadian police, prosecutors and government lawyers do not share a common understanding of how Libman works; see "Libman at 25, Or, Canada and Qualified Territoriality: Do We Understand Jurisdiction Yet?", in C. Carmody, ed., *Is Our House in Order? Canada's Implementation of International Law* (Montreal/Kingston: McGill-Queen's University Press, 2010), 199-224. So while in principle Canada has jurisdiction over these offences, in practice it has trouble exercising it. The solution is to amend s. 6(2) of the Criminal Code to more thoroughly and accurately reflect the principle of qualified territoriality, and to ensure that offences in related federal criminal legislation are treated similarly. Note: this is related to, but separate from, jurisdiction under art 15(2)(c) of the Convention.*

**Q24: Does your country have jurisdiction to prosecute the offences established in accordance with Articles 5, 6,8, and 23 of the Convention and the Protocols to which it is party when the offences are committed on board a vessel flying its flag or an aircraft registered under its laws (art. 15, para 1(b))?**

One respondent explained that Canada has jurisdiction to prosecute all federal offences committed on board ship flying its flag under s. 477.1(c) of the *Criminal Code*, because of the broad definition of "offence" that

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applies to that part of the *Code*. Under s. 7(1) of the *Criminal Code*, Canada has jurisdiction over "offences" that take place on board a registered aircraft. However, it is not clear whether "offence" in the context of s. 7 incorporates all of the offences provided for in arts 5, 6, 8 and 23 of the Convention. For example, the definition of "offence-related property" in s 2 of the Code specifies that it includes offences under the CFPOA, but "offence" under s. 7 does not provide similarly.

**Q25: Does your country's legal framework allow for the following extraterritorial jurisdictional bases:**

- (a) Jurisdiction to prosecute the offences established in accordance with articles 5, 6, 8 and 23 of the Convention and the Protocols to which your country is a party when committed outside its territory by its nationals (or stateless persons who have habitual residence in the country) (art. 15, para. 2 (b))?**

Yes, **no**

However, the answer is not completely "no" since section 135 of the *Immigration and Refugee Protection Act* provides for essentially universal jurisdiction over human trafficking offences.

- (b) Jurisdiction to prosecute the offences established in accordance with articles 5, 6, 8 and 23 of the Convention and the Protocols to which your country is a party when committed outside its territory against its nationals (art. 15, para. 2 (a))?**

Yes, **no**

- (c) Jurisdiction to prosecute participation in an organized criminal group that occurred outside its territory with a view to the commission of a serious crime (art. 2, para. (b)) within its territory (art. 15, para. 2 (c) (i))?**

Yes, **no**

Again, "no" is not a complete answer. If the participation in the organized criminal group could be said to have a "real and substantial connection" to Canada – which depends on its facts – then the answer would be yes, per the *R. v. Libman* test mentioned previously.

- (d) Jurisdiction to prosecute ancillary offences related to money-laundering offences committed outside its territory with a view to the commission of the laundering of proceeds of crime in its territory (art. 15, para. 2 (c) (ii))?**

Yes, **no**

At least, "yes" vis-a-vis conspiracy, under s. 465(4) of the Code.

## Article 23: Criminalization of Obstruction of Justice

**Q26: Is obstruction of justice in relation to offences covered by the Convention and the Protocols to which your country is a party criminalized under your country's legal framework, in accordance with article 23 of the Convention?**

Yes, yes in part, no

**Please explain briefly.**

See section 139.3 of the *Criminal Code* (Obstructing Justice), which thoroughly criminalizes obstruction of justice. It criminalizes the wilful attempt "in any manner...to obstruct, pervert, or defeat the course of justice" and includes any act that dissuades or attempts to dissuade a person, through threats, bribes or other means, from giving evidence. Section 423.1 prohibits any act that interferes with the administration of justice against a "justice system participant." This term is defined in Section 2, and applies broadly, including attorneys, judges, jurors, peace officers and law enforcement, judicial administration and other public sector employees.

Section 129 of the *Criminal Code* makes it a crime to resist or obstruct a public officer or a peace officer in the performance of official duties. In addition, it is a crime to fail, without reasonable excuse, to assist a peace officer in making an arrest or preserving the peace.

### **Criminalization: Cases and Judgements**

**Q27: States are invited to provide examples, relevant cases or judgments relating to successful implementation and enforcement for each of the criminal offences reviewed above.**

Some examples (cases) are mentioned in the above responses.

### **Difficulties Encountered**

**Q28: Has your country encountered any difficulties or challenges in implementing the Convention?**

Yes, no

The most frequent difficulties encountered related to inter-agency coordination (as well as international cooperation) and the reluctance of practitioners to use existing provisions of the law. The lack of systematic enforcement, for a variety of reasons, is mostly responsible for the poor results in fighting organized crime in all its forms.

**(a) If the answer is "Yes", please specify:**

- Problems with the formulation of legislation

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- Need for further implementing legislation
- Reluctance of practitioners to use existing legislation
- Insufficient dissemination of existing legislation
- Limited inter-agency coordination
- Specificities of the legal system
- Competing priorities for the national authorities
- Limited resources for the implementation of existing legislation
- Limited cooperation with other States
- Lack of awareness of the existing legislation
- Other issues (please specify)

### Need for Technical Assistance

**Q29: Does your country require technical assistance to overcome difficulties in implementing the Convention?**

Yes, **no**

**Q30: If the answer is “Yes”, please specify the type of technical assistance needed.**

Some respondents thought that Canada had provided technical assistance to other states, but were unable to provide specific examples.

**Q31: Which of the following forms of technical assistance, if available, would assist your country in fully implementing the provisions of the Convention? In identifying the forms of technical assistance as listed below, please also indicate for which provisions of the Convention such assistance would be needed.**

- Legal advice
- Legislative drafting support
- Model legislation or regulations
- Model agreements
- Standard operating procedures
- Development of strategies, policies or action plans
- Dissemination of good practices or lessons learned
- Capacity-building through the training of practitioners or trainers
- On-site assistance by a mentor or relevant expert
- Institution-building or the strengthening of existing institutions
- Prevention and awareness-raising
- Technological assistance
- Establishment or development of information technology infrastructure, such as databases or communications tools

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- Measures to enhance regional cooperation
- Measures to enhance international cooperation
- Other assistance (please specify)

Like question 30, no respondents pointed to any specific areas in which Canada needs technical assistance.

**Q32: Please provide any other information that you believe is important for the Conference of the Parties to the United Nations Convention against Transnational Organized Crime to consider regarding aspects of, or difficulties in, the implementation of the Convention other than those mentioned above.**

No additional comments were provided by participants.



