

Human Trafficking and China: Past and Present

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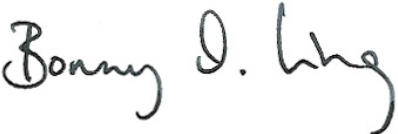
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Certification

I, Bonny Ling, certify that the presented thesis is all my own work and that I have not obtained a degree at the National University of Ireland Galway or elsewhere on the basis of this work.

Signed:

A handwritten signature in black ink that reads "Bonny D. Ling". The signature is written in a cursive style with a large initial 'B' and a distinct 'L'.

Date: 26 June 2014

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Summary

China's human trafficking problem is a multifaceted phenomenon that defies a simple characterisation. This is partly due to the extensiveness of China's domestic migration, which in combination with its significant emigration and immigration flows, can obscure forced migratory dynamics such as those seen in trafficking. Also, there is a great diversity of purposes for which a trafficked victim can be exploited for his or her labour. As such, trafficking cases in China can involve different victims of exploitation, such as commercial sex workers, internal migrant workers or vagrant street children. Moreover, the exploitation can take place in the private sphere of family life, where the identification and rescue of victims can become more complicated as they take on the roles of domestic servants or, for some women, wives and mothers. Hence, properly tackling China's trafficking problem is a significant challenge for its law-makers and enforcement bodies. Understandably, most of the discussions on China and human trafficking focus on the gravity of present-day human trafficking problems and the immediate challenges associated with an effective anti-trafficking strategy based on the framework established by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted by the UN General Assembly in 2000.

The idea of human trafficking as a new and distinct problem, a modern form of slavery that entraps individuals without agency in their own countries and abroad, is a common perception that has popularised the usage of the term "human trafficking" and mobilised public support for various anti-trafficking initiatives, especially those focusing on the sex trafficking of women. It is also part of the political narrative to compel states to ratify the Trafficking Protocol and legislate laws that are consistent with their international obligations under the Trafficking Protocol and other relevant international treaties. Yet, the portrayal of human trafficking as modern slavery is fundamentally an oversimplification that disregards important historical antecedents. Placed in a wider historical narrative, problems of human trafficking in the twenty-first century notably represent the latest phase in enduring global campaigns against slavery, as well as institutions and practices similar to slavery. In this context, China is no exception, for there are significant historical parallels to the perceived contemporary problem of human trafficking in China.

This dissertation examines the present-day and historical aspects of the problem of human trafficking in China, beginning with the imperial period of the late-Qing of

the mid-nineteenth century to the present-day People's Republic of China, founded in 1949. Certain epochs during this period were marked by intense engagement with the international community on issues of international law as they pertained to the situation of trafficking in China, as was seen during the intervening Republican decades from 1912 to 1949. However, the political vicissitudes of this time, resulting in a rapid succession of governments with competing ideologies in the twentieth century, have hindered a nonpartisan and thoughtful historical consideration of long-standing social problems. These include the marginalised status of women and vulnerabilities of destitute families that have contributed to the situation of trafficking in China.

By using a retrospective lens to examine the problem of human trafficking in contemporary China, the research presented here is driven by the question: What are these historical antecedents to trafficking of modern twenty-first century China? Related to this examination of past and present dynamics of trafficking is naturally the important question of how various Chinese governments of its modern era have responded to this multifaceted problem of human exploitation. The work demonstrates that there is much to be gained by using a systematic exploration of Chinese legal history as regards the examination of the country's situation of human trafficking. By exploring these important parallels between the current trafficking situation in China and its past, as well as the effectiveness or limitations of its past efforts to address issues of human exploitation, one can arrive at a better understanding of how this historical legacy has affected China's view of the problem of human trafficking and its response in both law and policy.

1. Introduction

Within this last decade, the term “human trafficking” has become an integral part of both the popular lexicon and the language of international human rights law. Although accurate figures are difficult to establish due to the clandestine nature of human trafficking operations, one estimate from the International Labour Organisation in 2008 places the total volume of trafficked victims to be around 2.4 million at any given time.¹ In contemporary discussions, human trafficking is often equated with slavery and is seen as a modern manifestation of traditional chattel slavery, where owners treated their slaves as possessions and were able to legally sell or transfer them to others as in the transatlantic slave trade. As described by the Office of the United Nations High Commissioner for Human Rights: “The word ‘slavery’ today covers a variety of human rights violations. In addition to traditional slavery and the slave trade, these abuses [also] include...the traffic in persons.”² Seen in the pernicious context of slavery, efforts to combat human trafficking enjoy wide international support at both States and grassroots levels and are frequently labelled as priorities for both domestic law enforcement and international bodies.³

¹ International Labour Organization, *ILO Action Against Trafficking in Human Beings* 1 (2008).

² Office of the United Nations High Commissioner for Human Rights, *Fact Sheet No. 14, Contemporary Forms of Slavery* 1 (1991). Other listed abuses under the broad category of modern-day slavery include the sale of children, child prostitution, child pornography, the exploitation of child labour, the sexual mutilation of female children, the use of children in armed conflicts, debt bondage, the traffic in persons and in the sale of human organs, the exploitation of prostitution, and certain practices under apartheid and colonial regimes.

³ See, for example, United Nations Department of Public Information, *Secretary-General, at General Assembly Dialogue on Human Trafficking, Violence against Women, Stresses Need to Make Such Crimes ‘Unprofitable and Untenable’* (3 April 2012) (available at <http://www.un.org/News/Press/docs/2012/ssgm14212.doc.htm>).

This increased public awareness of the issue of human trafficking is the result of concerted efforts made by various international organisations, national governments, donors and non-governmental organisations that have sought to highlight human trafficking and the types of human rights violations involved therein. In terms of activities from international governmental organisations, human trafficking is seen as a cross-thematic issue that warrants cooperation not only within human rights mechanisms but also the involvement of other specialised bodies that focus on labour, children's rights, women's rights, migration, health and criminal justice.⁴ Governments are also increasingly coming under pressure from non-governmental organisations to recognise that all trafficked individuals are victims of human rights violations and to provide them with adequate protection and rehabilitation. An influential non-governmental organisation in this advocacy area is the London-based Anti-Slavery International, which was at the forefront of the campaign to abolish transatlantic slavery and now includes human trafficking as one of its six main programmes for eradicating contemporary forms of slavery.⁵

1.1. Trafficking and Exploitation

Notwithstanding the popularity of the term, human trafficking has been described as “a difficult concept to pin down” because “it does not denote a uniform condition, but covers a spectrum of practices, involving varying degrees of consent, coercion, treatment, and autonomy.”⁶ The phenomenon can cover a wide array of purposes for which trafficked victims can be exploited for their labour. For example, human trafficking cases can be as varied as:

- Indian metalworkers recruited under valid guest worker visas to the United States forced to live in isolated camps and threatened with employment termination and deportation if they complained about unmet compensation;⁷

⁴ The increased profile of human trafficking led to the establishment of the UN Global Initiative to Fight Human Trafficking (UN.GIFT) in 2007. Launched by the UN Office on Drugs and Crime, UN.GIFT is a joint initiative with other international organisations that also work on anti-trafficking from their particular area of focus, such as labour, migration, children's rights and human rights.

⁵ See Claude E. Welch, Jr., *Defining Contemporary Forms of Slavery: Updating a Venerable NGO*, 31 Hum. Rights Q. 70 (2009).

⁶ Joel Quirk, *The Anti-Slavery Project: Linking the Historical and Contemporary*, 28 Hum. Rights Q. 565, 576 (2006).

⁷ N.Y. Times, *Editorial: They Pushed Back*, <http://www.nytimes.com/2010/06/29/opinion/29tue3.html> (28 June 2010).

- Cambodian women sold into false marriages with South Korean men by unscrupulous matchmakers;⁸
- Girls as young as 15 in Brooklyn, New York, threatened with violence and forced into prostitution in order to meet daily earning quotas for their pimps;⁹
- A Nigerian woman recruited by a New York family worked as their child caregiver for twelve years without pay;¹⁰ and
- Peruvian immigrants to the U.S. forced to hand over their earnings and passports to their smugglers who facilitated their entry into the U.S. under false tourist visas and later threatened to report them to immigration authorities.¹¹

The conceptual complexity of human trafficking also translates into research challenges to obtain estimates for different forms of human trafficking. For instance, a 2008 report by the International Labour Organization found that while it is often assumed and believed that victims are mostly trafficked for the purpose of commercial sexual exploitation, the percentage difference between those who were trafficked for sexual exploitation and labour exploitation differed only by 11 percentage points—at 43 percent and 32 percent respectively—with the remaining 25 percent of trafficking cases pointing to a mixture of both forms of exploitation.¹² This figure, however, is in sharp contrast to a report based on criminal justice data from 155 countries published a year later by the United Nations Office on Drugs and Crime, which found sexual exploitation to be the most commonly identified form of human trafficking at 79 percent of all reported cases, followed by forced labour, at 18 percent.¹³ The latter report, however, recognises that the high percentage of sexual exploitation cases may be attributed to statistical bias due to its higher visibility when compared to other forms of exploitation that are also included in the international definition on human trafficking.

⁸ The Associated Press, *Cambodia: Ban on Marriages to South Korean Men*, N.Y. Times A7 (20 March 2010). Accessed online at <http://www.nytimes.com/2010/03/20/world/asia/20briefs-Cambrf.html>.

⁹ Karen Zraick, *N.Y. Times*, 8 *Charged in Brooklyn in Sex-Trafficking Case*, <http://www.nytimes.com/2010/06/03/nyregion/03sextraff.html> (2 June 2010).

¹⁰ David Gonzalez, *N.Y. Times*, *When American Dream Leads to Servitude*, <http://www.nytimes.com/2007/04/24/nyregion/24citywide.html> (24 April 2007).

¹¹ Julia C. Mead, *N.Y. Times*, *A Slow War on Human Trafficking*, <http://www.nytimes.com/2006/05/28/nyregion/nyregionspecial2/28litraf.html> (28 May 2006).

¹² International Labour Organization, *supra* n. 1, at 3.

¹³ United Nations Office on Drug and Crime, *Global Report on Trafficking in Persons* 6 (2009).

1.1.1. International Legal Definition

The diversity of cases that can fall under the heading of human trafficking is reflected by the legal complexity of the current definition of human trafficking in international law. Human trafficking is defined by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the “Trafficking Protocol”), supplementing the United Nations Convention against Transnational Organized Crime, which was adopted in November 2000 and came into force in December 2003.¹⁴ Heralded as a landmark development in the global fight against human trafficking, the Trafficking Protocol’s definition covers the various actions, means and types of exploitation inherent in human trafficking and forms the basis for a concerted international anti-trafficking strategy. Article 3 of the Trafficking Protocol defines human trafficking as:

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

Human trafficking is thus recognised as any conduct that combines the definition’s listed *action* and *means*, and is carried out for any of the listed *purposes of exploitation*. At the same time, the Trafficking Protocol accords special protection to child victims of trafficking by prescribing that the recruitment, transportation, transfer, harbouring or receipt of a child, defined as any person under eighteen years of age, for the purpose of exploitation is sufficient for it to be considered as a case of human trafficking even if the dynamic does not involve any of the means specified by the definition.¹⁵ Furthermore, because the definition of trafficking in persons includes the exploitation of “slavery or practices similar to slavery [and] servitude”, this brings the legal standings

¹⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the “Trafficking Protocol”) (15 November 2000), 2237 U.N.T.S. 319. The Trafficking Protocol currently has 159 ratifications as of 18 May 2014.

¹⁵ *Id.* at art. 3(c).

of these terms as contained in the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (the “1926 Slavery Convention”) and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956 (the “1956 Supplementary Convention”) within its interpretation.¹⁶

The Trafficking Protocol further sets out an international anti-trafficking agreement that binds States Parties to a wide-ranging list of obligations concerning transnational mutual cooperation in judicial and law enforcement to combat human trafficking. States Parties are obliged by the Trafficking Protocol to criminalise trafficking as a combination of the constituent actions, means and purposes of exploitation and not as each individual criminal act.¹⁷ Moreover, by having a broad scope of application, Article 3 of the Trafficking Protocol makes it clear that human trafficking can encompass different forms of exploitation and that this exploitation can occur through a variety of actions and means. This is important given that while sexual exploitation may be seen as the most common form of labour exploitation due to its high visibility in the public consciousness, it is not the only manner in which victims’ rights are violated. This is underscored by the fact that the qualification “at a minimum” was inserted in the definition to specifically denote that the various purposes of exploitation contained in the definition were not meant to be exhaustive and may therefore include other future forms of exploitation not explicitly mentioned.¹⁸

Due to the fact that human trafficking can involve a variety of victims and forms of exploitation achieved through different means, it is seen as a cross-thematic issue that simultaneously raises different concerns in international human rights law. These include the issues of slavery, women’s rights, rights of the child, labour and rights of migrant workers. While the issues of slavery and labour focus on the purposes of exploitation for which trafficking can take place, the other themes highlight the special

¹⁶ The Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (the “1926 Slavery Convention”) (25 September 1926), 60 L.N.T.S. 253. The 1926 Slavery Convention entered into force on 9 March 1927 and currently has 99 ratifications as of 18 May 2014; and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956 (the “1956 Supplementary Convention”) (7 September 1956), 226 U.N.T.S. 3. The 1956 Supplementary Convention entered into force on 30 April 1957 and currently has 123 ratifications as of 18 May 2014.

¹⁷ United Nations Office on Drug and Crime, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto* 268 (2004).

¹⁸ Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc. A/AC.254/4/Add.3/Rev.6, note 31, at 6 (2000).

human rights protections given to women, children and migrant workers, who are seen as particularly vulnerable to the myriad of abuses inherent in trafficking operations. Hence, the multiple aspects of human trafficking present a considerable challenge for domestic law enforcement, whose anti-trafficking strategy must be broad enough so as not to exclude potential victims, yet remains targeted and does not conflate human trafficking with other types of criminal activities. This is no exception for China, where human trafficking presents a serious challenge for law enforcement authorities.

1.1.2. China and Anti-trafficking

The intensity of international advocacy, at both governmental and grassroots levels, to combat human trafficking is also directed at China. As the world's most populous country, any issue involving migration, labour exploitation and social marginalisation naturally invokes an examination as to how these dynamics affect its 1.3 billion citizens, as well as other immigrants on its territory.¹⁹ At the same time, human trafficking in China, as is elsewhere, is not confined to a simple characterisation based on a specific purpose of exploitation or category of victims. This is seen in the diversity of purposes for which a person can be trafficked and exploited for his or her labour. Hence, the phenomenon of trafficking in China can involve different victims, who, on the surface, share very few outward similarities. They can be commercial sex workers, migrant workers or vagrant street children. The labour exploitation can also take place in the private sphere of family life, where the identification and rescue of victims can become more complicated as they take on the roles of domestic servants or, for some women, wives and mothers.

The complexity of China's trafficking dynamics is also compounded by the extensiveness of China's labour migration from rural to urban areas, which can camouflage forced migratory dynamics in trafficking under the cover of consent on the part of the migrant. For instance, one of the country's most prominent outbound movements of irregular migration involves women and girls being trafficked from inland provinces to neighbouring countries in the Asia-Pacific region for sexual

¹⁹ See Ronald Skeldon, *IOM Migration Research Series No. 1: Myths and Realities of Chinese Irregular Migration* 14 (International Organization for Migration 2000). Skeldon argues that the fear of migration from the world's most populous country is a possible explanation for the disproportionate concern directed at Chinese irregular migration, given that Chinese migrants do not feature predominantly, in absolute numbers or as a percentage, of total irregular migrants worldwide.

exploitation under the guise of legitimate employment opportunities.²⁰ The same dynamics of exploitation can also be seen in labour migration from China to Europe. A study of both Chinese male and female migrant workers in the United Kingdom in 2011 found that “most of the workers [interviewed had] experienced elements of forced labour” and that some “were on the verge of being in a [sustained] forced-labour situation.”²¹ Moreover, not only is China a country of origin for trafficking, it is also a significant country of destination for trafficking originating from neighbouring countries. Underscoring the extensiveness of these inbound trafficking operations into China, the 2011 U.S. Department of State Trafficking in Persons Report emphasised that not only are women and children trafficked into China from neighbouring countries but that victims from “locations as far as Romania and Zimbabwe are [also] reportedly trafficked to China for commercial sexual exploitation and forced labor.”²²

Understanding the contemporary anti-trafficking challenge facing China is also difficult, given the pronounced problem of arriving at a more accurate figure of its trafficking situation, owing to conflicting interpretations of the offense of trafficking in China’s criminal law. For instance, the *2013 U.S. Trafficking in Persons* report criticises the Chinese “government’s continued conflation of human smuggling, child abduction, and fraudulent adoption with trafficking offenses,” thereby rendering it difficult to accurately assess figures associated with China’s anti-trafficking efforts.²³ Various official anti-trafficking statistics, such as the one released by the Ministry of Public Security stating that 15,458 trafficked women and 8,660 trafficked children were rescued countrywide in 2011, are believed to be low and incomplete, especially if such figures are considered alongside the fact that China’s National Bureau of Statistics, for the same year, estimated the total number of irregular domestic migrant workers at

²⁰ United States Department of States’ Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report 2010*, at 112 (U.S. Department of State Publication 2010).

²¹ Carolyn Kagan et al., *Joseph Rowntree Foundation, Experiences of Forced Labour Among Chinese Migrant Workers* 41, <http://www.jrf.org.uk/publications/chinese-experiences-forced-labour> (2011).

²² United States Department of States’ Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report 2011*, at 121 (U.S. Department of State Publication 2011).

²³ United States Department of States’ Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report 2013*, at 130 (U.S. Department of State Publication 2013).

around 158.63 million.²⁴ Given that most domestic migrant workers in China do not have the necessary work permits to undertake employment away from where they were registered at birth, they are vulnerable to exploitative labour practices, such as prolonged wage arrears backed by actual or threats of physical harm or of denunciation to the authorities, which may be indicative of a situation of forced labour.²⁵

1.1.3. Presented Study and Research Questions

The scale of China's human trafficking problem presents a considerable challenge. Understandably, most of the discussions on this topic center on the gravity of the present-day situation and the immediate challenges associated with an effective anti-trafficking response. This is coupled with rhetoric from the Chinese government and media reports that tend to portray human trafficking, especially the sexual trafficking of women, as a recent social malaise.²⁶ The first research question of this presented study is one that fundamentally revisits this premise of human trafficking as a relatively new phenomenon in China. Using a retrospective lens to the problem of human trafficking in contemporary China, Part One of this work is framed by the question: what are these historical antecedents to the human trafficking situation of modern twenty-first century China? The varied aspects of China's human trafficking problem is thus explored from two temporal perspectives: a view of the contemporary situation in Chapter Three and a comparative examination in Chapter Four of past dynamics of human exploitation from the mid-nineteenth to the twentieth century.

²⁴ *China Daily* [中国日报], *Qunian Quanquo Gonganjiguan Gongjiejiu Beiguai Ertong 8660 Ren Funu 15458 Ren* [Public Security Authorities Nationwide Rescued a Total of 8660 Trafficked Children and 15,458 Trafficked Women Last Year; 去年全国公安机关共解救被拐儿童8660人妇女15458人], http://www.chinadaily.com.cn/dfpd/shizheng/2012-03/11/content_14806656.htm (11 March 2012); *National Bureau of Statistics of China* [國家統計局], *2011 nian Woguo Nongmingong Diaocha Jiancebaogao* [2011 Survey Monitoring Report on China's Migrant Workers; 2011年我国农民工调查监测报告], http://www.stats.gov.cn/tjfx/fxbg/t20120427_402801903.htm (27 April 2012); and National Bureau of Statistics of China, *China Statistical Yearbook 2011* (China Statistics Press 2011) (CD-ROM).

²⁵ See International Labour Organization, *Human Trafficking and Forced Labour Exploitation: Guidelines for Legislation and Law Enforcement* 20-21 (2005). These indicators often do not occur alone and are usually present in a combination of two or more elements.

²⁶ See Xinhua, *China Rescues 77 Children in Trafficking Bust*, People's Daily Online, <http://english.people.com.cn/90882/7753295.html> (9 March 2012); Zhang Qian [張倩], *Beijing Youth Daily* [北京青年報], *Ezhi Guaimai Funuertong Xianxiang cong Daji dao Yufang you Duoyuan* [Gap Between Combating and Preventing the Trafficking in Women and Children; 遏制拐賣婦女兒童現象從打擊到預防有多遠], <http://www.china.com.cn/chinese/law/498358.htm> (16 February 2004); and Zhang Yan & He Dan, *China Daily*, *Trafficking of Chinese Women on the Rise*, http://www.chinadaily.com.cn/usa/china/2011-01/24/content_11907603.htm (24 January 2011).

Related to this examination of past and present dynamics of trafficking is naturally the important question of how various Chinese governments of its modern era—the late-Qing from the mid-nineteenth century to 1912, the Republican period which then followed until the founding of the People’s Republic of China in 1949—had responded to this multifaceted problem of human exploitation. Part Two of this work demonstrates that there is much to be gained by using a systematic exploration of Chinese legal history with regards the examination of the county’s situation of human trafficking. By exploring these important parallels between the current trafficking situation in China and its past, as well as the effectiveness or limitations of past endeavours to address elements of human exploitation, one can arrive at a better understanding of how this historical legacy has affected modern China's understanding of the problem of human trafficking and its response in both law and policy. In so doing, this work is an attempt to add more depth to contemporary discussions of human trafficking in China, which have largely framed it as a recent development, without an acknowledgement of the efforts by past governments to tackle various aspects of this problem.

This study is divided into two parts. Part One consists of Chapters Two to Four, under the heading “Trafficking, Human Rights and China.” Chapter Two traces important developments in various branches of international human rights law that culminated in the present-day definition of human trafficking, including relevant international treaties that address the vulnerabilities and the protections given to specific marginalised populations, such as women, children and migrant workers. Chapter Three is an examination of the present-day human trafficking situation in China, covering not only the situation from China’s own interpretation of trafficking but the situation as comprehensively understood under Article 3 of the Trafficking Protocol. Chapter Four presents a historical perspective of the problem of trafficking in China from the mid-nineteenth to early twentieth century, addressing the trafficking of Chinese women, children and adult males held under various practices of labour exploitation in the domestic setting, commercial sex work or contract employment abroad.

Part Two of this study, consisting of Chapters Five to Seven, examines the evolution of China’s domestic responses in both law and policy to the problem of human trafficking under the three regimes of this period. Chapter Five is devoted to the late-Qing period, analysing how the imperial government had attempted to grapple with these difficult issues of labour abuses and exploitation, practices that were exacerbated by the general condition of social and political turmoil during this time. However, the contradictory and inconsistent approach of the imperial Qing government fell short of

its intended aim. Chapter Six addresses the idealistic, legalistic approach of the Republican era, as seen by its promotion of full legal equality of persons and prohibition of human exploitation in various forms. Chapter Seven is an exploration of the anti-trafficking response by the present-day People's Republic of China, whose efforts have mainly focused on illicit marriage practices and prostitution through the various periods of state consolidation since its founding in 1949.

Part Two also examines how each successive government, the late-Qing imperial government of the mid-nineteenth century, the Republican era and the People's Republic of China of the twentieth century, engaged with the international community on issues of international law as they pertained to the situation of trafficking in China. This is an important aspect of Chinese diplomatic history, as the country has seen a cyclic pattern of complete disengagement and then reengagement, and then again, with the international community from the nineteenth century to the present-day. From a practical standpoint and with the aim of understanding how China views its role in the international arena, this examination has contemporary relevance. It is now a reality in the current state of international affairs that engaging the practical support and meaningful participation of China is essential to effectively addressing issues of a potential transnational character, such as the trafficking in persons. Chapter Eight concludes this work by offering some observations as to the direction of future anti-trafficking efforts and challenges for China, in light of this complex historical legacy. It is the hope that this study will stimulate more scholarly interest in approaching the current situation of human trafficking in China, and elsewhere, without partisan divisions and as a continuum of power disparities and vulnerabilities from the past that remain relevant in the contemporary context.

1.2. Literature Review and Methodology

The issue of human trafficking has been a vibrant area of research in different disciplines and has progressed generally in three phases. Prior to the adoption of the Trafficking Protocol in 2000, studies tended to explore the nature and extent of the trafficking problem and its link to organised crime.²⁷ With the aim to influence both international and U.S. domestic negotiations on the definition of trafficking, law

²⁷ See Michelle O. P. Dunbar, *Comment: The Past, Present, and Future of International Trafficking in Women for Prostitution*, 8 Buff. Women's L.J. 103 (1999-2000); and Amy O'Neill Richard, *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime* (DCI Exceptional Intelligence Analyst Program An Intelligence Monograph, Center for the Study of Intelligence 1999), available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/trafficking.pdf>.

reviews in the late 1990s have mainly explored issues of definition and victim protection.²⁸ After the adoption of the Trafficking Protocol in 2000, many legal examinations focused on two key aspects. First was the question of what the Trafficking Protocol represented as a development in international law, as well as the potential impacts and limits of the treaty's implementation.²⁹ The second priority during this time was the analysis of specific provisions in the Trafficking Protocol that warranted special legal attention, such as the criminalisation of trafficking in domestic law, victims protection and assistance, and the gap between international standards versus these domestic legislations on trafficking.³⁰ Concerning the obligation established by the Trafficking Protocol on the criminalisation of human trafficking, the U.S. Trafficking Victims Protection Act of 2000 has received considerable scholarly attention.³¹ This is because the United States was the first country to legislate measures to specifically address the protection of trafficking victims, and this issue has remained a key diplomatic concern for the government, as seen by the U.S. Department of States' annual report on global human trafficking since 2001.

Following this initial period, research on trafficking proliferated and extended from law to other disciplines that also sought to assess, within their own fields, the meaning and implication of trafficking in persons. Anthropological studies have made a notable impact on understanding the cultural-specific practices that contribute to

²⁸ See Alison N. Stewart, *Report from the Roundtable on the Meaning of 'Trafficking in Persons': A Human Rights Perspective*, 20 *Women's Rights L. Rptr.* 11 (1998); and Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 *Harv. Hum. Rights J.* 65 (1998).

²⁹ See *International Trafficking in Persons, Especially Women and Children*, 95 *Am. J. Intl. L.* 407 (2001); Kara Abramson, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 21 *Harv. Intl. L.J.* 1 (2001); Kelly E. Hyland, *The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 8 *Hum. Rights Br.* 30 (2001); Shelley Case Inglis, *Expanding International and National Protections Against Trafficking for Forced Labor Using a Human Rights Framework*, 7 *Buff. Hum. Rights L. Rev.* 55 (2001); Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 *Mich. J. Intl. L.* 1143 (2003); and Tom Obokata, *Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System*, 54 *Intl & Comp. L. Q.* 445 (2005).

³⁰ See Ann D. Jordan, *Human Rights or Wrongs? The Struggle for a Rights-Based Response to Trafficking in Human Beings*, 10 *Gender & Dev.* 28 (2002); Jennifer Enck, *The United Nations Convention Against Transnational Organized Crime: Is It All That It Is Cracked up to Be? Problems Posed by the Russian Mafia in the Trafficking of Humans*, 30 *Syracuse J. Intl. L. & Com.* 369 (2003); and LeRoy G. Potts Jr, *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 *Geo. Wash. Intl. L. Rev.* 227, 239 (2003).

³¹ See Theresa Barone, *The Trafficking Victims Protection Act of 2000: Defining the Problem and Creating a Solution*, 17 *Temp. Intl. & Comp. L.J.* 579 (2003); Michael R. Candes, *The Victims of Trafficking and Violence Protection Act of 2000: Will It Become the Thirteenth Amendment of the Twenty-First Century?*, 32 *U. Miami Inter-Am. L. Rev.* 571 (2001); Kara C. Ryf, *The First Modern Anti-Slavery Law: The Trafficking Victims Protection Act of 2000*, 34 *Case W. Res. J. Intl. L.* 45 (2002); and Susan W. Tiefenbrun, *Sex Sells but Drugs Don't Talk: Trafficking of Women Sex Workers*, 23 *Thomas Jefferson L. Rev.* 199 (2001).

trafficking,³² as well as the inherent difficulties of trafficking as a research subject, whether these challenges arise from interviewing traumatised victims or countering subject biases on issues such as prostitution.³³ In the field of public policy, human trafficking is often approached from two policy perspectives: the regulation of sex work or migration.³⁴ Within the field of gender studies and trafficking, most attention is given to the sexual trafficking of women, particularly the debate between the views of those that advocate for the abolition versus the regulation of prostitution.³⁵ Furthermore, this longstanding debate on the element of consent in sex work led to “a clear and savage rift” that undermined the negotiation on key provisions of victim protection and assistance under the Trafficking Protocol.³⁶

Examinations of human trafficking often focus on specific geographical regions. Within these studies, the adoption of the Council of Europe Convention on Action against Trafficking in Human Beings in 2005 has given rise to comparative legal studies on different European domestic laws to combat human trafficking.³⁷ The literature also

³² See Lynellyn D. Long, *Anthropological Perspectives on the Trafficking of Women for Sexual Exploitation*, 42 Intl. Migr. 5 (2004).

³³ Elzbieta M. Gozdzia, *On Challenges, Dilemmas, and Opportunities in Studying Trafficked Children*, 81 Anthropological Q. 903 (2008); and Alicia W. Peters, “*Things that Involve Sex are Just Different*”: *US Anti-Trafficking Law and Policy on the Books, in Their Minds, and in Action*, 86 Anthropological Q. 221 (2013).

³⁴ See Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 Harv. Civ. Rights-Civ. Liberties L. Rev. 271 (2011); and Nazli Avdan, *Human Trafficking and Migration Control Policy: Vicious or Virtuous Cycle?*, 32 J. Pub. Policy 171 (2012).

³⁵ See Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. Pa. L. Rev. 1655 (2010).

³⁶ Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 Hum. Rights Q. 975, 1001-1002 (2001).

³⁷ See Elspeth Guild, *Immigration and Criminal Law in the European Union: the Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings* (Martinus Nijhoff Publishers 2006).

focuses on the trafficking challenges in Africa,³⁸ Latin America,³⁹ Asia⁴⁰ or in specific countries where the problem of trafficking is seen as particularly challenging. This is the case with China, where studies on the country's domestic and transnational trafficking situation have featured strongly in both the academic and advocacy literature on trafficking in persons.⁴¹ However, because trafficking in China involves great diversity in the types of victims and manners of exploitation, these studies have tended to examine a narrow subset of the problem, as oppose to its entirety. To date, there is a clear absence of a comprehensive study on the trafficking situation in China. The annual U.S. Department of States' Trafficking in Persons Report notably takes a comprehensive approach to its reporting on trafficking trends worldwide, but the report is not without criticisms owing to it being a governmental-backed study.

Starting from the mid-2000s, a current strand of criminological studies on trafficking in persons started to address the fundamental issue of sound methodology as the basis for effective policy, focusing on the difficulties of conducting research on human trafficking given its broad definition and the wide array of exploitative practices.⁴² In this way, these issues of methodological constraints from a criminological perspective are linked to studies on trafficking in law and public policy, particularly concerning the regulation of commercial sex work or irregular migration. These issues are not only highly emotive for local communities but also where accurate data are

³⁸ See Kathleen Fitzgibbon, *Modern-day Slavery? The Scope of Trafficking in Persons in Africa*, 12 *African Sec. Rev.* 81 (2003); Aderanti Adepoju, *Review of Research and Data on Human Trafficking in Sub-Saharan Africa*, in *Data and Research on Human Trafficking: A Global Survey* 75 (Frank Laczko & Elzbieta Gozdzia ed., International Organization for Migration 2005); and Wilfried Relwende Sawadogo, *The Challenges of Transnational Human Trafficking in West Africa*, 13 *African Stud. Q.* 95 (2012).

³⁹ See Laura Langberg, *A Review of Recent OAS Research on Human Trafficking in the Latin American and Caribbean Region*, in *Data and Research on Human Trafficking: A Global Survey* 129 (Frank Laczko & Elzbieta Gozdzia ed., International Organization for Migration 2005).

⁴⁰ See Vidyamali Samarasinghe, *Controlling Globalization in Anti-Trafficking Strategies in Asia*, 10 *Brown J. World Aff.* 91 (2003); June JH Lee, *Human Trafficking in East Asia: Current Trends, Data Collection, and Knowledge Gaps*, in *Data and Research on Human Trafficking: A Global Survey* 165 (Frank Laczko & Elzbieta Gozdzia ed., International Organization for Migration 2005); and Nancie Caraway, *Human Rights and Existing Contradictions in Asia-Pacific Human Trafficking Politics and Discourse*, 14 *Tul. J. Intl. & Comp. L.* 295 (2006).

⁴¹ See Julia O'Connell Davidson, *Save the Children, Children in the Sex Trade in China*, <http://resourcecentre.savethechildren.se/node/2400> (2001); Mary H. Hansel, *China's One-Child Policy's Effect on Women and the Paradox of Persecution and Trafficking*, 11 *S. Cal. Rev. L. & Women's Stud.* 369 (2002); Min Liu, *Migration, Prostitution, and Human Trafficking: the Voice of Chinese Women* (Transaction Publishers 2011); and Rangita de Silva de Alwis, *Opportunities and Challenges for Gender-Based Legal Reform in China*, 5 *E. Asia L. Rev.* 197, 281-283 (2010).

⁴² See Jo Goodey, *Human trafficking: Sketchy Data and Policy Responses*, 8 *Criminology & Crim. Just.* 421 (2008); and Jon Spencer & Rose Broad, *The 'Groundhog Day' of the Human Trafficking for Sexual Exploitation Debate: New Directions in Criminological Understanding*, 18 *Eur. J. Crim. Policy & Research* 269 (2012).

difficult to obtain due to their clandestine nature. Underscoring the vibrancy of this intersection between law and policy, the field on human trafficking in general has also significantly benefitted from the practitioner-academic intersection, with many individuals who have had direct experiences working within the United Nations or with domestic policymakers on human trafficking contributing their expertise to important academic work. Most notable is the scholarly work of Anne Gallagher, who represented the Office of the UN High Commissioner for Human Rights (OHCHR) at the negotiations for the Trafficking Protocol and wrote the first in-depth examination of the international law of human trafficking,⁴³ as well as OHCHR's *Commentary: Recommended Principles and Guidelines on Human Rights and Human Trafficking*.⁴⁴

Another important shift that occurred during the mid-2000s was a significant movement to reframe the human trafficking discussion by examining its linkages to the global history of slavery and its abolition. This is first represented by the research of Joel Quirk, whose work explores this complex relationship between the global history of slavery and contemporary forms of human exploitation. The lack of a holistic, historical consideration with regard to present-day discussions on the global situation of human trafficking is the central thesis of Joel Quirk's body of work on what he has termed "the Anti-Slavery Project" from the transatlantic slave trade to human trafficking.⁴⁵ Also explored by Karen Bravo in 2007, this view of linking historical issues of slavery and contemporary practices of labour exploitation rejects the shorthand of portraying human trafficking as a distinct and new matrix of power and exploitation.⁴⁶ In 2012, an important volume of works by seventeen prominent scholars on various historical and contemporary aspects of slavery was published. *The Legal Understanding of Slavery: From the Historical to the Contemporary*, edited by Jean Allain whose own work has explored the drafting history of the 1926 Slavery Convention and the 1956 Supplementary Convention, is a highly relevant examination of the definition of slavery and its evolution in international law.⁴⁷ Placed in a wider

⁴³ Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010).

⁴⁴ Office of the United Nations High Commissioner for Human Rights, *Commentary: Recommended Principles and Guidelines on Human Rights and Human Trafficking*, UN Doc. HR/PUB/10/2 (2010).

⁴⁵ Quirk, *supra* n. 6; and Joel Quirk, *The Anti-Slavery Project: From the Slave Trade to Human Trafficking* (University of Pennsylvania Press 2011).

⁴⁶ Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, B.U. Intl. L.J. 207 (2007).

⁴⁷ *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Jean Allain ed., Oxford University Press 2012); Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (Martinus Nijhoff Publishers 2008); and Jean Allain, *On the Curious Disappearance of Human Servitude from General International Law*, 11 J. Hist. Intl. L. 303 (2009).

historical narrative, problems of human trafficking in the twenty-first century thus represent the latest phase in a sustained global movement to prohibit egregious forms of human exploitation.

This wider historical perspective that links studies on human trafficking to the history of slavery and its abolition is important for the methodological approach of this presented work. A revision of the premise that human trafficking in China is a new form of criminality and exploitation is predicated on an examination of sources beyond those that explicitly address the phenomenon of human trafficking in China. Doing so would create a certain circular loop, where human trafficking is seen as a problem of late-twentieth and twenty-first century modernity because studies that outwardly employ the terminology of trafficking would reflect this inherent bias of interpretation. Therefore, the approach of this presented work is to rely on sources from different subject areas that had described various exploitative practices in Chinese history from the mid-nineteenth century, even if these practices had not been labelled as trafficking, or as slavery *per se*, but whose effects were the same as our current understanding of human trafficking based on the international definition established by the Trafficking Protocol in 2000. A prime example is the practice called *hsi-min*, addressed in Chapters Four and Six, which involved the selling of Chinese boys into domestic servitude. While this practice of enslaving them as hereditary servants was largely ignored in historical reports on trafficking in China, there is a strand of ethnological studies during the mid-twentieth century that explored this marginalised group of men and subsequently noted the similarities of this practice with African chattel slavery.⁴⁸

This dissertation draws upon various sources in anthropology, sociology, legal history and Chinese studies in order to reframe the discussions on China and human trafficking as the present-day continuation of past phenomena that had similar dynamics of marginalisation and exploitation. Where possible, the relevant literature in the Chinese language is also accessed so as to provide a comparative perspective and supplementary information not available in the English language. This interdisciplinary approach is one of necessity, given that the scholarly interest in examining the connection between human trafficking and the history of slavery and its abolition is not yet seen with regard to Chinese scholarship. Slavery generally has not received much rigorous academic attention as an issue of sociology or law in the Chinese domestic context. This is mainly due to the fact that domestic views on Chinese slavery saw it

⁴⁸ See Hugh D. R. Baker, *A Chinese Lineage Village: Sheung Shui* (Frank Cass & Co. Ltd 1968); Jack M. Potter, *Capitalism and the Chinese Peasant: Social and Economic Change in a Hong Kong Village* (University of California Press 1968); and James L. Watson, *Chattel Slavery in Chinese Peasant Society: A Comparative Analysis*, 15 *Ethnology* 361 (1976).

“almost exclusively [the] products of the Marxist pursuit of an orthodox ‘slavery stage’ in China’s ancient history.”⁴⁹ Therefore, the interpretation of Chinese slavery based on a linear conception of social development, from slavery to socialism, remains very much a Marxist ideological examination.⁵⁰ Nonetheless, a few sinologists have approached the topic from the perspective of Chinese history.⁵¹ Amongst these, historian E. G. Pulleyblank’s article on the origins and nature of Chinese institutions of slavery from around 200 B.C. onwards is perhaps the most comprehensive examination on this subject accessible to English readers.⁵²

While most Chinese Marxist scholars found that episodes of large-scale slavery had existed in the country, most scholars and Marxist historians outside of China believed that there was never any highly developed system of slavery in China—no large-scale or pure-type slave system, apart from “periods in which the institution was of more than marginal significance.”⁵³ There is then a certain dichotomy in the field between domestic and international perspectives on Chinese slavery, and this would partly explain why the formal abolition of slavery by the imperial Qing government in 1910 has received more attention from foreign scholars than their Chinese counterparts in the succeeding decades.⁵⁴ The *American Journal of International Law* was the first to publish an analysis of the law in 1911, and its translation of the imperial decree that formerly abolished slavery in China remains to date the only English translation of the law.⁵⁵

⁴⁹ James L. Watson, *Transactions in People: The Chinese Market in Slaves, Servants, and Heirs*, in *Asian and African Systems of Slavery* 225 (James L. Watson ed., Basil Blackwell 1980). For domestic interpretations of Chinese slavery based on Marxist ideology, see Xu Lun [徐伦], *Shenme shi Nuli zhi Shehui* [What is a Slave Society?; 什么是奴隶制社会] (East China People’s Publisher 1953); and Shih Hsing [史星], *Nuli Shehui* [Slavery Society; 奴隶社会] (Shanghai People’s Publisher 1973).

⁵⁰ E. G. Pulleyblank, *Discussion Contributions on Stages of Social Development: Stages in Chinese History*, 6 *Marxism Today* 94, 94 (1962).

⁵¹ See Clarence Martin Wilbur, *Slavery in China during the Former Han Dynasty, 206 B.C.—A.D. 25*. (Anthropological Series vol. 34, Field Museum of Natural History 1943); and Wang Yi-t’ung, *Slaves and Other Comparable Social Groups during the Northern Dynasties (386-618)*, 16 *Harvard J. Asiatic Stud.* 293 (1953).

⁵² E. G. Pulleyblank, *The Origins and Nature of Chattel Slavery in China*, 1 *J. Econ. & Soc. Hist. Orient* 185 (1958).

⁵³ Orlando Patterson, *Slavery*, 3 *Annual Rev. Sociology* 407, 412 (1977).

⁵⁴ See Marinus J. Meijer, *Slavery at the End of the Ch’ing Dynasty*, in *Essays on China’s Legal Tradition* 327 (Jerome Alan Cohen, R. Randle Edwards & Fu-mei Chang Chen eds., Princeton University Press 1980); and E. T. Williams, *The Abolition of Slavery in the Chinese Empire*, 4 *Am. J. Intl. L.* 794 (1910).

⁵⁵ *Official Documents: Report to the Throne of the Imperial Chinese Commission on Constitutional Government Recommending the Abolition of Slavery, Together with the Imperial Rescript Approving the Report and Ten Regulations for its Enforcement*, 4 *Supp. Am. J. Intl. L.* 359 (1910).

While there is a general consensus amongst scholars outside of China that imperial China was not a “slave society,” there were, nonetheless, particular marginalised groups whose status or practice of labour were similar to that of slavery. Discussions that took place during the late-Qing over the situation of these groups, especially female domestic servants and adopted daughters, would become a notable antecedent to the drafting of the 1956 Supplementary Convention, where many of these institutions and practices similar to slavery were discussed and proscribed by international law. The part of the presented research concerning practices of marginalisation and exploitation during the late-Qing, in Chapter Five, is based on an examination of various types of sources that covered this period of Chinese history from the mid-nineteenth century until the fall of the Qing government in 1912. These sources include primary references, translations of Qing’s legal code and memoirs of missionaries, as well as secondary analyses by scholars addressing various aspects of society and law during this period.

The same methodology applies to materials covering the Republican period from 1912 to 1949, as examined in Chapter Six. Importantly, the examination of the Republican period benefits from official documents from the archive of the League of Nations. These reports and intergovernmental communications offer valuable insights on the position of the Chinese Republican government in its engagement with the League of Nations on issues related to the trafficking in persons. Chapter Seven’s analysis of the legislative framework of the Communist government from 1949 to the present was also based on accessing the news archive of the *People’s Daily*, the official newspaper of the People’s Republic, and the database of state periodic reports maintained by the Office of the UN High Commissioner for Human Rights. Because legislative amendments in China are deliberated and adopted through a rather opaque process by the National People’s Congress Legislative Affairs Committee, a concrete analysis of the government’s position with regard to its legislative agenda is restricted by the problem of access. Therefore, an analysis of China’s periodic reports under human rights treaty bodies and officially released information on legislative reforms published in the government’s official paper can yield valuable insights, difficult to obtain elsewhere, on the evolution of the government’s position on human trafficking and interpretations of its legal obligations under the Trafficking Protocol.

There is a lacuna in the field on human exploitation in China given that both historical and contemporary scholars have taken a fragmented approach towards analyses on the topic. This problem may be unavoidable, given the varied exploitative

purposes which constitute trafficking in persons as established by the Trafficking Protocol and the breadth of Chinese history. For instance, there have been a few domestic studies on female prostitution in China that take a historical approach, some beginning with the Qin Dynasty around 220 BC to modern times.⁵⁶ While these studies add a necessary historical perspective to what are predominantly seen as modern problems of the commercial sex trade, their focus remains on the broader phenomenon of prostitution and not on the dynamics of trafficking and the intended purpose of labour exploitation, which constitutes the *mens rea* requirement for the definition of trafficking under the Trafficking Protocol. Anthropologist James Watson provides one of the few comprehensive analyses on this topic in a 1980 article on endemic Chinese practices of transferring slaves, servants and heirs.⁵⁷ Watson's article is notable for two main reasons: first, he included both female and male victims in his examination when literatures in this area have tended to focus exclusively on female exploitation; second, the article appeared in an edited volume on Asian and African systems of slavery. Thus, the central analytical frame of Watson's work was not on whether slavery according to Marxist ideology existed in China. Rather, his focus was on individual practices of exploitation that had the practical effects of reducing a person to slavery in modern Chinese history. The work presented here continues Watson's methodology of treating various forms of human trafficking in modern Chinese history in a comprehensive manner, not as gender-exclusive practices but based on an analysis of their practical effects of exploitation and abuse.

1.3. Chinese Historical Context and Prelude

As addressed above in the literature review, it is a more recent development to link studies on human trafficking to the broader historical associations of slavery and practices similar to slavery. However, few academic articles and reports on China's human trafficking draw such linkages to past dynamics. Even if they do, these references are usually cursory and rhetorically used to underscore the plight of the poor towards the tottering end of the Qing Dynasty, a chapter of "semi-colonial and semi-feudal" history that the government had renounced in 1949 with the founding of the

⁵⁶ See Dan Guangnai [单光霁], *Zhongguo Changji: Guoqu he Xianzai* [Chinese Prostitution: Past and Present; 中国娼妓: 过去和现在] (Law Press China 1995); Wu Zhou [武舟], *Zhongguo Jinu Shenghuo Shi* [A Life History of Chinese Prostitutes; 中国妓女生活史] (Hunan Literature and Art Publishing House 1990); and Wu Zhou [武舟], *Zhongguo Jinu Wenhua Shi* [A Cultural History of Chinese Prostitutes; 中国妓女文化史] (Shanghai East Publishing Center 2006).

⁵⁷ Watson, *supra* n. 49, at 223.