## Human Trafficking Questionnaire

### Article 3: Use of Terms

**Q33: Is trafficking in persons, when committed intentionally, criminalized under your country’s legal framework (art. 5, para. 1, in conjunction with art. 3)?**

Yes, yes in part, no

**(a) If yes, please cite the applicable laws and/or other measures, including the applicable sanctions for this offence.**

In Canada’s legal framework, human trafficking is an offence under criminal and immigration law:

Human Trafficking Provisions in the <i>Criminal Code of Canada</i>		
Offence	Section of the <i>Criminal Code</i>	Sanctions
<p><u>Trafficking in persons</u></p> <ul style="list-style-type: none"> <li>• Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control or direction or influence over the movements of a person, for the purpose of exploitation them or facilitating their exploitation is guilty of an indictable offence.</li> </ul>	279.01	<ul style="list-style-type: none"> <li>• Imprisonment for life and a minimum punishment of imprisonment for a term of five years if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence; or</li> <li>• Imprisonment for a term of not more than 14 years and a minimum punishment of imprisonment for a term of four years in any other case.</li> </ul>
<p><u>Trafficking of a person under the age of 18</u></p> <ul style="list-style-type: none"> <li>• Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person under the age of eighteen years, or exercises control, direction or influence over the movements of a person under the age of eighteen years, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence.</li> </ul>	279.011	<ul style="list-style-type: none"> <li>• Imprisonment for life and a minimum punishment of imprisonment for a term of six years if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence; or</li> <li>• Imprisonment for a term of not more than fourteen years and a minimum punishment of imprisonment for a term of five years, in any other case.</li> </ul>

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<p><u>Material benefit – trafficking</u></p> <ul style="list-style-type: none"> <li>• Every person who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 279.01(1), is guilty of an indictable offence.</li> </ul>	<p>279.02 (1)</p>	<ul style="list-style-type: none"> <li>• An indictable offence and liable to imprisonment for a term of not more than 10 years; or</li> <li>• An offence punishable on summary conviction.</li> </ul>
<p><u>Material benefit – trafficking of a person under the age of 18</u></p> <ul style="list-style-type: none"> <li>• Everyone who receives a financial or other benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 279.011(1), is guilty of an indictable offence.</li> </ul>	<p>279.02 (2)</p>	<ul style="list-style-type: none"> <li>• An indictable offence and liable to imprisonment for a term of not more than 14 years and a minimum punishment of imprisonment for a term of two years.</li> </ul>
<p><u>Withholding or destroying documents – trafficking</u></p> <ul style="list-style-type: none"> <li>• Every person who, for the purpose of committing or facilitating an offence under subsection 279.01(1), conceals, removes, withholds or destroys any travel document that belongs to another person or any document that establishes or purports to establish another person’s identity or immigration status – whether or not the document is of Canadian origin or is authentic – is guilty of an indictable offence.</li> </ul>	<p>279.03 (1)</p>	<ul style="list-style-type: none"> <li>• An indictable offence and liable to imprisonment for a term of not more than five years; or</li> <li>• An offence punishable on summary conviction.</li> </ul>
<p><u>Withholding or destroying documents – trafficking of a person under 18 years</u></p> <ul style="list-style-type: none"> <li>• Everyone who, for the purposes of committing or facilitating an offence under subsection 279.011(1), conceals, removes, withholds or destroys any travel document that belongs to another person or any document that establishes or purports to establish another person’s identity or immigration status – whether or not the document is</li> </ul>	<p>279.03 (2)</p>	<ul style="list-style-type: none"> <li>• An indictable offence and liable to imprisonment for a term of not more than 10 years and a minimum punishment of imprisonment for a term of one year.</li> </ul>

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of Canadian origin or is authentic – is guilty of an indictable offence.		
<p><u>Exploitation</u></p> <ul style="list-style-type: none"> <li>For the purposes of sections 279.01 to 279.03, 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.</li> </ul>	279.04 (1)	<ul style="list-style-type: none"> <li>N/A</li> </ul>
<p><u>Exploitation (Factors)</u></p> <ul style="list-style-type: none"> <li>In determining whether an accused exploits another person under subsection (1), the Court may consider, among other factors, whether the accused             <ul style="list-style-type: none"> <li>(a) Used or threatened to use force or another form of coercion;</li> <li>(b) Used deception; or</li> <li>(c) Abused a position of trust, power or authority.</li> </ul> </li> </ul>	279.04 (2)	<ul style="list-style-type: none"> <li>N/A</li> </ul>
<p><u>Exploitation (Organ or tissue removal)</u></p> <ul style="list-style-type: none"> <li>For the purposes of sections 279.01 to 279.03, a person exploits another person if they cause them, by means of deception or the use or threat of force or of any other form of coercion, to have an organ or tissue removed.</li> </ul>	279.04 (3)	<ul style="list-style-type: none"> <li>N/A</li> </ul>
<p><u>Offence in relation to trafficking in persons</u></p> <ul style="list-style-type: none"> <li>Notwithstanding anything in this Act or any other Act, every one who, outside of Canada, commits an act or omission that if committed in Canada would be</li> </ul>	7(4.11)	<ul style="list-style-type: none"> <li>N/A</li> </ul>

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<p>an offence against section 279.01, 279.02 or 279.03 shall be deemed to commit that act or omission in Canada if the person who commits the act or omission is a Canadian citizen or permanent resident within the meaning of subsection 2(1) of the <i>Immigration and Refugee Protection Act</i>.</p>		
---	--	--

In Canada, human trafficking is also prohibited under the *Immigration and Refugee Protection Act* (IRPA) as follows:

<b>Human Trafficking Provisions in the <i>Immigration and Refugee Protection Act</i></b>	
<b>Offence</b>	<b>Section of IRPA</b>
<p><u>Trafficking in persons</u></p> <ul style="list-style-type: none"> <li>• 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.</li> </ul>	118 (1)
<p><u>Definition of <i>organize</i></u></p> <ul style="list-style-type: none"> <li>• For the purpose of subsection (1), <i>organize</i>, with respect to persons, includes their recruitment or transportation and, after their entry into Canada, the receipt or harbouring of those persons.</li> </ul>	118 (2)
<p><u>Penalties</u></p> <ul style="list-style-type: none"> <li>• A person who contravenes section 118 is guilty of an offence and liable on conviction by way of indictment to a fine of not more than \$1,000,000 or to life imprisonment, or to both.</li> </ul>	120
<p><u>Aggravating factors</u></p> <p>The court, in determining the penalty to be imposed under section 120, shall take into account whether</p> <ol style="list-style-type: none"> <li>(a) Bodily harm or death occurred, or the life or safety of any person was endangered, as a result of the commission of the offence;</li> <li>(b) The commission of the offence was for the benefit of, at the direction of or in association with a criminal organization;</li> <li>(c) The commission of the offence was for profit, whether or not any profit was realized; and</li> <li>(d) A person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence.</li> </ol>	121
<p><u>Additional offences</u></p> <p>Of note is that Millar and O’Doherty (2020) found that other immigration provisions, specifically sections 117, 122, 123, and 124-128 of IRPA, have been used to prosecute immigration trafficking, citing two particular cases, <i>Ng</i> and <i>Orr</i>, as examples (p. 61).</p>	

**Q34: If the answer to question 33 is “Yes, in part” or “No”, please specify how trafficking in persons is treated under your country’s legal framework.**

Please refer to the above tables for the various criminal and immigration provisions.

**Q35: If the answer to question 33 is “Yes”, is trafficking in persons treated as a criminal offence in your country, in accordance with article 3, paragraph (a), of the Protocol (combination of three elements: action, means and purpose of exploitation)?**

Yes, **no**

**(a) Please explain.**

According to a civil society report by Millar & O’Doherty (2020), neither Canada’s criminal nor immigration anti-trafficking laws fully align with the definition of human trafficking pursuant to Article 3(a) of the Trafficking in Persons Protocol, in part because Canada defines human trafficking more broadly than the internationally agreed legal definition.

Whereas the Protocol requires the presence of all three constituent elements – *the act, means, and purpose* – for an act to legally constitute human trafficking, Canadian laws only require two of the three elements. In the *Criminal Code*, for instance, the *means* element is not required, although the court may consider, in determining if exploitation occurred, whether the accused (i) used or threatened to use force or another form of coercion; (ii) used deception; or (iii) abused a position of trust, power or authority. In the *Immigration and Refugee Protection Act* (IRPA), the *purpose* element is treated as an aggravating circumstance, rather than as part of the core offence.

Under section 279.01, Canada criminalizes the *act* (“recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control or direction or influence over the movements of a person”) and the *purpose* (“for the purpose of exploiting them or facilitating their exploitation”) of human trafficking, but the *means* is not a core offence element, although section 279.04 (2) instructs that the court may consider the means by which trafficking is facilitated. Where the victim is under the age of eighteen, the international legal definition deems the *means* element irrelevant, and thus section 279.011 of the *Criminal Code* appears consistent with the Human Trafficking Protocol. However, the absence of coercion and other means as a constituent and core element of Canada’s criminal legal definition of trafficking in persons pursuant to 279.01 creates challenges in distinguishing human trafficking from migrant smuggling and may be viewed as inconsistent with the intentions of the Human Trafficking Protocol.

Similarly, the additional language of “exercises control or direction or influence over the movements of a person” in section 279.01 (and 279.011) has expanded the ways in which the *act* element can be established, which may have contributed to its “overwhelming” use to prosecute domestic sex trafficking rather than non-sexual labour trafficking (Millar & O’Doherty, 2020, p. 60). Millar & O’Doherty (2020) caution that “the additional phrasing [of ss. 279.01 and 279.011] also subtly shifts the essence of human trafficking from unlawfully recruiting or moving a person, as seems to have been intended by the *UN Protocol* definition,

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to simply controlling (or directing or influencing) a person and their movement" (p. 61). In this regard, the researchers further observe "the appellate courts are adopting a comparatively expansive interpretation of exercising direction, control, or influence over a complainant's movement and that the courts interchangeably use trafficking *and* prostitution/commodification jurisprudence in interpreting this offence element in both trafficking and non-trafficking cases" (p. 90).

Canada's criminal human trafficking provisions further differ from the international legal definition in the Human Trafficking Protocol insofar as section 279.04 requires Crown prosecutors to prove that the accused reasonably caused the victim to fear for their safety or the safety of others. Compared to the Human Trafficking Protocol, Canada sets a higher legal standard in establishing whether exploitation occurred by requiring the fear of safety test, while also expanding the scope to potentially include psychological or emotional forms of exploitation. In the Human Trafficking Protocol, minimum forms of exploitation are delineated, including "exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs", some of which are absent from Canada's criminal definition of human trafficking.

Additionally, as noted above, Canada prohibits cross-border human trafficking under section 118 of IRPA, which instructs:

Under section 118 of IRPA, the *act* ("knowingly organizing the coming into Canada") and the *means* ("abduction, fraud, deception or use of threat of force or coercion") are required elements; however, *exploitation* is not necessary to legally constitute human trafficking. Instead, "sexual exploitation" represents an aggravating factor that the court, in determining the penalty to be imposed, shall take into account. In particular, section 121 of IRPA lists the aggravating factors as follows:

- (a) Bodily harm or death occurred, or the life or safety of any person was endangered, as a result of the commission of the offence;
- (b) The commission of the offence was for the benefit of, at the direction of or in association with a criminal organization;
- (c) The commission of the offence was for profit, whether or not any profit was realized; and
- (d) A person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence.

Absent from Canada's definition are the minimal forms of exploitation, as delineated in the Human Trafficking Protocol, including "the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs." Equally notable is that Canada defines the *act* of "knowingly organizing the coming into Canada" as the "recruitment or transportation and, after their entry into Canada, the receipt or harbouring of those persons", which excludes "transferring" in line with the Human Trafficking Protocol. Similarly, the *means* element of Canada's definition excludes "the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person", which is part of the international legal definition of human trafficking.

**Q36: If the answer to question 33 is “Yes”, are the following actions of trafficking in persons criminalized in your country (art. 3, para. (a))?**

- |                                    |   |
|------------------------------------|---|
| (a) Recruitment                    | Yes or no ( <i>IRPA &amp; Criminal Code</i> )   |
| (b) Transportation                 | Yes or no ( <i>IRPA &amp; Criminal Code</i> )   |
| (c) Transfer                       | Yes or no ( <i>Criminal Code</i> )  |
| (d) Harboring                      | Yes or no ( <i>IRPA &amp; Criminal Code</i> )   |
| (e) Receipt of persons             | Yes or no ( <i>IRPA &amp; Criminal Code</i> )   |
| (f) Other actions, please specify. | Pursuant to section 279.01 of the <i>Criminal Code</i> , Canada also lists “holds,” “conceals,” and “exercises control, direction or influence over the movement of a person” as acts that can help constitute human trafficking. |

**Please provide further details, if needed.**

N/A

**Q37: If the answer to question 33 is “Yes”, do the means of trafficking in persons consist of any of the following (art. 3, para. (a))?**

- |  |   |
|--|---|
| (a) Threat or the use of force or other forms of coercion  | Yes or no ( <i>IRPA &amp; considered under CC</i> ) |
| (b) Abduction  | Yes or no ( <i>IRPA</i> )                           |
| (c) Fraud  | Yes or no ( <i>IRPA</i> )                           |
| (d) Deception  | Yes or no ( <i>can be considered under CC</i> )     |
| (e) Abuse of power   | Yes or no ( <i>can be considered under CC</i> )     |
| (f) Abuse of position of authority   | Yes or no ( <i>can be considered under CC</i> )     |
| (g) The giving or receiving of payment or benefits to achieve the consent of a person having control over another person | Yes or <b>no</b>                                    |
| (h) Other means, please specify.   | N/A   |
| (i) Please provide further details, if needed.   | N/A   |

**Q38: If the answer to question 33 is “Yes”, does the purpose of exploitation include, at a minimum, any of the following (art. 3, para. (a))?**

- |  |           |
|--|-----------|
| (a) The exploitation of the prostitution of others or other forms of sexual exploitation | Yes or no |
|--|-----------|

- |  |           |
|--|-----------|
| (b) Forced labour or services                  | Yes or no |
| (c) Slavery or practices similar to slavery    | Yes or no |
| (d) Servitude                                  | Yes or no |
| (e) The removal of organs                      | Yes or no |
| (f) Other purposes, please specify.            | N/A       |
| (g) Please provide further details, if needed. | N/A       |

**Q39: Does your country ensure that, when the means set forth in article 3, paragraph (a), of the Protocol have been established, the consent of the victim to the intended exploitation is irrelevant (art. 3, para. (b))?**

Yes or no

**Please explain.**

Subsections 279.01(2) and 279.011(2) of Canada's *Criminal Code* state "[n]o consent to the activity that forms the subject-matter of a charge under subsection (1) is valid." In other words, no one can legally consent to being human trafficked in Canada.