People's Republic of China.⁵⁸ The severance with the past has brought about a certain historical shortsightedness; insofar as it was a political and socially constructed necessity for the new regime, it was fundamentally more a reflection of the tumultuous years that China had undergone in the twentieth century.

1.3.1. Severance with the Past

The political vicissitudes of Chinese modern history are seen in the rapid succession of governments during the first half of the twentieth century. At the beginning of the century, China was an imperial government in the waning years of the Qing Dynasty, which had ruled China since its cavalry breached the Great Wall in 1644. The last Qing ruler was enthroned in 1908 as a three-year-old, only to abdicate four years later when the dynasty collapsed. A weak Republican government followed, which was effectively controlled by warlords wielding military control for most of its early years. The years between the mid-1920s and 1949 were characterised by the contest between the Chinese Communists and Nationalists for ideological and political dominance, where “despite endless protestations to the contrary each of these major political parties grew narrow-minded and ingrown, saw vision succumb to the organizational needs of the moment, and employed weapons of censorship, harassment, intimidation, and death.”⁵⁹ While the two factions jointly fought the Japanese from 1937 to 1945, their differences ultimately culminated in a pernicious civil war. The bitter conflict only concluded with the founding of the People's Republic of China under the Chinese Communist Party in 1949 and the fleeing of Nationalist forces to the island of Taiwan.⁶⁰

Domestically, the abbreviation of Chinese modern history mainly to the events post-1949 not only conveniently sidesteps the legacy issues of this violent domestic

⁵⁸ See, for reference, *Constitution of the People's Republic of China* 11 (The Legislative Affairs Work Committee of the the Standing Committee of the National People's Congress ed. and trans., People's Publishing House 2004); Preamble, ¶ 1: “After 1840, feudal China was gradually turned into a semi-colonial and semi-feudal country...After waging protracted and arduous struggles...the Chinese people of all nationalities led by the Communist Party of China with Chairman Mao Zedong as its leader ultimately, in 1949, overthrew the rule of imperialism, feudalism and bureaucrat-capitalism, won a great victory in the New-Democratic Revolution and founded the People's Republic of China.”

⁵⁹ Jonathan D. Spence, *The Gate of Heavenly Peace: The Chinese and Their Revolution, 1895-1980*, at 19 (Penguin Books 1982).

⁶⁰ On this political transition from Chinese Republican to Communist rule and the protracted conflict between the two factions, see John K. Fairbank & Albert Feuerwerker eds., *The Cambridge History of China: Republican China, 1912-1949, Part 2* vol. 13 (Cambridge University Press 1986); and Roderick MacFarquhar & John K. Fairbank eds., *The Cambridge History of China: The People's Republic, Part 1. The Emergence of Revolutionary China, 1949-1965* vol. 14 (Cambridge University Press 1987).

struggle, it also hinders a nonpartisan and thoughtful consideration on historical antecedents to long-standing social problems. This is especially the case for social problems that the government, rhetorically at least, believes to have already successfully addressed through party policies and constitutional changes, such as the marginalised status of women.⁶¹ For instance, in a paper on the resurgence of female trafficking in China presented at an International Victimology conference in 1994, the historical roots of this phenomenon are simply described by a Chinese scholar as:

Trafficking in women was one of the ‘oldest evil trades’ to flourish in pre-communist China...The early practice of women and children trafficking represented women and children’s inferior social status before the law and generally reflected the society’s values and attitudes toward victims of this evil trade in the traditional Chinese society. When political power changed hands in China in 1949, the new government quickly abolished such inhuman practices against women and children.⁶²

Nonetheless, there are significant similarities between the phenomenon and dynamics of past and ongoing human trafficking in China, despite the frequent and tumultuous changes of government. However, a practical consequence of all these regime transitions has meant that it has not always been intuitive to view China’s trafficking problem as a holistic continuum, since these transitions resulted in a series of changing laws and policies. A comprehensive analysis of trafficking and China, historical and present, is also hindered by the overhaul of the Chinese writing system during the 1950s and 60s under an official program of character simplification, which compounded the challenge of accessing historical materials in the formal, traditional script and comparing them to contemporary documents.⁶³

⁶¹ According to Mao Zedong, women would no longer be inferior to men if they could gain economic independence through employment. Hence, the large increase in the number of employed women during the early years of the People’s Republic of China had convinced many that “Chinese women had achieved their complete liberation.” This interpretation, however, was flawed because it conflated gender issues with class struggles and economic oppressions in Marxist ideology; see Lijun Yuan, *Reconceiving Women’s Equality in China: A Critical Examination of Models of Sex Equality* 35-37, 60-64 (Lexington Books 2005).

⁶² Xin Ren, *Violence against Women under China’s Economic Modernisation: Resurgence of Women Trafficking in China*, in *International Victimology: Selected Papers from the 8th International Symposium* 69, 69 (Chris Sumner, Mark Israel, Michael O’Connell & Rick Sarre eds., Australian Institute of Criminology 1996).

⁶³ Those reading the new, simplified script would need to learn the corresponding traditional script, effectively meaning that two variations often exist for one character. The lack of a historical consideration may be a consequence of this issue of literacy. In addition, written Chinese of the twentieth century moved from a highly formalised system of syntax to one based on the colloquial language.

1.3.2. Modern Narratives

The idea of human trafficking as a new and distinct problem, a modern form of slavery that entraps “thousands of men, women and children [each year] in the hands of traffickers, in their own countries and abroad,”⁶⁴ is not a perception that is unique to the context of China. It is part of the political narrative that compels states to ratify the Trafficking Protocol and—as will be examined in the following chapter on international human rights law and human trafficking—legislate laws that are consistent with their international obligations under this protocol and other relevant international treaties. The portrayal of human trafficking as a modern form of slavery is fundamentally an oversimplification, and several reasons contribute to why it has tended to be perceived as a distinctively modern problem. Some of these include growing inequalities, migratory pressures amidst increasingly restrictive immigration controls, post-Cold War dislocations, demographic strain, the rise of informal labor markets and neoliberal economics.⁶⁵

Other reasons include developments in international law that have brought about a parallel change in the terminologies used to describe the problem of human trafficking, thus facilitating its equivocation as “modern slavery” for public attention. While these reasons capture some of the key issues for the emergence of this narrative, such portrayal of human trafficking as a modern development can have the unintended effect of detrimentally “expunging a much larger story, in which modern problems [of human trafficking] represent the latest phase in enduring campaigns against trafficking and forced prostitution.”⁶⁶ This historical shorthand thus underscores existing criticisms that our current understanding of “modern slave markets” is fundamentally “impressionistic and lacks depth,”⁶⁷ by overlooking important lessons that can be gleaned from the early international mobilisation against “white slavery” and later against the “traffic in persons” under the aegis of the League of Nations.

Echoing the sentiments expressed by the slavery scholar Kevin Bales, “It is very difficult to solve a problem you do not understand, and more so if the problem is called

⁶⁴ United Nations Office on Drugs and Crime, *Human Trafficking* (accessed 4 July 2012) (available at <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html>).

⁶⁵ Quirk, *The Anti-Slavery Project: From the Slave Trade to Human Trafficking*, *supra* n. 45, at 217.

⁶⁶ *Id.* at 217-218.

⁶⁷ United Nations Office on Drugs and Crime, *UNODC Report on Human Trafficking Exposes Modern Form of Slavery* (12 February 2009) (available at <http://www.unodc.org/unodc/en/frontpage/unodc-report-on-human-trafficking-exposes-modern-form-of-slavery-.html>).

by a different name every generation,”⁶⁸ the portrayal of human trafficking as a uniquely modern predicament misses an opportunity to learn from past endeavors that tackled variations of this complex problem. For example, as regards female trafficking during Republican China, these efforts were represented by different layers of policies instituted nationally and locally to address the issue of prostitution and the element of forced work that might have existed within it, as demonstrated in Chapter Six. Furthermore, Chapter Three’s historical examination adds depth to an exploration on the various factors that contribute to human trafficking, for rarely can issues that have deep cultural, social and economic roots be easily addressed by a shift in official proclamations. Moreover, such abbreviation of history not only overlooks the cultural roots of the trafficking problem in China but also ignores the history of extensive efforts from successive Chinese governments during the earlier half of the twentieth century to address this problem through active engagement with the international community.⁶⁹

The extensiveness of China’s engagement with the international community is highlighted by the fact that China was a State Party to the Protocol amending the International Agreement for the Suppression of the White Slave Traffic, signed at Paris on 18 May 1904, and the International Convention for the Suppression of the White Slave Traffic, signed at Paris on 4 May 1910, which were the first two international treaties on the trafficking of women for prostitution.⁷⁰ As a member of the League of Nations, China also ratified the 1921 International Convention for the Suppression of the Traffic in Women and Children in February 1926 and signed the 1933 International Convention on the Suppression of the Traffic in Women of Full Age when it first opened for signature. There is also a history of China under the Republican era of engaging with the League of Nations with regard to the exploitation of children within the preparatory work for the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. Despite China’s lengthy involvement in these early international mobilisation, which later evolved into

⁶⁸ University of Pennsylvania Press, *Newsletter*, http://www.upenn.edu/pennpress/news/newsletter/ppnl_06_11.html (June 2011).

⁶⁹ China, in fact, was an active participant in the League of Nations, to the extent that its commitment to the League to uphold the rule of law in the international community was later described by the China Institute of International Affairs in 1959 as perhaps “a touch of naïveté.” Jerome Alan Cohen & Hungdah Chiu, *People’s China and International Law: A Documentary Study* vol. 2, 1287-1288 (Princeton University Press 1974).

⁷⁰ International Agreement for the Suppression of the White Slave Traffic of 1904 (18 May 1904), 35 Stat. 1979. International Convention for the Suppression of the White Slave Traffic of 1910 (4 May 1910), 211 Consol. T.S. 45. Both treaties were amended by the Protocol Amending the International Agreement for the Suppression of the White Slave Traffic and the International Convention for the Suppression of the White Slave Traffic (4 May 1949), 30 U.N.T.S. 23. The 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others consolidates these two early international agreements.

the more expansive scope of protection under the Trafficking Protocol, current discussions on China's trafficking problems often overlook this historical chapter. The following chapter on international human rights law examines these developments in legal codification regarding the various prohibited forms of human exploitation, which have contributed to the present-day international definition of the trafficking in persons.

Part One: Trafficking, Human Rights and China

2. Trafficking in International Human Rights Law

Slavery is one of the most central issues in the development of international human rights law, and it is therefore perhaps unsurprising that human trafficking is often seen through the framework of slavery and its abolition.⁷¹ Owing to the long history of the abolition movement that began in the nineteenth century to ban the transatlantic slave trade, the right of individuals not to be enslaved is thus seen as an absolute right recognised and upheld by international law, under which states are allowed no permissible derogation. As the most egregious form of human exploitation, slavery, however, is but one form of exploitation enumerated by the definition of trafficking in persons under Article 3 of the Trafficking Protocol. In addition to slavery, other forms of exploitation that do not meet the legal threshold of slavery as defined by the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (the “1926 Slavery Convention”) but whose practice is proscribed by other important treaties on the subject of labour exploitation, are also referenced in the Trafficking Protocol’s definition of human trafficking.⁷² These include the prohibition on practices similar to slavery and forced or compulsory labour, which are addressed by the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956 (the “1956 Supplementary Convention”);⁷³ the Forced Labour Convention (No. 29) and the Abolition of Forced

⁷¹ See Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (Oxford University Press 2012).

⁷² Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (the “1926 Slavery Convention”) art. 1 (25 September 1926), 60 L.N.T.S. 253.

⁷³ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (the “1956 Supplementary Convention”) (7 September 1956), 226 U.N.T.S. 3.

Labour (No. 105) of the International Labour Organization.⁷⁴ Similarly, the emphasis on women and children as victims of trafficking also stems from a long history of international action that began as the prohibition against “white slavery,” which referred to the international trafficking in young women for sexual exploitation. While the focus of the international anti-trafficking regime would gradually expand to include other types of victim, the particular focus on woman and child victims would remain and overshadow the body of human rights law that deals specifically with the rights of migrant workers, who represent a large number of identified victims trafficked for the purpose of forced labour.⁷⁵ This chapter examines the developments concerning various prohibited forms of human exploitation, contributing to the present-day international definition of trafficking in persons.

2.1. Slavery

The prohibition against slavery and the slave trade is seen as a fundamental human right. The Universal Declaration of Human Rights, adopted in 1948, proclaims: “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”⁷⁶ Due to its importance in human rights law, the protection of individuals from slavery is considered as an obligation *erga omnes* held by all states towards the international community as a whole. Obligations *erga omnes* were first defined by the International Court of Justice in the *Barcelona Traction* decision of February 1970, wherein the Court included the protection from slavery as one of the four examples of obligations *erga omnes* that have emerged in contemporary international law, along with outlawing of acts of aggression, of genocide and the protection of individuals from racial discrimination.⁷⁷ Slavery is defined by the 1926 Slavery Convention as “the status or condition of a person over whom any or all of the

⁷⁴ International Labour Organization Forced Labour Convention (Convention No. 29) (28 June 1930), 39 U.N.T.S. 55. The Forced Labour Convention entered into force on 1 May 1932 and currently has 177 ratifications as of 18 May 2014; while this convention is named Forced Labour Convention, the entirety of the practice that forms the convention’s subject matter is termed “forced or compulsory labour.” International Labour Organization Abolition of Forced Labour Convention (Convention No. 105) (25 June 1957), 320 U.N.T.S. 291. The Abolition of Forced Labour Convention entered into force on 17 January 1959 and currently has 174 ratifications as of 18 May 2014.

⁷⁵ International Labour Organization, *ILO Action Against Trafficking in Human Beings* 3 (2008).

⁷⁶ Universal Declaration of Human Rights, GA Res. 217(III), UN GAOR, 3rd Sess., Supp. No. 13, UN Doc. A/810, art. 4 (1948).

⁷⁷ *Barcelona Traction, Light and Power Company, Limited, Judgement (Belgium v. Spain, Second Phase)*, 1970 IC.J. 3, ¶¶ 33-34, at 32 [hereinafter *Barcelona Traction*].

powers attaching to the right of ownership are exercised.”⁷⁸ The Convention also defined the slave trade as:

[A]ll acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.⁷⁹

The 1926 Slavery Convention further imposes an obligation on each Contracting Party to take necessary steps to “prevent and suppress the slave trade” and “bring about...the complete abolition of slavery in all its forms.”⁸⁰ Despite the fact that the 1926 Slavery Convention is not universally ratified, the moral opprobrium against slavery and the slave trade is so well-founded that this prohibition is considered to be a peremptory norm, *jus cogens*, in international law, which allows no derogation by states even if they are not legally bound to undertake such obligations through treaty law.⁸¹

The concept of slavery from the 1926 Slavery Convention was further expanded by the 1956 Supplementary Convention by obliging States Parties to progressively abolish or abandon practices and institutions outside the traditional concept of the African slave trade. Collectively termed practices of “servile status,” these four new forms of slavery were debt bondage, serfdom, certain practices of gender discrimination and the exploitation of child labour. Debt bondage is defined by the 1956 Supplementary Convention as:

“[T]he status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.”⁸²

This is in contrast to the practice of serfdom, which is defined as:

⁷⁸ 1926 Slavery Convention, *supra* n. 72, at art. 1.

⁷⁹ *Id.*

⁸⁰ *Id.* at art. 2.

⁸¹ Vienna Convention on the Law of Treaties art. 53 (23 May 1969), 1155 U.N.T.S. 331, which states: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law...a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

⁸² 1956 Supplementary Convention, *supra* n. 73, at art. 1(a).

“[T]he condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status.”⁸³

Certain gender discriminatory practices were also seen as an institution similar to slavery. These covered the three specific situations where “[a] woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group;” where “[t]he husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise;” and where the wife “on the death of her husband is liable to be inherited by another person.”⁸⁴ Furthermore, the 1956 Supplementary Convention also identified a specific form of child labour exploitation as an institution and practice similar to slavery, whereby “a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.”⁸⁵

With these provisions, the 1956 Supplementary Convention incorporated more prohibited practices within the multilateral framework on slavery. More importantly, by calling on all States Parties to abolish progressively, and as soon as possible, practices and institutions similar to slavery, the 1956 Supplementary Convention was able to broaden the *jus cogens* concept to practices not explicitly related to the traditional slave trade, but whose elements of ownership and control, often backed by the threat of violence, presented a compelling case for barring them under the characterisation of institutions and practices similar to slavery. As noted by one slavery scholar, however, these definitions of contemporary servile status akin to practices of slavery “are essentially pragmatic definitions based on examples of existing practise, rather than an attempt to find the common attributes of the different manifestations of the relationship known as slavery.”⁸⁶ Consequently, this has given rise to much of the present-day confusion concerning what practices should be considered as to have crossed the conceptual threshold of slavery. This confusion is exacerbated by the fact that neither

⁸³ *Id.* at art. 1(b).

⁸⁴ *Id.* at art. 1(c).

⁸⁵ *Id.* at art. 1(d).

⁸⁶ Kevin Bales, *Understanding Global Slavery: A Reader* 44 (University of California Press 2005).

the convention of 1926 nor that of 1956 had established a body to monitor the implementation of state obligations with respect to these treaties.

Because the 1956 Supplementary Convention had left the precise extent of practices analogous to slavery undefined and it is no longer legally permissible for any person to assert ownership over another, today's practices similar to slavery are usually determined by the circumstances of the enslaved person. This ultimately involves fundamental questions as to: (i) the degree of restriction of the individual's inherent right to freedom of movement; (ii) the degree of control of the individual's personal belongings; and (iii) the existence of informed consent and a full understanding of the nature of the relationship between the parties.⁸⁷ This is often seen in cases of human trafficking, where traffickers frequently exercise control over their victims through physical abuse or through confiscating their travel and identification documents, withholding their wages, restricting or banning their movement, prohibiting their communication with family and friends, selling and trading them to another owner or threatening their family members. Most often, a combination of these components is used to achieve their compliance, resulting in physical and mental abuses of the victims. It would be this element and the degree of control that would result in the characterisation of human trafficking as a contemporary form of slavery, leading to the UN Working Group on Contemporary Forms of Slavery to describe trafficking in persons in 2002 as "the modern equivalent of the slave trade of the nineteenth century."⁸⁸

2.2. Forced Labour

While the drafting of international treaties on the prohibition of slavery, the slave trade and practices similar to slavery took place first under the League of Nations and later the United Nations, the responsibility for the abolition of forced labour worldwide was entrusted to the International Labour Organization, an intergovernmental body founded in 1919 to promote "humane conditions of labour."⁸⁹ In June 1930, the International Labour Organization adopted the Forced Labour Convention, which defines "forced or compulsory labour" as "all work or service which

⁸⁷ David Weissbrodt & Anti-Slavery International, *Abolishing Slavery and its Contemporary Forms: Report submitted to the Sub-Commission on the Promotion and Protection of Human Rights* ¶ 21, at 7 (HR/PUB/02/4) (2002).

⁸⁸ *Id.* at ¶ 62, at 18.

⁸⁹ International Labour Organization Constitution (Part XIII of the Treaty of Versailles) Preamble (28 June 1919), 49 Stat. 2712.

is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”⁹⁰ It further obliges States Parties to undertake steps “to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.”⁹¹ Since both concepts of slavery and forced labour impose significant restrictions on an individual’s freedom and enjoyment of the fruits of his or her labour, the two are closely related. The 1926 Slavery Convention, recognising the close relationship between the two practices of forced labour and slavery, devotes Article 5 to oblige States Parties “to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.”⁹² The particular phrasing “developing into conditions analogous to slavery” was used to underscore that although the two practices are similar, fundamentally slavery represents a higher threshold of exploitation because it contains the element of ownership and all the rights and powers over another person attached to it. Therefore, unlike slavery, the practice of forced or compulsory labour lacks an absolute prohibition in international law, and these exemptions to forced or compulsory labour are set out by the Forced Labour Convention. These include any work or service that is: (a) exacted in virtue of compulsory military service; (b) part of “the normal civic obligations of the citizens”; (c) as consequence of a conviction in a court of law; (d) exacted in cases of emergency; and (e) minor communal services by members of the community.⁹³

The gradual suppression of forced labour was adopted to accommodate the view of colonial administrations that used various forms of coercion to obtain labour for large infrastructure projects in their territories.⁹⁴ This position, however, was modified by the Convention on the Abolition of Forced Labour in 1957, which limited the types of forced labour practices allowed by the earlier Forced Labour Convention. In contrast to its predecessor, the Convention on the Abolition of Forced Labour concretely obliges States Parties “to secure the immediate and complete abolition of forced or compulsory labour” as a means of political coercion, labour discipline, or racial, social, national or religious discrimination; as a method of mobilising and using labour for economic development; and as punishment for having participated in strikes.⁹⁵ In contrast, no such

⁹⁰ Forced Labour Convention, *supra* n. 74, at art. 2.

⁹¹ *Id.* at art. 1.

⁹² 1926 Slavery Convention, *supra* n. 72, at art. 5.

⁹³ Forced Labour Convention, *supra* n. 74, at art. 2(2).

⁹⁴ International Labour Organization, *Stopping Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* ¶ 22, at 10 (2001).

⁹⁵ Abolition of Forced Labour Convention, *supra* n. 74, at arts. 1-2.

limiting clause is needed for the prohibition of slavery in international law, for the prohibition on the legal ownership of a person by another gives rise to an obligation *erga omnes* by the international community.⁹⁶ At the same time, while there are clear distinctions of legal ownership and absolute prohibition in the two related issues of slavery and forced labour, there is less differentiation between forced labour and what are considered to be “institutions and practices similar to slavery” as addressed by the 1956 Supplementary Convention. Concerning these institutions and practices similar to slavery, also collectively referred to as “servitude” under Article 4 of the Universal Declaration of Human Rights in 1948, indeed there are certain conceptual overlaps between them and forced labour, owing to the elements of coercion and the denial of freedom in these labour relationships.⁹⁷ Consequently, as new forms of bondage emerge, they can simultaneously fall under the ambit of the international human rights regime as contemporary practices of slavery and the international labour regime as issues of forced labour. For instance, practices similar to slavery that, over time, have been incorporated into the forced labour concept by the International Labour Organization include debt bondage and extreme forms of child labour abuse, due to the fact that these practices also share characteristics of forced labour.⁹⁸

As a consequence of this conceptual overlap, the two terms of “forced labour” and “slavery,” as it specifically refers to contemporary institutions and practices similar to slavery, are often used interchangeably, bringing about a degree of confusion in the typology of terms. For example, the Working Group on Contemporary Forms of Slavery, under the Commission on Human Rights, has consistently examined the practice of forced labour worldwide within its mandate since its establishment in 1975. In its 1999 report on contemporary forms of slavery, the Working Group unequivocally “[r]eaffirms once again that forced labour is a contemporary form of slavery.”⁹⁹ The International Labour Organization has also reiterated its position that slavery is a form

⁹⁶ *Barcelona Traction*, *supra* n. 77, at ¶ 34, at 32.

⁹⁷ International Labour Organization, *supra* n. 94, at ¶ 2, at 1. The change of terminology from “servitude” in 1948 to “institutions and practices similar to slavery” in 1956 was not the result of disagreements on the issue of definition. In fact, the 1956 Supplementary Convention was originally envisaged as a supplementary treaty on slavery and servitude. However, the term “institutions and practices similar to slavery” was favoured so that States Parties could retain a gradualist and progressive approach towards its abolition or abandonment, as opposed to an outright abolition of servitude; see Jean Allain, *On the Curious Disappearance of Human Servitude from General International Law*, 11 J. Hist. Intl. L. 303 (2009).

⁹⁸ Weissbrodt & Anti-Slavery International, *supra* n. 87, at ¶ 48, at 14.

⁹⁹ Working Group on Contemporary Forms of Slavery, *Report of the Report of the Working Group on Contemporary Forms of Slavery on its Twenty-Fourth Session* ¶ 107(13.1), at 37, (E/CN.4/Sub.2/1999/17) (1999).

of forced or compulsory labour through its follow-up work on the 1998 ILO Declaration on Fundamental Principles and Rights at Work.¹⁰⁰

This conceptual overlap is also made more unclear due to the breadth of the current definition of trafficking in persons with regard to the purpose of exploitation. Under the definition of trafficking in persons, the purpose of exploitation can include, *inter alia*, forced labour as well as both slavery and practices similar to slavery. Slavery, in both its traditional and more contemporary manifestations, does not need to have taken place; only the intent to exploit the trafficked victim in a manner that falls within the scope of slavery or servitude is sufficient for it to be considered a form of trafficking in persons. This has led one legal scholar to criticise the simple characterisation that trafficking in persons is slavery without a thorough examination of the various constitute components in the definition of trafficking in persons. Writing in 2009, Jean Allain asked, “Why [is] trafficking [seen] as a new form of slavery? Why not trafficking as a new form of forced labour or a new form of servitude?”¹⁰¹ The conceptual shorthand of trafficking as modern slavery has the unintended effect of understating the history of developments in other branches of international law that also address similar issues of labour exploitation.

2.3. Women’s Rights

Although human trafficking represents a large phenomenon that includes victims of both genders, the specific female vulnerabilities present throughout the course of trafficking have long been a source of international concern. The issue of trafficking in women has its historical roots in what was labelled as “white slavery” during the latter half of the nineteenth-century. During this time, early feminists coined the term “white slaves” to describe the female victims of prostitution trafficked across Europe since this took place around the same time as the abolition movement against transatlantic slavery.¹⁰² The ensuing public outcry over “white slavery” led to the codification of two early international treaties on the trafficking of women for prostitution: the 1904 International Agreement for the Suppression of the White Slave Traffic and the 1910 International Convention for the Suppression of the White Slave Traffic (the “1904

¹⁰⁰ International Labour Organization, *supra* n. 94, at ¶ 6, at 2.

¹⁰¹ Jean Allain, *Book Reviews: Trafficking in Human Beings: Modern Slavery*, 20 EJIL 453, 455 (2009).

¹⁰² See League of Nations, *Records of the International Conference on Traffic in Women and Children*, Official No. C.484.M.339.1921.V., at 55 (1921).

Agreement” and the “1910 Convention,” respectively).¹⁰³ The term “white slavery,” however, eventually fell out of popular use and was replaced by “the traffic in women and children,” which was the terminology used by the two subsequent treaties on the subject drafted under the aegis of the League of Nations: the 1921 International Convention for the Suppression of the Traffic in Women and Children and the 1933 International Convention on the Suppression of the Traffic in Women of Full Age (the “1921 Convention” and “1933 Convention,” respectively).¹⁰⁴ After the League of Nations gave way to the founding of the United Nations in 1945, the United Nations, in an effort to continue previous work on the trafficking of women and to consolidate earlier treaties, adopted the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (the “1949 Convention”).¹⁰⁵

In terms of its impact on the current international anti-trafficking framework, the consolidated 1949 Convention was significant in the development of a coherent international strategy against trafficking for the purpose of prostitution. It established a multilateral framework in which trafficking in persons for prostitution was considered an issue of international law, as opposed to solely being a domestic matter as stipulated by the earlier treaties.¹⁰⁶ For example, both the 1904 Agreement and the 1910 Convention failed to address the exploitative purpose of trafficking for prostitution because it was considered to fall within a country’s domestic jurisdiction and, thus, outside the purview of these two international treaties. Explicitly articulating this view that the end purpose of trafficking was best left to domestic legislation, the Final Protocol of the 1910 Convention states: “The case of detention, against her will, of a woman or girl in a brothel, could not, in spite of its gravity, be dealt with in the present Convention, seeing that it is governed exclusively by internal legislation.”¹⁰⁷ This same

¹⁰³ International Agreement for the Suppression of the White Slave Traffic of 1904 (the “1904 Agreement”) (18 May 1904), 35 Stat. 1979. International Convention for the Suppression of the White Slave Traffic of 1910 (the “1910 Convention”) (4 May 1910), 211 Consol. T.S. 45.

¹⁰⁴ International Convention for the Suppression of the Traffic in Women and Children of 1921 (the “1921 Convention”) (30 September 1921), 9 L.N.T.S. 415. International Convention for the Suppression of the Traffic in Women of Full Age of 1933 (the “1933 Convention”) (11 October 1933), 150 L.N.T.S. 431. Both treaties were amended by the Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children and the Convention for the Suppression of the Traffic in Women of Full Age (12 November 1947), 53 U.N.T.S. 13.

¹⁰⁵ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949 (the “1949 Convention”) (2 December 1949), 96 U.N.T.S. 271. The 1949 Convention entered into force on 25 July 1951 and currently has 82 ratifications as of 18 May 2014. The 1949 Convention consolidates all the preceding international treaties on the traffic in women and children.

¹⁰⁶ Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 Harv. Hum. Rights J. 65, 75 (1998).

¹⁰⁷ 1910 Convention, *supra* n. 103, at Final Protocol D.

criticism also can be levied against the two subsequent treaties on trafficking in women and children for prostitution under the League of Nations, for both the 1921 and 1933 Conventions continued to consider the end purpose of prostitution to be a matter of domestic jurisdiction. The 1921 Convention, in particular, has been harshly criticised for encouraging states to adopt a domestic approach to the trafficking problem by mandating them to take “legislative or administrative measures regarding licensing and supervision of employment agencies and offices, to prescribe such regulations as are required to ensure the protection of women and children seeking employment in another country.”¹⁰⁸ As a result, the 1921 Convention, as one author has argued, “confused signatories, due to the difficulty of distinguishing between international trafficking and commercialized prostitution.”¹⁰⁹

Despite the limitations of the earlier conventions on trafficking, they were successful in gradually expanding the scope of protection to more victims. Whereas the 1904 Agreement only vaguely referred to “women and girls” as victims, the 1910 Convention specified the age of majority as twenty and referred to both women and girls under and over that age.¹¹⁰ This was followed by the 1921 Convention, which broadened the emphasis on female trafficking for prostitution from a regional, Europe-centered issue to a topic of international concern.¹¹¹ Most notably, the 1921 Convention brought to the forefront the issue of exploitation of underage boys for prostitution by expanding the scope of protective measures to children of either sex.¹¹² The 1921 Convention also increased the age of majority to 21 years, which was significant at this time given that the mere acts of having “procured, enticed, or led away, even with her consent” a female minor were sufficient to constitute the crime of white slave traffic.¹¹³ In contrast, the criminalisation of white slave traffic, where the victims were women of majority, required the additional elements of proving that the victims were led away without their consent by “fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion.”¹¹⁴ A decade later, women of full age were given the

¹⁰⁸ 1921 Convention, *supra* n. 104, at art. 6.

¹⁰⁹ Michelle O. P. Dunbar, *Comment: The Past, Present, and Future of International Trafficking in Women for Prostitution*, 8 *Buff. Women’s L.J.* 103, 110 (2000).

¹¹⁰ 1910 Convention, *supra* n. 103, at Final Protocol B and arts. 1-2.

¹¹¹ With the exception of Brazil, which signed the 1910 Convention, all the original signatories of both the 1904 Agreement and the 1910 Convention were European countries. This is in contrast to the 1921 Convention, which had a wider geographical coverage.

¹¹² 1921 Convention, *supra* n. 104, at art. 2.

¹¹³ 1910 Convention, *supra* n. 103, at art. 1.

¹¹⁴ *Id.* at art. 2.

same level of protection as underaged victims by the 1933 Convention, which extended the scope of punishable acts that had previously only applied to the trafficking of minors for prostitution to include women of full age.¹¹⁵

The 1949 Convention marks a significant development in the global response to trafficking of both adults and minors for the exploitation of prostitution by becoming the first international instrument to have an expansive view of the various operative elements within both domestic and international trafficking. In contrast to the earlier treaties, the 1949 Convention went beyond the initial dynamic of recruitment or transportation and expanded the parameters of criminalisation to include the more exploitative elements of trafficking, such as the profits made from prostitution. It obliged Contracting Parties to punish any person who, even with the consent of the other person, procures, entices or leads away the said person for purposes of prostitution or exploits the prostitution of another person;¹¹⁶ as well as anyone who keeps, manages or finances a brothel or who knowingly lets or rents a property to be used for prostitution.¹¹⁷ The 1949 Convention further obliged Contracting Parties to a series of mutual legal assistance measures, which included provisions on joint cross-border investigation, intelligence sharing and extradition,¹¹⁸ and a strategy of prevention and the subsequent rehabilitation of rescued and repatriated victims.¹¹⁹ Compared to the earlier treaties, these anti-trafficking obligations placed on the Contracting Parties by the 1949 Convention were more robust and comprehensive. The 1949 Convention thus represents a key turning point in the development of an effective international response to trafficking for prostitution by targeting the critical issues of prevention, the rehabilitation of victims and the prosecution of those who financially benefit from such exploitation.

It is important to note that despite the gradual broadening of the protective regime of these treaties on “white slave traffic” and the traffic in persons, they were

¹¹⁵ International Convention for the Suppression of the Traffic in Women of Full Age of 1933 (the “1933 Convention”) art. 1 (11 October 1933), 150 L.N.T.S. 431. The 1933 Convention required the punishment of persons who trafficked in women or girls of full age, where even their consent would not exempt the traffickers from criminal prosecution. Concerning adult male victims, who still remained until this time outside the scope of these earlier international treaties, this was changed by the adoption of the 1949 Convention, which became the first international agreement to refer to trafficking for prostitution in gender-neutral terms.

¹¹⁶ 1949 Convention, *supra* n. 105, at art. 1.

¹¹⁷ *Id.* at art. 2.

¹¹⁸ *Id.* at arts. 8-10 and 13-15.

¹¹⁹ *Id.* at art. 16.

only applicable to the crime of trafficking for prostitution and did not address other forms of female exploitation. In 1979, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the General Assembly and became the first multilateral treaty to oblige States Parties to address all forms of female trafficking.¹²⁰ CEDAW, which is a broad treaty that prohibits gender discrimination in all its forms, calls on its States Parties to “take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”¹²¹ The separation of the phrases “all forms of traffic in women” and “exploitation of prostitution” has been interpreted to mean that the convention aimed to extend its protection to victims of trafficking for purposes other than prostitution, such as forced domestic labour or forced marriage.¹²² Seen in this light, CEDAW is important in changing the conceptualisation of trafficking from a crime that was solely associated with prostitution to one with many possible forms of exploitation. Beyond the earlier international conventions on “white slavery” and the traffic in persons, CEDAW was the only other multilateral treaty until the adoption of the Trafficking Protocol in 2000 to concretely oblige States Parties to take measures towards the elimination of the trafficking in women. Furthermore, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women adopted by the UN General Assembly in October 1999 allows a right-to-petition procedure for individuals and groups.¹²³ Under the Optional Protocol, victims of female trafficking whose governments are States Parties to both the CEDAW and the Optional Protocol would be able to submit individual complaints of their governments’ failure to suppress female trafficking to the treaty’s monitoring committee, which can decide to conduct inquiries into these allegations of abuse.¹²⁴

In recent years, other declarations and special mandates of the Human Rights Council have highlighted the gender component of human trafficking. At the eighth session of the Human Rights Council in June 2008, the mandate of the Special Reporter on trafficking in persons, especially women and children, was renewed with a special recognition “that women and girl victims are often subject to multiple forms of

¹²⁰ Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”) (18 December 1979), 1249 U.N.T.S. 13. It entered into force on 3 September 1981 and currently has 188 ratifications as of 18 May 2014.

¹²¹ *Id.* at art. 6.

¹²² Chuang, *supra* n. 106, at 78.

¹²³ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (6 October 1999), 2131 U.N.T.S. 83. It entered into force on 22 December 2000 and currently has 104 ratifications as of 18 May 2014.

¹²⁴ *Id.* at art. 8.

discrimination and violence, including on the grounds of their gender, age, ethnicity, culture and religion, as well as their origins, and that these forms of discrimination themselves may fuel trafficking in persons.”¹²⁵ This resolution, in turn, follows the principle set by the pivotal Vienna Declaration and Programme of Action that emerged from the 1993 World Conference on Human Rights on the equal status and human rights of women by calling on all governments to work towards the elimination of violence against women in public and private life, all forms of sexual harassment, exploitation and trafficking and gender bias in the administration of justice, as well as to eradicate any potential conflict between women’s rights and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism.¹²⁶

2.4. Rights of the Child

Today, the formulation of children’s rights in international human rights law is embodied by the Convention on the Rights of the Child, which was adopted by the UN General Assembly in 1989 and came into force a year later.¹²⁷ The Convention on the Rights of the Child enjoys nearly universal ratification with only two states in the world—Somalia and the United States—outside its purview. The Convention’s goal is to establish a comprehensive regime to protect children’s rights by recognising that children are less able to draw attention to violations of their rights due to their limited physical and mental capacity. As such, they are entitled to special care, assistance and protection under the law. States Parties to the Convention are obliged to develop and undertake actions guided by the primary consideration of the best interests of the child, regardless of whether such actions emanate from “public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.”¹²⁸ The Convention on the Rights of the Child, therefore, not only provides a much needed legitimisation for the concept of the rights of the child in international law, but it also

¹²⁵ Special Rapporteur on Trafficking in Persons, especially Women and Children, HRC Res. 8/12, Human Rights Council, 8th Sess., UN Doc. A/HRC/RES/8/12, preamble (2008).

¹²⁶ Vienna Declaration and Programme of Action, World Conference on Human Rights, UN Doc. A/Conf. 157/23, § 3, ¶ 38 (1993). Vienna Declaration and Programme of Action was endorsed by GA Res. 121(XLVIII), UN GAOR, 48th Sess., UN Doc. A/Res/48/121 (1994).

¹²⁷ The Convention on the Rights of the Child (20 November 1989), 1577 U.N.T.S. 3. The Convention on the Rights of the Child entered into force on 2 September 1990 and currently has 194 ratifications as of 18 May 2014.

¹²⁸ *Id.* at art. 3(1).

facilitates further development and general acceptance of these specific civil, cultural, economic, political and social rights for the child.¹²⁹

The Convention on the Rights of the Child, however, was not the first instrument adopted by an intergovernmental organisation that recognises the vulnerabilities of children. The philosophical foundation for the Convention on the Rights of the Child stems from the Declaration of the Rights of the Child, adopted by the League of Nations in 1924.¹³⁰ Although the 1924 Declaration concerned itself more with provisions of child welfare and did not place concrete obligations on states in this regard, it was important in establishing the concept of the rights of the child in international law and laying the foundation for future international standard setting in the area of children's rights.¹³¹ The imperative to protect children from exploitation was found in this early declaration, which states: "The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation."¹³² This inclusive reference to "every form of exploitation" is significant, given that the other League of Nations treaty around this time—the 1921 International Convention for the Suppression of the Traffic in Women and Children—also addressed the protection of children but only focused on the traffic and exploitation of children for the purpose of prostitution.

This led to a development in international law, where the ambit of the standard setting on the rights of the child concerning the prohibition of child exploitation remains broad so as to bar all possible forms of exploitation against the child. For instance, after the work of the League of Nations, the United Nations continued this broad interpretation of the prohibition of child exploitation by adopting the Declaration of the Rights of the Child in 1959, the precursor to the Convention on the Rights of the Child, which proclaims as one of its ten principles: "The child shall be protected against all forms of neglect, cruelty and exploitation...[and] shall not be the subject of traffic, in any form."¹³³ The wide scope of the prohibition of child exploitation during the early codification efforts on the rights of the child is in sharp contrast to the earlier treaties on the traffic of children—as part of the broader international indignation over the 'white

¹²⁹ Geraldine Van Bueren, *The International Law on the Rights of the Child* xx (Martinus Nijhoff Publishers 1995).

¹³⁰ The League of Nations Declaration of the Rights of the Child (26 September 1924), League of Nations O.J. Spec. Supp. 21, at 43; in *International Documents on Children* 3 (Geraldine Van Bueren ed., 2nd ed., Martinus Nijhoff Publishers 1998).

¹³¹ Van Bueren, *supra* n. 129, at 7-8.

¹³² The League of Nations Declaration of the Rights of the Child, *supra* n. 130, at art. IV.

¹³³ The United Nations Declaration of the Rights of the Child, GA Res. 1386 (XIV), UN GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354, principle 9 (1959).

slave trade’ and the traffic in persons—whose focus remained solely on the end result of prostitution, to the exclusion of all other purposes of child exploitation.

The Convention on the Rights of the Child addresses a State Party’s general obligation to prevent the trafficking in children for any purpose in Article 35, which prescribes: “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.” There is, however, an overlap between Article 35 and the preceding article that addresses the sexual exploitation component of child trafficking by calling for States Parties to “protect the child from all forms of sexual exploitation and sexual abuse” by taking measures to prevent: (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials.¹³⁴ The conceptual overlap of these two articles is attributed to the position advocated by Mexico, Senegal, Venezuela, the International Labour Organization and the Informal NGO Ad Hoc Group during the drafting of the Convention that the issues of sexual exploitation and trafficking would be best addressed by two separate articles since trafficking can cover a wide range of exploitation not only limited to the sex trafficking of children.¹³⁵ Nonetheless, both Articles 34 and 35 should be interpreted together with other relevant provisions in the Convention on the Rights of the Child, such as Article 19 on a child’s right to protection from all forms of violence; Article 32 on the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous; Article 36 on a state’s preventive obligation to include all other forms of exploitation prejudicial to any aspects of the child’s welfare; and Article 39 on the rehabilitation of child victims.

After the Convention on the Rights of the Child came into force, several countries openly supported the adoption of a separate treaty that deals specifically with issues related to child sex trafficking, despite initial reluctance from the Committee that such efforts would undermine treaty coherence and overtly complicate coordination in treaty reporting requirements.¹³⁶ Support for this culminated in the adoption of the

¹³⁴ The Convention on the Rights of the Child, *supra* n. 127, at art. 34.

¹³⁵ Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child* vol. 2, 717 (2007).

¹³⁶ Vitit Muntarbhorn, *Article 34: Sexual Exploitation and Sexual Abuse of Children* vol. 34, in *A Commentary on the United Nations Convention on the Rights of the Child* ¶ 45, at 26 (Andre Alen, Johan Vande Lanotte, Eugeen Verhellen, Fiona Ang, Eva Berghmans & Mieke Verheyde eds., Martinus Nijhoff Publishers 2007).

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitutes and Child Pornography in May 2000, which concretely obliges States Parties to criminalise the sale of children, child prostitution and pornography.¹³⁷ The main shortcoming of the Optional Protocol with regard to international efforts to combat child trafficking, however, lies in the fact that it only specifically addresses the sexual exploitation of children and does not extend its scope to include other exploitative purposes of child trafficking. In this sense, the Optional Protocol fails to overcome the critique that the difficulty in countering the international trafficking in children could be partly attributed to the lack of a binding international instrument that prohibits all forms of child trafficking, such as domestic servitude or other forms of child labour exploitation.¹³⁸ To date, the most comprehensive framework specifically on the subject of child labour is found in the International Labour Organization's Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (the "Worst Forms of Child Labour Convention"), which enjoys wider ratification than the Optional Protocol.¹³⁹

The Worst Forms of Child Labour Convention calls for States Parties to "take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency," and includes within its scope the following issues: all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage, serfdom and forced or compulsory labour; child sexual exploitation; the use of child labour in illicit activities, such as drug trafficking; and all other forms of work that are likely to harm the health, safety or morals of children.¹⁴⁰ Although it focuses only on the end purposes of child labour exploitation and does not address the operative elements of trafficking such as recruitment and transportation, the Worst Forms of Child Labour Convention aims to strengthen both the international and domestic assistance available to prevent and also to reintegrate victims of the most exploitative forms of child labour. It is also important to note that the prohibition of the worst forms of child labour as prescribed by this convention shares a conceptual overlap with the prohibition on slavery or practices similar to slavery by

¹³⁷ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitutes and Child Pornography (25 May 2000), 39 I.L.M. 1285. It entered into force on 18 January 2002 and currently has 167 ratifications as of 18 May July 2014.

¹³⁸ Van Bueren, *supra* n. 129, at 280.

¹³⁹ International Labour Organization Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (Convention No. 182) (the "Worst Forms of Child Labour Convention") (17 June 1999), 2133 U.N.T.S. 161. The ILO Worst Forms of Child Labour Convention entered into force on 19 November 2000 and currently has 179 ratifications as of 18 May 2014.

¹⁴⁰ *Id.* at arts. 1, 3.

barring “the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.”¹⁴¹

2.5. Rights of Migrant Workers

In the post September 11th landscape, international migration has taken on an added emphasis on security concerns, especially for the immigrant receiving countries. All migrants, but especially those with irregular status, are potentially viewed with suspicion by law enforcement bodies responsible for strengthening border control and punishing employers who use undocumented labour, as well as those who facilitate and profit from the migrants’ illegal entries into the host countries. Within this framework, human trafficking across national borders can be treated as a crime of illegal entry, residency or employment by law enforcement, without due consideration for the elements of coercion, exploitation and victimisation that can exist within a trafficking dynamic. This can then lead to immigration offences and deportation for the trafficked victims in the transit or destination countries, since they are often transported without valid travel documents and then exploited in the shadow economy. The term “re-victimisation of the victims” describes this situation, in which the victims of human trafficking are prosecuted for offences that were committed as part of their exploitation at the hand of their traffickers. Therefore, the protection of trafficked victims based on a proper identification that distinguishes victims of trafficking from other types of migrants with irregular status poses a serious challenge. It is then important to examine the issue of human trafficking through the lens of international migration law, as well as the consequences that such robust implementation of law enforcement measures at the domestic level could have on the detection and protection of trafficked victims.

Much of the current discussions on migration has focused on the dichotomy between migrants with legal status and those without. In international human rights law, however, the terms “migrant workers” who are “non-documented” or “in an irregular situation” are preferred to the popular variant of “illegal migrants,” due to the latter term’s strong connotation with criminality. Migrant workers who are documented or in a regular situation are defined by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (the “Migrant Workers Convention”) as those who “are authorized to enter, to stay and to engage in a

¹⁴¹ *Id.* at art. 3(a).

remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party.”¹⁴² Conversely, migrant workers are considered as non-documented or in an irregular situation if they do not comply with the above conditions for an authorised entry, residency and employment activity.¹⁴³ At the same time, irregular migration is a broad category that can denote various forms of undocumented entry, residency and employment. It can include, for example, those who overstay on their valid visas or those who undertake employment activities when such is not permitted by their visa conditions. Whereas these two examples do not feature prominently in the current migration discussions, as result of them being mostly regarded as victimless offences where the migrants only jeopardise their own chances for future valid re-entry, human trafficking and the closely related irregular migration phenomenon of migrant smuggling have received extensively more enforcement attention.

Although migrant smuggling is conceptually a separate form of irregular migration from human trafficking, in reality the two can share certain overlaps as the situation of the migrant changes during the migration journey and in the destination country. It is, therefore, important to also examine these potential overlaps and how they can affect the detection and the subsequent protection available to victims of human trafficking. Migrant smuggling—also known as alien, people or human smuggling—is separately defined and addressed by a sister treaty to the Trafficking Protocol that also falls under the ambit of the United Nations Convention against Transnational Organised Crime, adopted in December 2000. Protocol against the Smuggling of Migrants by Land, Sea and Air defines the ‘smuggling of migrants’ to mean:

the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.¹⁴⁴

Migrant smuggling occurs when migrants willingly pay for the chance to work abroad by seeking the services of a smuggler, who provides a limited migratory service out of a

¹⁴² International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (the “Migrant Workers Convention”) art. 5(a) (18 December 1990), 2220 U.N.T.S. 3. The Migrant Workers Convention entered into force on 1 July 2003 and currently has 47 ratifications as of 18 May 2014.

¹⁴³ *Id.* at art. 5(b).

¹⁴⁴ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (the “Smuggling Protocol”) art. 3(a) (15 November 2000), 2241 U.N.T.S. 507. The Smuggling Protocol entered into force on 28 January 2004 and currently has 138 ratifications as of 18 May 2014.

sending country. It thus comes with some knowledge on the part of the migrants, at least at the onset of their journey, of their impending irregular status in the destination country. While migrant smugglers in the Americas are colloquially known as ‘coyotes,’ Chinese smugglers are called ‘snakeheads.’¹⁴⁵ Despite the fact that it is often the migrants themselves who seek and procure the services of smugglers, the process of being smuggled can often be marked by extreme danger and violence, as exemplified by regular reports of African migrants drowning at sea while attempting to reach the southern shores of Europe.¹⁴⁶ Some migrants are not aware of or were simply deceived by their smugglers as to the exact dangers posed by the journey, while others are too desperate to leave to be deterred by such risks. In some cases, there are allegations of human rights abuses committed by immigration and other state agents against the migrants.¹⁴⁷

Conceptually, migrant smuggling differs from human trafficking in that it does not involve the element of labour exploitation of the migrant workers. Once the migrants arrive at the country of destination, no more contacts or arrangements are necessary from the smugglers. In this way, smugglers are sometimes seen as informal travel agents, who provide a limited, well-defined service of entry. Migrant smuggling is thus described as “migrant exporting schemes [that are] often characterized by highly irregular, often short-lived criminality, much of it opportunistic.”¹⁴⁸ On the other hand, the aim of a human trafficker is to import labour for ongoing enterprises by criminal organisations or even semi-legitimate businesses in the destination country. Human trafficking, therefore, represents a longer cycle of criminality, since traffickers can profit from the victims’ continuous labour or from selling them to new ‘owners’ for the purpose of further exploitation through using various abusive and coercive means. It is also important to note that whereas migrant smuggling, by definition, entails a border

¹⁴⁵ Chinese smugglers are most notoriously known for transporting migrants as human cargo in freight carriers or trucks, at times with disastrous consequences. For instance, in June 2000, 58 Chinese migrants suffocated in the back of a lorry while attempting to cross illegally into England at the port of Dover; BBC News, *The Dover Tragedy: Europe Reflects*, http://news.bbc.co.uk/2/hi/world/monitoring/media_reports/798603.stm (20 June 2000).

¹⁴⁶ BBC News, *African Migrants Drowned at Sea*, <http://news.bbc.co.uk/2/hi/europe/7892308.stm> (16 February 2009).

¹⁴⁷ See Amnesty International, *Invisible Victims: Migrants on the Move in Mexico* 11-25 (2010).

¹⁴⁸ David Kyle & John Dale, *Smuggling the State Back In: Agents of Human Smuggling Reconsidered*, in *Global Human Smuggling: Comparative Perspectives* 29, 33 (David Kyle & Rey Koslowski eds., The John Hopkins University Press 2001).

crossing, this threshold does not need to be met for cases of human trafficking to fall under the scope of the Trafficking Protocol.¹⁴⁹

While the Smuggling and Trafficking Protocols delimit the conceptual differences between these two phenomena, in practice such distinctions are difficult to implement. Foremost, it is possible that smuggled migrants, despite having agreed to the undocumented or false entry, are later forced into exploitative labour dynamics beyond the scope of the migrant smuggling definition. They can then become victims of trafficking, despite having given their consent to migrate and procured the services of smugglers for that purpose. Immigration authorities, nonetheless, tend to focus on a migrant's consent at the point of departure as a gauge of his or her true intention and the level of coercion that may be present throughout the migratory journey. This approach, however, understates how ongoing circumstances of the migrant in the destination country may change by relying on a rather simplified view of trafficked victims as migrants who knowingly undertook certain risks in seeking a more prosperous life. Such simplification not only understates the amount of exploitation that may be present in trafficking, but it also abridges the entire trafficking process to only a consideration of the coercion methods used at the initial stages of recruitment and transportation. In this simplified view, only trafficked victims who are abducted and later forced into exploitation situation through overtly coercive means would qualify for victim status. Underscoring the challenge in the proper identification of trafficking victims based on the definitions of migrant smuggling and human trafficking, one official from the United Nations Office for the High Commissioner for Human Rights' Anti-Trafficking Programme notes:

The definition of migrant smuggling...is sufficiently broad to apply to all irregular immigrants whose transport has been facilitated—trafficked persons and smuggled migrants alike. It is only the small number of trafficked persons who enter the destination country legally who would not be considered, *prima facie*, smuggled migrants.¹⁵⁰

The immense challenge of properly identifying irregular migrants—trafficked or smuggled migrants—is not only a problem of classification, for it comes with significant differences in the protections offered to them by the host countries. While the Trafficking Protocol provides a wide range of preventative and protective measures,

¹⁴⁹ See United Nations Office on Drug and Crime, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto* 259 (2004).

¹⁵⁰ Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 Hum. Rights Q. 975, 1000 (2001).

the Smuggling Protocol contains only minimal reference to the protection of smuggled migrants. For example, Article 6 of the Trafficking Protocol obliges States Parties to provide victims of human trafficking various assistance and protection. These include: privacy and identity protection, information on court and administrative proceedings, measures aimed at their physical, psychological and social recovery, physical safety and the possibility of claiming compensation.¹⁵¹ Although the Trafficking Protocol has been heavily criticised for using optional language with regard to these victim assistance and protection measures,¹⁵² couched in terms such as “in appropriate cases” without identifying what criteria determine appropriateness, the range of protection and assistances measures available to trafficking victims is still more extensive than that stipulated by the Smuggling Protocol for smuggled migrants. For instance, the Smuggling Protocol establishes only the standard consular notification in cases of their detention and the minimum level of assistance and protection to smuggled migrants, by calling on States Parties to protect them from possible retaliatory violence and to respect their basic human rights to life, to physical safety and not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.¹⁵³

Moreover, trafficking victims who fear persecution or other serious harm in their countries of origin, such as re-trafficking, reprisals from traffickers or criminal networks, ostracism, social exclusion or discrimination to an extent that would amount to persecution, harassment, threats or intimidation can also claim for protection in the host country based on the principle of non-refoulement.¹⁵⁴ The principle of non-refoulement, the cornerstone of the 1951 Convention relating to the Status of Refugees, prohibits countries from returning any individual fleeing persecution to a country “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹⁵⁵ Many states now grant victims of human trafficking a reflection period and temporary residency visa that would allow them to access critical social assistance, so they can recover from their ordeal and make an informed decision on whether or not to cooperate in criminal

¹⁵¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the “Trafficking Protocol”) art. 6 (15 November 2000), 2237 U.N.T.S. 319.

¹⁵² Gallagher, *supra* n. 150, at 990-991; and Kelly E. Hyland, *The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 8 Hum. Rights Br. 30, 31 (2001).

¹⁵³ Smuggling Protocol, *supra* n. 144, at art. 16.

¹⁵⁴ United Nations Office on Drug and Crime, *Toolkit to Combat Trafficking in Persons* 339 (2008).

¹⁵⁵ Convention Relating to the Status of Refugees of 1951, art. 33 (28 July 1951), 189 U.N.T.S. 150. The convention entered into force on 22 April 1954 and currently has 145 ratifications as of 18 May 2014.

prosecutions against their traffickers.¹⁵⁶ Some countries also grant temporary residency visas, with the possibility of it leading to permanent residency, to victims who plan to testify against their traffickers. For example, under the “T-Visa” in the United States, trafficked victims are given social and health benefits, as well as temporary residency during the criminal prosecution of human trafficking offences, and cooperative witnesses are eligible for permanent residency status in cases justified on humanitarian or national interest grounds.¹⁵⁷ There are, however, no such equivalent programmes for smuggled migrants, and these significant differences in the protection offered to these two categories of migrants with irregular status has led one commentary to note that “[t]here is thus much to be gained from being classified as trafficked, and much to lose from being considered smuggled.”¹⁵⁸

Due to the significant differences in the protection and assistance given to smuggled and trafficked victims, many have advocated for the issue of their protection to be placed within the wider context of human rights protection for all migrants, regardless of their status in the country of employment.¹⁵⁹ Supporters point to the Migrant Workers Convention, which has been considered since its adoption to be “the most ambitious and broad-ranging international instrument to date to address the human rights of migrants, other than refugees, who are outside their countries of nationality.”¹⁶⁰ The goal of the Migrant Workers Convention is to reaffirm and establish basic norms in a comprehensive convention on the human rights of migrants by setting forth a wide range of civil, social, economic and cultural rights and protections for all migrant

¹⁵⁶ United Nations Office on Drug and Crime, *supra* n. 154, at 310-312.

¹⁵⁷ Kara C. Ryf, *The First Modern Anti-Slavery Law: The Trafficking Victims Protection Act of 2000*, 34 Case W. Res. J. Intl. L. 45, 54 (2002).

¹⁵⁸ Jacqueline Bhabha & Monette Zard, *Smuggled or Trafficked?*, 25 Forced Migr. Rev. 6, 8 (2006).

¹⁵⁹ *Id.* and Richard Danziger, *Where Are the Victims of Trafficking?*, 25 Forced Migr. Rev. 10, 12 (2006).

¹⁶⁰ Linda S. Bosniak, *State Sovereignty, Human Rights and the New UN Migrant Workers Convention*, 86 Am. Socy. Intl. L. Procs. 634, 635 (1992). The Migrant Workers Convention was amongst a core group of 25 multilateral treaties highlighted for universal participation by the UN Secretary-General in commemoration of General Assembly’s Millennium Summit in September 2000.

workers and their families.¹⁶¹ Hence, it is the only human rights treaty to explicitly address the human rights of the much maligned group of irregular migrants outside their country of nationality. By including irregular migrants within its purview, the Migrant Workers Convention underscores the commitment of international human rights law to protect especially vulnerable and marginalised groups and lists in Part III (Articles 8 to 35) the human rights of all migrant workers and their families, irrespective of their status in the country of employment. These rights include the prohibition on torture or cruel, inhuman or degrading treatment or punishment; prohibition on slavery or servitude, forced or compulsory labour; freedom of thought, conscience and religion; freedom of expression and opinion; right to liberty and security; and the right to a fair and public hearing.¹⁶² They also enjoy equal treatment with nationals in respect of remuneration, work and employment conditions; participation in trade unions; social security; and emergency medical care.¹⁶³ Children of migrant workers have the right to a name, birth registration and nationality; and right to education.¹⁶⁴

At the same time, despite the extensiveness of its provisions, the Migrant Workers Convention has been criticised for being “deeply ambivalent” in its treatment of irregular migrants because it is paradoxically seen “as striking for its exclusion of undocumented immigrants from the scope of certain important rights and protections as it is for its explicit coverage of them by others.”¹⁶⁵ Critics point to the fact that the Migrant Workers Convention deals with the protection of the rights of migrant workers and their families in two distinct parts. Whereas Part III of the convention focuses on the human rights of all migrant workers and their families, irrespective of their status in the country of employment, Part IV (Articles 36 to 56) establishes additional protective

¹⁶¹ For a detailed analysis of the provisions contained in the Migrant Workers Convention, see Ryszard Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* Chapter 4, at 137-204 (Oxford University Press 1997). While the Migrant Workers Convention is based on the standard setting activities of the International Labour Organization with regards to the labour protection of irregular migrant workers, as particularly seen by ILO’s Migration for Employment Convention (No. 97) and Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143), it is broader in scope than these earlier ILO conventions in two fundamental ways. First, in addition to labour-related rights, the convention sets forth a wide range of civil, social, economic and cultural rights and protections. Second, the rights it established are not only applicable to the migrant workers but also extend to members of their families. For a discussion on the standard-setting activities of the ILO on the theme of migrant labour and the origins of the Migrant Workers Convention, see Michael Hasenau, *ILO Standards on Migrant Workers: The Fundamentals of the UN Convention and Their Genesis*, 25 Intl. Migr. Rev. 687 (1991).

¹⁶² Migrant Workers Convention, *supra* n. 142, at arts. 10-13, 16, 18.

¹⁶³ *Id.* at arts. 25-28.

¹⁶⁴ *Id.* at arts. 29-30.

¹⁶⁵ Linda S. Bosniak, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under the International Migrant Workers Convention*, 25 Intl. Migr. Rev. 737, 741 (1991).

measures that explicitly exclude irregular migrants from their application. Therefore, migrant workers and their families who are documented or in a regular situation enjoy not only the rights prescribed in Part III but also the more extensive and specific rights set forth in Part IV. For instance, migrant workers and families with regular status may enjoy limited political rights in the countries of employment,¹⁶⁶ and they are also given equality of treatment with nationals with regard to access to educational institutions and vocational training, housing, social and health services and participation in cultural life.¹⁶⁷ Part IV also expands upon some of the Part III rights on the issue of employment, such as protection against dismissal and unemployment and equality of treatment with nationals in the exercise of remunerated activities.¹⁶⁸

One legal scholar writing a year after the adoption of the Migrant Workers Convention described it as having effectively established a two-tier system in the human rights protection of migrant workers: one that contains the minimum standard of treatment that must be universally applied to all migrants and another more exclusive regime where States Parties are permitted to discriminate against migrant workers and their families who are undocumented or in an irregular situation.¹⁶⁹ A notable example lies in the protection of trade union rights of migrant workers, which appears in both Parts III and IV of the convention, under Articles 26 and 40 respectively. While Article 26 grants all migrant workers the right to join, participate in and seek assistance from trade unions, Article 40(1) grants migrant workers and their families who are in a regular situation not only the right to join and participate in trade unions but also “the right to *form* associations and trade unions in the State of employment for the promotion and protection of their economic, social, cultural and other interests” [emphasis added in italics].¹⁷⁰ The discrepancy in the treatment of the two categories of migrant workers is largely attributed to the internal tension of the Migrant Workers Convention, which seeks to balance, on the one hand, the rights of irregular migrants to treatment in accordance with international human rights law with, on the other hand, the absolute

¹⁶⁶ Migrant Workers Convention, *supra* n. 142, at art. 42(3).

¹⁶⁷ *Id.* at art. 43.

¹⁶⁸ *Id.* at arts. 54-55.

¹⁶⁹ Bosniak, *supra* n. 165, at 741.

¹⁷⁰ This two-tier protection with regards to the rights of migrant workers to join and form trade unions based on their immigration status has been criticised for being inconsistent with international human rights standards. Article 23 of the Universal Declaration of Human Rights states: “Everyone has the right to form and to join trade unions for the protection of his interests.” Both the International Covenant on Civil and Political Rights (Article 22) and International Covenant on Economic, Social and Cultural Rights (Article 8) also do not qualify an individual’s enjoyment of trade union rights based on his or her immigration status. See Cholewinski, *supra* n. 161, at 164.

sovereign right of states to regulate immigration. Various provisions in the convention, therefore, seek to allay the concerns of states that the rights accorded to irregular migrants are not to be construed as an infringement of their territorial sovereignty. This is particularly seen, for example, in Article 34, which explicitly states that undocumented immigrants are not exempt from the obligation to respect the cultural identity of local inhabitants.

Notwithstanding these limitations, the Migrant Workers Convention represents an important advancement in the area of standard setting for the rights of migrants who are undocumented or in an irregular situation, who are considered a vulnerable and marginalised group because their irregular status often means that abuses they suffer remain unreported in the shadow economy and unrecognised by the wider society. In principle, the potential reach and effect of the Migrant Workers Convention have been enthusiastically praised as: “If ratified and enforced by the individual states parties, the Convention's terms would constrain the abusive exercise of state power against undocumented immigrants under certain circumstances, and would guarantee them a degree of social protection, particularly in the employment context.”¹⁷¹ Its effectiveness to protect and advance the rights of migrants with irregular status, however, is significantly limited by its low ratification rate. Since its adoption in 1990, the Migrant Workers Convention took thirteen years to enter into force, with major developed countries of immigration conspicuously absent from the list of ratifications. This is unlikely to change in the foreseeable future, as seen by the fact that even major states of immigration that had participated in its drafting, such as Germany, Australia, Japan and the United States, have all eschewed their support for the Migrant Workers Convention. Therefore, this tension between the rights of migrant workers versus state territorial sovereignty is likely to continue and affect the reality in which law enforcement, non-governmental organisations and others carry out their work to assist victims of human trafficking.

Given this reality, the protection of migrants with irregular status, including trafficked victims, within the human rights framework is constrained by practical considerations because the treaty that could be the most effective in the protection of their rights does not enjoy wide support. Consequently, the victim assistance and protection measures set forth by the Trafficking Protocol have more reach and effect, even though these measures are not prescribed as hard obligations on States Parties and are also not posited on the more comprehensive framework of the rights of all migrant

¹⁷¹ Bosniak, *supra* n. 165, at 742.

workers. The actual delivery of these assistance provisions established by the Trafficking Protocol is then critically dependent on the proper identification of trafficked victims. This is a considerable challenge for law enforcement bodies that are more accustomed to a straightforward interdiction strategy based on the interception and criminal prosecution of smugglers or traffickers. The protection of the human rights of trafficked victims must be posited on a multi-prong strategy: one that advocates for more ratifications of the Migrant Workers Convention while at the same time pursuing what one migration scholar labels as “supplementary strategies” to develop solutions outside the realm of positive law.¹⁷² Notable examples using such an approach to advance the issue of the rights of migrant workers include International Labour Organization’s Multilateral Framework on Labour Migration, which is a set of non-legally binding principles and guidelines for a rights-based approach to labour migration adopted by the organization in 2006,¹⁷³ and the work of the Human Rights Council’s Special Rapporteur on the human rights of migrants, whose mandate explicitly recognises the particular vulnerability of migrants who are undocumented or in an irregular status and covers the situation of migrants in all countries, irrespective of whether they have ratified the Migrant Workers Convention.¹⁷⁴

Furthermore, practitioners working on anti-trafficking initiatives must also come to terms with the fact that fundamentally the Trafficking Protocol was not negotiated as a human rights instrument. As a multilateral instrument under the ambit of the United Nations Convention against Transnational Organized Crime, the Trafficking Protocol was based on the overarching theme of improving transnational law enforcement cooperation to combat human trafficking as a serious crime. It is then somewhat unrealistic to expect the Trafficking Protocol to have comparable levels of civil, social, economic and cultural protections as those prescribed by the Migrant Workers Convention to all migrant workers and their families. Nonetheless, it is important to note that while the principal focus of the Trafficking Protocol remains firmly on the successful interception and prosecution of traffickers, its affirmation of the rights of trafficked victims has been described as “a considerable achievement [that] belie[s] any

¹⁷² Ryszard Cholewinski, *The Rights of Migrant Workers*, in *International Migration Law: Developing Paradigms and Key Challenges* 255, 270 (Ryszard Cholewinski, Richard Perruchoud & Euan MacDonald eds., T.M.C. Asser Press 2007).

¹⁷³ See International Labour Organization, *ILO Multilateral Framework on Labour Migration: Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration* (2006).

¹⁷⁴ Human Rights of Migrants: Mandate of the Special Rapporteur on the Human Rights of Migrants, HRC Res. 8/10, Human Rights Council, 8th Sess., UN Doc. A/HRC/RES/8/10, ¶ 1(a) (2008). The mandate of the Special Rapporteur on the human rights of migrants was first established in 1999 and renewed in 2005 by the Commission on Human Rights, pursuant to resolutions E/CN.4/RES/1999/44 and E/CN.4/RES/2005/47, respectively.

narrow law enforcement agenda.”¹⁷⁵ This is important, given that assistance and protection measures contained in the Trafficking Protocol, such as those that focus on psychological and social recovery, are more specifically tailored to the needs of trafficked victims.¹⁷⁶ Between these different approaches of advocating for more states to ratify the Migrant Workers Convention, participate in non-binding multilateral frameworks that seek to improve the situation of migrant workers and improve transnational law enforcement cooperation to combat human trafficking, much can be gained by addressing the specific needs of trafficked victims without it further prejudicing the advancement of the rights of the migrant worker group as a whole.

* * *

Notwithstanding these various developments in international human rights law, the term “human trafficking” remains vulnerable to being misunderstood and mislabelled due to other dynamics that may be present in a trafficking operation, such as immigration violations and illegal profiteering by organised criminal groups. The conceptual complexity of human trafficking does not only manifest itself in academic discussions on trafficking as an issue with roots in different branches of international human rights law, but it also has practical consequences on how human trafficking is perceived by the public and targeted by law enforcement. For example, because human trafficking as an issue of women’s rights has its origin in the development of early international conventions against “white slavery,” the trafficking of women abroad for prostitution, this has affected how today’s anti-trafficking initiatives are often seen or conveniently designed as anti-prostitution enforcement actions. Under this scenario, prostitutes apprehended during anti-trafficking raids on brothels or other establishments where sex work is suspected to take place are labelled *prima facie* as rescued victims of trafficking. They are commonly called “sex slaves” for public consumption without a clear articulation of the actions or means that led them to prostitution or the conditions of their labour, which would more accurately determine their trafficking status.

Owing to these separate, sometimes concurrent, developments in different branches of international human rights law dealing with various aspects of human exploitation, examinations of human trafficking usually pivot on a specific form of exploitation or a specific group of victims. On the various types of labour exploitation, the definition of human trafficking under Article 3 of the Trafficking Protocol provides

¹⁷⁵ David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* 21 (Oxford University Press 2007).

¹⁷⁶ Trafficking Protocol, *supra* n. 151, at art. 6(3).

a non-exhaustive list, including, at the minimum, sexual exploitation, forced labour or services, slavery or practices similar to slavery and servitude. The groups of victims that the Trafficking Protocol aims to especially protect are women and children, while its overall scope remains gender neutral and includes adult men. Due to these different conceptual approaches to human trafficking as a research subject, a large part of how trafficking is framed and explored as an issue of law will depend on the particular context of the history and culture in which the situation of human trafficking is being analysed. A good example is the prominence given to the issue of human trafficking as a “modern form of slavery” in the United States, which can be largely attributed to the country’s history of slavery, its abolition and the civil rights movement that sought to redress its domestic legacy of social inequality.

In the introductory chapter, it was noted that whereas certain endemic practices of female domestic servitude and child adoptions in China were discussed during the drafting of the 1956 Supplementary Convention, these issues did not garner significant attention from domestic scholars as issues related to institutions and practices similar to slavery. Part of this, as explained, was due to the predominate influence of Marxist ideology of slavery as a necessary stage of social development in Chinese studies on slavery. At the same time, it is difficult to use the normative framework of slavery as a fundamental issue of international law to conceptually ground domestic studies on slavery beyond the arguments of Marxist ideology, when China is not a State Party to both the 1926 Slavery Convention or the 1956 Supplementary Convention. The same is also true for examining trafficking as a prohibition on the use of forced or compulsory labour. To date, China remains one of the few remaining countries that have not signed the Forced Labour Convention.

Given these constraints, it is the international legal framework for the protection of women and children’s rights under CEDAW and the Convention on the Rights of the Child that have been the most highlighted in China with regard to the country’s human trafficking situation. CEDAW, in particular, has a special prominence in Chinese diplomatic history because it is the first human rights treaty signed by the People’s Republic of China. As explored in more detail in Chapter Seven, this was a key moment in the evolution of China’s engagement with the United Nations and the international human rights system. In many ways, such an approach based on victimology is not unique to analyses of the trafficking situation in China; it also applies to other countries, even if they are longstanding States Parties to the host of slavery and forced labour conventions. The inherent tensions in the international definition of trafficking, which aimed to establish a comprehensive definition but did not define how these different

concepts of exploitation relate to each other, has meant that it is far more intuitive to use a framework that explores the labour exploitation by the category of victims it affects, as oppose to imprecise, and sometimes overlapping terms, in international law. The next chapter will discuss these multifaceted dimensions of the present-day human trafficking situation in China, followed by Chapter Four that takes a retrospective approach to the same problem, using the human rights of women, children and the predominantly male migrant workers as its main analytical lens.

3. Human Trafficking in Contemporary China

Human trafficking in China involves three significant migratory movements: transborder outbound as a sending country; transborder inbound as a receiving country; and domestic trafficking. The extent of each of these migratory movements varies depending on the specific purpose of exploitation and type of victims. For instance, one of the most prominent outbound movements of irregular female migration from China involves women and girls being trafficked to neighbouring countries in the Asia-Pacific region for sexual exploitation.¹⁷⁷ This irregular movement is compounded by a recent increase in the number of reported cases of Chinese women and girls being trafficked to Africa for sexual exploitation, as China intensifies its economic activities on the continent.¹⁷⁸ Furthermore, with regard to labour migration from China to Europe, a study of both Chinese male and female migrant workers in the United Kingdom in 2011 also found that “most of the workers [interviewed had] experienced elements of forced labour” and that some “were on the verge of being in a [sustained] forced-labour situation.”¹⁷⁹ China is also a receiving country of trafficking. Underscoring the extensiveness of these inbound trafficking operations, the 2011 U.S. Department of State Trafficking in Persons Report emphasised that not only are women and children trafficked into China from neighbouring countries but that victims from “locations as

¹⁷⁷ United States Department of States’ Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report 2010*, at 112 (U.S. Department of State Publication 2010).

¹⁷⁸ *Id.*

¹⁷⁹ Carolyn Kagan et al., *Joseph Rowntree Foundation, Experiences of Forced Labour Among Chinese Migrant Workers* 41, <http://www.jrf.org.uk/publications/chinese-experiences-forced-labour> (2011).

far as Romania and Zimbabwe are [also] reportedly trafficked to China for commercial sexual exploitation and forced labor.”¹⁸⁰

Whilst most reports tend to highlight cross-border aspects of China’s human trafficking, there is now a growing recognition that domestic aspects of this phenomenon are conflated in the country’s extensive internal migration and may actually be the more significant, but overlooked, problem with regard to China.¹⁸¹ This is because internal migrants, both male and female, are drawn from rural communities to the prosperous coastal areas for work, and they represent a significant portion, believed to be close to 12 percent, of China’s total population.¹⁸² In this way, China’s domestic trafficking is a migratory movement deeply embedded within the country’s larger trend of internal migration, which is strictly regulated by the *hukou* registration system that curbs rural-urban migration by limiting migrants’ access to governmental benefits and services in the cities. Most migrant workers do not have the right of residency other than in the rural county where they were born. As these rural residents move to the rapidly developing coastal and urban areas for work, their employment reality is typically restricted to jobs that are considered “dirty, heavy, exhausting, low-paying” and shunned by their urban counterparts.¹⁸³ Moreover, the undocumented status of Chinese domestic migrants contributes not only to their marginalisation as “inferior second-class citizens deprived of the right to settle in cities,”¹⁸⁴ but it also increases their vulnerabilities to exploitative working practices because many undertake employment without having the necessary permits, as described by the following:

¹⁸⁰ United States Department of States’ Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report 2011*, at 121 (U.S. Department of State Publication 2011).

¹⁸¹ United Nations Inter-Agency Project on Human Trafficking, *SIREN Human Trafficking Data Sheet: China 1-2* (September 2008) (available at http://www.no-trafficking.org/reports_docs/china/CHINA_SIREN_data_sheet_Sept_2008.doc) [hereinafter *SIREN Data China*]; and United States Department of States’ Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report 2012*, at 118 (U.S. Department of State Publication 2012).

¹⁸² Estimates by China’s National Bureau of Statistics in 2011 place the total number of rural migrants working outside their *hukou* registered township at around 158.63 million, approximately 11.68 percent of China’s total domestic population of 1.34 billion; see *National Bureau of Statistics of China* [國家統計局], *2011 nian Woguo Nongmingong Diaocha Jiancebao* [2011 Survey Monitoring Report on China’s Migrant Workers; 2011年我国农民工调查监测报告], http://www.stats.gov.cn/tjfx/fxbg/t20120427_402801903.htm (27 April 2012); and National Bureau of Statistics of China, *China Statistical Yearbook 2011* (China Statistics Press 2011) (CD-ROM).

¹⁸³ Fei-Ling Wang, *Organizing through Division and Exclusion: China’s Hukou System* xi (Stanford University Press 2005).

¹⁸⁴ Kam Wing Chan & Will Buckingham, *Is China Abolishing the Hukou System?*, 195 *China Q.* 582, 582 (2008).

To leave their village, [rural migrant workers] are required to apply for a permit from their local government. To stay in any city they have to apply to the local police station for a temporary residential permit. When they are offered employment in the cities, they need to secure a contract with an employer and then they need their stay to be approved by the local labor bureau, which issues a work permit. Periodically the police carry out raids to round up those who do not possess such a temporary residential permit. These workers are harassed, humiliated and mistreated, thrown into detention centers, and then deported from the cities...Their transitory existence is precarious and can be exploited easily.¹⁸⁵

Consequently, the dynamics between internal migration and trafficking are fluid and may not be clear at different stages of the migratory process which category is involved, and this presents a significant problem for the identification and protection given to victims of trafficking inside the country.

Similar to victims of international trafficking, domestic migrants can be misled about the nature of their work at the point of recruitment or eventually find themselves in a coercive and exploitative labour situation. For instance, there are frequent reports of employers withholding wages from migrant workers for extended periods in China. This led to a nationwide official investigation on wage arrears in 2004, which found that a total of 360 billion *yuan* (USD 43 billion)—involving some 124,000 projects that had investment from the government or private property developers—was owed to migrant workers, including some who had not been paid for up to 10 years.¹⁸⁶ To combat the problem of sustained wage arrears, the then Chinese Vice-Premier Zeng Peiyan publicly launched a prominent, three-year government campaign against the exploitation of migrant workers' labour through unpaid wages. Despite some initial success, the problem of wage arrears persists. Official figures released by the central government continue to highlight the prevalence of wage arrears amongst rural migrant workers. Of the 70 million Chinese migrant workers who travelled back to their rural townships for the Chinese New Year in early 2009, a large sampling survey conducted by China's

¹⁸⁵ Anita Chan, *Labor Standards and Human Rights: The Case of Chinese Workers Under Market Socialism*, 20 Hum. Rights Q. 886, 890 (1998).

¹⁸⁶ Fu Jing, *China Daily*, *Zeng: Pay All Owed Wages to Migrant Workers*, http://www.chinadaily.com.cn/english/doc/2004-08/24/content_368117.htm (24 August 2004).

National Bureau of Statistics found that close to six percent of them were owed wage arrears by their employers.¹⁸⁷

Moreover, tensions and discontentment over the nonpayment of wages and other related employment disputes have the potential of leading to violent protests and retaliations. One such case reported in 2008 involves a group of 70 to 80 migrant workers in Hubei Province, whose wages had been withheld for over half a year. Failing to receive administrative intervention from the local authorities, the migrant workers protested against their employer but were assaulted by unknown personnel, resulting in eight injured workers needing medical attention.¹⁸⁸ Interestingly, the news report also referred to other migrant workers at the same construction site, who, instead of protesting or seeking official assistance, had opted to continue to work in the hopes of eventually receiving their pay. Thus, this case underscores the precarious position of domestic migrant workers in China. Whether or not they choose to protest or accept illegal labour practices, they are vulnerable to various human rights and labour abuses that, upon a more detailed investigation, may be indicative of more egregious practices of labour exploitations that would well fall within the scope of human trafficking.

3.1. Trafficking in Women

Female trafficking in late-twentieth and early twenty-first century China involves different forms of exploitation that are difficult to delineate due to their overlapping scope and the diversity in victims' experiences. Out of these, trafficking for prostitution is perhaps the most widely discussed form of female trafficking due to its connection to the commercial sex industry. Nonetheless, it is important to note that the broader category of female trafficking also encompasses trafficking for other purposes of exploitation. This can include trafficking for marriage or domestic servitude, where sexual exploitation can still take place albeit outside the commercial context and in domestic settings where the detection of victims is more difficult. In this way, the sexual exploitation experienced by trafficked women in forced marriages or domestic servitude may be part of a larger pattern of labour exploitation, abuse and vulnerabilities. This is

¹⁸⁷ *National Bureau of Statistics of China* [國家統計局], *2008 nianmo Quanguo Nongmingong Zongliang wei 22542 wan Ren* [Chinese Peasant Workers Totaled 225.42 Million at the End of 2008; 2008年末全国农民工总量为22542万人], http://www.stats.gov.cn/tjfx/fxbg/t20090325_402547406.htm (25 March 2009).

¹⁸⁸ *Yan Xiu* [严修], *Radio Free Asia Mandarin Service* [自由亚洲电台普通话], *Hubei Mingong Taoyaoqianxin Beiouda Duoren Shoushang* [Hubei Migrant Workers Beaten and Several Injured after Asking for Wage Arrears; 湖北民工讨要欠薪被殴打 多人受伤], <http://www.rfa.org/mandarin/yataibaodao/hubei-09252008095755.html> (25 September 2008).

particularly true for North Korean refugee women in China. Although many of them would have initially entered China voluntarily, up to an estimated 70 to 80 percent of these undocumented women would eventually become victims of trafficking for forced marriages, commercial sex exploitation and exploitative labour in China,¹⁸⁹ often at the hands of “[t]raffickers [who] exploit China’s deportation policy, the fear of torture and internment in North Korea, and the absence of UNHCR presence in Northeast China in order to recruit, imprison, transport, transfer, sell and often recapture and resell North Korean refugee women.”¹⁹⁰ Nonetheless, the trafficking of women between North Korea and China is but one facet of modern twenty-first century’s complex picture of female trafficking and China, where anti-trafficking efforts to address domestic and transnational trafficking of women for prostitution and marriages also present serious challenges.

3.1.1. Sex Trafficking

The trafficking in women for sexual exploitation is a serious problem in modern China. Many see the sex trade, ostentatiously present especially in its commercial metropolises, as an ignoble consequence of the country’s rapid economic rise.¹⁹¹ During the early years of China’s economic liberalisation, sex establishments operated in the Special Economic Zones and the main coastal cities and catered to businesspersons and foreign investors. The sex industry, in fact, has become so prevalent in China that almost every major city has a red-light district where sex establishments congregate. The composition of China’s sex workers also has extended beyond the poor, unemployed and uneducated, who traditionally characterise those engaged in sex work. Increasingly, as observed by one study on gender in modern China, “employees from state, collective and private enterprises, party and state cadres, intellectuals, science and

¹⁸⁹ Congressional-Executive Commission on China, 110th U.S. Cong., 2008 *Annual Report* 121 (31 October 2008) (available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:45233.pdf).

¹⁹⁰ Jane Kim, *Note: Trafficked: Domestic Violence, Exploitation in Marriage, and the Foreign-Bride Industry*, 51 Va. J. Intl. L. 443, 459 (2010); and Lee Hae Young, *Lives for Sale: Personal Accounts of Women Fleeing North Korea to China* 9-10 (The Committee for Human Rights in North Korea 2009).

¹⁹¹ See Xin Ren, *Lola Press, Prostitution and Employment Opportunities for Women under China’s Economic Reform*, <http://www.lolapress.org/artenglish/xinre13.htm> (accessed 20 June 2012); Gary Sigley & Elaine Jeffreys, *On “Sex” and “Sexuality” in China: A Conversation with Pan Suiming*, 31 Bull. Concerned Asian Scholars 50, 50, 55 (1999); Wu Zhou [武舟], *Zhongguo Jinu Shenghuo Shi* [A Life History of Chinese Prostitutes; 中国妓女生活史] 396-419 (Hunan Literature and Art Publishing House 1990); Wu Zhou [武舟], *Zhongguo Jinu Wenhua Shi* [A Cultural History of Chinese Prostitutes; 中国妓女文化史] 398-399 (Shanghai East Publishing Center 2006); and Jinghao Zhou, *Chinese Prostitution: Consequences and Solutions in the Post-Mao Era*, 4 China: Intl J. 238, 246 (2006).

technology personnel, and even university students and researchers, are becoming prostitutes.”¹⁹² Reflecting the trends in other countries where the demand for commercial sexual services is predominantly driven by men,¹⁹³ the majority of sex workers in China are adult women. It is now estimated that there are around three million sex workers in China, while other figures point to a number close to four million or could even be as high as ten million if one includes individuals who sometimes accept material benefits for sex.¹⁹⁴

China’s sex trafficking of women can have both international and domestic aspects. For the international trafficking of women, both transborder inbound as well as outbound, it is believed that strong linkages exist between this irregular type of international migration and the activities of international criminal gangs. In January 2011, Chen Shiqu, Director of the Anti-Human Trafficking Office of China’s Ministry of Public Security, stated that there has been an increase in the outbound international trafficking of Chinese women for sexual exploitation. Chen attributed this to “a growing trend for organized transnational human trafficking crime groups to target Chinese women for forced prostitution in foreign countries,” with a majority of these victims coming from poor rural areas in China and trafficked to Southeast Asia, Europe and Africa.¹⁹⁵ Chen also affirmed that the number of foreign women trafficked into China from other countries for commercial sexual exploitation is also increasing.¹⁹⁶ In parallel to China’s female trafficking outbound dynamics, Chen further noted that many trafficked women come from poor rural areas in Vietnam, Myanmar or Laos and are also lured by transnational criminal gangs into China.¹⁹⁷ To underscore the extensiveness of these international trafficking operations, the 2011 U.S. Department of State Trafficking in Persons Report emphasised that not only are women and children

¹⁹² Harriet Evans, *Women and Sexuality in China: Dominant Discourses of Female Sexuality and Gender Since 1949*, at 175-176 (Polity Press 1997).

¹⁹³ See Andrea Cauduro, *Review of the Research Studies on the Demand for Prostitution in the European Union and Beyond*, in *Prostitution And Human Trafficking: Focus on Clients* ch. 2 (Andrea Di Nicola, Andrea Cauduro, Marco Lombardi & Paolo Ruspini eds., Springer 2009); Jan Jordan, *User Buys: Why Men Buy Sex*, 30 *Austral. & N.Z. J. Criminology* 55 (1997); and Martin A. Monto & Deana Julka, *Conceiving of Sex as a Commodity: A Study of Arrested Customers of Female Street Prostitutes*, 10 *W. Criminology Rev.* 1 (2009), <http://wcr.sonoma.edu/v10n1/Monto.pdf>.

¹⁹⁴ Collection of different figures cited in Min Liu, *Migration, Prostitution, and Human Trafficking: the Voice of Chinese Women* 10 (Transaction Publishers 2011).

¹⁹⁵ Zhang Yan & He Dan, *China Daily, Trafficking of Chinese Women on the Rise*, http://www.chinadaily.com.cn/usa/china/2011-01/24/content_11907603.htm (24 January 2011).

¹⁹⁶ Agence France-Presse, *Rise in Asian Women Trafficked into China*, *The Raw Story*, <http://www.rawstory.com/rs/2011/12/03/rise-in-asian-women-trafficked-into-china> (3 December 2011).

¹⁹⁷ *Id.*

trafficked into China from neighbouring countries but that victims from “locations as far as Romania and Zimbabwe are [also] reportedly trafficked to China for commercial sexual exploitation and forced labor.”¹⁹⁸

Internally within China, female migrants are especially vulnerable to sexual exploitation because the sex industry is a major receptor of female migrants, aged both below and above 18, in China.¹⁹⁹ In this way, the commercial sex industry is a convenient option for providing supplementary income for the women who cannot earn enough in other occupations to meet their everyday expenses in the cities.²⁰⁰ Although there is no official estimate for how large the domestic trend could be for sexual trafficking, it is believed that it represents a significant portion within the larger trend of China’s internal female migration, which consists of some 30 to 40 million women who move from the countryside to the cities for work.²⁰¹ One figure by the U.S. State Department places the minimum number of internally trafficked victims, both male and female, at around 10,000 to 20,000, recognizing at the same time that the actual number could be much higher. If one were to extrapolate and come to a crude approximation for the number of trafficked women for sexual exploitation inside China based on the results of criminologist Min Liu’s study, where she found that six out of the forty female prostitutes she interviewed were trafficked into prostitution, the estimate would then come to a figure much higher than 20,000.²⁰² In fact, the number would be somewhere in the range of several hundred thousand of internally trafficked women, even when one uses the most conservative estimate of there being four million sex workers in China.

¹⁹⁸ *Trafficking in Persons Report 2011*, *supra* n. 180, at 121.

¹⁹⁹ Julia O’Connell Davidson, *Save the Children, Children in the Sex Trade in China* 11, <http://resourcecentre.savethechildren.se/node/2400> (2001).

²⁰⁰ Xin Ren, *supra* n. 191.

²⁰¹ China Labour Bulletin, “*Dagongmei*” - *Female Migrant Labourers*, <http://www.clb.org.hk/en/node/3448> (6 March 2004) [hereinafter *Dagongmei*].

²⁰² Min Liu, *supra* n. 194, at 96. There are several research biases in Liu’s study that would affect a rigorous estimate of internally trafficked women in China. First, she was not able to have a large, random sample due to the overriding problem of accessing those in the sex trade as a research population. This is a well-known difficulty in methodology for researches on prostitution, and Liu attempted to compensate by employing a snowball sampling method to find an initial, willing subject who can then refer her to additional subjects. Second, her study was limited to Shenzhen, whose status as a Special Economic Zone meant that its combination of a large migrant population, especially women, and rapid economic growth has seen a visible increase in the commercial sex trade. As such, Liu’s results do not purport to bear any indication on the extent of female trafficking elsewhere in China. Nonetheless, her research is a very unique contribution to the field because there has been very little academic, empirically-based research conducted specifically on prostitution and trafficking in China. Despite its methodological limitations, it is the only study that has sought, through extensive interviews, to identify and disaggregate the sex trafficking victims from the larger pool of voluntary, commercial sex workers in China.

3.1.2. Trafficking for Forced Marriage

In addition to female trafficking for commercial sexual exploitation, the cross-border trafficking of women for forced marriage, or “bride trafficking,” is a significant problem as Chinese rural men resort to seeking spouses from agencies that specialise in the recruitment of brides from poorer, neighbouring countries. For example, police statistics from Myanmar in 2009 revealed that two-thirds of all human trafficking cases registered by Myanmar police’s anti-trafficking unit involved women being trafficked into China for forced marriages.²⁰³ Most of the 103 said victims were lured by the false promise of high-paying jobs in China, but were then sold to Chinese men. According to one United Nations project coordinator in Myanmar, “most of the trafficked Myanmar women were sold to men in villages and poor communities in China...[who] pay anywhere from RMB 20,000 to RMB 40,000 (US\$2900 to \$5800)—or even more—to a broker for a trafficked woman to be their wife, depending on the woman’s looks and age.”²⁰⁴ Despite this, there is a conflicting perception of the scale of this problem. In 2007, a senior official of the anti-trafficking office of the Ministry of Public Security, Yin Jianzhong, commented that the number of children and women trafficked for bearing children or forced into marriage has been declining in recent years, owing to crackdowns that began in the 1980s. As a result, proclaimed Yin, “selling of women and children has been checked,” with cases dropping by 20 to 30 percent per year.²⁰⁵

Such statements, however, contradict the few police statistics that do emerge from the field, which indicate an upward trend in the trafficking of foreign women into China for marriages. For example, according to police statistics from Yunnan Province that borders Myanmar, the number of recorded cases of Myanmar women kidnapped and sold into forced marriages in Yunnan alone increased fourfold from 2007 to 2009.²⁰⁶

²⁰³ The exact figures provided by the Myanmar Police Force indicate that 103 out of the 155 human trafficking cases uncovered in 2009 involved the forced marriage of girls and women to China; in Juliet Shwe Gaung, *The Myanmar Times, Forced Marriages Driving Human Trafficking, UN Says*, <http://www.mmtimes.com/2010/news/512/n51206.html> (Volume 26, No. 512; accessed 19 June 2012).

²⁰⁴ *Id.*

²⁰⁵ Wang Zhuoqiong, *China Daily, More Forced into Prostitution, Labor*, http://www.chinadaily.com.cn/china/2007-07/27/content_5444409.htm (27 July 2007).

²⁰⁶ At least 268 Myanmar women were kidnapped and sold into forced marriages in Yunnan Province in 2009, a significant increase from the 87 recorded cases in 2008 and 54 cases in 2007. United Nations Inter-Agency Project on Human Trafficking China Office, *News Digest 3-4* (February 2010) (available at <http://www.notip.org.cn/UserImages/00001447.pdf>); and Lin Meilian, *Global Times, Demand for Smuggled Foreign Wives Up: Police*, <http://china.globaltimes.cn/editor-picks/2010-02/503191.html> (3 February 2010).