### **Article 5: Criminalization**

**Q40: Does your country's legal framework criminalize trafficking in children (recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation) even where it does not involve any of the means set forth in article 3, paragraph (a), of the Protocol (art. 3, para. (c))?**

Yes or no

**(a) If yes, please cite the applicable laws and/or other measures, including the applicable sanctions for this offence.**

As referenced above, trafficking in children is criminalized in Canada pursuant to section 279.011 of the *Criminal Code*, according to which:

#### **Trafficking of a person under the age of eighteen years**

**279.011 (1)** Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person under the age of eighteen years, or exercises control, direction or influence over the movements of a person under the age of eighteen years, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable

**(a)** to imprisonment for life and to a minimum punishment of imprisonment for a term of six years if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence; or

**(b)** to imprisonment for a term of not more than four-teen years and to a minimum punishment of imprisonment for a term of five years, in any other case.



**Consent**

(2) No consent to the activity that forms the subject-matter of a charge under subsection (1) is valid.

Where the victim is under the age of eighteen, the international legal definition deems the *means* element irrelevant, and thus section 279.011 of the *Criminal Code* appears consistent with the Human Trafficking Protocol. However, some researchers have noted with concern the inclusion of the phrasing “or exercises control, direction or influence over the movements of a person under the age of eighteen years”, which are more fully explained above.

**Q41: Who is considered to be a “child” under your country’s legal framework (art. 3, para. (d)):**

Section 279.011(1) of the *Criminal Code* specifies that a child constitutes anyone under the age of eighteen.

**Q42: Subject to the basic concepts of your legal framework, does your country criminalize attempting to commit trafficking in persons (art. 5, para. 2 (a), in conjunction with art. 3)?**

Yes, yes in part, or no

(a) Please explain. If the answer is “Yes” or “Yes, in part”, please cite the applicable laws and/or other measures, including the applicable sanctions for this offence.

N/A

(b) If your answer is “No”, do the basic concepts of your legal framework prevent the adoption of measures to criminalize attempting to commit trafficking in persons?

The basic concepts of Canada’s legal framework do not prevent the adoption of measures to criminalize attempting to commit trafficking in persons.

**Q43: Does your country criminalize participating as an accomplice in trafficking in persons (art. 5, para. 2 (b), in conjunction with art. 3)?**

Yes, yes in part, or no

(a) Please provide further details, if needed.

In Canada’s legal framework, an “accomplice” is dealt with as a “party to the offence.”

If the answer is “Yes,” or “Yes, in part,” please cite the applicable laws and/or other measures, including the applicable sanctions for this offence.

N/A

**Q44: Does your country criminalize organizing or directing other persons to commit trafficking in persons (art. 5, para. 2 (c), in conjunction with art. 3)?**

Yes, yes in part, or no

In Canada's legal framework, organizing or directing other persons to commit trafficking is dealt with as a "party to the offence."

**If your answer is "Yes" or "Yes, in part", please cite the applicable laws and/or other measures, including the applicable sanctions for this offence.**

N/A

### **Criminalization: Cases and Judgements**

**Q45: States are invited to provide examples, relevant cases or judgments relating to successful implementation and enforcement for each of the criminal offences reviewed above.**

In line with Millar and O'Doherty's (2020) review of published human trafficking court cases in Canada from 2006-2018, the following are the 92 cases they verified. In their report, Millar and O'Doherty (2020) reference seminal or notable cases in relation to various issues, such as sentencing, appeals, or alleged abuse of process. All data (cases and case citations) are on file with the authors, who can be contacted directly to inquire about the case information or their findings.

<i>R v AA[1], 2012</i>	<i>R v Gashi [and Simnica], 2014</i>	<i>R v Moazami, 2014</i>
<i>R v AA[2], 2013</i>	<i>R v GKS, 2014</i>	<i>R v Nakpangi, 2008</i>
<i>R v LA, 2013</i>	<i>R v Hosseini, 2012</i>	<i>R v Ng, 2007</i>
<i>R v Beckford [and Stone], 2013</i>	<i>R v Johnson, 2011</i>	<i>R v Orr, 2013</i>
<i>R v Burton (Mark Anthony), 2013</i>	<i>R v KO-M, 2014</i>	<i>R v Salmon (Courtney), 2011</i>
<i>R v Burton (Tyrone), 2014</i>	<i>R v Ladha, 2013</i>	<i>R v Salmon (Gregory), 2014</i>
<i>R v Byron, 2013</i>	<i>R v Lennox, 2008</i>	<i>R v St. Vil, 2008</i>
<i>R v Domotor [and Kolompar], 2012</i>	<i>R v Lynch, 2012</i>	<i>R v Tynes, 2010</i>
<i>R v Downey [and Thompson &amp; Roberts], 2009</i>	<i>Mataev c R, 2013</i>	<i>R v Urizar, 2010</i>
<i>R v Dzuazah, 2010</i>	<i>R v McCall, 2013</i>	<i>R v Vilutis, 2009</i>