Moreover, it is believed that the actual number is much higher than what is recorded, since these police statistics only capture cases where official missing reports are received by Myanmar officials and transmitted to their Chinese counterparts for mutual assistance.²⁰⁷ Li Shunqiong, of the anti-human trafficking office of Yunnan Public Security, believes the increase in the trafficking of foreign women from poorer neighboring countries is linked to the growing economic prosperity and the large demand for wives in China: "The neighboring countries admire China's economic boom; while in China, there is a growing population of men in poorer areas in several provinces...who are desperate to have a wife."²⁰⁸ Additionally, it would be inaccurate to believe that the trafficking of women for marriages in China is localised to the Myanmar-China context, for a significant number of women are also trafficked into China from Mongolia, North Korea, Russia, Burma, Laos, and Vietnam for this same purpose.²⁰⁹

There also have been increasing reports of men and young boys trafficked for sexual exploitation and held in controlled environments in China.²¹⁰ Public discourse on the sex trade, however, remains almost exclusively focused on women. Nonetheless, discussions on sex work in China already have had to expand their scope to include girls, in response to labour and migration organisations having raised alarm at the increasing number of younger-age women, around 16 to 17 years old, choosing to migrate for work and falling victims to exploitative situations.²¹¹ Citing one case of a 17-year-old Chinese girl deceived by men she befriended in Guangzhou who later forced her into sexual exploitation, one report by the International Labour Organization in 2005 described this category of young female migrants: "They drop out of school prematurely, do household chores and get bored with village life. Many try their luck and leave their villages, unprepared, and ill-informed of dangers or possible protection."²¹²

²⁰⁷ Lin Meilian, *supra* n. 206.

²⁰⁸ *Id.*

²⁰⁹ *Trafficking in Persons Report 2011*, *supra* n. 180, at 121.

²¹⁰ Roundtable Before the Congressional-Executive Commission on China, 111th U.S. Cong., *China and Human Trafficking: Updates and Analysis* 8-9 (20 August 2010) (available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:62288.pdf). Reference attributed to the statement of Wan Yanhai, of the Beijing Aizhixing Institute and expert on HIV/AIDS, human rights, and civil society in China.

²¹¹ *SIREN Data China*, *supra* n. 181, at 1-2.

²¹² International Labour Organization, *Girls for Sale: Preventing Trafficking within China* (25 November 2005) (available at http://www.ilo.org/global/about-the-ilo/press-and-media-centre/news/WCMS_075555/).

The special vulnerability of young women to labour and sexual exploitation has triggered concerns of child protection within broader discussions on China's migratory and trafficking dynamics. There is now widespread recognition that any effective strategy to combat trafficking must also include child protection concerns.²¹³ To this effect, China's *National Plan of Action on Combating Trafficking in Women and Children (2008-2012)* included references to the *Law on the Protection of Minors* and *Law on Compulsory Education*.²¹⁴ The issue of China's sex trafficking, however, lacks accurate numbers, which prevents a systematic analysis and rigorous understanding of both its scope and extent. Figures on female trafficking often are incomplete, conflated with general numbers on prostitution and do not distinguish between adult and minor victims.²¹⁵ As a result, adult women and girls under 18 years of age are frequently considered together with no further statistical disaggregation, thus making it extremely difficult to draw substantive observations about the specific dynamics in the trafficking of minors for sexual exploitation. Due to this limitation, this work uses the term "trafficking in women" broadly to refer to mostly adult female victims, while at the same time not excluding minors who are also caught by these same dynamics.

3.2. Child Trafficking

Similar to female trafficking, child trafficking is another serious problem in China. There are frequent reports of boys and girls being abducted and transported across China for a variety of purposes, ranging from illegal adoptions to working as beggars under the control of criminal gangs who profit from the children's labour. In

²¹³ See Anne T. Gallagher, *The International Law of Human Trafficking* 118-119, Ch. 5.5 (Cambridge University Press 2010).

²¹⁴ General Office of the State Council of the People's Republic of China, *Notice of the General Office of the State Council of the People's Republic of China on China National Plan of Action on Combating Trafficking in Women and Children (2008-2012)* [国务院办公厅关于印发中国反对拐卖妇女儿童行动计划(2008—2012年)的通知], No. 69 (2007) (available at http://www.gov.cn/zwggk/2007-12/20/content_839479.htm). *China National Plan of Action on Combating Trafficking in Women and Children (2008-2012)* was issued by the State Council on 13 December 2007 and came into effect on 1 January 2008. English translation available from the Chinese webportal of the UN-Inter Agency Project on Human Trafficking in the Greater Mekong Sub-region at <http://www.notip.org.cn/UserImages/00000570.pdf>.

²¹⁵ Pan Suiming, professor at the People's University of China in Beijing who is considered the preeminent scholar on sexological research in China, makes a similar point on the incompleteness of statistics on sex workers in China. As such, analyses on the topic inevitably involve extrapolated calculations; in Pan Sui-Ming [潘绥铭], *Cunzai yu Huangmiu: Zhongguo Dixia Xingchanye Kaocha* [Existence and Ridicule: An Examination of China's Underground Sex Industry; 存在与荒谬: 中国地下性产业考察] Introduction, § 2 (Qunyan Press 1999).

July 2012, China's Ministry of Public Security announced that they had successfully disrupted the operation of two large-scale child trafficking rings after months of investigation across 15 provinces.²¹⁶ Authorities rescued a total of 181 children and apprehended 802 suspects involved in the trafficking operation, including medical personnel who provided prenatal care to pregnant mothers and later acted as brokers for finding potential buyers for the newborns.²¹⁷ According to one investigative report of missing children in southwestern China, each abducted child is sold in the range of 11,000 to 18,000 *yuan* (around USD 1,800 to 2,800), representing more than a tenfold profit margin after accounting for the initial costs of transporting and accommodating the abducted children.²¹⁸ The price for an abducted child can also vary significantly across provinces. In northeastern China, a police officer in Shandong who had investigated an infant abduction case reported that the price for a boy could be as high as 50,000 *yuan* or close to 30,000 *yuan* for a girl.²¹⁹

The high profit margins of selling children in China have brought about a thriving underground criminal enterprise, marked by an increasing professionalisation and wide geographical coverage that make locating and rescuing these children extremely difficult. For example, in what is known as the "third-ground" strategy for evading law enforcement, children are bought in southwest China and then resold in the northeast to another group of brokers, who would sell them yet again to a third party, thus masking the trail of these illegal transactions.²²⁰ Local police officers in Yunnan province describe from their case knowledge of missing children that most abducted children are transported out of their home localities in less than 30 minutes after the initial abduction.²²¹ This means that by the time the families notice the children are missing and notify the police, they are already far from the initial scene of the abduction.²²² In June 2012, one police investigation into cases of infant abductions in

²¹⁶ *Xinhua News* [新华网], *Gonganbu Pohuo Guaimai Ertong Daan 181 ming Ertong Huojiu* [Ministry of Public Security Solved Major Case of Child Trafficking and Rescued 181 Children; 公安部破获拐卖儿童大案 181名儿童获救], http://news.xinhuanet.com/video/2012-07/07/c_123383337.htm (7 July 2012).

²¹⁷ *Id.*

²¹⁸ *Huanqiu.com* [环球网], *Guaimai Ertong Xingcheng Chanyelian Dangjie Qiang Xiaohai Banxiaoshi Yun Chucheng* [Child Trafficking Has Become a Seamless Operation with an Abducted Child Transported Out of the City in Half an Hour; 拐卖儿童形成产业链 当街抢小孩半小时运出城], <http://news.163.com/09/1106/00/5ND8Q0AA0001124J.html> (6 November 2009) [hereinafter *Guaimai Ertong*].

²¹⁹ Vicky Kung, *CNN, China: Thousands of Abducted Women, Children Released in Past Year*, <http://edition.cnn.com/2012/03/13/world/asia/china-child-abductions/index.html> (13 March 2012).

²²⁰ *Id.*

²²¹ *Guaimai Ertong*, *supra* n. 218.

²²² *Id.*

Yunnan Province uncovered that the cross-country sale of these abducted children, organised by a local family-run criminal group with well-established connections, can be concluded in three days.²²³

The tactics of child abductions are also varied. Abductions are often crimes of opportunity, with the kidnappers taking advantage of the fact that rural migrant workers do not earn enough to afford childcare and often must leave their children unsupervised.²²⁴ One investigative report found that communities with a large migrant population are deliberately targeted by kidnappers for the large pool of migrant children, whose parents are away at work for long hours and where the transient nature of the local migrant population allows the kidnappers to easily disappear.²²⁵ The opportunistic nature of the crime features strongly in child abduction cases. For instance, a napping two-year-old girl was abducted onboard a bus when her grandmother briefly stepped off at a rest stop in Dongguan;²²⁶ and a six-year-old boy in Kunming was abducted when he briefly left the family courtyard.²²⁷ Some children are also lured away and then drugged to facilitate their transfer. A five-year-old boy in Kunming was led away and given sleeping pills by a stranger posing as a relative.²²⁸ The trafficking of children in China is typically for three different purposes: illegal adoption by families who want another child; forced participation in street begging activity under the control of gangs; or prostitution.²²⁹ At the same time, beggary and prostitution should not be seen as exclusive types of forced work for the trafficked children, but rather as two potential manners, amongst others, in which the labour of the children can be exploited. For instance, other types of illegal child work, such as organised thievery and some locally-sanctioned work-study programs that exploit the labour of school-age children, also exist and are different facets of the problem of child labour exploitation in China.

²²³ Xinhua News, *SW China Police Rescue 31 Abducted Infants*, http://news.xinhuanet.com/english/china/2012-06/01/c_131625290.htm (1 June 2012).

²²⁴ *Guaimai Ertong*, *supra* n. 218.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Richard Jones, *The Vanishing*, *South China Morning Post Magazine*, 20 (14 October 2007).

²²⁸ *Id.* at 20-21.

²²⁹ *Guaimai Ertong*, *supra* n. 218.

3.2.1. “Trafficking” for Illegal Adoptions

Due to the cultural preferences for sons in China, which is seen as the only way to continue the family lineage, young boys are often abducted from their natural parents and sold to adoptive parents. The problem is compounded by China’s One-Child Policy, as families that cannot produce a son within its permitted rules look to other means of acquiring a male heir. Under the policy, urban parents are usually allowed only one child, but parents in coastal provinces are permitted a second child if the firstborn is female. In central and southern provinces, every couple is allowed a second child if the firstborn is a girl or if they meet the hardship criterion as determined by the local authorities. In the minority-dominated provinces of western China and Inner Mongolia, minority parents are allowed a second or third child, regardless of the gender of previous children. Parents who are both single children themselves can have a second child.²³⁰ Families that buy children are often those who already have daughters but cannot produce a son within the allowed exceptions, as well as childless or bereaved couples.²³¹ Geographically, the buyers of abducted children are concentrated in, but not limited to, the coastal provinces of Guangdong and Fujian, where their recent economic prosperity and strong local preferences for tradition have created a flourishing market for the sale of children.²³² There, the practice of buying boys to continue the family lineage is so common in some areas that buyers can openly speak of the purchase without fears of prosecution. As one Fujianese man who had purchased a boy explained to a local newspaper: “If I do not have a boy in my family everyone will look down upon me. My family line is finished and I will feel a shame towards my ancestors. I do not care how much money it takes to buy a son if my ancestors’ name will continue.”²³³

There also have been reports of families purchasing young girls as eventual wives for their sons. This is due to the fact that buying “child brides” is seen as a way to ensure that their sons will later have spouses to wed in an increasingly gender-skewed China, whilst also being more economical than providing a dowry for a traditional

²³⁰ Those who infringe these rules must pay a penalty, without which it would not be possible to obtain the requisite registration for the child to access basic government benefits and services; see The Economist, *The Worldwide War on Baby Girls*, 61, 63 (6 March 2010); and Mara Hvistendahl, *Has China Outgrown The One-Child Policy?*, 329 Science 1458 (2010).

²³¹ Kung, *supra* n. 219.

²³² Jones, *supra* n. 227, at 19.

²³³ *Id.*

wedding.²³⁴ Some parents from poverty-stricken areas directly sell their children for adoption because the profit earned through this practice is significantly more than what they could make through farming.²³⁵ In one documented transaction involving a trafficker and parents who had decided to sell their daughter because they were unable to pay the penalty for having a child without official permission, the purchase price was negotiated based on the child's gender, age, weight and the wealth of the adopted family, with factors such as appearance and perceived intelligence of the child also having an influence on the final price.²³⁶ In 2005, the Ministry for Public Security officials in Inner Mongolia disrupted a trafficking network that had bought over 70 newborns from their parents and sold them for around twofold the purchasing price.²³⁷ Underscoring the complexity of this child selling dynamic, where some parents view the sale as a viable alternative to child abandonment, the head of this trafficking network maintained, for her defense, that all the children were voluntarily sold by their mothers and that none had been reported as missing to the police. Thus, she viewed her acquiring the children as a form of charity, regardless of the fact that she and her associates had profited from the transaction and that the subsequent outcome of the sold children remains unclear.²³⁸

3.2.2. Labour Exploitation

The abduction of children for labour exploitation is also a significant problem in China. There are frequent reports of abducted children working as street beggars, especially in large cities, under the control of criminal gangs that profit from the children's labour. In recent years, the abduction of children for the purpose of solicitation in China has received widespread domestic attention, in large part due to the high-profiled case of Yang Weixin, a five-year boy who was abducted in July 2009 and reportedly trafficked into open solicitation by criminals who are believed to have

²³⁴ Minnie Chan, *South China Morning Post*, *Baby Traffickers Shift Focus to Girls*, <http://www.scmp.com/article/510885/baby-traffickers-shift-focus-girls> (4 August 2005).

²³⁵ Kung, *supra* n. 219.

²³⁶ Juli Weiner, *The Huffington Post*, *Birth Controlled: China's Stolen Children Reviewed*, http://www.huffingtonpost.com/juli-weiner/birth-controlled-emchinas_b_112530.html (14 July 2008).

²³⁷ Tang Ji [汤计], *Xinhua News* [新华网], *Neimenggu "5.11" teda Fanyingan de Sikao* [Observations on the Major "11th of May" Case of the Sell of Infants in Inner Mongolia; 内蒙古"5.11"特大贩婴案的思考], http://news.xinhuanet.com/focus/2005-03/22/content_2714227.htm (22 March 2005).

²³⁸ *Id.*

deliberately broken Yang's legs in an effort to increase his earnings potential.²³⁹ Yang's story galvanised many Chinese citizens and inspired a prominent social media campaign for people to photograph street children and post their pictures on the internet, with the aim to identify and rescue missing children in China.

Street Begging and Thievery

It is believed children trafficked for organised begging form a significant portion of China's estimated population of 150,000 to one million street children,²⁴⁰ but there is no figure available on a subgroup of this itinerant population that is believed to be held in exploitative labour situations. Most analyses and reports on the forced labour of vagrant children in China rely on witness accounts of child beggars being led, usually in groups, by adults whose relationship to the children is not clear.²⁴¹ One media report in August 2012 of child beggars at key pedestrian areas in the southern city of Shengcheng described that various groups of children and the adults who travel with them appear to know each other and coordinate their movements.²⁴² This has led many to believe that street children are being exploited to engage in begging for the benefit of others. According to one survey of residents in Xuzhou, Jiangsu Province, more than half of the respondents indicated that they believe the solicitation of street children is not genuine because the children are coached, controlled and used by others to engage in solicitation

²³⁹ *Qingdao News* [青岛新闻网], *Muqin zai Weibo Kandao Beiquai 2 nian Erzitui Beidaduan Yanjie Qitao* [Mother Saw on Weibo Abducted Son of Two Years Begging on the Street with Broken Legs; 母亲在微博看到被拐2年儿子腿被打断沿街乞讨], http://www.qingdaonews.com/content/2011-01/30/content_8652278.htm (30 January 2011).

²⁴⁰ Bi Wei [毕伟], *A Summary of the Studies on Vagrant Children in China* [国内流浪儿童状况研究综述], 25 *J. Yunnan Nationalities U.* [云南民族大学学报] 53, 54 (2008). The article cites different estimates presented by various Chinese researchers and organisations that work on issues relating to children. The lower figures of 150,000 and 200,000 were given by researchers and the official All-China Women's Federation. The highest estimate of there being close to one million vagrant children was attributed to researchers who work on youth-related issues, possibly a reference to those from the official China Youth and Children Research Center founded in 1991 with support from the Communist Youth League of China. The author attributes this wide range of estimates to two factors: first, the difficulty of obtaining accurate numbers on the vagrant children population for a rigorous statistical analysis; and second, seasonal variations and ease of transportation links can affect the movement of vagrant children and present a statistic bias owing to these temporal and spatial considerations.

²⁴¹ Yan Haibo [严海波], Sui Shuxia [隋树霞] & Xu Cheng [徐成], *Guanzhu Zhongguo Chengshi Liulang Ertong—Xuzhoushi Liulang Ertong Zhuangkuang Diaocha* [Focus on Vagrant Children in Chinese Cities: Survey on the Situation of Vagrant Children in Xuzhou; 关注中国城市流浪儿童—徐州市流浪儿童状况调查], 2 *Youth Stud.* [青年研究] 8, 9 (2005).

²⁴² Long Tengfei [龙腾飞] & Wang Kai [王凯], *West Metropolis Daily* [西海都市报], *Anfang Jietou Xingqi Ertong* [Hidden Investigation of Street Child Beggars; 暗访街头行乞儿童], <http://www.qhnews.com/newscenter/system/2012/08/09/010850358.shtml> (9 August 2012).

as a profession.²⁴³ Furthermore, underscoring this public perception are reports of child beggars being punished by their adult minders for not being more successful in their efforts. One such example involves a passerby who witnessed an adult woman repeatedly thrusting a needle into the faces of two young street children as punishment for their unsuccessful solicitation.²⁴⁴

The labour of street children in China could also be exploited for purposes other than begging. According to the Centre for the Rescue and Protection of Street Children in Guangzhou, one of the most pressing protection issues facing its work is the exploitation of street children by individuals who directly or indirectly control the children.²⁴⁵ One reported incident in July 2007 involved an eyewitness who saw two adults severely beating a group of children selling flowers on the street in Guangzhou. Over the subsequent month, the eyewitness befriended the children and discovered that their accompanying adults were not relatives. With the information, the police rescued the six children and arrested the adult minders.²⁴⁶ In addition to street begging or peddling goods, another form of child labour exploitation involves offenses against property, whereby the proceeds of the children's thefts are captured by the individuals who exert effective control over them. For instance, one case in 2006 involved a 12-year-old vagrant boy who was approached by a man who, under the guise of charity, fed and sheltered him. The man, however, later forced the boy to steal from private residences and would severely beat him if he disobeyed. Under threats of physical violence, the boy committed larceny from some 40 private residences, amounting to criminal proceeds of around 200,000 *yuan*, or about USD 30,000.²⁴⁷

²⁴³ Yan Haibo [严海波] et al, *supra* n. 241, at 9.

²⁴⁴ Lin Zegui [林泽贵], *Southeast Morning Post* [东南早报], *5 sui Nantong bei Guaicheng Qigai Gonganjiguan Zhuananzu Jieru* [5-Year-Old Boy is Trafficked for Begging and a Task Force is Formed by Public Security to Investigate; 5岁男童被拐成乞丐公安機關專案組介入], <http://news.sohu.com/20110121/n279013630.shtml> (21 January 2011).

²⁴⁵ Chen Liping [陈丽平], *Legal Daily* [法制日报], *Jianhuzhidu Cunzai Yingshang Wuleiertong Baohu Fali Shui Laizuo Shexie Teshuertong Jianhuren* [Custodianship System Fails to Protect Five Types of Marginalised Children: Who will be the Guardians of these Children; 监护制度存在硬伤五类儿童保护乏力 谁来做这些特殊儿童监护人], http://www.legaldaily.com.cn/misc/2006-06/01/content_326447.htm (1 June 2006).

²⁴⁶ *Beijing Youth Daily* [北京青年报], *80 hou Zhiyuanzhe "Zizi" Jiejiu Beiguai Ertong 50 Duoming* [Thirty-Year-Old Volunteer "Zizi" Rescued Some 50 Abducted Children; 80后志愿者“仔仔”解救被拐儿童50多名], <http://bjyouth.ynet.com/article.jsp?oid=66116505> (31 May 2010).

²⁴⁷ Chen Liping [陈丽平], *supra* n. 245.

Work-Study Programs

It is not only criminal enterprises that profit from the labour of trafficked children. There have been reports of children in government authorised work-study programs, supported by local authorities, where the children could face conditions of forced labor as part of their schooling.²⁴⁸ Work-study programs in China generally take one of three forms, depending on where the production takes place: first, in the school itself during or after school hours; alternatively, at the students' homes if the work is mostly out-production; or in industrial centres or farms, where schoolchildren are organised and transported to these sites in groups under the supervision of their teachers or other individuals.²⁴⁹ Because work-study programs of this last type take place away from the children's familiar surroundings, they are the ones that render the children the most vulnerable to labour exploitative practices. For instance, there have been consistent reports in recent years of local authorities in Xinjiang Province in Western China requiring schoolchildren to engage in long and unpaid labour during the annual cotton harvest in September and October.²⁵⁰ During harvests, the children no longer attend schools and, instead, stay in dormitories for up to six weeks, where they are "typically [woken] at 6 a.m. and [work] until dark, with only half an hour's break for lunch."²⁵¹ In light of wide concerns from parents and teachers that such work is unsafe, local education authorities justified the practice as an essential labour training course in keeping with similar work-study programs elsewhere in the country.²⁵²

The prevalence of work-study programs is largely driven by the fact that public education remains predominantly a locally-funded initiative in China.²⁵³ Local authorities, especially those from the underdeveloped, rural provinces, sanction these work-study programs as a way of supplementing their limited education funding. Even though these work-study programs take place under some cover of labour training and official sanction, they are mainly seen as education initiatives outside the reach of local

²⁴⁸ *Trafficking in Persons Report 2012*, *supra* n. 181, at 118.

²⁴⁹ G. K. Lieten & Hugh D. Hindman, *Child Labor in China: An Overview*, in *The World of Child Labor: An Historical and Regional Survey* 860, 864 (Hugh D. Hindman ed., M.E. Sharpe, Inc. 2009).

²⁵⁰ *Trafficking in Persons Report 2012*, *supra* n. 181, at 118; and Radio Free Asia, Xinjiang Children Forced To Work in Cotton Fields, http://www.rfa.org/english/uyghur/uyghur_labor-20050921.html (21 September 2005).

²⁵¹ *Radio Free Asia*, *supra* n. 250.

²⁵² *Id.*

²⁵³ Lieten & Hindman, *supra* n. 249, at 864.

labour authorities,²⁵⁴ thus “contribut[ing] to many of the worst child labor abuses in the country.”²⁵⁵ One mother, whose 15-year-old daughter worked in an electronics assembly plant under a work-study program in another province, which was directly arranged by her school and the factory, described that her daughter “worked from 8 a.m. to 11 p.m. and...[was] constantly busy and tired.”²⁵⁶ Students reported that they had to work 14-hour days, including mandatory overtime, and had their wages withheld; furthermore, for those who had wanted to leave, they had no way to reach their families or pay for the journey home.²⁵⁷ As such, these exploitative employment conditions, in combination with the organised actions of recruitment, transportation, transfer, harbouring or receipt of these children, would meet the definition of trafficking in children under the Trafficking Protocol. Although—as special protection for child victims of trafficking—the constitute element of means used to carry out the trafficking does not need to be met for the trafficking in children to be established under the Trafficking Protocol,²⁵⁸ the role that the abuse of power or of a position of vulnerability of the children plays in these exploitative work-study cases should not be overlooked. This is because many families and their children only participate in these programs due to their inability to pay the school fees or fear of retaliation by local education officials, which could jeopardise the children’s continued access to education.²⁵⁹

Child Prostitution

Another form of child exploitation in China is commercial sexual exploitation. Children, defined as persons under the age of 18 under both international law and domestic Chinese law,²⁶⁰ are represented in China’s sex work industry, but the extent of their presence and the conditions surrounding their entry into sex work, however, are not well-known. Similar to the experiences of migrants in other countries, migratory

²⁵⁴ Howard W. French, *N.Y. Times, Ideals and Reality Conflict on Chinese Child Labor*, <http://www.nytimes.com/2007/06/18/world/asia/18iht-china.4.6192697.html> (18 June 2007).

²⁵⁵ Lieten & Hindman, *supra* n. 249, at 864.

²⁵⁶ French, *supra* n. 254.

²⁵⁷ *Id.*

²⁵⁸ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the “Trafficking Protocol”) art. 3(c) (15 November 2000), 2237 U.N.T.S. 319.

²⁵⁹ See French, *supra* n. 254; and *Radio Free Asia*, *supra* n. 250.

²⁶⁰ The Convention on the Rights of the Child art. 1 (20 November 1989), 1577 U.N.T.S. 3; and Standing Committee of the Seventh National People’s Congress, *Law of the People’s Republic of China on Protection of Minors* [中华人民共和国未成年人保护法], art. 2, adopted and promulgated on 4 September 1991.

pressures can operate directly on children in China, especially those from impoverished rural families who may feel an obligation to seek out urban employment in order to escape poverty.²⁶¹ This is currently seen in China, where an increasing number of younger-age women, around 16 to 17 years old, are choosing to migrate for work.²⁶² One study on children in the sex trade in China found that the vast majority of children affected by the commercial sexual exploitation “are post-pubertal teenagers working within the mainstream sex industry and catering to demand from ‘ordinary’ clients who neither know nor care whether the prostitutes they use are above or below the age of 18.”²⁶³

There is, however, very little information on the trafficking of young children for the purpose of prostitution, despite that it is not uncommon for articles on child abductions in China to refer to this as a possible outcome, especially for missing girls.²⁶⁴ According to the same study on children in the sex trade in China, this may be partly due to the fact that, as in most other countries, “the segment of the commercial sex trade that caters to demand from such individuals [who are interested in prepubertal children] is a small and largely concealed ‘niche market’ within the sex industry.”²⁶⁵ Thus, it would be extremely difficult to access information on young children who are forced into these situations of sexual exploitation and assess the extent of its connection to child abductions in China. For instance, there is a growing perception that the problem of men and young boys trafficked for sexual exploitation and held in controlled environments exists in China,²⁶⁶ but there is little available information on these cases. Public discourse on the sex trade, hence, remains almost exclusively focused on the adult women.

3.2.3. Particular Context of China

It is important to note that “child trafficking” as a term used in China is understood broadly to encompass two end purposes—illegal adoptions by families and various forms of forced child work. Consequently, both domestic and international

²⁶¹ Davidson, *supra* n. 199, at 11.

²⁶² *SIREN Data China*, *supra* n. 181, at 1-2.

²⁶³ Davidson, *supra* n. 199, at 7.

²⁶⁴ *Guaimai Ertong*, *supra* n. 218.

²⁶⁵ Davidson, *supra* n. 199, at 7.

²⁶⁶ *China and Human Trafficking: Updates and Analysis*, *supra* n. 210, at 8-9.

articles on China's problem of child trafficking tend not to distinguish between these two purposes. This interpretation, however, contradicts the original intent of the Trafficking Protocol. On the issue of illegal adoptions, the interpretative notes for the *travaux préparatoires* of the United Nations Convention against Transnational Organized Crime and the Protocols states that illegal adoption only falls within the scope of the Trafficking Protocol when it amounts to a practice similar to slavery as defined by the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery:²⁶⁷

Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, *with a view to the exploitation of the child or young person or of his labour* [emphasis in italics added].²⁶⁸

This reference to the 1956 Supplementary Convention thus supports the view that the element of labour exploitation must be present for adoptions to be considered a purpose of child trafficking under the Trafficking Protocol.²⁶⁹ Therefore, this has led the U.S. Department of State to exclude illegal, but non-exploitative, adoptions from the breadth of its annual report on global human trafficking, unless the adoption results in the sexual exploitation or coerced labour of the child.²⁷⁰

This conceptual distinction has important ramifications for discussions on, as well as efforts to tackle, human trafficking in China, where the majority of missing children cases are believed to involve boys abducted from their natural families and sold to adoptive parents. The predominant aim of these adoptions is to foster the children

²⁶⁷ United Nations General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the Work of its First to Eleventh Sessions [Addendum]: Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, UN Doc. A/55/383/Add.1, ¶ 66, at 12 (2000).

²⁶⁸ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (the "1956 Supplementary Convention") art. 1(d) (7 September 1956), 226 U.N.T.S. 3.

²⁶⁹ Gallagher, *supra* n. 213, at 41.

²⁷⁰ United States Department of States' Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report 2005*, at 21 (U.S. Department of State Publication 2005); in reaching this interpretation, the report cites relevant U.S. federal and international laws on trafficking and interstate adoptions: "Though baby selling is illegal, it would not necessarily constitute human trafficking where it occurs for adoption, based on the [U.S.] Trafficking Victims Protection Act [of 2000], the UN Protocols on Trafficking in Persons and the Sale of Children, the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, and definitions of adoption established by U.S. jurisdictions."

without the intent to harm or exploit them. For instance, in one of the most high-profile cases of child abductions in China where the missing boy was eventually reunited with his natural family three years after his abduction, the father admitted to have conflicted feelings towards the boy's adopted mother, with whom the child had developed genuine affection.²⁷¹ The focus on illegal, but non-exploitative, adoptions within efforts to combat human trafficking in China signifies a difference in the colloquial use of the term "child trafficking" in China when compared with the international legal definition of trafficking. Moreover, the emphasis on adoption cases obscures the seriousness of other dynamics of child trafficking, where labour exploitation remains the intent and can take on divergent forms—such as begging, thieving, selling or prostituting—for the financial or material benefits of individuals who exert control on the child.

As underscored by a UNICEF 2009 study on child trafficking in east and southeast Asia, efforts to combat child trafficking are complicated by differences arising from "the nuances of process, actors and evidence required to demonstrate that [child] trafficking has taken place."²⁷² For instance, from the standpoint of law enforcement, it is highly problematic to exclude the abduction and selling of children for illegal, but non-exploitative, adoptions from the scope of anti-trafficking activities because these cases can have many attributes in common with human trafficking.²⁷³ It may be the same human traffickers who carry out the initial abduction, transfer or sell the children, regardless of whether the purpose is to circumvent the rules for a legal adoption or to eventually place the child to work in commercial sexual exploitation. Therefore, it is seen as operationally difficult for law enforcement to determine whether the intent of exploitation meets the definition of human trafficking at the initial stages of a potential child trafficking case.²⁷⁴ Some advocates have argued that it is counter-productive to provide a loophole for traffickers by excluding the selling of children for adoption from the scope of anti-trafficking legislations and, thereby, undermining protections for the rights of all children.²⁷⁵ At the same time, an opposing view argues that, despite the

²⁷¹ China Central Television "Xinwen Diaocha" [中国中央电视台"新闻调查"], *San Beiguai Haizi Zaoyu: Peng Wenle Xunhui 1 nian Rengyu Yangmu Tonghua* [Three Abducted Children and their Experiences: Peng Wenle Still Talks to Adopted Mother One Year after Rescue; 三被拐孩子遭遇:彭文乐寻回1年仍与养母通话], <http://news.sina.com.cn/c/sd/2012-06-23/215724644385.shtml> (23 June 2012).

²⁷² The United Nations Children's Fund, East Asia and Pacific Regional Office, *Reversing the Trend: Child Trafficking in East and South-east Asia* 19 (August 2009) (available at http://www.unicef.org/eapro/Unicef_EA_SEA_Trafficking_Report_Aug_2009_low_res.pdf).

²⁷³ *Trafficking in Persons Report 2005*, *supra* n. 270, at 21.

²⁷⁴ See Wafa Issa, *The National*, *Child-Selling Definition Sparks Debate at Trafficking Forum*, 23 November 2009.

²⁷⁵ *Id.*

repugnant nature of children being bought and sold by parents and intermediaries, “it is counter-intuitive to view every ‘sale’ of a person as rendering that person a slave,” especially when “the ultimate intent was to place the children into families as sons or daughters.”²⁷⁶ This is supported by an interpretation of the 1956 Supplementary Convention, where “the failure of the Supplementary Slavery Convention to include parallel provisions concerning children [to that of the transfer of women for marriage] could be viewed as a deliberate decision not to condemn the sale of children for adoption as a practice ‘similar to slavery.’”²⁷⁷ Discussions on the situation of child trafficking in China, therefore, must be seen and analysed through this complex prism of divergent opinions on the scope of the crime of child trafficking, under both domestic and international law and in actual practice.

3.3. Trafficking in Adult Men

Within the discourse on human trafficking, the trafficking of women and children has received the most widespread attention, given their special vulnerabilities. Developments in the bodies of international law on the human rights of women and children have sought to address their exploitation as separate phenomena from the general template of labour exploitation, so as to afford them specialised protection. This is seen by the fact that important developments in international efforts to protect women and children from abusive exploitation, such as the 1921 International Convention for the Suppression of the Traffic in Women and Children and the 1924 Declaration of the Rights of the Child, had preceded the codification of the Forced Labour Convention under the auspices of the International Labour Organization in 1930.²⁷⁸ These developments, along with those in the related bodies of law on the abolition of slavery and, more recently, the protection of migrant workers, are important precursors to the present-day Trafficking Protocol. Underpinning this legal discussion, however, is the practical challenge of how to best balance the recognition that whilst specific groups have special vulnerabilities and thus require additional protection, the definition and overall legal framework should be inclusive and not have the unintended effect of

²⁷⁶ David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 Val. U. L. Rev. 281, 289 (2004).

²⁷⁷ *Id.* at 293. Beyond the issue of legal definitions, Smolin opined that the current system of inter-country adoptions in the absence of serious reforms will eventually be abolished as a form of human exploitation because it “has [effectively] become so intertwined with market behavior as to, in [both] theory and practice, frequently permit child selling as a form of adoption”; *id.* at 282, 325.

²⁷⁸ International Convention for the Suppression of the Traffic in Women and Children of 1921 (the “1921 Convention”) (30 September 1921), 9 L.N.T.S. 415; the League of Nations Declaration of the Rights of the Child art. IV (26 September 1924), League of Nations O.J. Spec. Supp. 21, at 43; and International Labour Organization Forced Labour Convention (Convention No. 29) (28 June 1930), 39 U.N.T.S. 55.

excluding potential victims and purpose of exploitation from its scope.²⁷⁹ Such efforts to properly balance these two concerns were seen in the naming of the Trafficking Protocol, where the wording “trafficking in persons, [but] especially women and children” was chosen by the United Nations General Assembly in 2000 to reflect the special protection accorded to these two groups of victims but without excluding adult men from the overall discussions and enforcement strategies on human trafficking.²⁸⁰

Despite such efforts, the trafficking in adult men for their labour in general, as compared to that of women and children, does not receive a similar level of interest in China or elsewhere. Such discrepancies in the attention given to the trafficking of women and men have brought about very different statistics being captured on human trafficking, where the sexual trafficking of women particularly has become almost synonymous with human trafficking.²⁸¹ For instance, the United Nations Office on Drugs and Crime has consistently presented that sexual exploitation, at 79 percent of all reported cases, makes up the vast majority of cases on human trafficking where most of these victims are female, but, at the same time, attributing this figure to possible statistical bias.²⁸² The caveat on this statistical bias for sex trafficking arises from two factors: first, the high visibility of female sexual exploitation versus other forms of exploitation; and second, the underreporting of other forms of labour exploitation.²⁸³ However, this statistical bias is seldom explored in depth, with most studies on human trafficking continuing to highlight female victims of sex trafficking to the neglect of exploitations that also can exist for adult male labourers. Reported cases of the trafficking of adult males, therefore, do not feature as highly as those involving female victims, either within the specific phenomenon of sex trafficking, where violence can also be directed at male victims, or within other contemporary forms of slavery, such as debt bondage and forced labour. As one critic notes, the vast attention given to female

²⁷⁹ International Labour Organization, *ILO Action Against Trafficking in Human Beings* 29 (2008).

²⁸⁰ Draft United Nations Convention against Transnational Organized Crime and the Draft Protocols Thereto, GA Res. 54/126 (LIV), UN GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/126 (2000).

²⁸¹ See Stephanie Hanes, *The Christian Science Monitor*, *Human Trafficking: A Misunderstood Global Scourge*, <http://www.csmonitor.com/World/Global-Issues/2012/0909/Human-trafficking-a-misunderstood-global-scourge> (9 September 2012).

²⁸² United Nations Office on Drug and Crime, *Global Report on Trafficking in Persons* 6 (2009). According to this report, forced labour is the second most commonly identified form of human trafficking, at 18 percent of reported cases from information provided by 155 countries and territories.

²⁸³ *Id.*

sex trafficking “ends up sidelining other concerns—such as the broader categories of human trafficking or even forced labour, which do not have to involve sex.”²⁸⁴

Fundamentally, the predominant focus on the sex trafficking of women is problematic because it undermines one of the aims of the Trafficking Protocol, which was to evolve from the gender-exclusive and exploitation-specific approaches of the earlier trafficking conventions into an inclusive framework for the prevention of all forms of trafficking. Such an uneven focus based on the gender of trafficked victims obscures the vulnerabilities of adult male labourers to exploitative labour conditions outside the realm of commercial sexual exploitation. This is especially the case for male migrant workers in China, who outnumber the domestic female migrant population by almost a two-to-one ratio.²⁸⁵ Contributing to the vulnerability of adult male labourers to exploitation is the fact that many work without the necessary employment and residency permits in their new localities, whilst also lacking sufficient knowledge of their labour rights and statutory employment protections.²⁸⁶ However, the labour exploitation of Chinese adult men is mainly discussed in terms of labour rights violations and seldom features in the trafficking context, even for extremely exploitative cases where many face conditions indicative of forced labour.²⁸⁷ These can include threats or actual physical harm to the worker, restrictions on their physical movement, debt bondage, the withholding of wages, retention of identity documents, and threat of denunciation to the authorities when the worker is in an irregular immigration status.²⁸⁸

²⁸⁴ The quote is attributed to Ann Jordan, Director of the Program on Human Trafficking and Forced Labor at American University; in Hanes, *supra* n. 281.

²⁸⁵ *Dagongmei*, *supra* n. 201. Some provinces have a higher percentage of female migrant workers due to these areas' high concentration of unskilled, labour intensive and lowly paid industries—such as garment, toys, footwear and electronics—that typically hire women.

²⁸⁶ Zhou Tianyong [周天勇], *Tupo Fazhan de Tizhixing Zhangai* [Breaking Through the Obstacles to Development; 突破发展的体制性障碍] 2-6 (Guangdong Economy Publishing House 2005); in China Digital Times, *Breaking Through the Obstacles to Development—Zhou Tianyong*, <http://chinadigitaltimes.net/2006/02/breaking-through-the-obstacles-to-development-zhou-tianyong/> (19 February 2006).

²⁸⁷ See Yang Wenlong [杨文龙], *Lun “Guaimairenkouzui” de HuiFu* [A Discussion On Reinstating the Crime of the Trafficking in Persons; 论“拐卖人口罪”的恢复], 3 Hubei Soc. Sci. [湖北社会科学] 150 (2008).

²⁸⁸ International Labour Organization, *Human Trafficking and Forced Labour Exploitation: Guidelines for Legislation and Law Enforcement* 20-21 (2005). Anti-Slavery International has argued that an investigation should be triggered for cases where at least one of these indicators is present. Where a case involves two or more identified elements of coercion, it should be considered as a situation of forced labour; see Gary Craig et al., *Joseph Rowntree Foundation, Contemporary Slavery in the UK: Overview and Key Issues* 18, <http://www.jrf.org.uk/sites/files/jrf/2016-contemporary-slavery-uk.pdf> (2007).

The following testimony from some 20 Chinese migrant workers at a joint-venture footwear factory in 1995 illustrates the extent of labour abuses that can exist domestically, which meet the exploitation threshold of “forced labour or services, slavery or practices similar to slavery [and] servitude” under Article 3(a) of the Trafficking Protocol:

The company docks our pay, deducts and keeps our deposits, beats, abuses, and humiliates us at will...Those of us who came from outside the province only knew we had been cheated after getting here. The reality is completely different from what we were told by the recruiter. Now even though we want to leave, we cannot because they would not give us back our deposit and our temporary residential permit, and have not been giving us our wages. This footwear company has hired over one hundred live-in security guards, and has even set up teams to patrol the factory. The staff and workers could not escape even if they had wings...Being beaten and abused are everyday occurrences, and other punishments include being made to stand on a stool for everyone to see, to stand facing the wall to reflect on your mistakes, or being made to crouch in a bent-knee position. The staff and workers often have to work from 7 a.m. to midnight. Many have fallen sick..It is not easy even to get permission for a drink of water during working hours.²⁸⁹

This case is unique in that it contains extensive, first-hand testimony from the exploited workers, attesting to egregious violations of their labour rights—including fraudulent recruitment, non-payment of wages, physical abuses, threats and restrictions on movement—that identify it as a situation of forced labour. Subsequent investigations were conducted by both the provincial labour bureau and the official trade union, who confirmed these instances of labour abuses.²⁹⁰

Another similar example came to light in 2010, involving ten male migrant labourers who worked on a hydroelectric project under a subcontractor for a local electricity company in southwest China.²⁹¹ The labourers reportedly started in July 2009 and worked without pay for nearly eight months. When they asked for their wage arrears, the subcontractor allegedly refused to pay until the workers finish another project. Later, the subcontractor again refused to pay and reportedly hired other

²⁸⁹ Chan, *supra* n. 185, at 888.

²⁹⁰ *Id.*

²⁹¹ Xiong Tingting [熊婷婷], *Chongqing Economic Times* [重庆商报], *Mingong Taoxin Beiju Hai'ai Laoban Shouxia Baoda* [Migrant Workers Rejected for Requesting Backpay and Brutally Beaten by Boss' Men; 民工讨薪被拒 还挨老板手下暴打], http://e.chinacqsb.com/html/2010-02/13/content_60293.htm (13 February 2010).

individuals to assault the workers. Initial investigation by a local paper found that the electricity company had paid the subcontractor, but it was uncertain whether the subcontractor had transferred the wages to the workers. Results from the investigation conducted by the local labour office were also unclear because the migrant workers were not in an employment relationship with the subcontractor.²⁹² However, since most migrant workers in China undertake employment without having the necessary authorisations from local authorities, it would not be unexpected to find that no formal labour contract had been signed between these workers and the subcontractor. Echoing this view is Zhou Tianyong of the Chinese Communist Party Central Party School, who in 2005 described the linkage between wages withheld from the migrant workers and their vulnerability to unscrupulous employment arrangements as:

My personal estimate is that various construction projects throughout China have a cumulative debt of about 1 trillion RMB [renminbi]. Of this debt, over 300 billion RMB in back wages are owed to migrant workers. Owing to the great surplus of labor on the labor market, the poor education and poor awareness of the law on the part of migrant workers, only 50% signed a labor contract. This makes their situation even more difficult.²⁹³

The undocumented status of most of China's internal migrant workers effectively renders them more vulnerable to situations indicative of forced labour abuses, such as the prolonged withholding of wages. Moreover, their low socioeconomic status also means they are often recalcitrant to access judicial remedies due to the prohibitive costs of lodging a legal claim. For example, it has been estimated by the All-China Lawyers Association that a migrant worker seeking wage recovery through the courts would need to pay, for a chance at a positive outcome, at least three times the amount owed him for various out-of-pocket expenses.²⁹⁴

Mirroring these domestic reports of the forced labour of workers in China are cases where Chinese emigrants are subjected to similar practices of exploitation abroad. First, many would have needed to borrow heavily from family and friends to finance their outbound migration, and the practical need to repay these large debts often inhibits

²⁹² *Chongqing Economic Times* [重庆商报], *Laodongju: Gongchengfang Meiqian Mingong Gongzi* [Bureau of Labour: Construction Does Not Owe Migrant Worker Backpay; 劳动局: 工程方没欠民工工资], http://e.chinacqsb.com/html/2010-04/23/content_76461.htm (23 April 2010).

²⁹³ Zhou Tianyong [周天勇], *supra* n. 286, at 2-6.

²⁹⁴ China Labour Bulletin, *High Cost of Wage Recovery Deepens Sense of Futility in Legal Route, Stirs Up Social Unrest*, <http://www.clb.org.hk/en/node/18840> (10 November 2005). The All-China Lawyers Association further cautioned that even in light of a favourable court judgment it is not certain that these migrant workers would actually receive their backpay from their employers.

their willingness to escape from abusive employment conditions. According to one study based on interviews with Chinese migrant workers in France, the fees smugglers charged for arranging their transportation and logistics from southern China to Europe ranged from 13,000 to 22,000 euros; entry into the United Kingdom would cost a further 11,000 euros, while the fees increase almost threefold for smuggling into the United States.²⁹⁵ These high recruitment fees compound Chinese migrant workers' vulnerability to debt bondage and other situations of trafficking.²⁹⁶ There have been reports of migrants without kinship support resorting to borrowing from their smugglers and becoming directly indebted to them upon arrival in the destination countries. The debts must then be repaid with the migrants' labour, resulting in a situation of debt bondage where their freedoms are usually more limited when compared to others without such directly contracted debts.²⁹⁷

Once the Chinese migrant workers arrive at the countries of destination, they may experience abusive labour practices that push them in the direction of forced labour, while their undocumented status may mean that many are unwilling to seek redress for these instances of exploitation. For instance, a study of 32 Chinese migrants workers with irregular status in the United Kingdom in 2011 found two cases of forced labour and "widespread exploitation of Chinese migrant workers by employers who were not compliant with immigration, business or employment regulations."²⁹⁸ In particular, the system of subcontracting, similar to cases where this was used to evade labour regulations domestically in China, also contributes to their vulnerabilities. Two studies of the garment-making industry in Italy and France underscore the subcontracting system as a key factor underlying the exploitative conditions, where the aggressive race-to-the-bottom competition amongst contract tenders for cost saving results in long-hours, as well as unsafe and unhealthy working conditions for the Chinese workers.²⁹⁹ In describing the labour conditions of Chinese textile workers in Italy, one study observes:

²⁹⁵ Yun Gao & Véronique Poisson, *Exploitation of Chinese Immigrants' Vulnerabilities in France*, in *Concealed Chains: Labour Exploitation and Chinese Migrants in Europe* 33, 43 (Gao Yun ed., International Labour Office 2010).

²⁹⁶ *Trafficking in Persons Report 2012*, *supra* n. 181, at 118.

²⁹⁷ See Carolyn Kagan et al., *supra* n. 179, at 41.

²⁹⁸ *Id.* at 5.