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<i>R v Emerson, 2009</i>	<i>R v McFarlane, 2012</i>	<i>R v Williams, 2014</i>
<i>R v Estrella, 2011</i>	<i>R v McPherson, 2013</i>	<i>R v A. A. [3], 2017</i>
<i>R v D.A., 2017</i>	<i>R v K.G.A, 2019</i>	<i>R v N.A, 2017</i>
<i>R v Abara, 2018</i>	<i>R v Alexandre, 2016</i>	<i>R v Alexis-McLymont, 2017</i>
<i>R v Bright, 2015</i>	<i>R v Brown, 2017</i>	<i>R v Cain, 2017</i>
<i>R v Crosdale, 2018</i>	<i>R v Campbell-Ball, 2016</i>	<i>R v A.D., 2018</i>
<i>R v Dagg, 2015</i>	<i>R v Deiac, 2017</i>	<i>R v D'Souza, 2016</i>
<i>R v Evans, 2017</i>	<i>R v Flinestone, 2017</i>	<i>R v Gallone, 2017</i>
<i>R v Gibson-Skeir, 2016</i>	<i>R v Gray, 2018</i>	<i>R v H.H., 2015</i>
<i>R v Ibeagha, 2016</i>	<i>R v Jordan, 2018</i>	<i>R v Joseph, 2017</i>
<i>R v Leblanc, 2018</i>	<i>R v Leung, 2015</i>	<i>R v Lopez, 2018</i>
<i>R v Lucas-Johnson, 2018</i>	<i>R v M.M., 2018</i>	<i>R v Majjdalani, 2017</i>
<i>R v Masoudi, 2016</i>	<i>R v McGee, 2016</i>	<i>R v Mohsenipour, 2018</i>
<i>R v Moradi, 2016</i>	<i>R v Murenzi, 2018</i>	<i>R v T.Q.N., 2015</i>
<i>R v Ngoto, 2018</i>	<i>R v KO, 2018</i>	<i>R v Oliver, 2018</i>
<i>R v H.P., 2016</i>	<i>R v Purcell, 2018</i>	<i>R v Rasool, 2015</i>
<i>R v Rocker, 2018</i>	<i>R v Rye, 2018</i>	<i>R v A.S., 2016</i>
<i>R v (R.R.) S., 2015</i>	<i>R v Salmon, 2019</i>	<i>R v Sinclair, 2017</i>
<i>R v Surendran, 2015</i>	<i>R v Symonds, 2018</i>	<i>R v Turnbull, 2017</i>
<i>R v J.W, 2017</i>	<i>R v P.N.W., 2017</i>	<i>R v R.W., 2018</i>
<i>R v T.Y.W., 2016</i>	<i>R v Webber, 2018</i>	

### Difficulties Encountered

**Q44: Does your country encounter difficulties or challenges in implementing any provisions of the Trafficking in Persons Protocol relevant to cluster I?**

Yes or no

**(a) If the answer is "Yes," please explain.**

With one exception, all respondents indicated that Canada continues to encounter difficulties or challenges in implementing the pertinent provisions of the Human Trafficking Protocol.

### Need for Technical Assistance

**Q47: Does your country require technical assistance to implement the Protocol?**

**(a) If the answer is "Yes," please indicate the type of assistance required:**

- **Assessments of criminal justice responses to trafficking in persons**
- **Legal advice or legislative drafting support**
- **Model legislation, regulations or agreements**
- **Development of strategies, policies or action plans**
- **Good practices or lessons learned**
- **Capacity-building through the training of criminal justice practitioners and/or the training of trainers**
- **Capacity-building through awareness-raising among the judiciary**
- **On-site assistance by a relevant expert**
- **Institution-building or the strengthening of existing institutions**
- **Prevention and awareness-raising**
- **Technological assistance and equipment**
- **Development of data collection or databases**
- **Workshops or platforms to enhance regional and international cooperation**
- **Specialized tools, such as eLearning modules, manuals, guidelines and standard operating procedures.**
- **Other (please specify)**

Of the respondents who suggested that Canada still encounters difficulties in implementing the Protocol, a unanimous consensus emerged on the need for capacity building through the training of criminal justice practitioners, capacity building through awareness raising among the judiciary, prevention and awareness-raising, and the development of data collection or databases.

According to the Canadian Centre to End Human Trafficking, "[g]overnments were slow to implement the items identified above and are only recently putting them in place. While recent developments have been encouraging, they have come quite late after the adoption of the Protocol in Canada."

The Canadian Centre for Child Protection explained why it thinks Canada should devote further efforts to the "development of strategies, policies, or action plans" as follows:

*[O]nly some provinces have put in place legislation specific to human trafficking or created anti-trafficking strategies. Without similar legislation and strategies in all provinces and territories in Canada, traffickers will continue to have provinces and territories that are conducive to their "business activities". Ontario has the most cases of human trafficking. It may be easy to attribute this to the fact that it is a larger province and Toronto has a high number of cases overall, however it is clear that Ontario also has a dedicated strategy to combatting human trafficking which increases the likelihood of traffickers being apprehended and victims rescued. In the absence of similar strategies in the other provinces and territories, it is possible that they also face similar rates of human trafficking that have simply not been discovered.*

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While beyond the scope of question 47, respondents were also asked to comment on the kinds of assistance that Canada provided to other countries to facilitate the implementation of the Human Trafficking Protocol. Results show that there is a lack of knowledge on how Canada funds or delivers international capacity building or technical assistance projects, such as through voluntary contributions to UNODC or other UN agencies, or how Canadians are deployed abroad, whether as independent international consultants or on non-reimbursable loan agreements to international organizations by the Government of Canada, among other modalities. For its part, the Canadian Criminal Justice Association referenced the ongoing work by Professor Yvon Dandurand, who has “played a key role on behalf of the UN and ICCLR,” as well as Dr. John Winterdyk’s assistance in countries such as Namibia, Croatia, and Poland. Indeed, Canada is well regarded internationally as a key contributor of crime prevention and criminal justice projects, having deployed several prominent international consultants to assist other countries in implementing UNTOC and the Protocols thereto from 2002 onwards.

### **Q48: Is your country already receiving technical assistance in those areas?**

Yes or **no**

**If the answer is “Yes,” please specify the area of assistance and who is providing it.**

N/A

### **Q49: Please provide any other information that you believe is useful to understand your implementation of the Trafficking in Persons Protocol and information that is important for the Conference of the Parties to the United Nations Convention against Transnational Organized Crime to consider regarding aspects of, or difficulties in, the implementation of the Protocol.**

According to the Centre to End All Forms of Exploitation (CEASE), “it is really key that Canada and other countries seriously implement a range of strategies to decrease the demand that foster exploitation, especially of women and children.” With respect to labour trafficking, CEASE further noted “we create the demand and the market for cheap goods, which requires cheap labour. Canada can do more to educate Canadians that we participate unknowingly in labour exploitation.”

Another respondent, Le Phare des AffranchiEs, reiterated “the importance of consulting survivors of trafficking in the process of developing any bill, measure, parliamentary committee, action plan, etc. Their experiences represent an essential contribution to a better understanding of the complex realities and dynamics involved and are currently not sufficiently taken into account.”

## Migrant Smuggling Questionnaire

### Article 3: Use of Terms

**Q50: Is the smuggling of migrants criminalized under your domestic legal framework (art. 6, para. 1)?**

Yes, no

(a) If the answer is "No," please explain.

N/A

**If the answer is "Yes," is the smuggling of migrants defined in your country as a criminal offence, in accordance with article 3, paragraph (a)?**

Yes, it is.

**Q51: Is in particular the purpose of obtaining a "financial or other material benefit" a constituent element of the offence, in accordance with article 6, paragraph 1, in conjunction with article 3, paragraph (a), of the Protocol?**

Yes, no

Yes, it does. Canada had to amend its law to ensure that it conformed more directly to the definition of the Migrant Smuggling Protocol. Note that different countries have found different ways to include the question of material benefits into their legislation (see: UNODC, 2017).