²⁹⁹ Yun Gao, *Introduction*, in *Concealed Chains: Labour Exploitation and Chinese Migrants in Europe* 1, 10 (Gao Yun ed., International Labour Office 2010).

[There is] a common shared willingness and consent from workers to accept any working arrangements whatsoever from employers: 20 hours a day, wages below the minimum, obligations to pay back the debt resulting from smuggling services, a compressed family life, child labour, and long night shifts. Costs are cut by low rates of pay, the transfer of tax and social security payments from employer to worker, and disrespect for labour entitlements, such as sickness or maternity leave, or even rest breaks.³⁰⁰

Nevertheless, it is not straightforward to label these conditions as *de facto* forced labour without further investigation because these cases persist on an element of self-exploitation on the part of the migrant workers themselves—a consensual arrangement beyond what is stipulated by law. The continued acceptance of these conditions, however, by the migrant workers can give rise to more coercive practices regardless of whether they are in a situation of regular or irregular migration.

There has been an increase in reported cases of labour abuses in Japan involving Chinese and other foreign students on an official, international vocational program. Critics of the program believe that, due to Japan's labour shortage as result of the country's decreasing population, foreign trainees have become exploited workers, who are "exposed to substandard, sometimes even deadly, working conditions."³⁰¹ In 2009, the Japanese Justice Ministry found more than 400 cases of trainee mistreatment across the country, such as: employers' failure to pay legal wages; dangerous work conditions; and excessive overwork without adequate rest, which is believed to be a contributory factor to the death of at least 127 trainees between 2005 to 2010.³⁰² These abusive labour practices were highlighted by the death of a young, Chinese male trainee named Jiang Xiaodong at a Japanese metal processing factory in June 2008. Subsequent investigation by the Japanese authorities found that Jiang Xiaodong had died from heart failure induced by excessive overwork.³⁰³ Jiang's passport was held by his employer, and, according to his family, Jiang also feared losing the security deposit he had borrowed from his family and becoming liable for uncompleted work if he were to refuse the long work hours.³⁰⁴

³⁰⁰ *Id.*

³⁰¹ Hiroko Tabuchi, *N.Y. Times*, *Japan Training Program Is Said to Exploit Workers*, www.nytimes.com/2010/07/21/business/global/21apprentice.html (20 July 2010).

³⁰² *Id.*

³⁰³ Zhang Shi [张石], *Chinanews.com* [中国新闻网], *Zairi Guolaosi Zhongguorenjiashu Mianhui Ribenguanyuan Yucheche Shijian* [Family of Chinese Worker Died of Overwork in Japan Meets with Japanese Officials and Calls for a Thorough Investigation; 在日过劳死中国人家属面会日本官员 吁彻查事件], <http://news.sina.com.cn/o/2011-03-04/145822053573.shtml> (4 March 2011).

³⁰⁴ *Id.*

In another similar case, 12 Chinese female students were exploited under this training program in Japan from August 2005 to November 2006; their passports were confiscated by their employers, and they were forced to work overtime sewing uniforms at textile factories in southern Japan, while only receiving half their entitled pay.³⁰⁵ In September 2009, the students arrived at a settlement with their former employers, who agreed to pay compensation and apologise for contravening labour regulations. These two cases exemplify the fact that abuses that are more frequently associated with forced migration can also exist in voluntary migration, since the large debts incurred by the migrants for their outbound journey and their subsequent marginalisation can lead to a position of extreme vulnerability and situation of forced labour. This is underscored by the U.S. Department of State Trafficking in Persons Report's country narrative for China, which, alongside the issue of female and child trafficking, has consistently reported on "Chinese workers [who] migrate voluntarily to other countries for jobs, but some subsequently face conditions indicative of forced labor, such as withholding of passports and other restrictions on movement, nonpayment of wages, physical or sexual abuse, and threats."³⁰⁶

It is important to note that, in practice, the trafficking of men, similar to other forms of trafficking, can seldom be neatly arranged to fit a convenient typology. This is because the trafficking of men, whether domestically within China or abroad, can simultaneously cut across several protection issues, as the nature of the employment evolves and becomes less or more coercive over time. Fundamentally, the issue of male trafficking raises concerns of the protection of the rights of migrant workers, for men feature prominently in cases of trafficking for the purpose of labour exploitation in the private economy, without the element of sexual services.³⁰⁷ Within this phenomenon, labour exploitation can occur either in a situation of regular or irregular migration. For migrant workers whose status is undocumented abroad or domestically, as in the case of China where internal population movement is strictly regulated in a similar way to transnational labour migration, they can be at an increased risk for coercive labour practices as result of their irregular status and their reluctance to seek legal redress. At

³⁰⁵ Zhao Xueliang [趙學亮], *Global Times* [环球时报], *Zai Riben Zaoqiangpolaodong de 12 ming Zhongguo Yanxiusheng yu Guzhu Hejie* [The 12 Chinese Graduate Students Exploited for Forced Labour in Japan Reached Settlement with Employers; 在日本遭强迫劳动的12名中国研修生与雇主和解], <http://world.huanqiu.com/roll/2008-09/231581.html> (27 September 2008).

³⁰⁶ *Trafficking in Persons Report 2012*, *supra* n. 181, at 118.

³⁰⁷ International Labour Organization, *ILO Global Estimate of Forced Labour: Results and Methodology* 14 (2012).

the same time, the exploitation of migrant workers can occur under the cover of a legitimate employment arrangement, such as through subcontracting or authorised traineeship programs, which can make abuses harder to detect.

3.4. Lack of Accurate Data

Understanding the human trafficking situation in China in a comprehensive manner is made more difficult by the lack of official and disaggregated statistics on the extent of the problem. As an example, the Chinese government has been heavily criticised for not releasing any statistic relating to the trafficking for forced labour or the trafficking in men.³⁰⁸ In the absence of official numbers, what exists is a scattered compilation of selected numbers and statements from official sources, focused mainly on the trafficking of women and children. An often-cited figure released by the Ministry of Public Security states that a total of 24,118 trafficking victims were rescued in 2011, including 15,458 women and 8,660 children, but without denoting the gender of the children or the specific types of exploitation involved.³⁰⁹ These haphazard numbers are supplemented by official statements that indicate the trend of the problem but often without more precise figures. This was seen in January 2011 when Chen Shiqu, Director of the Anti-Human Trafficking office of the Ministry of Public Security, spoke directly on how the number of Chinese women trafficked abroad and forced into prostitution has risen amidst an increasing number of international criminal groups engaged in trafficking.³¹⁰ “[T]here has been a growing trend for organized transnational human trafficking crime groups to target Chinese women for forced prostitution in foreign countries,” Chen explained, but, according to the news report, declined to provide specific figures.³¹¹

The lack of more precise data on human trafficking and China is a serious lacuna in the field and a frustrating endeavor for those who want to understand the full extent of this problem. This difficulty, however, is not unexpected, given the twin problems of accessing the concealed nature of exploitative labour situations that characterise human

³⁰⁸ *Trafficking in Persons Report 2012*, *supra* n. 181, at 118-119.

³⁰⁹ *China Daily* [中国日报], *Qunian Quanquo Gonganjiguan Gongjiejiu Beiguai Ertong 8660 Ren Funu 15458 Ren* [Public Security Authorities Nationwide Rescued a Total of 8660 Trafficked Children and 15,458 Trafficked Women Last Year; 去年全国公安机关共解救被拐儿童8660人妇女15458人], http://www.chinadaily.com.cn/dfpd/shizheng/2012-03/11/content_14806656.htm (11 March 2012).

³¹⁰ Zhang Yan & He Dan, *supra* n. 195.

³¹¹ *Id.*

trafficking and the challenge of properly identifying victims from the general population of those engaged in more legitimate work. This is particularly seen with regard to sex trafficking in China, where, due to the hidden nature of sexual establishments, it is extremely difficult to arrive at a credible estimate of the number of sex trafficking victims in the country. As observed by one study on prostitution in China: “Erotic services take place in various establishments that include karaoke bars, hotels, sauna salons, hair salons, disco and other dancing halls, small roadside restaurants, parks, cinemas, and video rooms.”³¹² To this list, one Chinese scholar adds massage parlours, which flourished in the late 1980s due to a regulatory loophole that allowed them to register as medical establishments in different localities.³¹³ Sexual services can also be solicited in public areas and then carried out in private residences, as well as in vans whose mobility and ubiquitousness in traffic make them hard to detect by law enforcement.³¹⁴ The same problem exists for child trafficking, where child abductions for illegal adoptions, seen to be within the scope of trafficking in China, or for forced begging and thievery are obscured by layers of criminal activity specifically aimed at evading detection and rescue.

Second, the identification of trafficked victims within the pool of those who are engaged in more legitimate work presents another formidable challenge, especially since the means used to achieve the exploitation are diverse and can change as the victims’ circumstances evolve. This is seen in the diversity of cases reported to the International Labour Organization of migrant workers under debt bondage in “agriculture and in other labour-intensive sectors, including construction, garments, packaging and food processing,” where they can work alongside others who are not held under bondage and enjoy better employment conditions.³¹⁵ Reports on child labour in China frequently highlight the practical difficulties of detecting their labour abuses amidst the wider worker community. For example, a 2012 report of exploited child labour at one electronics factory in southern China found that there were at least seven

³¹² Tiantian Zheng, *Red Lights: The Lives of Sex Workers in Postsocialist China* 55 (University of Minnesota Press 2009).

³¹³ Dan Guangnai [单光鼐], *Zhongguo Changji: Guoqu he Xianzai* [Chinese Prostitution: Past and Present; 中国娼妓: 过去和现在] 404, 407 (Law Press China 1995).

³¹⁴ *Id.* at 393-394.

³¹⁵ International Labour Organization, *A Global Alliance Against Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* ¶ 35, 9 (2005).

cases of underaged child employees subjected to various labour violations,³¹⁶ such as unfair dismissals without pay, work without labour contracts and excessive overtime, among the 2000 workers employed at this factory.³¹⁷ It was, however, impossible to ascertain if more cases of exploited child labourers existed, since the investigator only gained access to the seven child workers under the cover of being a fellow employee and had limited contact with workers in other divisions.

Whilst labour abuses in legitimate work settings have frequently been the focus of labour monitoring reports, it is perhaps the element of force and coercion in commercial sex work that has received the most media attention due to the level of deception that could be involved in such cases. Some women are lured into the sex trade through false promises of legitimate employment from recruiters and then find themselves forced into sexual exploitation. This is illustrated by one case of forced prostitution reported in August 2007, involving five female victims, between the age of 15 to 18. They were initially recruited to work as reflexology therapists by a man who had promised them a monthly wage, board and accommodation, with a chance of performance-based promotion. When they arrived, they discovered reflexology was merely a cover for prostitution, and they were forced to serve about ten customers a day without pay. The girls were heavily monitored, beaten and threatened with death after several failed escapes. One eventually found the police, who then rescued the remaining girls and apprehended the recruiter and his four accomplices.³¹⁸

Stories like the one above and of other workers who are deceived through the bait of legitimate employment highlight the difficulty of statistically discerning voluntary workers from those whose labour meets the requirement of exploitation under the trafficking definition in a variety of abusive situations. Proper identification and the subsequent labelling of someone as a human trafficking victim are not trivial tasks. They require detailed and extremely sensitive interviews to determine the extent of the

³¹⁶ The Chinese Labour Law prohibits employers from recruiting minors under 16 and only allows an exemption for art, sports and special-skill units from this rule. These units then must guarantee the minors' right to compulsory education and can only begin recruitment after official approval; Standing Committee of the Eighth National People's Congress, *Labour Law of the People's Republic of China* [中华人民共和国劳动法], art. 15, adopted and promulgated on 5 July 1994 and came into effect on 1 January 1995.

³¹⁷ China Labor Watch, *Samsung Factory Exploiting Child Labor: Investigative Report on HEG Electronics (Huizhou) Co., Ltd. Samsung Supplier 3*, 7-9, 11, 15-17 (2012).

³¹⁸ Tang Yang [汤洋], *Xinhua News Zhejiang* [新华网浙江频道], *Wenzhou 5 Shaonu Beipian zhi Chenyang Maiyin Meitian Yaojie 10 ge Keren* [Five Young Women from Wenzhou Tricked and Sent to Shenyang for Prostitution, Forced to Serve Ten Customers Each Day; 温州5少女被骗至沈阳卖淫 每天要接10个客人], http://www.zj.xinhuanet.com/newscenter/2007-08/30/content_11001166.htm (30 August 2007).

exploitation and the means used to achieve such abuse at all stages of the trafficking process.³¹⁹ In a recently published study on prostitution and human trafficking conducted in Shenzhen, China, by criminologist Min Liu, only six out of the forty female prostitutes she had interviewed over a two-year period were found to be victims of human trafficking.³²⁰ Such detailed studies that seek to discern trafficking dynamics within the larger sector-wide situation, whether in the specific area of the commercial sex trade or other types of labour arrangements, are rare within both the international and domestic literature. As a result, it is currently not possible to have more accurate numbers on the overall situation of human trafficking in China, beyond incomplete and selected statistics framed by a vast array of individual anecdotes of exploitation. Despite this, the Chinese government has recognised that human trafficking, both domestic and international, is a serious problem for the country. To this effect, the Chinese government acceded to the Trafficking Protocol in February 2010 with the goal of strengthening international cooperation to prevent and combat the trafficking in persons, whilst also calling for widespread support from other countries for the Trafficking Protocol's parent convention—the *United Nations Convention Against Transnational Organized Crime*.³²¹

* * *

The term “human trafficking” as it is used in China is a broad term that is easy to misuse due to other dynamics that may be associated with trafficking and human exploitation. For instance, female trafficking is mostly associated with all forms of commercial sex work. Under this scenario, prostitutes apprehended during anti-trafficking raids on brothels or other establishments where sex work is suspected to take place are often labelled *prima facie* as victims of trafficking and included in statistics on

³¹⁹ See Cathy Zimmerman & Charlotte Watts, *WHO Ethical and Safety Recommendations for Interviewing Trafficked Women* (World Health Organization 2003).

³²⁰ Min Liu, *supra* n. 194, at 96. The percentage of human trafficking victims in Min Liu's sample of interviewed prostitutes may even be higher than six out of the 40 she is concluded to have found after an analysis of their pathways into prostitution. This is because three of the interviewees were likely to have been underaged at the time of their entry into prostitution. According to the Trafficking Protocol, Article 3, subparagraphs (c) and (d), it is not necessary to establish the means component of the trafficking definition when any person under 18 years of age is involved. Therefore, the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation, even when it does not involve any of the improper means of “threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits” (art. 3(a)), is sufficient for it to be considered as trafficking in persons.

³²¹ Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and Other International Organizations in Switzerland, *Position Paper of the People's Republic of China At the 65th Session of the United Nations General Assembly* (27 September 2010) (available at <http://www.china-un.ch/eng/hom/t756521.htm>).

trafficking in China. This is mainly done for public consumption and without a clear articulation of the actions or means that led them to prostitution or the conditions of their labour, which would more accurately determine their trafficking status. On the other extreme are reports of some local police parading prostitutes after such a raid has taken place, so as to appear to have a zero-tolerance for prostitution and crimes in general.³²² Much of this reflects public moral sentiments about the nature of prostitution at the turn of the twentieth century and also in twenty-first century China and abroad, where some categorically view all prostitutes as victims of an inherently exploitative trade, irrespective of their consent in the exercise of their choice of employment. Commenting on this normative debate concerning whether or not it is possible for a woman to engage in consensual prostitution and how this has affected the anti-trafficking movement, one scholar opined: “Deeming consent irrelevant to the women’s victimization also risks portraying women as perennial victims of false consciousness, incapable of making autonomous choices regarding their means of migration and employment.”³²³

Equating trafficking with prostitution inevitably gives rise to the situation where other categories of trafficking victims and exploitation will be overlooked. This is especially true in China, where legislation and law enforcement strategies have largely focused on trafficking for the purpose of prostitution. As a result, other forms of labour exploitation, covering slavery or practices similar to slavery, servitude and forced labour, are largely excluded from the scope of China’s definition of the term “trafficking” under its criminal law. The human trafficking situation in China is also further complicated by the fact that, although the government acceded to the Trafficking Protocol in February 2010, its victim assistance and protection programs available to both domestic and international victims of trafficking are largely seen as falling short of international standards and insufficient in dealing with the scale of its trafficking problem.³²⁴ For example, much of the law enforcement to combat child trafficking in China has tended to focus on the prosecution of criminals who are involved in the abduction of children—usually boys owing to the cultural preference of having male

³²² See Andrew Jacobs, *N.Y. Times*, *China Pushes to End Public Shaming*, <http://www.nytimes.com/2010/07/28/world/asia/28china.html> (27 July 2010); China Daily, *China Bans 'Shame Parades' of Prostitutes*, http://www.chinadaily.com.cn/china/2010-07/28/content_11058479.htm (28 July 2010); and Edward Cody, *Washington Post*, *Public Shaming of Prostitutes Misfires in China*, <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/08/AR2006120801480.html> (9 December 2006).

³²³ Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 *Harv. Hum. Rights J.* 65, 85 (1998).

³²⁴ United States Department of States’ Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report 2009*, at 105 (U.S. Department of State Publication 2009).

heirs—for illegal, but non-exploitative, adoption. However, these cases of child adoptions, which fundamentally are not for the purpose of labour exploitation and thus fall outside of the scope of the Trafficking Protocol, are often conflated with trafficking offences in China. Consequently, this confusion has greatly overshadowed the protection and assistance given to child victims who are trafficked for the specific purpose of their labour exploitation, such as forced begging, thievery, abusive labour or work-study programs.

It may be that due to the complexity of the human trafficking situation in contemporary China, it is mainly seen as a social problem of “the excesses of capitalism” since the start of the country’s economic liberalisation in 1978.³²⁵ The decision by the Chinese Communist leadership to embark on market reforms had a singular, seismic effect on modern Chinese society and ushered in decades of economic and cultural transformation, including perceived societal ills of the emergence of criminality and prostitution. This view, however, may not be completely accurate. In fact, the phenomenon and dynamics of trafficking in China are not completely severed from its past. Instead, what mostly changed was the labelling of the problem, as a result of developments in international law on trafficking from the early 1900s, and the political rhetoric surrounding issues of human exploitation with each successive change in government during China’s turbulent twentieth century. This next chapter addresses the question as to what are these historical antecedents to the human trafficking situation of modern twenty-first century China? This exploration will attempt to bridge this historical divide by examining similarities between past and present migratory dynamics, and the means used by traffickers to achieve and maintain the labour exploitation of Chinese women, children and men.

³²⁵ Han Zhu [寒竹], *Guancha.cn* [观察者网], *Guangchang Yundong yu Pushizhuyi* [Mass Protest Movements and Universalism; 广场运动与普世主义], <http://www.guancha.cn/html2/51162/2012/06/14/79038.shtml> (14 June 2012).

4. Historical Perspective

The current situation of trafficking in persons in China, as examined in the previous chapter, presents a complex picture of the victims and criminal elements, as well as the exploitative purposes involved. With regard to the specific dynamics of female trafficking, a frequent scenario is one where a woman is trafficked for commercial sexual exploitation or forced marriage. In both scenarios, providing assistance of rehabilitation or repatriation to trafficked victims is made more challenging by the difficulties of their initial identification. This is particularly true in cases of trafficking for forced marriages, where the identification of victims would need to differentiate between wives whose marriage was based on full agency from others who were perhaps purchased and coerced into the marital union. Concerning the trafficking in children, any analysis of this situation in China would not only need to address the element of the exploitation of a child's labour but also the issue of illegal, but non-exploitative, adoptions, since the term "child trafficking" is broadly used in China to encompass these two main purposes. In addition to these two groups of victims is also the more overlooked issue of the trafficking in adult men, who often work as migrant workers in China's growing metropolises. Their precarious employment status, arising mostly from their lack of documentation to legally work and reside in the city, makes them vulnerable to unscrupulous labour abuses. Given the inherent complexity of present-day human trafficking in China, it is understandable that most of the discussions on this topic have tended to focus on the gravity of the present situation. However, it would not be accurate to view China's trafficking in persons as a recent development, a problem of the late-twentieth or early twenty-first century, for there are significant historical parallels to this perceived contemporary problem.

4.1. Types of Exploitation

In the Chinese historical context, trafficking affected individuals of both genders. Some women and young girls in the late-Qing and Republican periods, from mid-nineteenth to early twentieth century, were sold or pledged by their families into prostitution, often as a survival strategy for the remaining members of the indigent family. Besides forced prostitution, women could also be sold into concubinage. Young girls were transferred, often in exchange for money, as domestic servants or as betrothed brides-to-be. These two phenomena for the sale of girls, *mui tsai* and *tungyanghsi* as they were called respectively, were especially common during the late-Qing period, when internal instability and natural disasters brought about widespread poverty and significant population displacement. While both practices were not originally intended as exploitative labour arrangements, the young girls in such situations were extremely vulnerable to abuses in the domestic setting. By the mid-1950s, these two quasi-familial, foster relationships would come to embody practices similar to slavery and addressed by Article 1(d) of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (the “1956 Supplementary Convention”) as prohibited practices of child labour exploitation.³²⁶

Furthermore, labour exploitation was not confined to the above-mentioned practices in the trafficking of women and children. In the nineteenth century, Chinese male labourers were contracted to work on the sugar plantations in Latin America in what is referred to as the “coolie trade.” Supplanting African slave labour on these plantations following the abolition of slavery, these Chinese male emigrants were treated harshly despite their supposed free labourer status. Mortality rate was high. Many simply did not survive either the journey to the New World or their harsh working conditions on the plantations. Moreover, some labourers did not voluntarily emigrate. At the point of recruitment, many undoubtedly were voluntary migrant workers, but others were abducted and sold against their will. In this way, the trafficking of these Chinese male emigrants shares many key similarities with the trafficking in Chinese women and children in the acts and means used to enable and sustain their subsequent exploitation.

As a point of comparison to the previous chapter on the current situation of human trafficking in China, this present chapter will examine the different manners in which

³²⁶ See Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* 295, 304-322, 326-349 (Martinus Nijhoff Publishers 2008).

Chinese women, children and men were exploited for their labour in the past. Covering the period of the mid-nineteenth century under Qing imperial rule to the mid-twentieth century, this chapter explores the historical parallels to the human trafficking situation of modern twenty-first century China. However, because terminologies evolve with the times, differences in the expressions used to describe various forms of exploitation inevitably introduce another layer of confusion to any historical comparison. Therefore, a particular focus of this chapter will be on the process of trafficking and the actions used by the traffickers to secure the compliance of their victims. Furthermore, since the component of coercion is central to trafficking, this chapter will also analyse these historical parallels through the framework of the different types of means used to maintain various situations of labour exploitation.

4.1.1. Women, Marriage and Prostitution

Similar to the contemporary situation of trafficking in Chinese women, their exploitation in the past could take place in both the private domain of the family and in commercial sexual establishments. A woman could be sold into concubinage and then exchanged amongst wealthy men who could afford to support multiple partners. To illustrate the transferrable status of concubines, one study cites an example of a wealthy merchant who had “bought, and then sold, a succession of secondary wives” after he could not produce a son with his first wife.³²⁷ The position of a concubine in the family was perilous. In cases where she produced a much-desired boy in the absence of one from the primary wife, the concubine would gain some status in the household as the mother of the designated heir. However, even then, it was not certain that her position would drastically improve and supplant the position of the first wife. In general, a concubine was subservient to the principal wife, and her formal position in the family was treated by both Qing and Republican law as somewhat equivalent to a household servant.³²⁸ For example, a concubine was a legal non-person under Republican law, since concubinage was not recognised as a practice that gave rise to a valid marriage contract.³²⁹ Failing other means of livelihood, a concubine could claim some

³²⁷ James L. Watson, *Transactions in People: The Chinese Market in Slaves, Servants, and Heirs*, in *Asian and African Systems of Slavery* 223, 232 (James L. Watson ed., Basil Blackwell 1980).

³²⁸ Sue Gronewold, *Beautiful Merchandise: Prostitution in China 1860-1936*, at 49 (Harrington Park Press 1985).

³²⁹ Philip C. C. Huang, *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared* 187, 194 (Stanford University Press 2001).

maintenance as a general member of the household, similar in position to a purchased child-bride-to-be of the household, but not as a legitimate spouse.³³⁰

The inferior position of a concubine was bound to the fact that she had entered the household by purchase and without a respectable dowry.³³¹ In this way, her status was fundamentally different from the respect accorded to the first wife, who would have arrived with a sizeable dowry and commanded the household as the major wife. However, even then, the position of the first wife was also not inviolable. In desperate times, the principal wife too could be sold as a survival strategy for the rest of the family.³³² Legal historian Philip Huang, in his study on the status of women in the Qing and Republican period, described how women, in general and without distinction as to their marital status, were “widely treated as chattel, to be bought and sold for what they might fetch.”³³³ On the prevalence of their exploitation in the family domain, he observed that almost half of all marriage-related cases that came before two Qing county courts from the mid-eighteenth to early twentieth century involved a financial transaction of women.³³⁴

It is important to note that unlike the definition for human trafficking in the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the “Trafficking Protocol”), wherein the exploitation for the purpose of trafficking can take different forms and extend into the domestic realm, “traffic in women” during this period of history was exclusively focused on transnational prostitution. This narrow focus was reflected in the definition for the traffic of women, codified as the crime of “gratify[ing] the passions of another person...for immoral purposes...notwithstanding that the various acts constituting the offence may have been committed in different countries.”³³⁵ Reflecting the international law of this period on prostitution as the sole purpose for the trafficking in women, a key League of Nations report in 1932 examining the situation of trafficking in the East delved into some length in distinguishing Chinese women who were prostitutes from those who were not. Even if the latter worked in sectors that might have had some

³³⁰ Articles 1116 and 1117, *The Civil Code of the Republic of China: Book IV on Family Law*.

³³¹ Watson, *supra* n. 327, at 232.

³³² *Id.* at 231.

³³³ Huang, *supra* n. 329, at 170.

³³⁴ *Id.*

³³⁵ International Convention for the Suppression of the White Slave Traffic of 1910 (the “1910 Convention”) arts. 2 and 3 (4 May 1910), 211 Consol. T.S.

overlap with prostitution, the report held prostitution itself—and not the element of exploitation—as its main lens of examination. This was particularly evident in the report’s discussion on a group of Chinese female social entertainers known as the singing-girls, which focused more on the potential dangers of their succumbing to prostitution rather than on the actual, existing elements of labour exploitation in their working lives.³³⁶ For instance, it was known that the singing-girls had very restrictive freedom of movement. The report described the constant surveillance in the life of a singing-girl: “[T]he singing-girl is invariably accompanied, wherever she goes, by a woman who is in charge of her, who may be the actual exploiter or a person delegated by the exploiter.”³³⁷ Notwithstanding these concerns, the Commission of Enquiry did not examine their possible labour exploitation at the hands of their minders and only referred to them in the context of a potential pathway into prostitution.

The emphasis on prostitution in the discussions on the traffic in women reflects a wider criticism directed at the limits of international legal development at this time, namely that the 1921 Convention confused signatory countries by equating international trafficking with commercialised prostitution, given the practical difficulties of distinguishing between the two.³³⁸ This was not an abstract criticism. It had wide ramifications for understanding the demography of the traffic in women, since various national authorities relied on the number of registered prostitutes as an indicator for the scale of this traffic on their territories. Consequently, official victim numbers reported to the Commission of Enquiry are believed to be low estimates for the historical traffic of women because they would have excluded those who were not registered with the police and had no wish to make their status known to the authorities. For instance, the Commission of Enquiry report cited the following numbers of Chinese prostitutes officially known to the authorities as an estimate for the scale of the Chinese traffic in women at the time of its visit: the French Union of Indo-China, about 50; Siam (Thailand), about 1,000; British Malaya, 5,000 to 6,000; and British India, 30.³³⁹ Beyond these very general estimates—incredulously low to be the focus of a 6-month long enquiry from the League of Nations—the actual extent of the traffic in Chinese women during this period is believed to have been deeply embedded in their immense emigration, which saw the port of Hong Kong alone averaging between 7,000 to 8,000

³³⁶ League of Nations, *Commission of Enquiry into Traffic in Women and Children in the East: Report to the Council*, Official No. C.849.M.393.1932.IV., 49 (1932) [hereinafter *Commission of Enquiry Report*].

³³⁷ *Id.* at 50.

³³⁸ Michelle O. P. Dunbar, *Comment: The Past, Present, and Future of International Trafficking in Women for Prostitution*, 8 *Buff. Women’s L.J.* 103, 110 (2000).

³³⁹ *Commission of Enquiry Report*, *supra* n. 336, at 37.

Chinese female emigrants each year from 1890 to 1939.³⁴⁰ Amidst this large female emigration, authorities would have needed to detect, identify and separate the trafficked women from the general migrant population, so as to provide them with special protection and assistance. This was, as it is today for modern, anti-trafficking law enforcement bodies, a truly formidable challenge.

One aspect of the Chinese trafficking in women from this period that invoked the most international indignation was the selling of women into prostitution. Many of these victims were sold by their families out of desperation as the result of a series of natural disasters that struck China during the decline of the last imperial government, which was unable to cope with the mounting relief challenge. The British missionary Timothy Richard, in 1876, witnessed a market for the sale of women in a village in Shantung devastated by widespread starvation. He wrote of his experience: “[The market was] attended by men who had come from the Far East to buy. I slept little that night because of the great commotion and distress.”³⁴¹ Similarly, in 1889, the report of the China Famine Relief Fund, an international philanthropic body established to broaden the relief work in Northern China, observed: “Women and girls were sold in troops to traffickers, who took the opportunity of making money in this abominable manner, and suicide was so common as hardly to excite attention.”³⁴² Many of these purchased women would later be resold to brothels, where they would become known as “prostitutes of the house” because they kept very little of the money they earned. It was the brothel-owners or -keepers who mostly profited from their labour.³⁴³

Another related phenomenon was pawning, or pledging, of women into prostitution, where they themselves became items of collateral. This could be done by the women’s relatives, friends or strangers whom she had mistakenly trusted. One such case, in February 1908, involved a nineteen-year-old woman from Wuzhou in Southeastern China, who paid her sister a visit in Hong Kong. There, she ran into a man

³⁴⁰ Hiroaki Kani, *Zhuhua: Bei Fanmai Haiwai di Funu* [“Zhuhua”—Women Trafficked Abroad; “猪花”—被贩卖海外的妇女] 257 (Sun Guoqun & Zhao Zongpo [孫國群 & 趙宗頤] trans., Henan People’s Publishing House 1990).

³⁴¹ Timothy Richard, *Forty-five Years in China: Reminiscences* 118 (Frederick A. Stokes Company 1916).

³⁴² Shanghai Committee of the China Famine Relief Fund, *The Great Famine: Report of the Committee of the China Famine Relief Fund* 120 (American Presbyterian Mission Press 1879).

³⁴³ The bond between these “adopted daughters” and the brothel-owners could sometimes evolve into a more complicated relationship with elements of genuine affection and feelings of kinship, especially if the women no longer had ties with their own families; see Renate Scherer, *Das System der chinesischen Prostitution dargestellt am Beispiel Shanghais in der Zeit von 1840 bis 1949*, at 193-194 (unpublished Ph.D. dissertation, Freie Universität Berlin, 1983) (copy on file in ETH-Bibliothek, Zurich, Switzerland).

who claimed to be from her family clan and proposed for them to travel back together. Once aboard the ship, she was locked under the deck and learned of his intent to pawn her into a brothel in present-day Vietnam because he was in debt. Despite these early events, she must be considered as one of the more fortunate ones, for she—after much protest, mistreatment and a bout of illness—was eventually sent to a charity home instead.³⁴⁴ While the pawned prostitutes were not considered as the properties of the brothel, they were bonded to it through debt that they contracted upon entry. They received food and lodging but were required to turn over half of their earnings to the brothel-keepers. They could keep the other half and apply it towards their debt with the brothel. In principle, they were free to leave once their debts were repaid, but, in reality, this was often unattainable, given that brothel-owners would add various costs, such as clothing and other finery, to run the pawned women further into debt.³⁴⁵ Moreover, the problem of repayment was also compounded by the high interests that brothels often charged on the debts, cited by one study to be around 40 to 50 percent per annum in the 1890s, rendering it virtually impossible for the pawned prostitutes to clear off their debts.³⁴⁶ In this way, the pawned prostitutes shared a similar reality with that of the sold women, for whom escape through repayments was never a possibility.

The practice of selling and pawning women into prostitution during this time was pervasive and was not confined to a simple rural-urban categorisation.³⁴⁷ Historian Christian Henriot, in his study on prostitution in Shanghai from 1849 to 1949, estimated that the “proportion of girls sold or pledged probably did not amount to more than half” of all the prostitutes.³⁴⁸ The other half would be the voluntary prostitutes—or “free prostitutes” according to the designation used by the League of Nations Commission of Enquiry—who also received food and lodging against half of their earnings but had no additional debts to repay.³⁴⁹ Both pathways of being sold or pledged into prostitution represented a form of extreme labour exploitation. Respectively characterised by Henriot as “slaves” or “virtual slaves,” these sold or pledged women were maintained in their situation of sexual exploitation by a complex set of dynamics, where certain

³⁴⁴ Kani, *supra* n. 340, at 264.

³⁴⁵ *Commission of Enquiry Report*, *supra* n. 336, at 140.

³⁴⁶ Christian Henriot, *Prostitution and Sexuality in Shanghai: A Social History, 1849-1949*, at 262 (Noël Castelino trans., Cambridge University Press 2001).

³⁴⁷ Gronewold, *supra* n. 328, at 13. In the twentieth century, the practice of selling women gave way to pawning, possibly because pawnage allowed families to share in the proceeds of the women’s labour, as well as maintaining the façade of kinship; see *id.* at 88.

³⁴⁸ Henriot, *supra* n. 346, at 233.

³⁴⁹ *Commission of Enquiry Report*, *supra* n. 336, at 43-44.

components mirrored present-day realities.³⁵⁰ These means could extend from overt methods of coercion, such as physical punishments, to the more covert abuses of their sense of vulnerability. It is also important to note that the typology of the different types of exploitation did not have fixed boundaries based on the age of the victim. Boundaries were inevitably fluid, especially in sexual exploitation where youth and beauty affected demand. Consequently, there were also reports of girls being sold into prostitution. The plight of these girls, colloquially called “pocket-daughters” or “adopted daughters” of the brothel-owners or -keepers to belie the transactional nature of the relationship, was considered worse than the fate of the girls who were sold by their parents to become domestic servants or child brides-to-be in other families.³⁵¹

4.1.2. Children and the Family

Similar to the forced prostitution of Chinese women, the labour exploitation of Chinese girls in two endemic arrangements within the family was the subject of intense advocacy attention abroad in the late nineteenth and early twentieth century. One was a practice commonly known by its Cantonese name in English as *mui tsai*,³⁵² where young girls were transferred to recipient families by their parents in exchange for money. Extreme poverty was usually the *raison d’être* for these sales. In the way the arrangement was originally intended, it was considered “a charitable system [that] enabl[ed] poor families to assure the welfare of their daughters by selling them to rich households, who would provide for them while they were young and find them suitable husbands when they grew up”.³⁵³ A *mui tsai* was responsible for common domestic chores in the new household, but her formal position was marginally higher than a regular servant.³⁵⁴ This was seen by the fact that while a *mui tsai* typically did not receive a wage for her work, it was expected of her new family that she would be

³⁵⁰ Henriot, *supra* n. 346, at 233.

³⁵¹ Gronewold, *supra* n. 328, at 71; and J. Russell, *Extract from Correspondence Respecting Child Adoption and Domestic Service among Chinese (Including Mr. Russel’s Report)*, in *Mui Tsai in Hong Kong: Report of the Committee Appointed by His Excellency the Governor, Sir William Peel, K.C.M.G., K.B.E.*, Appendix No. 12, at 235, 237 (Noronha & Co. Government Printers 1935).

³⁵² Although *mui tsai*, also rendered as *mui jai* in English, literally means “little younger sister” in Cantonese, its actual meaning is more accurately reflected by the term “maid servant”; see Watson, *supra* n. 327, at 241.

³⁵³ Maria Jaschok & Suzanne Miers, *Women in the Chinese Patriarchal System: Submission, Servitude, Escape and Collusion*, in *Women and Chinese Patriarchy: Submission, Servitude and Escape* 1, 11 (Maria Jaschok & Suzanne Miers eds., Hong Kong University Press 1994).

³⁵⁴ George Maxwell, *Slavery: The Mui Tsai System*, Official No. LON/BPC/ESC/18, at 1 (1935). This document constitutes an annex to the report of the Advisory Committee of Experts on Slavery addressed to the Council of the League of Nations on 10 April 1935, Official No. C.159.M.113.1935.VI.

clothed, fed and, in general, “regarded as a member, although a humble member, of the family into which she had been taken.”³⁵⁵ After her marriage, a *mui tsai* would move out of the household she had served and join her husband’s family. At the point of marriage, she would no longer be held as a *mui tsai*, although many did choose to stay in touch with their former households, especially if they no longer had any contact with their natal families.³⁵⁶ Nevertheless, the stigma of having been sold as a *mui tsai* by one’s own parents could linger well into adulthood, given that it was held more negatively than outright parental abandonment.³⁵⁷

Young girls under the *mui tsai* arrangement were extremely vulnerable to a wide array of abuses, since often they were not accepted as new family members but as unpaid servants. Originally, a *mui tsai* girl would be taken in by a neighbouring family, so that she was not completely severed from her own family or kin, and her proximity to them would also deter maltreatment.³⁵⁸ However, changes in Chinese society as a result of the ease of transport and significant rural-to-urban migration at this time made it difficult for many families to remain in contact and keep watch on the well-being of the daughters they had sold.³⁵⁹ Many *mui tsai* eventually lost ties with their natal families. Firsthand accounts of former *mui tsai* pointed to the extreme maltreatment they suffered at times as domestic servants. In one of the few autobiographical accounts by former *mui tsai*, Janet Lim, who was sold by her mother when she was eight and later trafficked abroad and sold to an elderly Chinese merchant in Singapore, recounts the physical and emotional abuses she endured:

My master was a rich man...After about three months he started trying to visit me at night. I cannot express my terror when I heard his footsteps. I crawled anywhere, inside cupboards, under the beds, outside the windows, anywhere, as long as I could get out of his reach...One night when he could not find me the old man complained to his wife who came with him to look for me...[T]hen at last they found me under a platform on which stood pots of flowers. Neither of them could reach me so the woman took a long stick and struck me many times...They even tried to force me out by pouring water over me. It must have been an hour after they had left me before I crawled

³⁵⁵ *The Mui Tsai System in China, Hong Kong, and Malaya*, 34 Intl. Lab. Rev. 663, 665 (1936) [hereinafter *The Mui Tsai System*].

³⁵⁶ Jaschok & Miers, *supra* n. 353, at 6.

³⁵⁷ See *id.* at 3.

³⁵⁸ *The Mui Tsai System*, *supra* n. 355, at 665.

³⁵⁹ George Maxwell, *supra* n. 354, at 2.

out shivering with cold, my long hair wet. I dragged my aching body to the bathroom; I had never experienced such pain.³⁶⁰

The *mui tsai* arrangement was equated with slavery by abolitionists in Great Britain, who pressured the colonial government to abolish the practice where it took hold.³⁶¹ The rationale of *mui tsai* as a form of slavery was made on four bases to highlight the girls' vulnerability under the arrangement: *mui tsai* were of minor age and therefore not in a position to give consent; they were often overworked and regularly maltreated; their labour was enforced and unpaid from child to adulthood; and they were effectively held under an arrangement whereby "any or all of the powers attaching to the right of ownership are exercised."³⁶² The practical effects of *mui tsai* as a labour arrangement, within which the exploitation amounted to that of the prohibited chattel slavery, were discussed at length by the drafters of the 1956 Supplementary Convention.³⁶³ The examination of *mui tsai* as a form of child exploitation thus framed the 1956 Supplementary Convention's prohibition, under Article 1(d), of "[a]ny institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour."

Related to the practice of *mui tsai* was another arrangement known as *tungyanghsi*, whereby more affluent families took in *tungyanghsi* girls from poor families to foster as future brides for their sons.³⁶⁴ Money was often exchanged between the families through an intermediary, and *tungyanghsi* was also commonly referred to in English as purchased "child brides" or "child betrothed." The prevalence of *tungyanghsi* was attributed to it being an easier arrangement for families to provide for their sons' eventual marriage, without having to pay the expensive dowry to the future brides' parents. Before her marriage around the age of sixteen, a *tungyanghsi* was required to

³⁶⁰ Janet Lim, *Sold for Silver: An Autobiography* 41-42 (The Book Club 1959) (originally published 1958 by Collins).

³⁶¹ Jaschok & Miers, *supra* n. 353, at 11.

³⁶² Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (the "1926 Slavery Convention") art. 1(1) (25 September 1926), 60 L.N.T.S. 253; and George Maxwell, *supra* n. 354, at 2.

³⁶³ Allain, *supra* n. 326, at 295, 304-322, 326-349.

³⁶⁴ *Tungyanghsi* was also known by other English renderings, such as *tong-yang-xi* or its Cantonese name of *sai po tsai* or *sim pu tsai*; in James Hayes, *San Po Tsai (Little Daughters-in-Law) and Child Betrothals in the New Territories of Hong Kong from the 1890s to the 1960s*, in *Women and Chinese Patriarchy: Submission, Servitude and Escape* 45, 48 (Maria Jaschok & Suzanne Miers eds., Hong Kong University Press 1994). Other renderings can exist. For example, Watson notes two additional designations: *san pou jai* and *tung yeung sik*; in Watson, *supra* n. 327, at 244.

work in the new household much in the same manner as a *mui tsai* and often under the same exploitative conditions, where “[s]he would be trained to be submissive and to accept whatever was doled out to her by the entire family.”³⁶⁵ Catholic bishop Paolo Maria Reynaud, based near Shanghai around the turn of the century, described the plight of *tungyanghsi* girls in his memoir:

It is very usual to see in Chinese houses a little girl, the drudge of the women, who is cruelly beaten on all occasions. This is the future daughter-in-law often purchased for a dollar out of a heathen orphanage. Should the child break down, she is callously thrown out to die, and she is fortunate if she happen to be picked up by a Sister of Charity, or some humane person, and conveyed to the hospital. But if the girl grows up well in spite of the inhuman usage, she is married to the son for whom she has been purchased, and instantly is treated with consideration in the household, and in due time her own turn arrives to have a daughter-in-law to maltreat precisely in the same manner.³⁶⁶

The relationship between a *tungyanghsi* and her mother-in-law was often complex because it began as one of servitude under quasi-familial ties. As noted by Reynaud, once a *tungyanghsi* was grown, she could take on the same abusive behaviour towards the new *tungyanhsi* joining her household.

One may expect that because a *tungyanghsi* was taken in from the outset as a future daughter-in-law, her position in the new household would be more secure than that of a *mui tsai*. In reality, such distinction of vulnerabilities was difficult to make. Both *mui tsai* and *tungyanghsi* girls suffered a strong stigma of having been sold by their parents and were vulnerable to abuses in their new environment. They also had precarious fates, described as: “[T]he position of a little [*tungyanghsi*] daughter-in-law [was] no more secure than that of a *mui jai* [*tsai*]. If for any reason the marriage [did] not materialise the girl [could] be resold or exchanged in the nearest market town.”³⁶⁷ The marital ties that supposedly bound a *tungyanghsi* to her new family could also be a source of intimidation and coercion for the girl, from which she felt there could be no escape. For example, Reynaud recounted how a gravely-ill *tungyanghsi* had to be convinced that she would not be met by the abuses of her recently-deceased mother-in-

³⁶⁵ Koh Choo Chin, *Implementing Government Policy for the Protection of Women and Girls in Singapore 1948-66: Recollections of a Social Worker*, in *Women and Chinese Patriarchy: Submission, Servitude and Escape* 122, 129 (Maria Jaschok & Suzanne Miers eds., Hong Kong University Press 1994).

³⁶⁶ Paolo Maria Reynaud, *Another China: Notes on the Celestial Empire as Viewed by a Catholic Bishop* 95 (M. T. Kelly ed., Browne & Nolan, Ltd. 1897).

³⁶⁷ Watson, *supra* n. 327, at 244.

law even in the afterlife.³⁶⁸ In this way, the abuse she had experienced was not less intense than that of a *mui tsai*. These two phenomena of *tungyanghsi* and *mui tsai*, therefore, must be considered as both creating a spectrum of vulnerabilities that could change as the girl's domestic situation evolved. For this reason, discussions on child exploitation during the drafting process of the 1956 Supplementary Convention turned to both of these Chinese traditional arrangements for the transfer of young girls.³⁶⁹

Compared to a Chinese girl from an indigent family, a young boy in a similar situation usually fared better as an adopted son. During both the Qing dynasty and Republican China, young boys were usually sold to other families who sought a designated heir to continue the family lineage. It was the prevalence and common acceptance of this method of child adoptions in the past that gave rise to the contemporary view in China that the selling or abduction of children for non-exploitative, but illegal, adoptions still constitutes a form of child trafficking. Given the special status of the male child in the traditional Chinese family structure, "boys were invariably the last to be sold," and his birth family would not have considered such a transaction lightly, unless they truly had no other means.³⁷⁰ In this sense, the sale and adoption of a boy was similar to the *mui tsai* and *tungyanghsi* customs for Chinese girls, for it too was popularly seen as a charitable arrangement that lessened the burden on an extremely destitute family. Nonetheless, poverty was not the only factor to consider in the adoption of a male child through sale and purchase. For example, ethnographer James Watson has described a system of intra-clan adoption, whereby boys from impoverished families were adopted by the more affluent ones in the same clan, so the boys could stay within their ancestral line of descent.³⁷¹ In contrast and reflecting the inferior position of a girl in the family patriarchy, no similar consideration of lineage was given to the transfer of a *mui tsai* or *tungyanghsi* from her natal to foster family. As a result, the reality for an adopted boy was often much more acceptable than for a girl in a similar situation, for whom exploitation and abuse were often routine.

The conventional practice of acquiring young boys to foster as a designated heir, especially by childless couples, had given rise to the widely-held belief that no male child was transferred for any other purpose. For example, an extensive inquiry into the

³⁶⁸ Reynaud, *supra* n. 366, at 95.