Section 117 of IRPA was challenged in Canadian courts. It was alleged by the defendants that s. 117 of the IRPA was unconstitutionally overbroad and contrary to s. 7 of the *Canadian Charter of Rights and Freedoms*. They held that it captured a broader range of conduct and people than what was essential to achieve the government's objective. In accordance with the over-breadth doctrine, a law can be found invalid if it punishes constitutionally protected conduct or speech as well as unprotected conduct or speech without sufficient justification. The defendants argued that s. 117 was overbroad and therefore unconstitutional because the provision captures two hypothetical categories of people outside its stated purpose: specifically, that it may lead to the prosecution and conviction of family members or humanitarian workers assisting asylum-seekers to come to Canada for altruistic reasons (Para 38, [R. v. Appulonappa, 2013 BCSC 31](#); [Appulonappa BCCA 2014](#)).

Eventually, in the unanimous decision in [R. v. Appulonappa 2015 SCC 59](#), the Supreme Court found s. 117 to be inconsistent with s. 7 of the Charter as being overbroad in relation to permitting the potential prosecution, conviction and imprisonment of three categories of conduct: (1) humanitarian aid to undocumented entrants, (2) mutual aid amongst asylum-seekers, and (3) assistance to family entering without the required documents. In her reasons for the decision, Chief Justice McLachlin recognized that the purpose of s. 117 of the IRPA is to criminalize the smuggling of people into Canada in the context of organized crime only and a punitive goal of prosecuting persons with no connection to and no furtherance of organized crime was inconsistent with Parliament’s stated purpose of s. 117 and Canada’s international commitments because it criminalized conduct beyond the stated legislative objective. The Court found it unnecessary to consider the other legal arguments (s. 7 liberty argument on disproportionality) because they had already ruled s. 117 as being overbroad and inconsistent with s. 7 and that the inconsistency could not be saved by s. 1 (Crown did not meet the burden of providing a ‘demonstrable justification for inconsistencies with the Charter’). In allowing the appeal and seeking an appropriate remedy, the SCC read down s. 117 of the IRPA, as it was at the time of the alleged offences, as not applying to persons providing humanitarian aid to asylum-seekers or to asylum-seekers who provide each other mutual aid, including aid to family members, to bring it in conformity with the Charter.

**Q52: Can the presence of a “financial or other material benefit”, when appropriate, constitute an aggravating circumstance of the crime?**

**Yes, no**

**Please cite the applicable laws and/or other measures, including the applicable sanctions for this offence.**

*Immigration and Refuge Protection Act (IRPA), s. 121(c). (SC 2001, c. 27, s. 121 (sc)).*

### **Article 5: Criminal Liability of Migrants**

**Q53: Does your country’s legal framework make a distinction between the smuggling of migrants and trafficking in persons?**

**Yes, no**

Yes, Canada’s legal framework distinguishes clearly between the two offences. Human trafficking offences are defined in both Canada’s *Criminal Code* and IRPA. The problem, however, is that the legal definitions do not always accord with the reality of migrant smuggling and human trafficking. However, as respondents observed, the law may posit a distinction between illegal migrants, victims of human trafficking, and refugees, but in practice, migrant smuggling, facilitating the movement of refugees, and trafficking in persons often overlap.

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Given the clandestine nature of these activities and the complexities of migration flows, it is difficult to know to what degree certain smuggling and trafficking organizations overlap and merge their operations with one another. The distinction between human trafficking and migrant smuggling, which is never clear-cut, is blurred even further by the States' often dominant focus on immigration control and border protection.

Research has also shown that the complex dynamics of mixed migration makes it almost impossible for states receiving large flows of immigrants to effectively distinguish between refugees and migrants or between smuggled migrants and victims of human trafficking.

The legal distinction made in the protocols between migrant smuggling and human trafficking was originally based on the untested supposition that it would be feasible and practical for states to reflect that distinction in their laws and enforcement practices. More importantly, it was based on the belief that it would be possible, in practice, to reserve the claim of victimhood for victims of human trafficking and exclude from it victims of various forms of violence and abuse at the hands of migrant smugglers. It seems that these various assumptions stood up neither the test of time nor a confrontation with the reality of globalization (see also: Dandurand & Jahn, 2019).

**If the answer is "No," please explain.**

N/A

### Article 6: Criminalization

**Q54: Is producing, procuring, providing or possessing a fraudulent travel or identity document (as defined in art. 3, para. (c)) for the purpose of smuggling migrants criminalized under your country's legal framework (art. 6, para. 1 (b)), or as a related offence or offences?**

Yes, no

**If the answer is "Yes," please specify.**

These offences are created in s. 122 of the Immigration and Refugee Protection Act.

**Q55: Is enabling a person who is not a national of or a permanent resident in your country to remain in its territory without complying with the necessary requirements for legally remaining, by using the means referred to in question 54 or any other illegal means, criminalized under your domestic legislation (art. 6, para. 1 (c))?**

Yes, no



**Q56: Does your country's legal framework establish as a criminal offence the attempt to commit the offences referred to in questions 50, 54 and 55 (art. 6, para. 2 (a), in conjunction with art. 6, para. 1)?**

Yes, no

**(a) If the answer is "Yes", please cite the applicable laws and/or other measures, including the applicable sanctions.**

Yes, attempts to commit these offences are also criminalized and can be prosecuted.

**Q57: Is participating as an accomplice in the offences referred to in questions 50, 54 and 55 criminalized under your country's legal framework (art. 6, para. 2 (b), in conjunction with art. 6, para. 1)?**

Yes, no

**(a) If the answer is "Yes", please cite the applicable laws and/or other measures, including the applicable sanctions.**

An accomplice would be defined as a "party to the offence".

**Q58: Is organizing or directing other persons to commit the offences referred to in questions 50, 54 and 55 criminalized under your country's legal framework (art. 6, para. 2 (c), in conjunction with art. 6, para. 1)?**

Yes, no

**(a) If the answer is "Yes", please cite the applicable laws and/or other measures, including the applicable sanctions.**

Yes, such a person would be a party to the offence.

**Q59: Does your country adopt such legislative and other measures as might be necessary to establish as aggravating circumstances to any of the offences referred to in questions 50, 54, 55, 57 and 58, conduct that endangers, or is likely to endanger, the lives or safety of the smuggled migrants or that subjects them to inhuman or degrading treatment, including for exploitation (art. 6, para. 3, in conjunction with art. 6, paras. 1 and 2)?**

Yes, no

**(a) If the answer is "Yes", please cite the applicable laws and/or other measures, including the applicable sanctions.**

Yes, see s. 117 of IRPA

### **Criminalization: Cases and Judgements**

**Q60: States are invited to provide examples, relevant cases or judgments relating to successful implementation and enforcement for each of the criminal offences reviewed above.**

No such examples were offered during the consultation.

### **Difficulties Encountered**

**Q61: Does your country encounter difficulties or challenges in implementing any provisions of the Smuggling of Migrants Protocol relevant to cluster I?**

Yes, no

**If the answer is "Yes," please explain.**

It is probably fair to say that the investigation and prosecution of the various offences related to migrant smuggling encountered some difficulties due to the manner in which these offences were defined by law, in particular the question of the "profit motive". As Canadian laws criminalizing assistance to undocumented migrants did not allow for any exceptions based on the offender's motive, there were sometimes complications. It had been argued that the s. 117(4) requirement for the Attorney General's consent to prosecute as a screening device would protect against improper prosecutions on humanitarian, family or other grounds and that should such a prosecution proceed it could be constitutionally challenged as an 'improper exercise of ministerial discretion'.