³⁶⁹ Allain, *supra* n. 326, at 295, 304-322, 326-349.

³⁷⁰ Watson, *supra* n. 327, at 235.

³⁷¹ *Id.* at 230.

practice of *tungyanghsi* by colonial authorities in Hong Kong in 1935, contained observations on the exchange of boys that stated in absolute terms:

The most careful inquiry shews [*sic*] that no male children are bought and sold here as slaves or servants, and confirms the statements...that “Boys are sold to be sons not slaves” and “that no such thing as a slave boy exists in Hongkong [*sic*].” It might too with truth have been added “nor in Canton” [on Mainland China].³⁷²

However, the assumption that the labour of a male child was not exploited, much in the same way as a *mui tsai* or *tungyanghsi* prior to her marriage, was simply not true. In fact, a strand of anthropological studies that emerged in the 1960s has shed important insights on a unique form of male slavery in southern China, adding more nuance to previously-held ideas about the reason for the exchange of male children in China. In effect, there were two purposes for which a Chinese boy could be sold: to become the designated heir of the buyer or to work as a domestic slave for his owner’s household.³⁷³

This latter category of Chinese male domestic servants was known, in one English rendering, as *hsi-min*. Similar to the background of *mui tsai* or *tungyanghsi*, *hsi-min* often hailed from poor families and were sold into affluent households to be raised specifically as domestic servants. Because the purchase price for a boy was usually four or five times higher than that for a girl, the acquisition of boys to rear as domestic servants—not as adopted sons—was marked by a sense of financial exclusivity.³⁷⁴ In this way, *hsi-min* were ostentatious symbols of wealth with a precarious social position because they, for all practical purposes, were considered as property of the household. Upon the death of the master patriarch, *hsi-min* in the household, like other assets, would be divided and transferred amongst the heirs.³⁷⁵ Moreover, the status of *hsi-min* was inheritable through patriline. Male descendants of a *hsi-min* were “servants in perpetuity,” a permanent underclass whose social separation would be further enforced through marriage and accommodation.³⁷⁶ As such, a *hsi-min* was effectively “a slave

³⁷² Russell, *supra* n. 351, at 237.

³⁷³ Watson, *supra* n. 327, at 223-224.

³⁷⁴ Hugh D. R. Baker, *A Chinese Lineage Village: Sheung Shui* 157 (Frank Cass & Co. Ltd 1968).

³⁷⁵ James L. Watson, *Chattel Slavery in Chinese Peasant Society: A Comparative Analysis*, in *Village Life in Hong Kong: Politics, Gender, and Ritual in the New Territories* 125, 129-130 (James L. Watson & Rubie S. Watson eds., The Chinese University Press 2004).

³⁷⁶ Baker, *supra* n. 374, at 156.

[who] had minimal rights—he was, in fact, a chattel whose descendants remained the hereditary property of the owner’s family.”³⁷⁷

It is unclear why this practice of labour exploitation of a Chinese male slave from early childhood to adulthood did not garner more attention. Although a *hsi-min* and a *mui tsai* shared similar domestic responsibilities, the *hsi-min* system was actually closer to chattel slavery in the sense that these male servants were truly considered as property of the household, from which neither he nor his male descendants could escape. In contrast, the condition of a *mui tsai* or a *tungyanghsi* was never inherited. A *mui tsai* was released from the household that had purchased her upon marriage.³⁷⁸ She could return to visit or even come to regard her former household as her family if the relationship was not acrimonious. The question remains whether a bias in gender roles has coloured our interpretation of practices of human exploitation during late nineteenth and early twentieth-century China, in that a girl child in a domestic exploitative situation was more readily labelled as a slave than a boy in the same situation. However, this issue of a gender bias is not confined to the issue of child exploitation. Questions of bias also come to the fore with the exploitation of Chinese male migrants abroad from 1847 to 1874 in what is called the coolie trade. Despite the trade having shared many similarities with transatlantic slavery, the egregious exploitation of these Chinese men remains an underemphasised area of historical research. The following section examines the exploitation of these Chinese men known as coolies in the Americas.

4.1.3. Male Emigrant Coolies

At the height of domestic strife in late-Qing China between 1847 and 1874, it is conservatively estimated that approximately 1.5 million Chinese emigrants sought a better livelihood abroad.³⁷⁹ Many were male labourers, who were recruited and transported from the southern ports of China mainly to countries and colonial territories in the Americas under a contract system that bonded them to their employers for a definite period. Under this arrangement, both the Chinese labourer and an agent of the employer would sign a contract, stipulating the legal obligations of both parties. For example, a sample contract with an employer agent in Peru held the Chinese labourer to a wide range of responsibilities, as “cultivator, farmer, labourer, shepherd, workman or

³⁷⁷ Watson, *supra* n. 327, at 223-224.

³⁷⁸ See Jaschok & Miers, *supra* n. 353, at 6.

³⁷⁹ Arnold J. Meagher, *The Coolie Trade: The Traffic in Chinese Laborers to Latin America 1847-1874*, at 61 (Xlibris Corporation 2008).

general servant for the period of six years from the commencement of such service... [where he shall] till the soil, clear ground, herd cattle, drive carts, do garden or other such work as he may be required, and make himself generally useful.”³⁸⁰ In exchange, a labourer was to be paid a combination of wages and in-kind remuneration, such as food, clothing, lodging and medical attention.³⁸¹ According to the terms of the contract, the labourer would be released and considered free after the said period of work was reached. The period of contract varied. For the Chinese labourers in Cuba, it was usually eight years.³⁸²

Official migration records during this time are incomplete, given that emigration was strictly prohibited during most of Qing rule and was punishable under the penalty of death for those caught returning to China.³⁸³ Nonetheless, it is known that this outward migration was vast and covered an extensive area. Destinations for Chinese emigrants included the British colonies in Latin America, Brazil, Chile, Cuba, Ecuador, Panama, Peru and the Hawaiian Islands; a significant number of Chinese voluntary labourers also arrived on the west coast of the United States and were instrumental in building the country’s transcontinental railroads.³⁸⁴ Cuba and Peru remained the primary receiving countries for contract migration from China to the New World, since their local economies depended heavily on the labour-intensive agricultural cultivations of sugar, coffee, tobacco and cotton.³⁸⁵ In the case of Peru, it also required labourers to develop its indigenous industry based on the extraction of guano, a natural and valued fertilizer in the form of bird excretions. Thus, both Cuba and Peru needed a large pool of new labourers to fill shortages as result of the emancipation of African slaves.³⁸⁶ In this way, Chinese emigrants became the cheap and dependable alternative to slave labour. Between 1847 to 1874, it is believed that as many as 125,000 Chinese contract labourers arrived in Cuba and a further 95,000 went to Peru, together accounting for

³⁸⁰ *Id.* at app. V, at 356.

³⁸¹ Evelyn Hu-DeHart, *Chinese Coolie Labor in Cuba in the Nineteenth Century: Free Labor or Neoslavery?*, 12 Contributions Black Stud. 38, 39 (1994).

³⁸² Wang Guan-hua, *Chinese Emigrants and Government Policy Adjustments in the Late-Qing—On the Case of Chinese Workers in Cuba and in Peru*, 44 Twenty-First Cent. Rev. 47, 50 (1997).

³⁸³ Ronald Skeldon, *Migration from China*, 49 J. Intl. Affairs 434, 435 (1996).

³⁸⁴ Robert L. Irick, *Ch’ing Policy Toward the Coolie Trade 1847-1878*, at 7-8 (Chinese Materials Center 1982).

³⁸⁵ Meagher, *supra* n. 379, at 40-43.

³⁸⁶ Hu-DeHart, *supra* n. 381, at 38.

almost 15 percent of the total estimated emigration from China during this short period.³⁸⁷

The debased status of these Chinese emigrant labourers was reflected by the term used to describe them as a migrant population in the nineteenth century. They were known in English as “coolies,” a term believed to be later adapted into Spanish as *culi*.³⁸⁸ The word “coolie” is a direct English rendering of the two Chinese characters meaning “bitter labour” or “bitter strength” and carried a denigratory connotation amongst popular usage in China even before mass emigration to the Americas had begun.³⁸⁹ Some Chinese texts also use the term “coolies” interchangeably with another Chinese term *chu-tsai* or “human pigs” to signify the menial status of these unskilled men who chose to work abroad.³⁹⁰ Chinese historian Robert Irick has observed that “coolie” in English is a confusing term, owing to attempts to restrict it exclusively to Chinese forced emigrants as opposed to its general meaning of an unskilled but voluntary labourer.³⁹¹ However, such distinction of voluntariness is difficult to determine at the onset and may even be counter-productive by overlooking the abuses that voluntary migrants may have suffered at later stages of their journey. Similar to present-day discussions on migrant smuggling versus human trafficking, migrants could begin as voluntary workers but arrive at exploitative and coerced situations where their initial consent no longer mattered, in the same way that a coolie who had signed his employment contract in the nineteenth century could later regret his initial consent.

Within recent scholarship on Chinese emigration, the terms “coolie” and the “coolie trade” have taken on a special prominence in denoting this key chapter of mass Chinese emigration and indentured servitude within the global history on the abolition of slavery, where the designation “coolie trade” invariably describes the forced aspects of this emigration. Situating the transpacific movement of the Chinese coolie trade within this wider historical context, historian Joel Quirk writes:

³⁸⁷ *Id.*

³⁸⁸ Lisa Yun, *The Coolie Speaks: Chinese Indentured Laborers and African Slaves of Cuba* xix (Temple University Press 2008).

³⁸⁹ On the etymology of the term “coolie,” see, for a useful discussion, Irick, *supra* n. 384, at 3-6.

³⁹⁰ Chen Weiren [陈为仁], *Kuli Maoyi: Guaipian Lulue Huagong* [The Coolie Trade: Abductions through Deceit and Forced Kidnaps of Chinese Labourers; 苦力贸易—拐骗掳掠华工] 10-28 (The Chinese Overseas Publishing House 1992).

³⁹¹ Irick, *supra* n. 384, at 4.

Indentured migration saw millions of workers from Asia, Africa, India, and the Pacific being transported to many parts of the globe to toil under restrictive work contracts for extended periods. Bonded labor was particularly prominent in...Latin America, where it proved to be a popular alternative to slavery in the aftermath of legal abolition.³⁹²

Furthermore, the coolie trade was not only a consequence following the legal abolition of slavery but also one that bore notable similarities to the African slave trade. As one contemporary scholar observed, the worst excesses of the labour abuses against these coolies “was slavery in every social aspect except the name.”³⁹³

The analogy between the Chinese coolie trade and the African slave trade rests on two important pivots of vulnerability and abuse. First, similar to perils that slaves from Africa faced during their transatlantic voyage, the Middle Passage, the Chinese coolies also faced a high rate of mortality during their transpacific transport from southern China to destinations in the Americas. In 1859, a Cuban newspaper, *Diario de la Marina*, compiled the mortality rate on board the 116 coolie vessels that arrived in Havana between 1847 and 1859 and found the average mortality rate onboard to be about 15.2 percent.³⁹⁴ In comparison, the mortality rate for the coolie ships bound for Peru was even higher: Peruvian official records indicated that the mortality rate onboard reached close to 40 percent in the 1850s and then decreased to 30.4 percent in the following decade.³⁹⁵ For the ships that set out for Panama and British Guyana in the 1850s, the mortality rate was 24 and 20 percent, respectively.³⁹⁶ It is also very likely that the actual figures were higher than the ones reported, given that the above statistics only captured the numbers of ships that actually arrived at the port of destination, thereby excluding ships that perished at sea or the number of coolie suicides at the departure port before their embarkation.³⁹⁷

Overcrowding on these ships was a common problem, as different companies sought to maximise their human cargo hold. The coolies were packed on board by

³⁹² Joel Quirk, *The Anti-Slavery Project: From the Slave Trade to Human Trafficking* 12 (University of Pennsylvania Press 2011).

³⁹³ Yun, *supra* n. 388, at 29.

³⁹⁴ Chen Weiren [陈为仁], *supra* n. 390, at 32-33. A total of 50,123 Chinese migrants were transported, with 7,722 deaths.

³⁹⁵ *Id.*

³⁹⁶ *Id.* at 33-34.

³⁹⁷ *Id.* at 33.

methods similar to those used to stow slaves for the Middle Passage. With an average space of twenty-one inches per coolie, this at least allowed each coolie to lie on his back and “not so tightly packed together in the bunks that they had to lie in each other's lap like a ‘row of spoons’ as happened on some [African] slave ships.”³⁹⁸ Conditions onboard were usually dire, as described by a group of Chinese labourers arriving in Cuba:

We remember that we were shut in the cabin or even put in the bamboo cages or locked up in irons when we were on the ship. The owners of the ship arbitrarily dragged several people out and beat them to put on a show of force. We did not know how many of our peers died on the ship because of illness, beating, thirst, or suicide by jumping into the sea when there was a chance.³⁹⁹

The overcrowding aboard the ships frequently led to disease outbreaks, but medical attention was scant. Testimonies spoke of coolies who were beaten by the crew for simply complaining of feeling unwell and of doctors who, instead of providing care, ordered the sick to be beaten, hung upside down or thrown overboard.⁴⁰⁰ The lack of adequate provisions was also a serious issue. Many testimonies focused on the overwhelming thirst and hunger experienced by the coolies during their passage at sea. Some reported having to pay for drinkable water onboard.⁴⁰¹ The withholding of food and water was used as a measure to ensure compliance, alongside other practices that created an overall climate of fear. A prime example was the practice on these ships of bolting down the storage area in the between-deck with iron bars, so as to prevent the stealing of provisions by the passengers. At the same time, these reinforced areas provided an impregnable stronghold, where armed guards could easily take up position in the event of a mutiny during the journey.⁴⁰²

For those who survived the maritime journey, the conditions awaiting them at their destination were typically not a major improvement from what they had experienced earlier. For example, immediately after their disembarkation, the Chinese

³⁹⁸ Meagher, *supra* n. 379, at 153-154.

³⁹⁹ Yun, *supra* n. 388, at add., at 249.

⁴⁰⁰ *Huagong Chuguo Shiliaohuibian: Zhongguo Guanwenshu Xuanji* [Historical Compilations of Chinese Labourers Abroad: A Selection of Official Governmental Documents; 华工出国史料汇编: 中国官文书选辑] vol. 1, at 587 (Chen Hanzhu [陈翰笙] et al. eds., Zhonghua Book Company 1984) [hereinafter *Huagong Chuguo Shiliaohuibian*].

⁴⁰¹ *Id.* at 586-587.

⁴⁰² Meagher, *supra* n. 379, at 155.

coolies arriving at Havana were detained and held until their contracts were resold through auctions. However, the purchase of these contracts, as opposed to the persons themselves, was more an issue of terminology than substance, since purchasing dynamics mirrored that of chattel slavery. Firsthand accounts from coolies spoke of the humiliation of having been washed, ordered to undress and physically examined by potential buyers, “like cows and horses”.⁴⁰³ Many described this experience as their most profound shame, as below:

On landing, four or five foreigners on horseback, armed with whips led us like a herd of cattle to the [holding cell] barracoon to be sold. At Havana, after a detention at the quarantine station, our [plaited hair] queues were cut, and we awaited in the man-market the inspection of a buyer and the settlement of a price. When offered for sale...we were divided into three classes, first, second and third, and were forced to remove all our clothes so that our person might be examined and the price fixed. This covered us with shame.⁴⁰⁴

This experience, however, was not unique to the labourers arriving at Havana. For instance, Chinese coolies arriving at Callao, the entry port to Peru, also underwent a similar treatment, where prospective buyers made “what one commentator called a shameful examination [that was both] humiliating to the Chinese as well as to those who had witnessed it.”⁴⁰⁵

Amongst these purchased coolies in Cuba, it is believed that no more than 20 percent of the total imported coolies went into domestic service, public works and small industries; the vast majority were sent to plantations, a figure that increased to around 90 percent towards the later years of the coolie trade.⁴⁰⁶ A stark difference existed between life on the plantations and in other settings, with plantation labour being the most taxing. One group of coolies in Cuba described the contrasting working and living conditions, depending on where their employment contract was subsequently resold:

If one is sold to a household to be a servant or a cook, although one still gets lashed, at least one will not be starved and will have fewer

⁴⁰³ *Huagong Chuguo Shiliaohuibian*, *supra* n. 400, at 590-591.

⁴⁰⁴ Meagher, *supra* n. 379, at 215. Cutting a Chinese man’s hair plait during the Qing period was considered a grave offense. An article printed by an abolitionist magazine in 1855 described the act as “tantamount to a brand for felony” and was regarded by the Chinese male emigrant as the most derogatory insult possible; in *Chinese Immigration and the Guano Trade*, 3 *Anti-Slavery Reporter* 39, 39 (1855).

⁴⁰⁵ Meagher, *supra* n. 379, at 230.

⁴⁰⁶ *Id.* at 218; and Hu-DeHart, *supra* n. 381, at 45.

night shifts. However, not that many people are fortunate. If one is sold to work at brick kilns, bakeries, mountain hut or sugar refinery, one cannot prevent from working with feet shackled and work overnight shifts.⁴⁰⁷

On the plantations, the coolies were housed in the same quarters as slaves or former slaves. Work was long and laborious. Food was meagre and of substandard quality, and their daily life was one where they felt “no one inquired whether we were dead or alive.”⁴⁰⁸ To ensure compliance, the coolies were subjected to similar methods of control and punishment previously meted out to African slaves, such as stocks and metal bars, leg chains, whippings, jails and lockups, and summary executions.⁴⁰⁹ There were frequent reports of runaway coolies. In Cuba, coolies who escaped from plantations were called Chinese *cimarrones*, a term that referred to slaves-on-the-run, even though they were legally not purchased slaves.⁴¹⁰ Suicides, seen as the “deliverance from the miseries of [their] lot in life”, were not uncommon.⁴¹¹

While most coolie accounts detailed harsh living conditions and labour exploitation, it is important to note that there were also positive reports of magnanimous employers. In Peru, one such employer managed the workforce, by all accounts, with conscience and honoured the terms of the signed contract, such that there was not one escape or complaint by a coolie of ill-treatment.⁴¹² Another account spoke of a different Peruvian plantation, where the Chinese coolies were well-treated and had access to places of worship, opium saloons and a hospital on-site.⁴¹³ At the same time, these occasional, positive accounts were juxtaposed with descriptions of the overall abhorrent living and working conditions, the worst of which were on the Chincha Islands of Peru where coolies toiled for guano. In the mid-nineteenth century, the guano trade was based on “entrepreneurial exploitation, greed, and corruption,” enabled by the abject abuses of imported Chinese labourers who represented the majority of the guano-toiling workforce.⁴¹⁴ The following account of guano-mining was printed by a pro-slavery

⁴⁰⁷ Yun, *supra* n. 388, at add., at 243.

⁴⁰⁸ *Huagong Chuguo Shiliaohuibian*, *supra* n. 400, at 591.

⁴⁰⁹ Hu-DeHart, *supra* n. 381, at 45.

⁴¹⁰ *Id.*

⁴¹¹ Watt Stewart, *Chinese Bondage in Peru: A History of the Chinese Coolie in Peru, 1849-1874*, at 98 (Duke University Press 1951).

⁴¹² *Id.* at 106-107.

⁴¹³ *Id.* at 107.

⁴¹⁴ Meagher, *supra* n. 379, at 222, 224.

publication in the United States in 1855, which decried the abysmal working conditions of the coolies on the Chincha Islands:

They commence work in the morning as soon as they can see to work. They have five tons of guano to dig and wheel to a distance of over one-eighth of a mile. It is all, or nearly all, so hard, that it has to be picked up; and if they do not accomplish these five tons by five o'clock P.M., they are flogged with raw hide whips, some five feet long, receiving one dozen strips, each of which starts the blood; then they are driven back to finish their work. The guano has a very bad effect upon them, swelling their legs and arms, and giving them bad sores on their legs, feet, and hands. Notwithstanding all these however, if they can get along, they are compelled to finish their task.⁴¹⁵

As an indicator of their vulnerability and of the severity of abuse they routinely experienced, the mortality rate of the Chinese workers on the plantations of Cuba and Peru was exceptionally high. Over half of the coolies brought to Cuba died before reaching the conclusion of their eight-year contracts.⁴¹⁶ In Peru, less than a third of the imported Chinese labourers reportedly lived out their term of service.⁴¹⁷ Out of the 1,000 Chinese men brought to Panama in 1854 to help build the country's railways, the vast majority died of disease, ill-treatment and suicide; only 205 survived to the end of the year.⁴¹⁸ Moreover, reaching the end of the stipulated contract period was often a formality that had no real impact on the reality of the coolies' lives. For example, one historian described the eight-year contract period for the Chinese coolies in Cuba as simply "illusory," owing to the fact that many were coerced into remaining in servitude due to the unenforceability and the arbitrary interpretation of their original contracts.⁴¹⁹

The well-being of the coolies was fully dependent on how their employers viewed their contractual obligations, for there was little, if any, external enforcement. Employers who honoured the terms allowed their coolies to become free after serving out their contracts; as such, this system of labour recruitment was an attractive option for desperate emigrants seeking a better life abroad. However, the lack of external oversight meant that in most cases, the system was characterised by coercion, deception

⁴¹⁵ *Chinese Immigration and the Guano Trade*, *supra* n. 404, at 40.

⁴¹⁶ Yun, *supra* n. 388, at 29.

⁴¹⁷ Stewart, *supra* n. 411, at 105.

⁴¹⁸ Meagher, *supra* n. 379, at 272.

⁴¹⁹ Yun, *supra* n. 388, at 29.

and egregious abuses, as the demand for cheap labour continued. For these reasons, this system of human exploitation was prohibited by Article 4 of the 1948 Universal Declaration of Human Rights, which affirmed that “[n]o one shall be held in slavery or servitude.” Later, the 1956 Supplementary Convention would also come to hold such egregious labour abuses as an institution and practice similar to slavery, where States Parties are obliged to take all steps to bring about its progressive and complete abolition or abandonment.⁴²⁰

4.2. Actions of the Early Traffickers

The process of trafficking is represented by the recruitment, transportation and transfer of potential victims. These actions, plus the harbouring and receipt of the said persons, establish one part of the act of trafficking as defined by the Trafficking Protocol. During the late nineteenth and early twentieth century China, trafficked victims could have been sold into labour exploitation by their families, as was the case for the transfer of children under the *mui tsai* and *tungyanghsi* arrangements, or by kidnappers. For instance, one way of procuring Chinese women for the brothels during this period was through abduction.⁴²¹ Reports from this period were replete with examples of Chinese women and girls disappearing from their communities and then forced into prostitution by unknown strangers. One newspaper report in 1872 described a chaotic scene at Shanghai’s north city gate, where a group of men were apprehended by guardsmen on suspicion of being kidnappers because they were forcibly dragging away a woman.⁴²² One study on prostitution in China during this period described these kidnappers as a network “[of] roving bandits or unemployed or underemployed city men looking for an easy source of income, abduct[ing] women and girls ‘of good families’ ...[who often] were offered for ransom and, if none was forthcoming, were sold for a high price to brothels or procurers.”⁴²³ There were also reports of the forced abductions of adult men. For example, one 35-year-old Chinese man reported that he was overpowered by ten men wielding knives and axes and taken into a coolie-transporting ship.⁴²⁴

⁴²⁰ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (the “1956 Supplementary Convention”) art. 1 (7 September 1956), 226 U.N.T.S. 3.

⁴²¹ Gail Hershatter, *Dangerous Pleasures: Prostitution and Modernity in Twentieth-Century Shanghai* 75 (University of California Press 1997).

⁴²² Shen Bao [申報], *Jinu Siben Anjian* [Case of a Prostitute’s Escape; 妓女私奔案件] (7 October 1872).

⁴²³ Gronewold, *supra* n. 328, at 13.

⁴²⁴ Chen Weiren [陈为仁], *supra* n. 390, at 21-22.

For the victims of trafficking, the act of being abducted and sold into unenviable situations was undoubtedly harrowing, but it would also be an oversimplification to view this as the most distressing act of the trafficking process, for this could have been preceded by other crimes that were equally as traumatic. This was particularly the case for young children who were sold into domestic servitude by their own impoverished parents as a survival strategy. Even though the sale for these cases was not preceded by the crime of abduction, the shame of being sold by one's own family could be just as distressing, if not more aggrieved and unspeakable. For instance, slavery historian Suzanne Miers commented on one case of a young Chinese girl being sold into domestic servitude in the late 1920s by her own parents: "It is indicative of the shame of being sold into slavery that was to pursue her over the years that [she] did not divulge...that it was her own parents who actually sold her or that the deal was concluded in front of her. She did not even tell her own husband and children this until 1989."⁴²⁵

While the procurement of victims through kidnapping—the “sudden, unexplained, and often irreversible disappearance”⁴²⁶—provided the single most compelling parallel to the transatlantic chattel slave trade, in reality most kidnappers were not complete strangers to their victims. Often, they were individuals the victims had known, some even as friends. In this way, these kidnappers acted more like recruiters for the trafficking in persons, who relied on a combination of enticements, deceptions and physical control to achieve their goal of procuring individuals for labour exploitation. As described by one historian: “[A]bduction and kidnapping often came about by chance or through a combination of special circumstances,” usually by someone who was not a complete stranger to the victim.⁴²⁷ One such method was for traffickers to operate under the guise of being recruiters for legitimate jobs. Many Chinese labourers, who were shipped to Cuba as part of the coolie trade, reported of being deceived about their employment. One coolie spoke of ending up in the holding cells at the port of Macau, then shipped off to Havana, because he was misled by the promises of a foreigner who spoke fluent Chinese.⁴²⁸ Similar to the fate of the deceived migrants, once a woman was lured into leaving her home for the promise of employment, she

⁴²⁵ Suzanne Miers, *Mui Tsai Through the Eyes of the Victim: Janet Lim's Story of Bondage and Escape*, in *Women and Chinese Patriarchy: Submission, Servitude and Escape* 108, 111 (Maria Jaschok & Suzanne Miers eds., Hong Kong University Press 1994).

⁴²⁶ Hershatter, *supra* n. 421, at 186.

⁴²⁷ Henriot, *supra* n. 346, at 188.

⁴²⁸ *Huagong Chuguo Shiliaohuibian*, *supra* n. 400, at 583.

could be easily sold into prostitution with few chances of escape. She was then “[c]ut off from [her] famil[y], lost in the anonymity of the city, often illiterate, and above all threatened with violence or having become victims of violence [and]...incapable of offering resistance.”⁴²⁹

Traffickers themselves also defied a straightforward characterisation, with much depending on who had access at any given time to potential victims of trafficking. Women formed the majority of traffickers who were recruiting other women for prostitution because of their easier approach to members of the same gender, and most coolies were recruited by men for the same reason. Often these female traffickers recruited other women from their home regions, by exploiting the trust inspired by the feeling of kinship.⁴³⁰ According to one quantitative study of prison data from twenty Chinese cities during the late 1920s, female traffickers committed for abduction and kidnapping charges represented more than a quarter of the general population of female prisoners and were almost the single largest category amongst the offending and imprisoned women.⁴³¹ Interestingly, often those who recruited coolies were foreigners or locals with strong ties to the foreign community that operated in the extraterritorial ports of China. Many coolie testimonies spoke of being deceived by Portuguese or foreign men, along with Chinese collaborators who facilitated the recruitment of migrant labourers.

In reality, generalised characterisations of female and male traffickers were difficult to maintain because traffickers often collaborated to procure and transfer their victims at various stages of the process. For example, one case reported in 1949 involved a woman who had many years earlier decided to leave her marital family after years of abuse. During her escape, she was befriended by another woman, who hosted her for one night under the pretense of hospitality before turning her over to a group of men the following morning. The men claimed they were coming to her assistance by taking her to see a doctor to treat an illness, but, in reality, they left her at a brothel.⁴³² The situation can become even more complicated in cases of selling children into

⁴²⁹ Henriot, *supra* n. 346, at 188.

⁴³⁰ *Id.* at 189.

⁴³¹ Ching-Yueh Yen, *Crime in Relation to Social Change in China*, 40 *Am. J. Sociology* 298, 302-303 (1934). Female traffickers committed for abduction and kidnapping charges represented 28.6 per cent of the general population of female prisoners surveyed by the study, closely trailing the largest group, at 29.2 per cent, of those committed for drug-related offenses.

⁴³² Li Wanqi [李万启], *Binghe Kaidong* [The Unfreezing of an Iced River; 冰河开冻], in *Beijing Fengbi Jiyuan Jishi* [A Record on the Closing of Beijing's Brothels; 北京封闭妓院纪实] 49, 60 (Li Runshan & Liu Chaojiang [李润山 & 刘朝江] eds., China Peace Publishing House 1988).

domestic servitude, where the line between trafficker and familial relations was blurred. For example, one *mui tsai* child was first sold at the age of eight by her mother and stepfather; the girl was later transferred to intermediaries, under the pretense of setting her free, and then resold to another family in Singapore.⁴³³ There were also frequent reports of families purchasing young girls from orphanages to become their future daughters-in-law under the practice of *tungyanghsi*,⁴³⁴ although it remains unclear how the girls came to be hosted at these institutions and whether such institutions profited from these sales.

The diversity of traffickers reflected the fluidity of the process of trafficking, where different actions could have been undertaken by the same individual trafficker. One such example was a group of intermediary traffickers labelled as “the brokers” by Gail Hershatter in her landmark study on Chinese prostitution in twentieth-century Shanghai, along with the kidnapers and the transporters of the trafficked women.⁴³⁵ The brokers, known colloquially as “white ants,” could have been involved in the initial kidnapping and then used their connections with the procurers and brothel-owners in Shanghai to substantially profit from the traffic of Chinese women, receiving around a 20 percent commission for arranging each sale of a victim to the brothel.⁴³⁶ The example of the brokers whose activities could pervade any stage of the trafficking process, from the initial procurement to exploitation, highlights the fact that it is important not to view traffickers according to a convenient typology with distinct categories. Instead, developments in international treaties on the trafficking in persons have expanded the scope of the means elements, recognising that the method used to achieve and maintain individuals in situations of labour exploitation can either be direct, as in the use of brute force, or indirect by employing deception and fraud.⁴³⁷ The following section discusses the means present in the historic traffic of Chinese women, children and men.

⁴³³ Lim, *supra* n. 360, at 35-39.

⁴³⁴ Reynaud, *supra* n. 366, at 95.

⁴³⁵ Hershatter, *supra* n. 421, at 183. Hershatter observed that there were at least three groups of traffickers who profited from this trade in Chinese women: the kidnapers, transporters and brokers.

⁴³⁶ *Id.* at 186.

⁴³⁷ See Anne T. Gallagher, *The International Law of Human Trafficking* 31 (Cambridge University Press 2010).

4.3. Means of Coercion and Deception

The means by which individuals are maintained in situations of exploitation can encompass both direct and indirect coercion, and it can also change as the situation of trafficking evolves. In 2000, the Trafficking Protocol broadly defined that the means used in trafficking can consist of “the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person,”⁴³⁸ thereby continuing the position taken since the 1910 International Convention for the Suppression of the White Slave Traffic that means can be both overt and covert. Similar to the present-day definition of human trafficking, the 1910 Convention was very broad in its interpretation of the types of means that could be used during the trafficking process. Article 2 of the 1910 Convention states: “Whoever, in order to gratify the passions of another person, has, by *fraud*, or by means of violence, threats, abuse of authority, or any other method of *compulsion*, procured, enticed, or led away a woman or girl over age, for immoral purposes, shall also be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries [emphasis added].” The reference to “any other method of compulsion” in this article is significant because it indicated that the drafters took an expansive view on the types of means that could be used to carry out the traffic in women and, therefore, did not intend for fraud, violence, threats and abuse of authority to be an exhaustive list.⁴³⁹

4.3.1. Violence and Brutality

Violence, usually in the form of beatings, was a real threat in the daily lives of children who were transferred into other households, either as female *mui tsai* or male *hsi-min* in domestic servitude or as child-brides-to-be *tungyanghsi*. Writing in 1935, British abolitionist George Maxwell observed the pervasiveness of ill-treated *mui tsai*: “Most unfortunately, terrible cases of unmerciful punishment, sometimes amounting to torture, have been proved, and cases of heartless ill-treatment are not uncommon.”⁴⁴⁰ In cases of a *tungyanghsi* girl, the violence meted out against her, especially by the family

⁴³⁸ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the “Trafficking Protocol”) art. 3(a) (15 November 2000), 2237 U.N.T.S. 319.

⁴³⁹ 1910 Convention, *supra* n. 335, at art. 2.

⁴⁴⁰ Maxwell, *supra* n. 354, at 2.

matriarch, was seen as part of her domestic training as a future wife. In this way, the physical abuses under the cover of familial ties can inflict more long-term emotional damage on the young girl. There is, for example, a moving account of how one former *tungyanghsi*, who become very affluent later in life, held a simple ring that her mother-in-law had bequeathed her as her most treasured possession. For her, the ring was finally a token of acceptance from her maternal figure, who had treated her very cruelly when she first joined the family as a young girl.⁴⁴¹

For the Chinese women trafficked into prostitution from the late nineteenth and early twentieth centuries, violent beatings served to punish and deter them from behaving in a manner contrary to the rules and wishes of the brothel-owners.⁴⁴² In fact, these acts of violence in the everyday life of the prostitutes were so frequent and common that one Chinese commentator in the 1930s simply noted the following:

Not all prostitutes who yield to their life of cruelty behind their facade of smiles consented freely to their fate...it is unimaginable for others to think of the physical punishments they suffer. At least the vitriolic scoldings that they regularly receive from the brothel-keepers and owners are not held for much because they do not amount to physical pain. And as far as beatings are concerned, it suffices to say that there are many variations.⁴⁴³

These recurrent acts of physical punishment are also different from other, less frequent, but extreme cases of brutality. Christian Henriot illustrated this latter category with cases of a prostitute who was beaten and jabbed with needles, another who was seriously wounded from being hit with an iron bar, and one whose face was burnt by the brothel madam and then later chained in a room.⁴⁴⁴ The same level of brutality was also frequently meted out to the Chinese male labourers in the Americas. Testimonies by coolies spoke of ferocious beatings by guards and overseers whose whippings drew blood and drove many to commit suicide because they could no longer tolerate such routine, harsh treatment.⁴⁴⁵ Ultimately, the different forms and severity of violence had

⁴⁴¹ Qin Silin [秦嗣林], *29 zhang Dangpiao: Diandang budao de Renshengqifa* [29 Piece of Collateral Tickets: Invaluable Life Lessons; 29張當票:典當不到的人生啓發] 51-54 (Rye Field Publishing Co. 2012).

⁴⁴² Dan Guangnai [单光鼐], *Zhongguo Changji: Guoqu he Xianzai* [Chinese Prostitution: Past and Present; 中国娼妓: 过去和现在] 162 (Law Press China 1995).

⁴⁴³ *Id.*

⁴⁴⁴ Henriot, *supra* n. 346, at 151-153.

⁴⁴⁵ *Huagong Chuguo Shiliaohuibian*, *supra* n. 400, at 591-593.

the same practical effect, that of maintaining the trafficked individuals in a state of submission.

Physical violence also did not actually have to take place for it to be an effective deterrent, for fears of its administration carried the same effect. Beatings in brothels were sometimes carried out in front of the other women or within hearing distance, so that the punishment for one served as a warning to all others.⁴⁴⁶ Threats of force were further reinforced by restrictions on the women's movement, frequently enforced by men who had dubious ties to criminal gangs and were in the service of the brothels. One incident reported in 1872 involved a prostitute who had tried to escape but only to be dragged away by a group of men, presumably those employed by the brothel-owner to guard the women, just as she had reached the city gate.⁴⁴⁷ There could also be other types of threats not directly involving physical violence but carried the same effect of intimidation. One report of abuses against the Chinese labourers in Cuba involved no physical violence but the desecration of the body of a coolie who had committed suicide in full view of all the labourers.⁴⁴⁸ In response, the plantation owner publicly burnt the deceased's body and then scattered his ashes, as a warning to others who were contemplating the same. Since it was believed under Chinese customs of the time that such an act would prevent the departed's spirit from returning home, the owner's retaliatory measures would have been regarded by the coolies as an abhorrent offense, described as follows: "The struggle for power here depends on cultural subjugation, as the owner did not mete out physical punishment; instead, he sought to deeply violate Chinese cultural beliefs, which do not espouse the scattering of body and spirit."⁴⁴⁹

4.3.2. Fraud and Deception

A century ago, a trafficked person, in addition to the overt means of violence and threats, could also have entered and be maintained in a situation of labour exploitation through the indirect means of fraud and deception by someone in a position of trust. For women, one such means was through the pretense of marriage. As described by one Chinese scholar, "while some [Chinese] prostitutes emigrated voluntarily, others were lured and tricked by the feigned affection of their male suitors," who had much to profit

⁴⁴⁶ Dan Guangnai [单光鼐], *supra* n. 442, at 163.

⁴⁴⁷ Shen Bao [申報], *Jinu Siben Anjian* [Case of a Prostitute's Escape; 妓女私奔案件] (7 October 1872).

⁴⁴⁸ Yun, *supra* n. 388, at 149.

⁴⁴⁹ *Id.*

from the sale of the women to brothels abroad.⁴⁵⁰ Others were lured without the traffickers ever having sought permission for marriage, such as through elopement. These eloped women were commonly derided as “fallen women” for whom there existed few options other than begging or prostitution once they were abandoned by the men they had trusted.⁴⁵¹ One newspaper article in 1887 articulated the dangers posed to womanhood upon such a loss of reputation: “Succumbing to one moment of temptation, her one misstep leads to a lifelong of regrets and shame” when she is eventually recruited by former prostitutes who scout for concealed residences to set up brothels.⁴⁵² In cases involving the sale of children, if the child is old enough to understand some aspects of his or her transfer to a different family, the deception often disguised the element of parental abandonment. One former *mui tsai*, for example, clearly remembered her mother leaving her in the care of a supposed family friend and promising to return after attending to some family matters. However, the mother never returned, and when the girl ran away to look for her family, she was caught and then chained to a door for a month as punishment.⁴⁵³

Other forms of deception were job-related and focused on the nature and conditions of the promised employment. Many Chinese labourers, who were shipped to Cuba as part of the coolie trade, reported being deceived about employment opportunities. A group of coolies reported seeing a hire sign in front of a foreign shop; when they went in to inquire, they were held against their will and not allowed to leave.⁴⁵⁴ In 1883, three young Chinese women left their families to follow a man who had promised them legitimate jobs in Hong Kong. Once there, the man held them at a private house, and they eventually learnt of his intent to send them to Singapore to work as prostitutes. The women were only rescued when a neighbour happened to overhear their wails and notified the police. Later, a note in the police case file simply stated that these cases of deception were common.⁴⁵⁵ In fact, one study on Chinese female prostitution in Singapore during the late 1880s observed that almost every steamer that arrived from Hong Kong carried young Chinese women destined for the brothels, who

⁴⁵⁰ Wu Zhou [武舟], *Zhongguo Jindu Wenhua Shi* [A Cultural History of Chinese Prostitutes; 中国妓女文化史] 287 (Shanghai East Publishing Center 2006).

⁴⁵¹ Gronewold, *supra* n. 328, at 72.

⁴⁵² Shen Bao [申報], *Jin Taiji Yi* [Discussion On the Prohibition of Brothels Disguised as Private Lodges; 禁臺基議] (14 November 1887).

⁴⁵³ Lim, *supra* n. 360, at 35-37.

⁴⁵⁴ *Huagong Chuguo Shiliaohuibian*, *supra* n. 400, at 582.

⁴⁵⁵ Kani, *supra* n. 340, at 151.

were recruited under the pretense of employment as servants, nurses or hairdressers, or possibly for marriage or education.⁴⁵⁶

4.4. Abuse of Power and of Vulnerabilities

The legal concept of the abuse of power and of a person's position of vulnerability as a means of trafficking is a modern development. While a reference to the "abuse of authority" first appeared in the 1910 Convention as a method of compulsion,⁴⁵⁷ the inclusion of a person's "position of vulnerability" as a form of abuse in addition to that of authority and the broader concept of power, is unique to the Trafficking Protocol.⁴⁵⁸ Earlier drafts of the Trafficking Protocol retained the reference to the "abuse of authority," but this was later replaced with "abuse of power," as various specialised UN agencies appeared to have preferred the latter formulation. The *travaux préparatoires* for the Convention against Organized Crime and its three sister protocols also indicates that delegates disputed the exact meaning of the word "authority," thus suggesting that the final wording of "abuse of power" was favoured for its broader meaning that "[t]he word 'authority' should be understood to include the power that male family members might have over female family members in some legal systems and the power that parents might have over their children".⁴⁵⁹ Nevertheless, the "abuse of power or of a position of vulnerability" as a trafficking means is not defined in the Trafficking Protocol, and one must refer to the interpretative notes, international standards and other relevant legal developments for the meaning given to this concept. For instance, the

⁴⁵⁶ James Francis Warren, *Chinese Prostitution in Singapore: Recruitment and Brothel Organisation*, in *Women and Chinese Patriarchy: Submission, Servitude and Escape* 77, 86 (Maria Jaschok & Suzanne Miers eds., Hong Kong University Press 1994).

⁴⁵⁷ 1910 Convention, *supra* n. 335, at art. 2.

⁴⁵⁸ See Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc. A/AC.254/4/Add.3/Rev.7, art. 2 bis, at 3-4 (2000). Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund and the International Organization for Migration on the Draft Protocols Concerning Migrant Smuggling and Trafficking in Persons*, UN Doc. A/AC.254/27, ¶ 2, at 2 (2000); this official note was later corrected to reflect the joint participation of the Office of the United Nations High Commissioner for Refugees (UN Doc. A/AC.254/27/Corr.1. (2000)).

⁴⁵⁹ See Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc. A/AC.254/4/Add.3/Rev.6, note 29, at 6 (2000) [hereinafter *Revised Draft Protocol*, UN Doc. A/AC.254/4/Add.3/Rev.6]; and United Nations Office on Drug and Crime, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* ¶ 20, at 343 (2006) [hereinafter *Travaux Préparatoires*].

“abuse of a position of vulnerability,” as further elaborated by the interpretative notes for the *travaux préparatoires* and subsequently reproduced almost verbatim by the European Union Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, is understood to include “any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved,”⁴⁶⁰ where these vulnerabilities can include but are not limited to those “resulting from the person having entered the country illegally or without proper documentation, pregnancy or any physical or mental disease or disability of the person, including addiction to the use of any substance, or reduced capacity to form judgments by virtue of being a child.”⁴⁶¹

Whereas there is some interpretative guidance on the “abuse of a position of vulnerability,” the same is not true for the related and also undefined concept of the “abuse of power,” leading the Secretariat of the Conference of Parties to the United Nations Convention against Transnational Organized Crime to emphasise in 2011 that “[c]omparatively little attention has been given to the interpretation of the concept of abuse of power as opposed to the concept of abuse of a position of vulnerability.”⁴⁶² The only direct interpretative guidance on the meaning of the “abuse of power” during the negotiations for the Trafficking Protocol was a reference that it should be understood to include “power that male family members might have over female family members in some legal systems and power that parents might have over their children.”⁴⁶³ Other references to the “abuse of power” are directed to the United Nations Declaration of

⁴⁶⁰ United Nations General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the Work of its First to Eleventh Sessions [Addendum]: Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, UN Doc. A/55/383/Add.1, ¶ 63, at 12 (2000). The wording in *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims*, replacing *Council Framework Decision 2002/629/JHA*, differed only slightly: “A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved [italics added].”

⁴⁶¹ These vulnerability factors are taken from the U.S. Department of State’s Model Law to Combat Trafficking in Persons, released in 2003, and cited in United Nations Office on Drug and Crime, *Model Law against Trafficking in Persons* 10 (2009) (available at http://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf).

⁴⁶² Working Group on Trafficking in Persons of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Analysis of Key Concepts: Focus on the Concept of “Abuse of Power or of a Position of Vulnerability” in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime: Background Paper Prepared by the Secretariat*, UN Doc. CTOC/COP/WG.4/2011/3, ¶ 9, at 4 (2011).

⁴⁶³ *Revised Draft Protocol*, UN Doc. A/AC.254/4/Add.3/Rev.6, *supra* n. 459, at note 29, at 6; and *Travaux Préparatoires*, *supra* n. 459, at ¶ 20, at 343.

Basic Principles of Justice for Victims of Crime and Abuse of Power, a landmark UN General Assembly resolution that was the first internationally agreed upon standard on the rights of victims and reaffirmed in the Preamble of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law in 2005.⁴⁶⁴ However, the Declaration itself also does not contain a straightforward definition of the abuse of power. Instead, victims of the abuse of power are defined as individuals who “have suffered harm...through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights” in cases where the criminal abuse of either political or economic power is not already proscribed by domestic criminal law.⁴⁶⁵ Consequently, the picture that emerges of the abuse of power in the criminalisation of human trafficking is complex, for it links the traditional concept of the abuse of authority, where the trafficker acts under the cloak of being an agent of the state,⁴⁶⁶ with practices that effectively result in power disparities based on gender, race, ethnicity and poverty,⁴⁶⁷ as well as political or economic access.⁴⁶⁸

The additional means of the “abuse of power or of a position of vulnerability” in the trafficking definition is a significant modern development, for it broadens the protective scope of the Trafficking Protocol to include those who are not maintained in exploitation through violent and deceptive means but suffer the abuse based on their belief of having no other alternative but to submit to a party or entity that is perceived to have authority over them. Although its broad scope, along with the fact that it was left

⁴⁶⁴ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34 (XL), UN GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/RES/40/34 (1985); and Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res. 60/147 (LX), UN GAOR, 60th Sess., Supp. No. 49, U.N. Doc. A/RES/60/147 (2005).

⁴⁶⁵ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *supra* n. 464, at ¶¶ 1, 18, 21.

⁴⁶⁶ Centre for International Crime Prevention of the United Nations Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* 9, 40 (1999) (available at <http://www.uncjin.org/Standards/9857854.pdf>).