**Q62: If domestic legislation has not been adapted to the Protocol requirements, what steps remain to be taken? Please specify.**

N/A

### **Need for Technical Assistance**

**Q63: Does your country require additional measures, resources or technical assistance to implement the Protocol effectively?**

Yes, No

**(a) If the answer is "Yes," please indicate the type of assistance required to implement the Protocol:**

**Q64: In which areas would border, immigration and law enforcement officials in your country need more capacity-building?**

They most certainly have the means, but it is not clear that they have treated the problem as a priority.

**Q65: In which areas would criminal justice institutions in your country need more capacity-building?**

The capacity exists, but it needs to be operationalized and minimally include national, regional, and international cooperation.

**Q66: Is your country already receiving technical assistance in those areas?**

Yes or No

(a) If the answer is "Yes," please specify the area of assistance and who is providing it.

N/A

## Conclusion

For Canada and other State parties to the Convention and its Protocols, the UNTOC review is an opportunity to reflect on the impact of various measures to prevent and control transnational organized crime, such as the extent to which States parties have transposed the Convention's dispositions into domestic legislation to achieve legal harmonization as a basis for cooperation. Ultimately, the review allows States parties to draw conclusions on whether the fight against transnational organized crime was strengthened by the kind of cooperation promoted by the Convention. Similarly, it offers a chance to assess the effectiveness of protection measures for victims of transnational organized crime, including human trafficking victims. It will also help countries identify specific capacity and technical assistance needs. In the end, the review process should enable states to hold each other accountable for their (in)action to improve international cooperation against transnational organized crime.

Although the consultation with Canadian civil society revealed some frustration with the current level of success with the enforcement of laws against organized crime, the Canadian legal framework, especially with respect to the criminalization of conducts obligated by the Convention and its protocols, was generally considered sufficient to prosecute organized crime, migrant smuggling, and human trafficking. A few gaps were identified concerning the criminalization of money laundering, some of which have already been acknowledged by the Government of Canada. And, some debate continues within Canadian society about how to more effectively criminalize and counter human trafficking.

The consultation yielded less feedback on how Canada established jurisdiction over the offences described in the Convention and two protocols that it ratified. This is a technical question with which civil society organizations have had less cause to engage.

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The overarching goal of the Convention and its protocols is to promote and facilitate international cooperation in fighting transnational organized crime, specifically migrant smuggling, human trafficking, and firearms trafficking. It appears that Canada has established the necessary legal framework (criminalization and establishing its jurisdiction over the targeted crimes) to facilitate such cooperation. However, there remain other obstacles to international cooperation that the Review Mechanism might more carefully address at future stages of the process. The ways and extent to which Canada can cooperate with other countries in criminal matters will remain an important policy discussion in the foreseeable future, and not only because the fentanyl crisis, money laundering, cybercrimes, and most other criminal activity cannot be effectively countered without international cooperation.

The outcomes of the Review Mechanism remain to be seen, but part of its success arguably lies in States parties' willingness to welcome inputs from civil society. In supporting and welcoming this consultation with civil society, Canada has demonstrated how civil society's input can enrich its self-assessment process and ensure that the review creates an impetus to further improve Canada's response to transnational organized crime.

ICCLR is encouraged by the interest that this consultation has met on the part of civil society organizations and is grateful for their collaboration. Given the extremely short timeframe within which the consultation had to be initiated and completed, it was heartening to see so many people and organizations taking the time to engage with the process. The consultation has produced information and perspectives that will undoubtedly inform, together with other consultations, Canada's self-assessment report. We hope that similar consultations will be conducted by Canada and that civil society organizations will continue to have an input during the next phases (clusters) of the UNTOC Review Mechanism.

## References

- Barton, J. (2018). Reforming the mutual legal assistance treaty framework to protect the future of the internet. *Ohio State Law Journal*, 79, pp. 91-112.
- Brown, N. (2022). *Submission to the Standing Committee on Justice and Human Rights*. Ottawa: House of Commons Standing Committee on Justice and Human Rights. Retrieved from <https://www.ourcommons.ca/Content/Committee/441/JUST/Brief/BR11570548/external/BrownNancy-e.pdf>
- Chin, V. & Dandurand, Y. (2014). *Uncovering Labour Trafficking in Canada: Regulators, Investigators, and Prosecutors*. Vancouver: International Centre for Criminal Law Reform.
- Citizenship and Immigration Canada (2015). *Evaluation of the Global Assistance for Irregular Migrants Program*. Evaluation Division, September 2015. [https://www.canada.ca/content/dam/ircc/migration/ircc/english/pdf/pub/e2-gaim\\_eng.pdf](https://www.canada.ca/content/dam/ircc/migration/ircc/english/pdf/pub/e2-gaim_eng.pdf)
- Cohen, I. et al. (2021). *An Examination of the Impact of Court Rulings on Police Investigation Time and Resources*. Abbotsford: Centre for Public Safety and Criminal Justice Research. Retrieved from <https://cjr.ufv.ca/an-examination-of-the-impact-of-court-rulings-on-police-investigation-time-and-resources/>
- Cohen, J. & Caldera, S. (2021). Putting an end to snow-washing: The case for a publicly accessible corporate registry of beneficial owners in Canada. *Journal of Financial Compliance*, 4(4), pp. 379-390.
- Conference of the Parties to the United Nations Convention Against Transnational Organized Crime. (2018). *Self-Assessment Questionnaire for the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*. Vienna: UNODC. Retrieved from <https://bit.ly/3BCIDg8>
- Cotter, A. (2020). *Trafficking in Persons in Canada, 2018*. Ottawa: Statistics Canada. Retrieved from <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2020001/article/00006-eng.pdf?st=mAyOUgr8>
- CSIS. (2021). 2020 Report: Organized Crime in Canada. Ottawa: CSIS. Retrieved from <https://cisc-src.gc.ca/media/2021/2021-01-27-eng.htm>
- Dandurand, Y. (2020). *Migrant Smuggling Patterns and Challenges for Law Enforcement*. Vancouver: International Centre for Criminal Law Reform. [Migrant Smuggling Networks and their Methods \(icclr.org\)](https://www.icclr.org)
- Dandurand, Y. (2020). *Organized Crime, Illegal Markets, and Police Governance*. Vancouver: International Centre for Criminal Law Reform. Retrieved from <https://icclr.org/wp->

[content/uploads/2020/05/Dandurand\\_Police-Governance-and-Organized-Crime.pdf?x77040&x30145](https://www.icclr.org/wp-content/uploads/2020/05/Dandurand_Police-Governance-and-Organized-Crime.pdf?x77040&x30145)