⁴⁶⁷ *Integration of the Human Rights of Women and a Gender Perspective: Report of the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, especially Women and Children*, Sigma Huda, Commission on Human Rights, 62th Sess., UN Doc. E/CN.4/2006/62, ¶ 42 (2006).

⁴⁶⁸ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *supra* n. 464, at ¶ 21.

undefined in the Trafficking Protocol, has led to some controversial interpretations,⁴⁶⁹ it does allow for a more in-depth understanding of trafficking dynamics. For instance, if one takes the same broad approach towards analysing female trafficking in China in the last century by also examining the role that power and vulnerability had played in maintaining the victims in situations of exploitation, then the dynamics that emerge become more nuanced. It then requires a much more holistic understanding of the different and intersecting layers of power-vulnerability dynamics, such as customary practices of family relations and patriarchy and lack of access to justice, during a turbulent time when vast segments of the population experienced extreme poverty and dislocation.

4.4.1. Expectations of Filial Piety

One of the most prominent yet subtle ways for maintaining a trafficked Chinese person in various forms of labour exploitation during the late nineteenth and early twentieth century was filial piety. The practice of filial piety, devotion to one's parents and to the family unit by extension, was and remains one of the most paramount virtues in the Confucian-based value system.⁴⁷⁰ Because of this, filial piety was a very effective means of trafficking, especially if it was one's own parents who had taken part in the initial recruitment by financially benefitted from the exchange in person. Historian Sue Gronewold commented that "[a] woman's obligation to be filial and supply her family's needs was often so strong that the last thing she would have considered was refusing them, even if she herself opposed the decision and suffered its consequences."⁴⁷¹ In the various child trafficking practices of *mui tsai*, *tungyanghsi* or *hsi-min*, this intersection between filial piety and labour exploitation was even more pronounced because such relationships took place within the family setting and carried with it a sense of belonging and legitimacy. For instance, many *tungyanghsi* came to address their future parents-in-law as their own birth parents.⁴⁷² Even if their days were filled with domestic drudgery and maltreatment, such devotion to filial piety was expected of them as

⁴⁶⁹ For instance, some have criticised the move to include severe economic pressures, in addition to physical and psychological methods of compulsions, within the scope of the "coercion" element of the international definition of trafficking in persons; see Gallagher, *supra* n. 437, at 32.

⁴⁷⁰ In Confucianism, the three most noble conducts were filial devotion, humaneness and ritual decorum. These ideas not only were associated with the intellectual elite of China but were deeply embedded in the value system of Confucianised East Asia; see William Theodore de Bary & Irene Bloom, *Sources of Chinese Tradition* vol. 1, 39-44, 116 (2d ed., Columbia University Press 1999).

⁴⁷¹ Gronewold, *supra* n. 328, at 70.

⁴⁷² Hayes, *supra* n. 364, at 55.

adopted daughters-in-law. In the worst cases, as one report observed in 1935: “The notion of duty of a Chinese daughter, natural-born or adopted, is that she must prostitute herself if the person in *loco parentis* indicates that it is expected of her.”⁴⁷³

The coercive effect of the expectation of filial piety is perhaps best understood within the context of the trafficking of Chinese women into prostitution, owing to the quantity of historical sources that addressed this aspect. For instance, the Director of the Department of Social Affairs of Peiping, present-day Beijing, described the effectiveness of filial piety as a form of control in the brothels in 1931:

Many of the girls are under the control of the [brothel] houses, but they work for their parents. They feel it is their duty to support their parents. That is why they stay there. If you ask them why they are staying in the profession they say ‘I want to support my parents. If I leave tomorrow, how about my parents?’⁴⁷⁴

Appealing to a daughter's sense of filial obligations was a typical survival strategy amongst destitute families, and popular literature of this time was replete with references to families directly placing their daughters and wives into, or at least urging them to accept, prostitution. In Shen Congwen's short story “The Husband” written in 1930, the indigent farmer sent away his wife to work as a prostitute, as per the local custom where “every male knows how much is to be gained from such a business [of prostitution],” but only to experience a change of heart afterwards.⁴⁷⁵ These accounts, though fictional, were grounded in the harsh reality faced by many women, whose income earned through prostitution was crucial to their families. A good example of this reality was recounted in a collection of narratives on the closing of all brothels in Beijing in 1949, as per the order of the new Communist government. Upon finding that her daughter was no longer bound to the brothel, a mother openly lamented the difficult decision she had taken earlier to pledge her own daughter into prostitution on account of the family's overwhelming poverty.⁴⁷⁶

⁴⁷³ Russell, *supra* n. 351, at 239.

⁴⁷⁴ *Commission of Enquiry Report*, *supra* n. 336, at 141.

⁴⁷⁵ Shen Congwen, *Imperfect Paradise: Stories by Shen Congwen* 34 (Jeffrey Kinkley ed., University of Hawai'i Press 1995).

⁴⁷⁶ Liu Chaojiang [刘朝江], *Shenye Jinji Xingdong* [One Late-Night Urgent Operation; 深夜紧急行动], in *Beijing Fengbi Jiyuan Jishi* [A Record on the Closing of Beijing's Brothels; 北京封闭妓院纪实] 23, 47 (Li Runshan & Liu Chaojiang [李润山 & 刘朝江] eds., China Peace Publishing House 1988).

4.4.2. Lack of Access to Justice

The lack of access to justice was most pronounced in the case of the coolies who laboured on foreign lands, where their frustration with the local language exacerbated their sense of helplessness.⁴⁷⁷ Beyond the language barrier, their physical separation from the local community was also another isolating factor, especially for the Chinese men who toiled on the large and remote plantations. These factors contributed to their sense of alienation and marginalisation. For instance, the sentiment that no one cared for their well-being and that their expendability was akin to that of animals featured strongly in the firsthand accounts of coolies who worked on the plantations in Cuba.⁴⁷⁸ A historical study of the Chinese coolies in Peru described their inaccessibility in seeking remedies under Peruvian law:

[N]either [the Peruvian] constitution nor laws were very well administered...Arbitrary action on the part of officials and influence exerted by the well-placed and the wealthy were widespread. The government was highly centralized; communications throughout the country...were poor. These factors made the [estate owner] *hacendado*, a wealthy man and often a man of rank and lineage, on his isolated plantation pretty much a person of absolute power. The local official, even if his intentions were of the best, was often not sufficiently supplied with police or soldiers to present a strength equal to that of the *hacendado*...⁴⁷⁹

Due to the lack of confidence in the ability of the local judiciary to censure abusive treatment, many coolies in Peru, instead of appealing to courts, sought escape, either through flight, revolt or suicides.⁴⁸⁰

In addition to the Chinese coolies abroad, the lack of access to justice for those embedded in quasi-familial and exploitative dynamics also featured prominently. On the lack of avenues of escape for the married women or the *tungyanhsi* girls, one study simply remarked that their coping mechanism was not escape or suicide in extreme cases; rather, it was the acceptance that it was their way of life.⁴⁸¹ For the Chinese women who were trafficked into prostitution during the late nineteenth and early

⁴⁷⁷ See *Huagong Chuguo Shiliaohuibian*, *supra* n. 400, at 594.

⁴⁷⁸ Yun, *supra* n. 388, at 84.

⁴⁷⁹ Stewart, *supra* n. 411, at 108.

⁴⁸⁰ *Id.* at 109.

⁴⁸¹ Hayes, *supra* n. 364, at 65.

twentieth century, their access to justice was not straightforward because their relationship to the authorities was filled with suspicion. There was a sense of general mistrust amongst the population for the police during this period in China. Poorly paid and held in low status, the police frequently resorted to corruption, bribery and terror and elicited little confidence in their competence and impartiality.⁴⁸² It would be difficult now, almost a century later, to qualitatively or quantitatively describe the impact that the mistrust of the police would have contributed towards maintaining the trafficked women in their situation. Nonetheless, it would not be unfounded to believe that many Chinese women who contemplated escape would have harboured some doubts about approaching the police. For example, by 1920, it was well known that a local secret society called the “Green Gang,” with ties to the Shanghai Municipal Police and police forces of the international concessions, virtually ruled over Shanghai’s underworld like a “massive criminal confederation.”⁴⁸³ It oversaw and profited from almost every illegal undertaking in the city, such as the procurement of prostitutes and the management of opium dens.⁴⁸⁴

At the same time, it would be inaccurate to paint the police with a broad stroke, for newspaper articles from this period also contained reports of the police coming to the active assistance of the prostituted women who tried to escape. For example, in June 1909, two police detectives found four young Chinese girls, aged 12, 14, 15 and 17, working in a brothel. Two were maids, while the 14- and 17-year-old worked as prostitutes. The detectives sent the four girls to a charity home and apprehended the brothel-owners.⁴⁸⁵ Nonetheless, the relationship between the trafficked women and the police was rarely as straightforward as the rescue of victims of forced prostitution. Similar to other bodies of authority, the relationship with the police was filled with some unease and misunderstandings from both sides; notwithstanding that, whether domestically or abroad, there was no legally-sanctioned, financial or contractual obligation that bound a trafficked woman to a brothel against her will. For example, one official from the Chinese Protectorate in Singapore revealed to the League of Nations Commission of Enquiry:

⁴⁸² Gronewold, *supra* n. 328, at 82.

⁴⁸³ Frederic Wakeman Jr., *Policing Modern Shanghai*, 115 *China Q.* 408, 414-415 (1988).

⁴⁸⁴ *Id.*

⁴⁸⁵ Shen Bao [申報], *Guigun Guancheng* [Official Punishment for a Male Brothel-Owner; 龜棍官懲] (21 June 1909).

The girls would never confide in us...With all the best intentions in the world on the side of the protectorate officers, it was impossible to get the girls to meet them halfway. Every year all the Chinese prostitutes used to be brought to the office of the protectorate and had to listen to a harangue saying that they were perfectly free to do as they liked, that they were not bound to pay debts to keepers and that they could cease to be prostitutes if they wished. They used to laugh and go away.⁴⁸⁶

Recognising this problem of lack of trust and access, the Chinese delegates at the League of Nations' Bandoeng Conference on the Traffic in Women and Children in February 1937 highlighted as a national priority the recruitment of female police officers with the hope that it would facilitate the protection of women and children.⁴⁸⁷ It is not clear, however, whether this policy truly had a positive effect in countering the general perceptions of the police having some partial loyalty to criminal organisations. For instance, a popular saying of that period amongst the prostitutes of Beijing was that they had three fears, one of them being the police detective squad under the Nationalist government that was tasked with the regulation of licensed brothels, thus giving some indication as to the angst that many prostitutes must have had in approaching the police for assistance.⁴⁸⁸

In addition to the police, trafficked women in the early twentieth century in China also could apply to the courts for a remedy. Similar to their interactions with the police, their experiences with magistrates also presented a mixed picture. Foremost, traffickers were rarely caught and punished. This is due to the fact that many of them could simply disappear in the anonymity of China's itinerant masses, compounded by the practical difficulties of finding proof of the initial abduction or by other means at the place where the crime had first taken place.⁴⁸⁹ As explained by the head of the Shanghai municipal police in 1911, the high discharge rate of individuals brought before the court on kidnapping charges "result[ed] from the difficulty we are experiencing in finding proof of thefts (kidnappings) committed outside Shanghai as well as proof of practices involving the trade in children [and women] that is being carried out openly in China

⁴⁸⁶ *Commission of Enquiry Report*, *supra* n. 336, at 64.

⁴⁸⁷ *Zhongguo Daibiaotuan Chuxi Guolian Yuandong Jinfanfuru Huiyijingguo Baogaoshu* [Meeting Records of the Chinese Delegation at the League of Nations' Conference on the Traffic in Women and Children in the Far East; 中国代表团出席国联远东禁贩妇孺会议经过报告书], 3 Republican Archives [民国档案] 15, 19 (2007).

⁴⁸⁸ Li Wanqi [李万启], *supra* n. 432, at 84.

⁴⁸⁹ Henriot, *supra* n. 346, at 191.

and against which we are powerless.”⁴⁹⁰ Moreover, in most cases of ill treatment of prostitutes before the courts, brothel-keepers escaped lightly, with their main punishment seen as the loss of income by removing the said prostitute to a charitable home.⁴⁹¹

Seeking justice through the courts presented a certain paradox. Whereas the ill treatment of prostitutes was at least seen as a punishable offense, the act of purchasing them was often left unpunished by Qing magistrates if the court deemed that the brothel-owners had acted in good faith by directly purchasing the women with the contractual consent of her parents or legal guardians, as described below:

The proprietors of the houses of prostitution defended themselves in the courts by protesting their good faith. They would generally say that a girl had been sold to them by persons purporting to be her parents, and they would go so far as to furnish proof that the girls in their care had been honestly purchased.⁴⁹²

The situation, however, started to improve in the 1920s with the introduction of a modern criminal code under the Republican government.⁴⁹³ Consequently, more prostitutes approached the court with their grievances to assert their claims and lodge complaints against those who made competing claims on their property and labor.⁴⁹⁴ It was also during this time that they started to behave “neither as disadvantaged victims nor as stigmatized disrupters of urban peace, but as aggrieved citizens pursuing various goals in a legal venue.”⁴⁹⁵

It would be a significant challenge now, due to the historical distance, to evaluate more precisely the effects of the abuse of authority by the police and lack of access to effective remedy had had as a means of trafficking during the late 1800s and early 1900s. However, it stands to reason that, in the absence of a completely transparent and predictable outcome following a trafficked woman’s approach to the police authorities or the courts, many would not have taken the decision lightly and without a second thought as to their chances of success, especially given that failure to achieve a

⁴⁹⁰ *Id.* The brackets in the quoted passage appeared in the original text.

⁴⁹¹ *Id.* at 154.

⁴⁹² *Id.* at 192-193.

⁴⁹³ *Id.* at 198.

⁴⁹⁴ Hershatter, *supra* n. 421, at 203.

⁴⁹⁵ *Id.*

successful outcome when dealing with the authorities very likely would have been met with harsh punishment. Notwithstanding their fears, many women must have also felt that, all doubts considered, taking a chance with the authorities—the police, courts and other civil services—might still have been better than a most certain premature end, either from the inflicted violence or venereal disease. Just how many chose then to shy away from the authorities and remain inaccessible and resigned to their fate, one would never know.

* * *

Using a historical perspective to examine the trafficking of today and in the past in China, one of the most striking aspects that emerges is the similarities in the means used to achieve the labour exploitation of the trafficked individuals. These diverse means can include, on the one hand, brutal violence and coercion and, on the other hand, the more subtle forms of fraud, deception and abuse of vulnerability during these different epochs. Such a historical examination also highlights an interesting observation that, despite their diversity, the means used in the trafficking in persons in contemporary China are not newly invented ways of coercion or compulsion. While the labels describing how individuals are exploited have changed, the means often have not. For example, present-day cases of women being abducted and sold into prostitution mirror cases in the past of selling women directly into brothels. At the same time, while the historical practice of pawning women into prostitution as a form of collateral no longer exists, there are firsthand contemporary accounts of Chinese women working in China's sex trade, who, despite not being pledged by their families into a life of prostitution, describe their fate in similar terms of filial piety, of economically providing for their family and of having no other alternative but to accept their fate.⁴⁹⁶

Another similarity between China's contemporary and past dynamics of human trafficking lies in the neglected historical chapter of the Chinese coolie trade to the Americas in the nineteenth century. While no such organised and exploitative contract migration exists today, there are similar elements of abuse and factors of vulnerability under the cover of voluntary migration in contemporary cases of the exploitation of Chinese migrant workers. In their search for a better livelihood abroad, often using irregular channels, Chinese migrants remain vulnerable in their countries of employment for the same reasons that coolies felt excluded in the past: language barrier, cultural divide, mistrust of local authorities and sense of social alienation. These factors,

⁴⁹⁶ See Tiantian Zheng, *Red Lights: The Lives of Sex Workers in Postsocialist China* 147-148 (University of Minnesota Press 2009).

in combination or separately, can render a migrant vulnerable to exploitative labour practices due to his or her perceived lack of better alternatives. Highlighting the potential for abuse in the employment of Chinese emigrant workers, a 2011 study on Chinese migrant workers in the United Kingdom found that most of the workers interviewed had experienced elements of forced labour.⁴⁹⁷ China's significant domestic rural-urban migration of labourers also largely mirrors these transborder dynamics, for freedom of movement is highly regulated within the country, and most domestic migrants would have taken employment without having the necessary employment and residence permits.

Compared to the trafficking in women and men, the trafficking in children for domestic servitude under quasi-adoption arrangements is one where there appears to be more differences than similarities between present and past dynamics. The two endemic arrangements of *mui tsai* and *tungyanghsi* for the transfer of young girls are no longer widespread and accepted survival strategies adopted by impoverished families. The *hsi-min* practice of enslaving boys and their male descendants into domestic servitude also seemed to have disappeared by the time of the founding of the People's Republic in 1949.⁴⁹⁸ Thus, these terms appear as bygones of another era, outdated and mostly irrelevant to the contemporary context. Nonetheless, if one probes beyond the labels of terminology, it may be that these practices are still taking place, albeit not as prevalent as before, with the an element of exploitation that is similar to cases of child trafficking in the past.

There have been, for instance, contemporary reports of Chinese families, mostly from rural areas, purchasing young girls as eventual wives for their sons. Since procuring girls in such a manner is less costly than an expected dowry in more typical marriage arrangements, the families view this as a more economical way of guaranteeing an eventual spouse for their sons.⁴⁹⁹ Therefore, even though the girls purchased in such a manner in present-day China are not specifically referred to as *tungyanghsi*, their new familial arrangements are reminiscent of the reason that *tungyanghsi* were acquired in the past: as child-brides-to-be for the sons of their adopted families. Furthermore, it is also important to point out that, beyond this particular

⁴⁹⁷ Carolyn Kagan et al., *Joseph Rowntree Foundation, Experiences of Forced Labour Among Chinese Migrant Workers* 41, <http://www.jrf.org.uk/publications/chinese-experiences-forced-labour> (2011).

⁴⁹⁸ See Watson, *supra* n. 375, at 133; and Yuen-fong Woon, *Social Organization in South China, 1911-1949: The Case of the Kuan Lineage in K'ai-p'ing County* 84 (Center for Chinese Studies of the University of Michigan 1984).

⁴⁹⁹ Minnie Chan, *South China Morning Post, Baby Traffickers Shift Focus to Girls*, <http://www.scmp.com/article/510885/baby-traffickers-shift-focus-girls> (4 August 2005).

arrangement of child exploitation, tackling the problem of trafficking in children for prostitution and other forms of sexual exploitation in present-day China remains, as it was in the past, a considerable anti-trafficking challenge, especially due to the involvement of adolescent girls in the mainstream sex trade.⁵⁰⁰

If one expands the parameters to include a historical perspective on the problem of human trafficking in twenty-first century China, then the narrative of trafficking as being mainly a contemporary problem that arrived only after the country opened to market reforms in 1979 does not wholly explain the phenomenon. More importantly, a historical perspective based on our current understanding of how the more hidden dynamics of the abuse of power and vulnerability can effectively maintain victims in a situation of labour exploitation adds more cultural depth to an examination of the trafficking problem in China. It then requires a more holistic understanding of the different and intersecting layers of power-vulnerability dynamics, such as customary practices of family relations and patriarchy, structural problems associated with a lack of access to justice, and extreme poverty and dislocation experiences by vast segments of the population. Many of these factors are still relevant today and contribute to power disparities and vulnerabilities as means of trafficking in present-day China. Furthermore, a historical examination of social customs, cultural practices and familial relations contributing to human exploitation in various forms also raises issues of governance. The second part of the presented work is thus an exploration of this evolution in domestic responses, in order to better understand how the various Chinese governments of the nineteenth and twentieth century responded to this multifaceted problem of human exploitation.

⁵⁰⁰ Julia O'Connell Davidson, *Save the Children, Children in the Sex Trade in China* 30, <http://resourcecentre.savethechildren.se/node/2400> (2001).

Part Two: Evolution in Domestic Response

5. Internal Contradictions: Approach of the Late-Qing

The continuity of the human trafficking problem in China, from the mid-nineteenth century when China was still under the imperial rule of the Qing dynasty to the early twenty-first century, presents a complex but consistent narrative where key components of the trafficking problem have not drastically changed. This is particularly seen in the migratory dynamics and the means used to achieve and maintain the exploitation of Chinese women, men and children for different purposes of exploitation. The key difference is that whereas the scope of what constituted trafficking was initially limited to transnational female prostitution as first delimited by the early international treaties on “white slavery,” the types of exploitation recognised as constituting a practice of human trafficking by the Trafficking Protocol, which China acceded to in February 2010, are more diverse than for the purpose of sexual exploitation alone. In the twentieth century, the crime of human trafficking in international law was gradually expanded to have a much broader and gender-neutral scope on the purposes of exploitation, as well as having a more expansive understanding of the actions and means that could be used to carry out the intended exploitation.

In parallel with these developments in international law were concrete domestic efforts by the Chinese government at both national and local levels to combat the country’s trafficking problems and, where it had concretely undertaken such commitments, meet its obligation under these international treaties. However, modern Chinese history has seen several seismic changes: the transition from imperial government to Republican rule in 1912, followed by a bitter and prolonged civil war between the Nationalists and Communists and the founding of the People’s Republic of

China in 1949. Thus, it has not been intuitive to view human trafficking and China in a holistic, historical perspective that traces the variety of its domestic responses under different governments to tackle specific dimensions of this complex problem. Nonetheless, an examination of developments during these different epochs in modern China is important, for it not only underscores the enormity of the challenge facing China with regard to the trafficking of persons, but it also further illustrates how the country's engagement—and at times disengagement—with the international community has influenced the evolution of this continuous effort. This chapter traces this evolution in China's domestic response to trafficking, as seen in relevant provisions of its laws and their enforcement, against the backdrop of Chinese engagement, or disengagement, with the international community.

Qing was the last imperial dynasty of China and spanned a long reign from 1644 to 1912. Founded by the Manchurian nomads of northeast China, Qing became highly integrated with Chinese culture during the course of its rule, and its society subsequently shared many characteristics with that of the preceding dynasties. Regarding practices of enslavement, for instance, the socio-economics dynamics of the Qing state conformed to the predominate historical assessment that China—outside of ideological Marxist interpretations of social development—had never been a “slave society,” where “slaves formed a large part of the whole population at any time or outweighed in economic importance [other marginalised populations, such as] the attached retainers, hired labourers, share-cropping tenants and unattached peasants.”⁵⁰¹ Nonetheless, there were particular marginalised groups of individuals whose status or labour was similar to that of the practice of slavery in other countries. Discussions that took place during the late-Qing on the situation of these marginalised groups, in particular the Chinese women who were sold into domestic servitude, were notably framed within this context of slavery and the international abolition movement by some Qing officials. Half a century later, this early twentieth-century examination of practices analogous to slavery in China would become a notable historical antecedent to the drafting of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, where many of these institutions also became prohibited by international law.

Interestingly, these discussions illustrate the early influences of international law and diplomacy on the Qing government, which had not viewed foreign relations as a

⁵⁰¹ E. G. Pulleyblank, *The Origins and Nature of Chattel Slavery in China*, 1 J. Econ. & Social Hist. Orient 185, 220 (1958). For a discussion on Marxist ideology of social development as it is applied to Chinese history, especially regarding the issue of slavery, see E. G. Pulleyblank, *Discussion Contributions on Stages of Social Development: Stages in Chinese History*, 6 Marxism Today 94 (1962).

necessary component of statecraft for the majority of its rule.⁵⁰² Competing political factions debated the necessity of engagement with the West, but as Qing faced growing challenges on its legitimacy, especially by the early twentieth century, modernisation became more an issue of necessity than ideological debate. Hence, the abolition of slavery became a component of the modernists' projection of China as a civilised society. However, this belated modernisation agenda took place when the government was already under intense domestic pressure for political reform. Widespread popular discontent threatened the dynasty's survival, and the primary aim of the Qing court at this time was to placate these internal waves of dissension. Hence, the substance of many reform policies were hastily examined and poorly implemented. This had contradictory consequences. For example, the central government actually did not have sufficient funding to support its reform programs and resorted to taxing the provinces heavily, which only increased popular discontent.⁵⁰³ The discussion on slavery in China must also be seen through this historical context in the sense that even though the slavery problem in China garnered attention and its abolition was endorsed by the throne, the actual issue at hand was not only about the actual emancipation. Implicit to the discussion was also the potential negative projection of China to the rest of the international community if it were seen to condone slavery. This meant that the discussion on slavery within the Chinese empire at the highest level of Qing bureaucracy was highly symbolic and, at times, contradictory in its effects.

5.1. Constitutional Reforms and the Abolition of Slavery

Constitutional projects of the late-Qing begun in earnest in August 1900 when a military alliance of Austria-Hungary, France, Germany, Italy, Japan, Russia, the United Kingdom and the United States occupied Peking, in response to a domestic rebellion that besieged diplomatic legations in the imperial city with full support from the Qing military.⁵⁰⁴ The raiding and subsequent looting of Peking by these forces sent the imperial household on a hasty escape, and the shock and humiliation of this forced

⁵⁰² *Tsungli Yamen*, the administrative body responsible for foreign affairs in the Qing bureaucracy, was only established in 1861. For a discussion on imperial China's traditional view on foreign relations, see Zhang Xiaomin & Xu Chunfeng, *The Late Qing Dynasty Diplomatic Transformation: Analysis from an Ideational Perspective*, 1 Chinese J. Intl. Pol. 405, 412-418 (2007).

⁵⁰³ Chuzo Ichiko, *Political and Institutional Reform, 1901-11*, in *The Cambridge History of China: Late Ch'ing, 1800-1911, Part 2* vol. 11, 375, 414 (John K. Fairbank & Kwang-Ching Liu eds., Cambridge University Press 1980).

⁵⁰⁴ There were frequent local rebellions during the late-Qing, but this particular one, known in the West as the Boxer Rebellion, was a forceful, populist movement that was especially virulent towards foreigners and Christianity in China; see William T. Rowe, *China's Last Empire: the Great Qing* 243-246 (Harvard University Press 2009).

dislocation finally compelled the imperial court to recognise that the need for reforms was no longer an ideological debate between conservative and modernist factions but one that impinged the dynasty's own survival. In December 1905, in what is now seen by historians as “the first concrete action, however indirect, taken by the moribund [Q]ing dynasty toward a change in the form of the government,” China sent five ministers abroad to study foreign models of constitutionalism and whether any could be successfully applied to the Chinese context.⁵⁰⁵ The mission returned the following year and recommended constitutionalism as the best model for maintaining imperial authority.⁵⁰⁶ This led to the establishment in 1907 of the imperial body *Xianzhen Biancha Guan*, the Committee for Investigating and Drawing up Regulations of Constitutional Government, also referred to in English, in short form, as the Imperial Committee—or Commission—on Constitutional Government (the “Constitutional Commission”).⁵⁰⁷ Over the next five years, the Constitutional Commission was to have a prominent role in the issuance of a number of imperial edicts on constitutionalism and related projects before the dynasty's eventual fall in 1912.

The issue of the buying and selling of human beings in China was first submitted as a memorial to the Throne in March 1906 from Viceroy Zhou Fu, a high-ranking official in the Qing bureaucracy who governed the three provinces along the Yangtze River. In his memorial, Viceroy Zhou premised his petition for abolishing slavery on the basis that such practices were no longer accepted by the community of nations and “that foreign nations look upon those that tolerate slavery as barbarous peoples.”⁵⁰⁸ Referencing international law, Viceroy Zhou further stated that Western nations “join in hunting men that buy and sell human beings and punish them, thereby exhibiting a love of humanity and bringing the whole earth to recognize as a binding international law the obligation to protect men in the enjoyment of liberty.”⁵⁰⁹ Three years later, another official took up the same cause of abolition and petitioned the Throne to outlaw slavery on the grounds that it was fundamentally incompatible with the government's reform agenda. Censor Wu Wei-ping wrote:

⁵⁰⁵ E-Tu Zen Sun, *The Chinese Constitutional Missions of 1905-1906*, 24 *J. Modern Hist.* 251, 251 (1952). The countries visited were Japan, England, the United States, Germany and France.

⁵⁰⁶ Ichiko, *supra* n. 503, at 389.

⁵⁰⁷ M. J. Meijer, *The Introduction of Modern Criminal Law in China* 41 (Koninklijke Drukkerij de Unie 1949). There was no official English translation for this official body, and subtle variations of its name exist in English, such as the interchangeability between “committee” and “commission.”

⁵⁰⁸ E. T. Williams, *The Abolition of Slavery in the Chinese Empire*, 4 *Am. J. Intl. L.* 794, 795 (1910).

⁵⁰⁹ *Id.*

[W]e are about to establish a constitutional regime throughout the Empire. The educated should be encouraged in the pursuit of culture and the lowly should be regarded with equal solicitude. It is inconsistent with good government that the poor and unfortunate, though innocent of crime, should be bought and sold and allowed to sink into the degradation of slavery, to be oppressed and cruelly ill treated and denied all human rights.⁵¹⁰

Because both memorials dealt with the same issue, the Constitutional Commission considered them jointly and agreed that practices of slavery would undermine the goals of constitutionalism and also threaten the legitimacy of the government in the eyes of other countries if such practices were not outlawed in China.⁵¹¹ The Constitutional Commission, after consultation with the imperial commission separately tasked with revisions of the law, then proposed ten regulations for the abolition of slavery in China. The regulations were approved by the Emperor and promulgated in January 1910.

The imperial edict of 1910 abolishing slavery was a significant step towards the full realisation of legal equality of persons in China. The edict expunged references to slaves from its legal code, criminalised the sale and purchase of human beings—including the sale of one’s self or children on account of poverty—and nullified all such contracts.⁵¹² One Western scholar, writing in the same year as the imperial emancipation, opined that symbolically it was “a charter of liberty to myriads of the down-trodden and oppressed [in China], and will mark for them the upward turning of the way toward freedom and enlightenment” but that the extent of its effects was unclear.⁵¹³ Indeed, a more careful analysis of the Constitutional Commission’s report and the imperial emancipation reveals that the full effects of these regulations were more ambiguous. The report identified practices of slavery in China, yet also justified certain practices as outdated and irrelevant. It dealt with the issue of bonded servants in Chinese families harshly, but less so for those in similar situations within Manchu households. Whilst concerns over the projection of China as a civilised country effused the report with lofty proclamations, it shied away from a substantial discussion on the serious implementation challenges of these regulations, beyond references to immoral customs. This meant that the issue of how juridical interpretation and domestic enforcement lacked consistency and conflicted with practical realities of poverty and

⁵¹⁰ *Official Documents: Report to the Throne of the Imperial Chinese Commission on Constitutional Government Recommending the Abolition of Slavery, Together with the Imperial Rescript Approving the Report and Ten Regulations for its Enforcement*, 4 Supp. Am. J. Intl. L. 359, 360-361 (1910) [hereinafter *Report to the Throne*].

⁵¹¹ *Id.* at 361-362.

⁵¹² Meijer, *supra* n. 507, at 47.

⁵¹³ Williams, *supra* n. 508, at 794.

customs was not fully examined. For instance, it was not Qing's formal law that tolerated the sale of one's self or children on account of poverty, for this was clearly proscribed by Qing's legal code.⁵¹⁴ Rather, it were the magistrates who had come to accept, on the merit of compassion for the destitute, the prevalent practice of pledging or selling one's self or other family members.⁵¹⁵

Despite these limitations, the report was significant in that it saw the problem of domestic slavery and trafficking inclusively, as one that affected both male and female victims regardless of their age and for a wide array of purposes, including but not limited to prostitution. For instance, while the 1910 International Convention for the Suppression of the White Slave Traffic defined the crime of traffic as one of "procur[ing], entic[ing], or [leading] away, even with her consent, a woman or girl under age for immoral purposes," the report clearly stated that the "traffic in human beings has not been conducted solely for the purpose of securing men and women for slaves, but also as a method of obtaining wives, concubines and male heirs."⁵¹⁶ The report spurred on an interesting examination of customary practices within family life during the Qing dynasty whose practices were comparable to that of slavery, and in so doing forms the backdrop to similar discussions that would take place about five decades later on the Supplementary Slavery Convention. The following section examines customary marginalisation and exploitation during the late-Qing period, challenges that would continue in various manifestations during the subsequent Republican and Communist eras in modern Chinese history.

5.2. Customary Marginalisation and Exploitation

Qing society was highly hierarchical and strictly organised according to ethnicity, occupation and status. Fundamental to Qing society and administration was the system of eight banners, whereby each banner represented a military division that was also a unit of residence and economic production for the soldiers and their

⁵¹⁴ Article 275(5) of the Qing Code, in *The Great Qing Code 258-259* (William C. Jones, Tianquan Cheng & Yongling Jiang trans., Oxford University Press 1994). The Qing Code did not specify sub-articles. Instead, each of its 436 articles was relatively long, when compared to western legal codes. The numbering of the articles used in this chapter, including assigned references to the sub-articles, is in accordance with this translation by Jones et al., which is the most recent, scholarly English translation of the Qing Code. This numbering, however, is not to be confused for the substatutes (also known as codified precedents), *tiaoli*, that came to be appended to the Qing Code over time, for these *tiaoli* were not included in the cited translation completed by Jones et al. in 1994.

⁵¹⁵ Philip C. C. Huang, *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared* 168 (Stanford University Press 2001).

⁵¹⁶ *Report to the Throne*, *supra* n. 510, at 367.

dependents.⁵¹⁷ The bannermen were mostly ethnic Manchus but also included Mongol and Chinese soldiers who had fought alongside the Manchus in their conquest of China during the seventeenth century. They received special entitlements—which included grants of land, pensions, government positions, as well as reduced criminal liability in a special judicature—which caused resentment amongst the Chinese who were not part of this privileged banner system.⁵¹⁸ Specific functional occupations were those seen as befitting of commoners with a “good” standing; these included scholars who were at the top of the social hierarchy, followed by farmers, artisans and merchants.⁵¹⁹ This was in stark contrast to the “mean people,” whose hereditary-based occupations, such as musicians, actors, prostitutes and some very low-leveled local government employees, were associated with individual moral depravity.⁵²⁰ Within this social structure, the Constitutional Commission identified three major groups of individuals whose complete emancipation were identified as particular challenges: the *pao-i* bondsmen of the Manchu banner system; bonded servants and servile field workers; and women trafficked mainly, but not exclusively, into the domestic setting as wives or servants.

Pao-i were bondsmen of Manchu aristocrats and were a subordinate and efficient group of troops within the banner system.⁵²¹ In addition to these bondsmen, some high-ranking Manchu households had bonded servants and servile field workers, who were usually acquired by gift, self-surrender or purchase. For these individuals, their servile status could be inherited by their descendants, and they would not be entitled to an independent household registration separate from that of the families they served.⁵²² Many bonded field workers were tied to their ancestral land because their forebears had voluntarily surrendered to the Manchus during their conquest of China—essentially, a survival strategy during a time of upheavals when the affiliation afforded some protection.⁵²³ Insofar as the report was effused with sympathy toward these two

⁵¹⁷ Rowe, *supra* n. 504, at 15.

⁵¹⁸ Meijer, *supra* n. 507, at 44-45.

⁵¹⁹ John W. Dardess, *Confucianism and Autocracy: Professional Elites in the Founding of the Ming Dynasty* 19 (University of California Press 1983).

⁵²⁰ Susan Naquin & Evelyn S. Rawski, *Chinese Society in the Eighteenth Century* 117 (Yale University Press 1987).

⁵²¹ Williams, *supra* n. 508, at 798.

⁵²² Naquin & Rawski, *supra* n. 520, at 118.

⁵²³ It would be too simple to equate protection with widespread contentment of these servile field workers. In fact, there were frequent rebellions by these bonded labourers during the early-Qing when the Qing reversed the preceding dynastic practice of land distribution to household-scale cultivators. These rebellions ended in 1658 when the Qing military brutally suppressed a revolt in Henan, which was instigated by a false rumour of universal emancipation; see Rowe, *supra* n. 504, at 29.

types of bonded individuals under the Manchu aristocracy, in reality the Constitutional Commission devoted a significant amount of examination to debunk the relevance of these practices. For instance, concerning the *pao-i* bondsmen, the Constitutional Commission put forward several rationales to illustrate that these were either outdated practices or that the concerned individuals “were never slaves in the ordinary sense” because they were not barred from taking the civil examinations or holding office.⁵²⁴ The report further commented, on the issue of the bonded servants and field workers, on how “for several decades the custom of presenting slaves to meritorious officials has been discontinued, and for a long time there have been no reports of men surrendering themselves into slavery nor of slaves that have been bought under deeds of sale.”⁵²⁵

The last category of enslaved individuals as identified by the Constitutional Commission were mostly women trafficked for domestic servitude in affluent Manchu and Chinese households; however, it also observed that women could be trafficked for other purposes, such as concubinage and prostitution. In contrast to the Manchu practices of *pao-i*, bonded servants and field workers, it was this subject of enslaved female domestic servants that received the most substantial discussion in the report on the abolition slavery. In fact, the examination of this one issue was felt to be so asymmetrical as compared to the other Manchu practices of enslavement and bondage that one scholar of the time simply noted: “The report shows less consideration for the interests of Chinese than for those of Manchu slave-holders [due to the fact that the] slaves of the Chinese [who are mainly female] are all to be set free without exception.”⁵²⁶ The disproportionality of responses, however, could be largely attributed to the politics of modernisation and reforms—tacitly described as “delicate aspects” by one legal scholar—where severe criticisms of traditional Manchu customs risked undermining support for the dynasty’s overall reform program.⁵²⁷

As discussed earlier, it was undeniable by the mid-nineteenth century that the trafficking of Chinese women had become a serious problem, irrespective of whether the purpose of exploitation was in the realm of family life—as wives, concubines, child-brides or servants—or as prostitutes. Female prostitution during the period was far from nonexistent, despite sustained efforts by the Qing government to outlaw its practice since 1723. In fact, the population of those engaged in prostitution had become more

⁵²⁴ Williams, *supra* n. 508, at 798; and *Report to the Throne*, *supra* n. 510, at 362.

⁵²⁵ *Report to the Throne*, *supra* n. 510, at 363.

⁵²⁶ Williams, *supra* n. 508, at 802.

⁵²⁷ Meijer, *supra* n. 507, at 46.

diverse, with trafficking increasingly seen as a major mode of recruitment,⁵²⁸ yet the link between trafficking and prostitution defied a simple characterisation. Where abduction represented the most forcible form of trafficking, many other cases involved the consent and knowledge on the part of the women and their families, resulting in a situation where “[m]any prostitutes, perhaps most, remained enmeshed in complex family networks that were a source of obligation, support, and conflict.”⁵²⁹

To address slavery and its abolition in China, the Constitutional Commission proposed the bonded labourers be granted the status of hired servants, since existing Qing law had never intended for individuals be held in perpetual, intergenerational bondage.⁵³⁰ For example, on the issue of bonded child servants, the Constitutional Commission proposed for them to be contracted as hired servants until the age of twenty-five, whilst “such payment for their services as may be agreed upon [be] received in advance.”⁵³¹ No such age limit, however, was proposed for the bonded servants and field workers of Manchu households. With regard to these individuals, it actually argued against fixing a specific age for their emancipation, citing that there was a great reluctance from the Manchu aristocracy for their release due to their agricultural labour value and, without further elaboration, the “great embarrassment [that] might result” at their emancipation.⁵³² These policy contradictions thus led to the general critique that while the status of bonded individuals might have been elevated to hired servants or free labourers, in reality the change was only nominal because they were still required to remain indefinitely with their original households.⁵³³

The same contradiction existed in the proposal to change child bonded servants to that of hired household help, notwithstanding that the age limit for such arrangements was fixed. Bonded or “hired” in name, it is difficult to see the practical reality for the child servants as vastly different from that of being sold, since payments for their service would have been received years in advance. In cases of ill-treatment, the Constitutional Commission further proposed that these child servants could be redeemed, if their natural families could return a proportional amount of the money

⁵²⁸ Gail Hershatter, *Dangerous Pleasures: Prostitution and Modernity in Twentieth-Century Shanghai* 181-202 (University of California Press 1997).

⁵²⁹ *Id.* at 182.

⁵³⁰ *Report to the Throne, supra* n. 510, at 368-369.

⁵³¹ *Id.* at 369.

⁵³² *Id.* at 370.

⁵³³ Williams, *supra* n. 508, at 801.

exchanged—a lofty proposition, given that it must have been highly unrealistic to expect impoverished families, driven to “hiring” out their children for servitude, would have had sufficient funds to readily redeem them from maltreatment. Effectively, the stipulation, as well-intended as it might have been to alleviate concerns of possible maltreatment, only further underscored the transactional nature of such servile relationships by framing the deterrent of maltreatment outside of criminal responsibility.

A closer examination of the Constitutional Commission’s report of 1910 on slavery indicates that many of the legal reform proposals, such as outlawing the buying and selling of human beings or criminalising the act of selling one’s own children on account of poverty, were not new legal constructions. Instead, the Qing Code, the comprehensive legal code of the Qing dynasty that encompassed both civil and criminal law, had similarly dealt with the issue of trafficking in persons, specifically the buying and selling of individuals for various purposes of exploitation. Hence, the problem with the Qing Code’s provisions on trafficking was not that there were no such provisions; instead, the flaw lay mainly with the interpretation and enforcement of the law. Consequently, there was an incongruence between the spirit and implementation of the law, in light of powerful social customs that frequently overrode the aim of the imperial government to deter practices of trafficking and exploitation. The following section examines the criminal provisions relating to human trafficking in the Qing Code and analyses their ideological basis, which affected their interpretation and implementation and, ultimately, also their effectiveness at reining in the widespread practice of trafficking in China by the end of the twentieth century.

5.3. Trafficking and the Qing Code

The Qing Code continued the legal tradition of preceding dynasties in that its laws reflected the state ideology of Confucianism, especially concerning its ideals of social propriety and righteousness. These, in turn, were founded on a system of proper social relations between individuals, “according to what is proper and suitable in view of the other person’s position and the extent of one’s obligation to [the said person],” such as those between the ruler and his subjects; parent and child; husband and wife.⁵³⁴ Amongst these relationships, the role of women during the Qing was especially marked by a rigid set of legal rules and social mores. Many aspects of these gender roles were not unique to the Qing dynasty, since Confucian virtues such as filial piety,

⁵³⁴ William Theodore de Bary & Irene Bloom, *Sources of Chinese Tradition* vol. 1, 87 (2d ed., Columbia University Press 1999).

righteousness and female chastity had had a strong historical grounding much earlier than in the presently examined period of the late-Qing. However, these expected virtues for women, culminating in the overriding concern for the chastity of female widows, received such heavy emphasis from the Qing government that it “became a veritable cult,” as seen by numerous Qing initiatives to bestow honour on selected exemplary women.⁵³⁵ These were usually young widows who, instead of remarrying, had earned imperial recognition by meeting the expectations for a chaste, and thus virtuous, widowhood. In this way, a key purpose of this officially-driven widow honour campaign was to confront the commodification of young widows by providing a strong motivation for a female widow’s marital family to underwrite her chaste widowhood.⁵³⁶

It is unclear how successful these widow-chastity programs had been at tackling the commodification of widowed daughter-in-laws as one dimension of China’s trafficking problem during the late-Qing period. Over time, the government had to temper its own support when the movement took on the heightened fervour for widow suicides—an action that the authorities increasingly suspected had been coerced by the widow’s family.⁵³⁷ Certainly, by the end of the twentieth century when central governance was weak and there was widespread poverty and population displacement in the country, it was common to hear of daughters-in-law being cast aside by their marital families who could no longer afford to support them. There were also frequent reports of daughters who were similarly abandoned by their natal families, as some indigent families resorted to selling their children when they could no longer bear the costs of childrearing. Young boys were commonly sold to other families as heirs, while young girls often became child-servant-brides, whose purpose was also to ensure the continuation of the lineage of their adopted families through an eventual marriage with one of their sons.⁵³⁸ While it was perhaps a more acceptable scenario for the daughters to be sold to other families, it was also frequent, as the previous chapter discussed, for them to be directly sold or pawned into prostitution. Fundamentally, the Qing government saw these phenomena as negative social mores and had sought to control their spread through strict criminal provisions and punishment; the most relevant were Article 275 on the “kidnapping persons and selling the person kidnapped” and Article

⁵³⁵ Susan Mann, *Widows in the Kinship, Class, and Community Structures of Qing Dynasty China*, 46 J. Asian Stud. 37, 37-38 (1987).

⁵³⁶ Rowe, *supra* n. 504, at 107.

⁵³⁷ *Id.*

⁵³⁸ Arthur P. Wolf & Chieh-shan Huang, *Marriage and Adoption in China, 1845-1945*, at 1-10, 108-112 (Stanford University Press 1980).

367 on “encouraging or allowing wives and concubines to commit illicit sex.”⁵³⁹ Nevertheless, as exemplified by the widow-chastity movement, a central characteristic of the Qing government’s response to the traffic in persons was to address such problems through the lens of strict Confucian morality, with little emphasis on the profiteering elements of the labour exploitation. As a result, these provisions in the Qing Code that dealt with aspects of human trafficking bore—and were hampered in their effectiveness by—this heavy influence of familial and sexual morality.

5.3.1. Article 275

Article 275 on “kidnapping persons and selling the person kidnapped,” a long statute under the chapter on public disorder and thefts, dealt primarily with the trafficking in persons into the domestic setting, where they became the wives, sons, daughters or house servants of their new families. It covered a broad spectrum of actions and means for what the law considered to be criminal activities associated with trafficking, beyond the monetary transaction of the sale. The article had a broad understanding of the types of criminal acts inherent in trafficking by seeking to punish the principal offender—the trafficker who carried out the initial act of recruitment—and any accomplice who received and harboured the person to be sold, as well as potential buyers and broker-guarantors of the transaction.⁵⁴⁰ The criminal responsibility of these accomplices, however, depended upon their knowledge of the intended crime. As stated by Article 275(7), there was to be no punishment if there was no prior knowledge of the crime. The proposed regulations of the Constitutional Commission in 1910 recognised that this was a loophole that could be abused by those involved in the trafficking to evade criminal responsibility, and it called for the law to expunge this provision.⁵⁴¹ As regards the means component in trafficking, Article 275 recognised that in addition to forcible abductions, the more covert means of fraud and deception could be used to recruit and maintain victims in exploitation, where control over these individuals could be exacted through sell, transfer or enticement. For example, Article 275(1) prescribed in detail the penalties associated with various degrees of force and coercion:

⁵³⁹ This chapter mainly uses the English translation of the Qing Code by Jones et al. *supra* n. 514, except where the author believes there is a more nuanced translation available. On this specific instance, the translation of “encouraging [or] allowing wives and concubines to commit illicit sex” for Article 367, at Huang, *supra* n. 515, at 157, is preferred to Jones et al.’s “facilitating and tolerating the wife’s or concubine’s fornication.” This is because the term “illicit sex” connotes a wider scope of sexual activities than the physical act alone.