- Dandurand, Y. (2021). *Law Enforcement Strategies to Disrupt Illicit Drug Markets*. Vancouver: International Centre for Criminal Law Reform. Retrieved from [https://icclr.org/wp-content/uploads/2021/11/Dandurand\\_Law-Enforcement-Strategies-to-Disrupt-Illicit-Drug-Markets\\_Nov-15-2021.pdf?x96127](https://icclr.org/wp-content/uploads/2021/11/Dandurand_Law-Enforcement-Strategies-to-Disrupt-Illicit-Drug-Markets_Nov-15-2021.pdf?x96127)
- Dandurand, Y. & Jahn, J. (2019). The Failing International Legal Framework on Migrant Smuggling and Human Trafficking, in J. Winterdyk and J. Jones (Eds.), *The Palgrave International Handbook of Human Trafficking*, Switzerland: Palgrave Macmillan, Cham.
- Dandurand, Y. & Jahn, J. (2021). *The Future of International Cooperation Against Transnational Organized Crime: The Undoing of UNTOC?* Geneva: Global Initiative Against Transnational Organized Crime. Retrieved from <https://globalinitiative.net/wp-content/uploads/2021/10/GITOC-The-future-of-international-cooperation-against-transnational-organized-crime.pdfet/analysis/international-cooperation-organized-crime/>
- Federation of Law Societies in Canada. (2018). *Final Report on the Model Rules*. Ottawa. Retrieved from: <https://flsc.ca/wp-content/uploads/2018/10/Report-on-the-Model-Rules-1Oct2018.pdf>
- German, P. (2019). *Turning the Tide: An Independent Review of Money Laundering in B.C. Real Estate, Luxury Vehicle Sales & Horse Racing*. Victoria: Ministry of the Attorney General of British Columbia. Retrieved from [https://icclr.org/wp-content/uploads/2019/06/Dirty\\_Money\\_Report\\_Part\\_2.pdf?x27608](https://icclr.org/wp-content/uploads/2019/06/Dirty_Money_Report_Part_2.pdf?x27608)
- Global Initiative Against Transnational Organized Crime. (2021). *Global Organized Crime Index 2021*. Geneva: GITOC. Retrieved from <https://globalinitiative.net/wp-content/uploads/2021/09/GITOC-Global-Organized-Crime-Index-2021.pdf>
- Government of Canada. (2021). *Budget 2021: A Recovery Plan for jobs, Growth, and Resilience*. Ottawa. Retrieved from <https://www.budget.gc.ca/2021/home-accueil-en.html>
- Ibrahim, D. (2021). *Trafficking in Persons in Canada, 2019*. Ottawa: Statistics Canada. Retrieved from <https://www150.statcan.gc.ca/n1/en/pub/85-005-x/2021001/article/00001-eng.pdf?st=7zeMHdTS>
- Lam, E. & Lepp, A. (2019). Butterfly: Resisting the harms of anti-trafficking policies and fostering peer-based organising in Canada. *Anti-Trafficking Review*, (12), pp. 91-107.
- Millar, H. & O'Doherty, T. (2020). *Canadian Human Trafficking Prosecutions and Principles of Fundamental Justice: A Contradiction in Terms?* Vancouver: International Centre for Criminal Law Reform. <https://icclr.org/wp-content/uploads/2020/06/Millar-and-ODoherty-Technical-Report-on-Canadian-Human-Trafficking-Prosecutions-1.pdf?x27608>

## Civil Society Inputs for Cluster I of Canada's UNTOC Review

- Moreau, G., Jaffray, B. & Armstrong, A. (2020). *Police-reported Crime Statistics in Canada, 2019*. Ottawa: Public Safety Canada. Retrieved from <https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00010-eng.htm>
- Osula, A. (2015). Mutual legal assistance and other mechanisms for accessing extraterritorially located data. *Masaryk University Journal of Law and Technology*, 9(1), pp. 43-64.
- Perrin, B. (2010). *Invisible Chains: Canada's Underground World of Human Trafficking*. New York: Viking Canada, Penguin Group.
- Perrin, B. (2013). *Migrant Smuggling: Canada's Response to a Global Criminal Enterprise*. Allard Research Commons. [https://commons.allard.ubc.ca/fac\\_pubs/259](https://commons.allard.ubc.ca/fac_pubs/259)
- Public Safety Canada. (2019). *2019 Law Enforcement Roundtable on Drugs - Meeting Summary*. Ottawa, PSC, September 2019.
- Public Safety Canada. (2021a). *Gun and Gang Violence*. Ottawa: Government of Canada. Retrieved from <https://www.publicsafety.gc.ca/cnt/cntrng-crm/gn-crm-frms/index-en.aspx>
- Public Safety Canada. (2021b). *Taking Action to Reduce Gun Violence*. Ottawa: Government of Canada. Retrieved from <https://www.canada.ca/en/public-safety-canada/campaigns/firearms.html>
- Roots, K. (2018). *The Human Trafficking Matrix: Law, Policy and Anti-Trafficking Practices in the Canadian Criminal Justice System*. Ph.D. Dissertation. York University. Toronto. ON.
- Shannon, K. & Bruckert, C. (2022). *The Protection of Communities and Exploited Persons Act (PCEPA): Findings from the Gender, Work, and Health Care Study*. Ottawa: House of Commons Standing Committee on Justice and Human Rights. Retrieved from <https://www.ourcommons.ca/Content/Committee/441/JUST/Brief/BR11576509/br-external/Jointly1-e.pdf>
- Swire, P. & Hemmings, J. (2017). Mutual legal assistance in an era of globalized communications: The analogy to the visa waiver programme. *NYU Annual Survey of American Law*, 71.
- UNODC (2015). *Migrant Smuggling in Asia: Current trends and related challenges*. Bangkok: United Nations Office on Drugs and Crime, pp. 73-74.
- UNODC (2017). *The Concept of "Financial or Other Material Benefit" in the Smuggling of Migrants Protocol: Issues Paper*. New York: United Nations.
- Vancouver Collective Against Sexual Exploitation. (2022). *Brief to the House of Commons Committee on Justice and Human Rights on the Protection of Communities and Exploited Persons Act*. Ottawa: House of Commons Standing Committee on Justice and Human Rights. Retrieved from

## Civil Society Inputs for Cluster I of Canada's UNTOC Review

<https://www.ourcommons.ca/Content/Committee/441/JUST/Brief/BR11570561/br-external/VancouverCollectiveAgainstSexualExploitation-e.pdf>

Winterdyck, J. & Dhungel R. (2018). Migrant Smuggling in Canada: Possible lessons for other countries. *NBP. Nauka, bezbednost, policija*, 23 (3): 211-232.

Woods, A., K. (2015). *Data Beyond Borders: Mutual Legal Assistance in the Internet Era*. Washington: Global Network Initiative.

Woods, A., K. (2017). Mutual Legal assistance in the digital age. In: Gray, D. & Henderson, S., E. (Eds.), *Cambridge Handbook of Surveillance Law*, pp. 659-676. Cambridge: Cambridge University Press.

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