⁵⁴⁰ *The Great Qing Code*, *supra* n. 514, at art. 275(7).

⁵⁴¹ *Report to the Throne*, *supra* n. 510, at 368.

Anyone who devises tricks and entices and gets hold of honourable persons (*to make slaves of them*), or who kidnaps and sells honourable persons (*to others*) as slaves, will...be sentenced to 100 strokes of the heavy bamboo and exile to 3000 *li*...If, because (*those kidnapped and sold do not [willingly] follow along*), there is injury (*among the kidnapped*) persons, then [the offender] is punished with strangulation...If someone is killed, then the sentence is beheading.⁵⁴²

Moreover, because Article 275 addressed the trafficking of persons into the domestic setting and the breach of familial relationships that such sales inevitably entailed, the article labouriously assigned penal proportionality based on the relationship between the initial trafficker and the victim. It states:

If one kidnaps and sells his son or son's son to be a slave, the penalty is 80 strokes of the heavy bamboo. If it is a younger brother or sister, brother's child [*zhi*], brother's son's son [*zhi sun*], daughter's son, one's own concubine, or the wife of a son or son's son, then the penalty is 80 strokes of the heavy bamboo and penal servitude of two years. (*If one kidnaps and sells*) the concubine of a son or son's son, reduce [the penalty] two degrees. If it is the child of the father's brother who is younger than the kidnapper, or the children or son's children of the father's brother's sons, then the penalty is 90 strokes of the heavy bamboo and penal servitude of two and a half years.⁵⁴³

For cases where the sale was not physically coerced and was undertaken with an element of consent from the person sold, Article 275(3) assigned heavier criminal liability to the person who enticed the other to agree to such an arrangement. The

⁵⁴² *The Great Qing Code*, *supra* n. 514, at 257-258. The italics within parentheses and square brackets are as cited and used by the translators to denote, respectively, the original interlinear commentary in Chinese and the explanatory material in English.

⁵⁴³ *Id.* at art. 275(5). These are original parentheses and brackets as cited. Familial relationships are translated somewhat awkwardly in this passage. William C. Jones. noted that this is because the Chinese language distinguishes between patrilineal and matrilineal relationships. Hence, these complicated descriptions of relationships were felt to be the most accurate renderings in English. Nonetheless, this translation incorrectly suggests that only the kidnapping and selling of one's own male child or grandchild was punishable. This misunderstanding possibly arose from the fact that the Chinese character for child 子 (*zi*) nominally means a male child, but in the context of 子孫 (*zisun*) it means offsprings or descendants, which includes female children. The exclusion of the female child is also not consistent with subsequent parts of Article 275(5), where specific references were made to the selling of one's younger sisters or the children of one's daughter. For the first part of Article 275(5), a previous 1810 English translation of the Qing Code is perhaps more accurate: "Any person who sells his children or grand-children against their consent, shall be punished with 80 blows. Any person who in like manner sells his younger brother or sister, his nephew or niece, his own inferior wife, or the principal wife of his son, or his grandson, shall be punished with 80 blows, and two years banishment;" in *Ta Tsing Leu Lee; Being the Fundamental Laws, and a Selection from the Supplementary Statutes, of the Penal Code of China* 292 (George Thomas Staunton trans., Ch'eng-wen Publishing Company 1966) (originally published 1810).

punishment was 100 strokes of the heavy bamboo and three years of penal servitude for the “enticer” if the other person was sold to become a slave. However, the punishment was reduced to 90 strokes and two and a half years of penal servitude if, under the same circumstances, the person sold joined another household as a wife, concubine, or child or grandchild for adoption. As such, Qing law seemed to give some recognition that being sold into another household as a family member was marginally preferable to that of domestic servitude. No such recognition was given to the more nefarious purpose of forced prostitution, for which the trafficking of persons, especially amongst women and girls, could also take place. The following is an examination of Qing law on “illicit sexual activities,” which came to encompass prostitution, with notable limitations.

5.3.2. Prostitution as Illicit Sexual Activities

Qing imperial law had only recognised the legality of prostitution insofar as those who were prostitutes were officially classified as dishonored people and firmly distinguished from others in society.⁵⁴⁴ This separation between respectability and debasement thus formed one of the strictest divisions in China’s hierarchical society during the early-Qing and was reinforced by laws that forbade intermarriages between these two classes.⁵⁴⁵ In the 1720s, the reigning Qing emperor removed, by imperial proclamation, the official debased status of these marginalised groups, including hereditary entertainers and musicians who were mostly associated with prostitution, thereby allowing them to change occupation and register as ordinary commoners.⁵⁴⁶ The practical effect of this emancipation was that prostitution became effectively outlawed, and the law came to regard prostitutes as morally corrupt but ordinary commoners who violated the prohibition on “illicit sexual activities.” In this way, the general provision on “illicit sexual intercourse” in Qing law was broad and included both adultery and prostitution within its scope.

The centrality of Confucian principles of proper social relationships to Qing morality was most apparent in the laws that regulated sexual relationships, therein Chapter 19 (Articles 366 to 375) of Part 6 on criminal laws of the Qing Code. Amongst these, Articles 366 and 367 were most relevant to the context of the sexual trafficking of

⁵⁴⁴ Huang, *supra* n. 515, at 158.

⁵⁴⁵ Naquin & Rawski, *supra* n. 520, at 117.

⁵⁴⁶ Rowe, *supra* n. 504, at 103-104.

women. Article 366 set out the penal proportionality for various scenarios of illicit sexual activity, such as:

In the case of fornication with consent, the punishment is 80 strokes of the heavy bamboo. If [the woman] has a husband, the punishment is 90 strokes of the heavy bamboo. For fornication brought about by trick [seduction], (*whether or not she has a husband*), the punishment is 100 strokes...If there is fornication with force, the punishment is strangulation...If someone engages in fornication with a young girl of twelve or below, then, although there is agreement, it is the same as fornication with force.⁵⁴⁷

Moreover, Article 367 specifically covered the role of the husband in facilitating and tolerating or forcing his spouse's illicit sexual activities. Where it involved the husband's facilitation and toleration, the punishment was 90 strokes for all the parties involved—the husband, the wife or concubine and the male adulterer.⁵⁴⁸ However, in cases of force, the woman would not be punished, but both the husband and male adulterer would receive 100 and 80 bamboo strokes, respectively.⁵⁴⁹ The same punishment applied to the woman's natural father, as well as her father- or grandfather-in-law, who either facilitated, tolerated or forced her to engage in illicit sexual activities. In cases where the husband accepted money to divorce his wife so that she could be married to another, then all the parties involved—the husband, the wife and the man paying for the divorce—would be punished with 100 bamboo strokes.⁵⁵⁰

There was an inherent problem in viewing prostitution solely as “illicit sexual activities” without addressing any of the associated commercial or potentially exploitative aspects. Historian Michael Sommer commented on this legal lacuna that even after the *de facto* prohibition of prostitution vis-a-vis the imperial emancipation of 1723, “one searches the Qing code in vain for a new law defining prostitution as something different from noncommercial forms of ‘illicit sexual intercourse’; no law singled out the commercial aspects as deserving extra penalties.”⁵⁵¹ In 1736, during a renewed government-backed campaign to tackle the four moral vices of banditry, gambling, fighting and prostitution, a new imperial statute was promulgated that further criminalised the “harbouring of prostitutes” and “failing to detect” the situation of

⁵⁴⁷ *The Great Qing Code*, *supra* n. 514, at 347. These are original parentheses and brackets as cited.

⁵⁴⁸ *Id.* at art. 367(7).

⁵⁴⁹ *Id.* at art. 367(1).

⁵⁵⁰ *Id.* at art. 367(3).

⁵⁵¹ Matthew H. Sommer, *Sex, Law, and Society in Late Imperial China* 273 (Stanford University Press 2000).

prostitution.⁵⁵² These regulations, however, were more a warning to officials whose anti-vice efforts had waned by imposing penalties for their dereliction than meaningful reforms.⁵⁵³ This is because the regulations fundamentally did not depart from the view that the problem of prostitution “was not that it made commodities of women’s bodies, but rather that it constituted ‘illicit sexual intercourse’—conduct that threatened the family morality and structure essential to social order.”⁵⁵⁴ Because prostitution was not seen as a separate and distinct crime but rather as a moral infringement, the component of labour exploitation was the least objectionable, to the detriment of those who were trafficked into situations of forced prostitution.

5.3.3. Contradictory Effects

Beyond a formal legal examination of the provisions in the Qing Code that dealt with the various purposes for which trafficking could take place—the selling into domestic settings or prostitution under the broad proscription against “illicit sexual activities”—there were several significant contradictions in the application and interpretation of these provisions that limited the ability of the Qing government to control its trafficking problem. For instance, with regard to the situation of women being trafficked into prostitution by their own husbands—or other male relatives such as father, father- or grandfather-in-law—the men who profited from this exploitative arrangement were not criminally liable beyond Articles 367(1) and 367(2)’s prohibition on “facilitating and tolerating illicit sex.” Under Article 367(1), the penalty for a husband who facilitated or tolerated his wife’s “illicit sexual activities” was 90 bamboo strokes or 100 strokes if it could be proven that he had forced her to engage in such activities. Where force was involved, he would also lose his wife or concubine through a court-mandated divorce, and she would be returned to her natal family.⁵⁵⁵ Nevertheless, the material fact that husbands were profiting from their wives’ prostitution was largely unaddressed by the law. This was seen by the fact that husbands who forcibly exploited their wives were punished less severely than individuals who were unrelated to the women but exploited them in a similar manner. As opposed to a

⁵⁵² *Id.* at 279-280; and Liu Jin-tao [刘锦涛], *Reasons Behind Government Tactics to Control the Prostitution Problem in Qing Dynasty* [试论清代治娼理路,措施与成败], 4 *Collection Women’s Stud.* 35, 37 (2008).

⁵⁵³ Sommer, *supra* n. 551, at 278-279. These measures were, as Sommer argued, more concerned with the government’s security and administrative integrity, amidst widespread allegations of official corruption, than prostitution as a crime or as a form of exploitation and trafficking.

⁵⁵⁴ *Id.* at 303.

⁵⁵⁵ *The Great Qing Code*, *supra* n. 514, at art. 367(1).

husband's 90 or 100 bamboo strokes, unrelated male traffickers would be punished by 100 bamboo strokes, in addition to three months of exposure in the cangue, a physical restraining device placed over a person's head, and three years of penal servitude under Substatute 375(1) of 1740.⁵⁵⁶

The fact that illicit sex abetted or tolerated by a husband was punished less severely than prostitution of the woman managed by an unrelated person, as in the case of most brothel prostitution, illustrated the legal paradox that it was somehow “much less of an offense for a husband to share with others his sexual monopoly over his own wife.”⁵⁵⁷ This was particularly seen by the fact that while Article 367(1) criminalised the husband's forcing of his wife or concubine to engage in illicit sex, in reality this provision was rarely applied:

As far as the judiciary was concerned, the crime of a husband “forcing” (*yi le*) his wife to engage in illicit sexual intercourse with another man appears to have been largely a matter of theory...[T]he judiciary almost never applied this law in practice. Instead, when a husband prostituted his wife, the crime was invariably labeled “abetting or tolerating” (*zong rong*), and the woman would be punished along with the men, regardless of what she said about her experience.⁵⁵⁸

This paradox between the intent of the law and the problem of implementation was exemplified in a 1852 case, where a wife appeared in front of her local magistrate to accuse her husband of forcing her into prostitution. Upon hearing the case, the local magistrate ordered the husband to control his wife better and had the couple slapped and expelled from court.⁵⁵⁹ In contrast, the law against forcing women into illicit sex was more often enforced to punish fathers who had similarly coerced their own daughters into prostitution, but the resolution for such cases was also flawed. Again, because Qing prohibition against illicit sexual activities was based on the framework of family morality, the prostituted daughter would remain in the custody of her father because,

⁵⁵⁶ Sommer, *supra* n. 551, at 275. The translation by Jones et al. in 1994 did not include the substatutes, *tiaoli*, which were appended to the Qing Code over time. Sommer referred to the substance of this substatute, but the specific reference was found in the complete Qing Code with all the substatutes in Zheng Qin [鄭秦] & Tian Tao [田濤], *Zhonghua Zhuanshi Fadian: Da Qing Luli* [Important Legal Codes of Chinese Civilisation: The Great Qing Code with Substatutes; 中華轉世法典: 大清律例] 528-529 (Law Press China 1998).

⁵⁵⁷ Sommer, *supra* n. 551, at 275.

⁵⁵⁸ *Id.* at 276.

⁵⁵⁹ *Id.* at 277.

unlike marriage or adoption, their relationship was not one that could be nullified.⁵⁶⁰ Whereas the prostituted wife, by law at least, would be granted a divorce from her husband in cases of forced prostitution, the daughter would have no such mandated severance and would remain vulnerable to similar manners of exploitation.

By the late-Qing, there were also tensions in the enforcement of the law against the selling and buying of wives—as well as children and other family members—to the point that Qing judicial opinion came to acknowledge and tolerate such practices.⁵⁶¹ Despite the Qing Code's prohibition on the buying and selling of individuals, the courts came to accept the prevalent practice of selling one's family members, citing compassion for the poor, who frequently resorted to this practice as a survival strategy. In 1828, concerning a case of a woman who was sold, the imperial government's Board of Punishment commented in an internal document:

If the parents...sell a [grown-up] son or daughter...out of mutual willingness...it must be because they have such difficulty surviving that they have no choice. Their situation calls for sympathy...[I]f people who are dirt poor and can otherwise only await death from starvation or cold, who have no other choice but to sell themselves in order to survive, that cannot be considered seduction and should not be punished.⁵⁶²

This was further illustrated by a case in 1818 of a wife being sold into remarriage by her husband, where the court considered the poverty of the first husband and did not nullify the wife's second marriage, as stipulated by Article 367. Instead, the court allowed the second marriage to stand, arguing that the woman would only be resold by her first husband if she were returned to him.⁵⁶³

The overall impact of the Constitutional Commission's report on the abolition of slavery in China was unclear due to these internal inconsistencies in its proposed reforms. Paradoxically, the report was both lofty and practical; it called attention to the situation of slavery and the need for swift imperial action, yet it was defensive when it came to the issue of emancipation by predicating a substantial discussion on how certain groups of slaves in the Chinese context were not ordinary slaves, either due to the outdatedness of the enslavement practice or to their potential for some social mobility.

⁵⁶⁰ *Id.*

⁵⁶¹ Huang, *supra* n. 515, at 157.

⁵⁶² *Id.* at 168.

⁵⁶³ *Id.* at 169.

The Constitutional Commission proposed regulations to outlaw the selling of individuals and called for the status of bonded servants be changed to hired labourers, yet it was very limited in specifying the protection mechanisms for such hiring arrangements. Notwithstanding the incompleteness of the examination, the Qing government, at minimum, recognised the existence of the problem of trafficking of women and children and sought to control the prevalent practices of abducting, buying and selling of persons through specific provisions in its legal code. Similar initiatives, however, were not seen on the issue of the trafficking of Chinese men abroad for the coolie trade until the mid-nineteenth century. In this context, the report of the Constitutional Commission on the issue of slavery was also significant for what it did not mention—that of the trafficking of Chinese, mainly male, migrants abroad. The omission illustrated that the Qing government considered the trafficking of migrants abroad separately, even though the phenomenon also involved the labour exploitation of its subjects. Such a divergent approach characterised Qing policy and created a situation whereby male Chinese labourers were exploited abroad with little protection and few ways to seek remedy. The following section discusses this much neglected historical aspect of China's trafficking problem.

5.4. Emigration of Male Labourers

Qing, for the most of its rule, had strictly forbidden emigration under possible penalty of death for those caught returning to China.⁵⁶⁴ While these restrictions were first implemented to deter political contacts between domestic dissidents and their counterparts abroad, the prohibition subsequently took on a moral tenor when emigrants were increasingly seen by the government as delinquents who had abrogated their familial responsibilities.⁵⁶⁵ The Qing government only recognised the right of its subjects to voluntarily emigrate in 1860, when the clause on the right of voluntary emigration was inserted in Articles 5 and 9 of the settlement treaties with Great Britain and France, respectively, following China's defeat in the Second Anglo-Chinese War.⁵⁶⁶ Based on these clauses, the Qing court, in cooperation with Great Britain and France,

⁵⁶⁴ Ronald Skeldon, *Migration from China*, 49 *J. Intl. Affairs* 434, 435 (1996).

⁵⁶⁵ Robert L. Irick, *Ch'ing Policy Toward the Coolie Trade 1847-1878*, at 390 (Chinese Materials Center 1982).

⁵⁶⁶ Convention of Peace Between Her Majesty and the Emperor of China of 1860 (the "settlement treaty with Great Britain of 1860") art. 5 (24 October 1860); and Convention Between the Emperor of the French and the Emperor of China of 1860 (the "settlement treaty with France of 1860") art. 9 (25 October 1926); in *Treaties Between the Empire of China and Foreign Powers* 8-10, 72-75 (William Frederick Mayers ed., Ch'eng-wen Publishing Company 1966) (originally published 1877). The Second Anglo-Chinese War from 1856 to 1860 is more commonly known as the Second Opium War.

drafted the Convention to Regulate the Engagement of Chinese Emigrants by British and French Subjects (the “1866 Emigration Convention”), which aimed to eliminate the worst excesses of the coolie trade by prohibiting all unregulated forms of contract emigration and any use of force, fraud or kidnapping in the recruitment of Chinese labourers.⁵⁶⁷ The Convention was signed between Great Britain and China in Peking on 5 March 1866, but, despite their initial support, both British and French governments later refused to ratify it.⁵⁶⁸ The British and French governments then sought a revision of the convention that was essentially “a retreat in many respects to the conditions of the unregulated coolie trade of the 1850s [because] [a]ll provisions for protecting the emigrant once he left Chinese shores were deleted; most of the power of the Chinese authorities to regulate the emigration establishments in their own ports was abolished; and the emigration agents and foreign consuls were given increased powers to prevent the Chinese from interfering in the recruitment and embarkation of laborers.”⁵⁶⁹

The Qing government rejected these proposed revisions on the basis that the 1866 Emigration Convention was already promulgated as the law of the land, and the emperor had already sanctioned heavier penalties, such as summary execution, for the Chinese traffickers.⁵⁷⁰ In this aspect, the refusal of the British and French governments to ratify it had limited domestic effect, but there were wider consequences for the refusal of the British and French governments to fully cooperate with a regulated system for contracting Chinese labour abroad. This was because, in an effort to force Peking to curtail the 1866 Emigration Convention, Britain and France had allied with Spain, whose support for a regulated recruitment system sat at odds with its prodigious demand for Chinese labourers transported through the Portuguese-held port of Macao for the sugar plantations of Spanish America.⁵⁷¹ In 1869, China responded by requesting the active cooperation of foreign governments to prohibit their merchant ships at Macao

⁵⁶⁷ Convention to Regulate the Engagement of Chinese Emigrants by British and French Subjects of 1866 (the “1866 Emigration Convention”) (5 March 1866) (ratification refused by British and French governments); *id.* at 32-36.

⁵⁶⁸ British objection to the convention was mainly financial, as British planters did not want to bear the costs for the repatriation of Chinese contract emigrants; the French objected on the basis that efforts to regulate the length of contracts and working conditions for the Chinese emigrants would be unenforceable, so long as more abusive labour arrangements existed elsewhere in the Americas; see Irick, *supra* n. 565, at 187-189.

⁵⁶⁹ *Id.* at 190.

⁵⁷⁰ *Id.* at 395, 404.

⁵⁷¹ For a Chinese perspective on the dichotomy between the proclamations and the actual practices of Western governments on the elimination of the coolie trade, in particular the role of the Portuguese vis-a-vis Macao, see Chen Weiren [陈为仁], *Kuli Maoyi: Guaipian Lulue Huagong* [The Coolie Trade: Abductions through Deceit and Forced Kidnaps of Chinese Labourers; 苦力贸易—拐骗掳掠华工] 26-28 (The Chinese Overseas Publishing House 1992).

from participating in the traffic of Chinese emigrants. While most nations were willing to cooperate, France and Britain remained noncommittal in their support.⁵⁷² In this way, the recalcitrant attitude of these two major Western powers frustrated and inevitably delayed diplomatic efforts to isolate Portugal on the issue of Macao and its role in the exploitative coolie trade. In fact, after the 1866 Emigration Convention, the traffic of Chinese labourers leaving from Macao actually increased, as countries continued to use Macao, which fell outside Chinese jurisdiction, to evade emigration controls.⁵⁷³ The lack of a coherent international support meant that it would take nearly a decade longer for the Portuguese to prohibit Chinese contract emigration from Macao; the last ships for the Americas left Macao in 1874.⁵⁷⁴

Although legal provisions in the Qing code on the issue of trafficking, as discussed above, were flawed, the approach, at the very minimum and notwithstanding problems of enforcement, recognised that this was a serious and widespread problem. In contrast to these efforts to rein in the abduction and sale of persons as wives, family heirs, child brides, domestic servants or prostitutes, the Qing government had refused to consider and engage with the issue of Chinese, mainly male, labour emigration to the Americas for most of its reign. It only began, rather belatedly, to regulate the coercive and exploitative coolie trade in the settlement treaties with Britain and France of 1860. Nevertheless, once the Qing government “move[d] from an attitude of indifference to a stance of concerned vigilance,”⁵⁷⁵ it remained steadfast in its position of not derogating from the basis of the 1866 Emigration Convention to regulate emigration, despite the equivocation of Britain and France. By this time, however, Qing central administration was already weakened after a series of aggressive, internal rebellions, and its ability to forcefully negotiate with other countries also was undermined by reverberations from earlier treaties that ceded Chinese sovereignty to other countries, either in terms of land concessions or granting the right of extraterritoriality to foreign nationals inside China.

The legacy of these Chinese negotiations with foreign powers during the late-Qing on the issue of labour emigration is therefore mixed and subjected to conflicting

⁵⁷² Arnold J. Meagher, *The Coolie Trade: The Traffic in Chinese Laborers to Latin America 1847-1874*, at 291 (Xlibris Corporation 2008).

⁵⁷³ Irick, *supra* n. 565, at 238.

⁵⁷⁴ David Northrup, *Indentured Labor in the Age of Imperialism, 1838-1914*, at 58 (Cambridge University Press 1995).

⁵⁷⁵ Marianne Bastid-Bruguier, *Currents of Social Change*, in *The Cambridge History of China: Late Ch'ing, 1800-1911, Part 2* vol. 11, 535, 585 (John K. Fairbank & Kwang-Ching Liu eds., Cambridge University Press 1980).

historical assessments, ranging from apathy and incompetence to active protection.⁵⁷⁶ It is interesting to note that, with the distance of time, perhaps the most significant policy shift arising from this historical chapter had less to do with the technicalities of regulating emigration than the decision of the Qing government to post permanent diplomatic representations abroad to protect the welfare of its emigrants. Between 1869 and 1895, the establishment of Chinese consulates abroad was negotiated in the principal areas of emigration;⁵⁷⁷ and, as argued by historian Arnold Meagher, it was China's belated recognition of the problem of the coolie trade that finally drew the country out of isolationism and promoted international contact and engagement on normal diplomatic basis.⁵⁷⁸ Substantively as an issue, however, by the early twentieth century, policy discussions on emigration had faded in prominence, as the Qing government struggled to retain power by committing itself to urgent domestic reforms in order to placate intensifying dissent. The report of the Constitutional Commission on the abolition of slavery in 1910, for instance, contained no reference to Chinese men having being sent abroad on the coolie trade in conditions reminiscent of the transatlantic slave trade, despite the issue having received the highest recognition of importance—that of the imperial seal—less than fifty years earlier. While the omission might partly be explained by the formal conclusion of the coolie trade in 1874, marked by the closure of Macao as a transportation port for Chinese emigrant labourers, the fact that the Constitutional Commission's report contained numerous references to what it saw as outdated slavery practices, yet still neglected the plight of Chinese emigrants, made such an interpretation not completely sustainable.

* * *

The reality was that, during the Qing period, the trafficking of Chinese men abroad did not generate as much attention as other forms of trafficking, involving the abduction or selling of women and children for marriage, heirs, child-brides, house servants or prostitutes. Even though the Qing government had come to accept voluntary emigration in the 1860s, its longstanding prohibition on emigration remained until it

⁵⁷⁶ See Peter Ward Fay, *Reviews of Books: Ch'ing Policy toward the Coolie Trade, 1847-1878* by Robert L. Irick, 88 *Am. Hist. Rev.* 732 (1983); and Jane Kate Leonard, *Book Review: Ch'ing Policy Toward the Coolie Trade, 1847-1878* by Robert L. Irick, 42 *J. Asian Stud.* 923 (1983). Irick, *supra* n. 565, at 160-162, 412-413. Irick's work, based on primary Qing sources, challenges the earlier, commonly-held assessment based on observations of foreigners in nineteenth-century China that Qing authorities were unconcerned with and unable to effectively negotiate on behalf of its emigrants.

⁵⁷⁷ Bastid-Bruguier, *supra* n. 575, at 585.

⁵⁷⁸ Meagher, *supra* n. 572, at 300.

was officially abolished by an edict in September 1893.⁵⁷⁹ On the international front, this biased approach was also mirrored in the advocacy efforts on behalf of trafficked Chinese women and children, which received more emphasis and attention than the plight of Chinese men working under exploitative conditions on plantations in the Americas. This distinction is exemplified by the different terms given to these separate issues of Chinese female and male trafficking; whereas Chinese men of the coolie trade were labelled as “indentured labourers” to undermine the gravity of the abuses perpetuated against them that were largely similar to chattel slavery,⁵⁸⁰ no such equivocation existed for the women trafficked into prostitution, who were widely known as victims of “white slavery” specifically to evoke public sympathy.⁵⁸¹ The result of this divergent approach was that the trafficking of Chinese men for their labour remained, as it is also now, an issue that did not receive as much attention and examination as other purposes of exploitation.⁵⁸² In this way, the practical decision by the Qing government to send Chinese diplomatic missions abroad to protect the welfare of its emigrants withstood the policy vicissitudes of competing political factions during Qing’s waning years, and this had far-reaching consequences. Beyond the issue of voluntary emigration or trafficking, the move to post Chinese legations abroad ushered in the approach of the Republican government, following the fall of the Qing in 1912, towards issues of a transnational character—that of an active engagement on both bilateral and international basis. In parallel with this policy of engagement with the international community, the Republican government also embarked on a sustained program of domestic legal reforms, including provisions to address various facets of its trafficking problem. The following section examines these initiatives under the Republican government from 1912 to 1949.

⁵⁷⁹ Bastid-Bruguere, *supra* n. 575, at 585.

⁵⁸⁰ Lisa Yun, *The Coolie Speaks: Chinese Indentured Laborers and African Slaves of Cuba* 29 (Temple University Press 2008); and Evelyn Hu-DeHart, *Chinese Coolie Labor in Cuba in the Nineteenth Century: Free Labor or Neoslavery?*, 12 *Contributions Black Stud.* 38, 47-50 (1994).

⁵⁸¹ See Mary Ann Irwin, “White Slavery” *As Metaphor: Anatomy of a Moral Panic*, 5 *Ex Post Facto* 1 (1996).

⁵⁸² See Meagher, *supra* n. 572, at 23. Meagher notes the legacy of Chinese labourers in Latin America is a largely neglected area of study.

6. New Legal Order: Republican Experiments

The Republican period of modern Chinese history, following the fall of the Qing dynasty in 1912, was a time of contradictions, and this duality has obstructed a critical and nonpartisan examination of this complicated chapter, including its response to the problem of human trafficking in various forms. Foremost, the change from imperial to Republican rule did not bring an end to the tremendous political and social turmoil that had characterised the late-Qing. These endemic problems included powerful warlords who wreaked domestic instability and sustained political dissension that further impaired governance. Destabilising forces of a weakened and corrupt government, especially under the early Republican years, continued due to incessant political infighting, even after the Nationalist party had consolidated control from the warlords over the country in 1928. The practical consequence was that while the new government instituted an ambitious program of legal reforms that had a large impact on the criminalisation of trafficking-related offenses, its enforcement of these new laws were weak. By the early 1940s, popular discontentment with the Republican government was high. The Chinese Communist Party, “indefatigable [in its] efforts to woo the poorer farmers of the countryside,” was able to effectively tap into this growing sense of disillusion with the Nationalists to broaden its support base.⁵⁸³ By the time the Japanese surrendered from the Second World War in 1945, the Communist Party had grown so influential that it could effectively demand a coalition government. The Nationalists, who did not trust political competition nor the intentions of their Communist rivals, rejected any plan of power-sharing.⁵⁸⁴ What followed was the resumption of the

⁵⁸³ Ch'ien Tuan-sheng, *The Government and Politics of China 1912-1949*, at 384 (Stanford University Press 1950).

⁵⁸⁴ *Id.*

internecine civil war between the Communists and Nationalists, leading to the Nationalists' retreat to Taiwan and her outlying islands and the founding of the Chinese Communist government on 1 October 1949.

Because the Republican government was short-lived and unstable, modern Chinese history has tended to focus on an abbreviated narrative of a Republican government that had barely lasted four decades before another transition took place. This interpretation of Republican China typically centers on the fact that the government was so plagued by problems similar to those of the preceding Qing that it came to be seen, especially in its early years, as “a farce” in the absence of fundamental changes in governance.⁵⁸⁵ For the most part, this narrative is not incorrect. However, like most interpretations framed by polarised axes of victory or defeat, it can also have the unintended effect of overlooking other aspects of Republican governance, such as a sense of idealism about the role of law in society and an eagerness in its approach to international diplomacy. Whereas the Qing was hesitant about its international engagement for much of its history, the Republican government was not as tentative, for it carried a significant political willingness to engage with the international community on a wide-array of transnational issues.⁵⁸⁶ Backed by a vibrant and dynamic intellectual exchange of ideas with the West, Republican China was a period with an “overwhelming impulse to join the world and open up its borders, minds and markets” during what has been described as “the age of openness” in modern Chinese history.⁵⁸⁷ The history of Republican China from 1912 to 1949 is thus complicated by this underlying schism of high ideals and ensuing failings, as perhaps best exemplified by reforms in the legal realm. This is because while Republican lawmakers were ambitious in their program of using laws as a tool to drive social change, they were unable to ensure legislative implementation and enforcement. Described by one account, the period from the late 1930s to the founding of Communist China in 1949 were “years of international war and internal social and political disintegration, [where] implementation of the laws became impossible, and the legislation of the late 1920s and

⁵⁸⁵ *Id.* at 61.

⁵⁸⁶ See William C. Kirby, *The Internationalization of China: Foreign Relations at Home and Abroad in the Republican Era*, in *Reappraising Republican China* 179 (Frederic Wakeman, Jr. & Richard Louis Edmonds eds., Oxford University Press 2000).

⁵⁸⁷ Frank Dikötter, *The Age of Openness: China Before Mao* 3 (University of California Press 2008). Historian Frank Dikötter describes China before Communism as the ‘age of openness,’ illustrating the extensiveness of the country’s engagement with the world.

early 1930s remained academic exercises scarcely affecting the majority of the population outside the modern cities.”⁵⁸⁸

It is easy to overlook the idealistic kernel that drove numerous legal reforms during the Republican period, especially those post-1928 when legal reforms were most prolific, if the view of the Republican government as a failed experiment between the Qing and the Communist eras continues to dominate. For legal historians, the linear approach of examining modern Chinese legal history from Qing to the Communist period, without an analysis of laws promulgated during the intervening Republican era, has resulted in a one-dimensional view of contemporary Chinese law. For instance, two prominent historians of Chinese law have observed:

As for the Republican period, it has so far been almost completely ignored by scholars. Part of the reason, no doubt, is that the attention of most scholars has been drawn away from the Guomindang [Nationalists] to the triumphant Communist side of the story...In any event, most scholars who studied contemporary law simply left the Republican period out of consideration. When they wrote about the historical roots of contemporary practices, they invariably looked only to the imperial past.⁵⁸⁹

Such an approach is somewhat problematic, for the legal codes promulgated during the Republican period were not superficial in their efforts, but represented a serious attempt to found a new, rights-based order.⁵⁹⁰ For instance, in his assessment of the promulgated legal codes of the Republican Nationalist government, historian Ch’ien Tuan-sheng in 1950 commended their draftsmanship, while attributing their implementation difficulties to structural failures, such as “the inaccessibility of the courts, the incompetence of the judges, and, especially, the interference of authorities other than the judicial in the administration of justice.”⁵⁹¹ Hence, an analysis of the laws of Republican China that addressed various elements of the crime of human trafficking as it is presently understood in international law is ultimately an examination of this schism between legal ideals and reality, at a time of continued domestic turmoil and prevailing social customs that could not be effaced with legal codifications alone. At the same

⁵⁸⁸ Laszlo Ladany, *Law and Legality in China: The Testament of a China-watcher* 50 (Marie-Luise Näth ed., Hurst & Company 1992).

⁵⁸⁹ Kathryn Bernhardt & Philip C. C. Huang, *Civil Law in Qing and Republican China: The Issues*, in *Civil Law in Qing and Republican China* 1, 4 (Kathryn Bernhardt & Philip C. C. Huang eds., Stanford University Press 1994).

⁵⁹⁰ In the context of the significance of Republican China’s Family Law in modern Chinese legal history, see Margaret Kuo, *The Legislative Process in Republican China: The 1930 Nationalist Family Law and the Controversy over Surnames for Married Women*, 36 *Twentieth-Cent. China* 44 (2011).

⁵⁹¹ Ch’ien Tuan-sheng, *supra* n. 583, at 249.

time, lofty legal ideals were also projected in the government's visions of a new world order, as seen by Republican China's vibrant diplomatic representation and engagement with the international community, especially with the League of Nations from the early 1920s.

6.1. Domestic Legal Reforms

The Republican government continued what had begun under the Qing government, a substantive program of domestic legal reforms. For example, during the early Republic, a revised version of the Qing Code was actually used as the provisional criminal code of China. Promulgated on 19 March 1912, this provisional law embodied the legal reform work started under the late-Qing, but the law was deemed “defective and imprecise” by the nascent Republican government, and work to revise it started soon after.⁵⁹² However, what was distinct about legal reforms under the Republican government was that they were not driven by the overriding concern for the survival of regime, as was the case with the preceding Qing bureaucracy. This was particularly seen by Qing's project on constitutional reforms, which was mainly a nominal move to appease calls for political change; despite widespread skepticism as to its substantive merits, its entry into force was hurriedly brought forward on several occasions when imperial rule came increasingly under threat.⁵⁹³ In contrast, legislative reforms under the Republican government were regarded not merely as means of survival for the regime but rather as an intrinsic agenda, where “[l]egal reform and judicial independence was pursued at the highest level of government.”⁵⁹⁴

The most critical and prolific period of Republican legislative reforms took place after 1928, following the Nationalist Party's consolidation of control over most of China and establishment of a central government in Nanjing. Under the leadership of Chiang Kai-shek, the post-1928 Republican government saw law as a powerful tool for the creation of a strong and centralised state.⁵⁹⁵ Law, therefore, was an essential component for the vision of a new unified China, where:

⁵⁹² Klaus Mühlhahn, *Criminal Justice in China: A History* 62 (Harvard University Press 2009).

⁵⁹³ See Chuzo Ichiko, *Political and Institutional Reform, 1901-11*, in *The Cambridge History of China: Late Ch'ing, 1800-1911, Part 2* vol. 11, 375, 396-398 (John K. Fairbank & Kwang-Ching Liu eds., Cambridge University Press 1980).

⁵⁹⁴ Dikötter, *supra* n. 587, at 29.

⁵⁹⁵ Mühlhahn, *supra* n. 592, at 63.

Many defended the rule of law by publishing in legal journals or participating in voluntary associations, and they were rarely shy in highlighting judicial shortcomings...Republican China may not have achieved the 'rule of law', as widespread discrepancy existed between the theoretical conception of law and its customary practice, but continued legal reform, sophisticated legal codification and widespread legal expertise were part and parcel of the entire era.⁵⁹⁶

Between 1928 and 1935, Republican lawmakers expeditiously issued numerous laws, covering a wide breadth of subjects, with many laws amended and twice promulgated within this short period. Amongst these were the basic codes establishing a new legal order in China, including: the Civil Code of 1929 and 1930;⁵⁹⁷ the Code of Civil Procedures of 1930 and the revised code of 1935;⁵⁹⁸ the Criminal Code of 1928 and the revised code of 1935;⁵⁹⁹ the Code of Criminal Procedures of 1928 and the revised code of 1935.⁶⁰⁰ Out of these various legal reforms, the most fundamental was the full legal equality of all persons, particularly as it pertained to gender relations, because this was an ideological departure from the Confucian view of social hierarchy based on positions, roles and gender.⁶⁰¹ It was this aspect of gender equality that had the most profound impact on Republican laws that criminalised various elements of the crime of human trafficking as it is comprehensively understood under present-day treaty law, embodied by the Trafficking Protocol of 2000. The following section examines the legal reforms under the Republican government with regard to the full legal equality of women and discusses how they affected the criminalisation of human trafficking, either

⁵⁹⁶ Dikötter, *supra* n. 587, at 30.

⁵⁹⁷ State Council of the National Government of the Republic of China, *The Civil Code of the Republic of China: Book I on General Principles*, adopted on 10 May 1929, promulgated on 23 May 1929 and came into effect on 10 October 1929. Other books of the civil law—*Book II on Obligations*; *Book III on Law of Things*; *Book IV on Family Law*; and *Book V on Succession*—were promulgated separately between 1929 and 1930.

⁵⁹⁸ State Council of the National Government of the Republic of China, *The Code of Civil Procedure of the Republic of China*, promulgated on 26 December 1930 and came into effect on 13 February 1931; revised code promulgated on 1 February 1935 and came into effect on 1 July 1935.

⁵⁹⁹ State Council of the National Government of the Republic of China, *The Criminal Code of the Republic of China*, promulgated on 10 March 1928 and came into effect on 1 September 1928; revised code promulgated on 1 January 1935 and came into effect on 1 July 1935.

⁶⁰⁰ State Council of the National Government of the Republic of China, *The Code of Criminal Procedure of the Republic of China*, promulgated on 28 July 1928 and came into effect on 1 September 1928; revised code promulgated on 1 January 1935 and came into effect on 1 July 1935.

⁶⁰¹ The principle of full legal equality was affirmed in all successive versions of the constitution of the Republican period, provisional or constitutional drafts, from 1912 onwards. However, gender discrimination was not explicitly referenced until 1946, when Article 7 of the Constitution of the Republic of China, adopted on 25 December 1946, specifically prohibited distinction on the basis of sex, in addition to religion, race, class or party affiliation.

in the actions and means used to carry out the exploitation or in the actual manner of exploitation itself.

6.1.1. Women and Full Legal Equality

Gender equality was more than a legislative priority for Republican China; it was central to the Republican projection of a changing and progressive China that was no longer bound to its imperial past. More than any other single issue, the subjugation of women came to embody outdated social customs in China that hindered the country's modernisation and ability to join the international community on an equal footing.⁶⁰² Gender equality was seen as such an important component of Republican China's vision of a new China that an editorial appearing in an influential Chinese legal journal in 1930 lauded domestic advancement in this area by referencing similar efforts in the West:

[While] it may be observed that in some Western countries women have won their political emancipation not without some struggle or a series of hunger strikes...[i]n this country, however, women have gained their full franchise almost by a stroke of the pen.⁶⁰³

The editorial then followed by asserting that the promptness with which Chinese women had achieved full legal equality should be seen as "ready amends" for the past denials of their political rights and important to the "moulding of a modern Cathay".⁶⁰⁴ The aim of gender equality resulted in significant changes in all aspects of the law, spanning across both civil and criminal realms; in this way, the drive for the full equality of women during Republican China was more than a superficial exercise. Fundamental shifts were particularly felt in the area of family law because Republican lawmakers had fully intended for its new civil code to be a major force in reshaping gender and family relations.⁶⁰⁵

One of the most prominent examples of this Republican socio-legal activism to affirm the principle of gender equality was the right to divorce, which had earlier sided

⁶⁰² For an overview of the diverse, domestic opinions on gender equality and China's modernisation during the Republican period, see *Women in Republican China: A Sourcebook* Pt. 4 (Hua R. Lan & Vanessa L. Fong eds., M.E. Sharpe 1999).

⁶⁰³ *Editorial: Recent Legislation in China*, 4 *China L. Rev.* 117, 117-118 (1930).

⁶⁰⁴ *Id.* at 118.

⁶⁰⁵ Kathryn Bernhardt, *Women and the Law: Divorce in the Republican Period*, in *Civil Law in Qing and Republican China* 187, 188 (Kathryn Bernhardt & Philip C. C. Huang eds., Stanford University Press 1994).

heavily with the interests of the husband during the Qing. Under the new civil law of the Republican government, however, both husband and wife had an equal right to initiate divorce proceedings.⁶⁰⁶ Beyond this, Republican law also sought to provide some measures of protection to women who were previously married, such as divorcees and widows. For example, a ruling issued by the judicial branch in the 1930s affirmed that women of foreign nationality who had legally acquired Chinese citizenship through marriage do not lose their Chinese citizenship after divorcing their husbands.⁶⁰⁷ The same principle of viewing women as their own persons also extended to the issue of inheritances. Article 1144 of the Civil Law, Book V on Succession, stated that each spouse had the right to inherit the property of the other, in established portions depending on whether other heirs to the property existed. Regardless of their wish to remarry or not, widows were entitled to the same portion of her deceased husband's properties as their children.⁶⁰⁸ Otherwise, she would be entitled to half of his properties, with the husband's parents or siblings receiving the other moiety.⁶⁰⁹ A Supreme Court decision further asserted that a dowry was deemed as "special paraphernalia" of the divorced woman and may be taken with her, without question and regardless of the reason for the divorce.⁶¹⁰ The same applied to female widowhood, such that the widow's dowry and any property that she might have inherited from her natal family remained with her and did not become agglomerated with the assets of her marital family.⁶¹¹

Similar to these changes in the civil domain were also shifts in the criminal code of Republican China, where this new rights-based conception of law and legal equality meant that offenses against the individual were seen intrinsically as violations of the right of the person to his or her liberty.⁶¹² Consequently, "thefts" as a category of offenses under Republican criminal law no longer included the abduction of individuals

⁶⁰⁶ *The Civil Code of the Republic of China: Book IV on Family Law*, art. 1052. For an English reference, see *The Civil Code of the Republic of China, Book IV, Family Law*, 5 China L. Rev. 170 (Ching-Lin Hsia trans. 1932).

⁶⁰⁷ *Legal Miscellanies: Nationality of Foreign Wives in China*, 8 China L. Rev. 348, 351 (1936).

⁶⁰⁸ *The Civil Code of the Republic of China: Book V on Succession*, art. 1144(1). For an English reference, see *The Civil Code of the Republic of China, Book V, Succession*, 5 China L. Rev. 220 (Ching-Lin Hsia trans. 1932).

⁶⁰⁹ *Id.* at art. 1144(2).

⁶¹⁰ *Selections from Judicial Decisions Rendered by the Supreme Court of China*, 7 China L. Rev. 90, ¶ 67(a), 100 (Cecilia S. L. Zung trans. 1934).

⁶¹¹ Philip C. C. Huang, *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared* 184 (Stanford University Press 2001).

⁶¹² *Id.* at 182.

into the domestic setting within the scope of the crime, as it was previously interpreted by the Qing Code.⁶¹³ Commenting on this severance with Qing legal ideology on the status of women in society, historian Philip Huang noted that this change fundamentally reflected the rights approach to legislation during Republican China:

Underlying these provisions was the notion that all social relations were at bottom matters of voluntary contracts between equal parties. That was how economic relations were seen, with contracts giving rise to rights and obligations. It was also how social relations were seen...[A]bduction was an offense because it violated the right of a person to liberty, not because it was a theft or robbery of a possession.⁶¹⁴

Hence, thefts, under Republican criminal law, only referred to the illegal appropriation of movable property, including electricity and gas.⁶¹⁵ The Republican legal principle of women as equal and autonomous individuals, each with her independent agency, not only nominally elevated the status of women, it also greatly altered how the crime of the abduction of women came to be addressed by the law. The following section examines the interpretation of the crime of the abduction of women during Republican China and its limitations of definition and implementation.

6.1.2. Limited Interpretation on the Abduction of Women

The promulgated 1938 Criminal Code of the Republican government criminalised, in Article 298, the trafficking of women by abduction for various purposes, such as: for marriage with the abductor or another man;⁶¹⁶ or for lucrative gain.⁶¹⁷ The same criminal provision also made it an offense where the abduction of the woman was carried out “with the intent that an indecent act may be committed against her or that carnal knowledge may be had of her.”⁶¹⁸ For cases of abduction for marriage, abductors could be sentenced to imprisonment of five years or less, but this could be extended to seven years, with a minimum sentence of at least a year, where the purpose

⁶¹³ *The Criminal Code of the Republic of China of 1935*, Chapter XXIX, arts. 320-324. Unless otherwise specified, English translations of the criminal code referenced in this chapter are from *The Revised Criminal Code of the Republic of China*, 9 China L. Rev. 167 (M. C. Liang trans. 1936).

⁶¹⁴ Huang, *supra* n. 611, at 181-182.

⁶¹⁵ *The Criminal Code of the Republic of China of 1935*, *supra* n. 613, at arts. 320-324.

⁶¹⁶ *Id.* at art. 298(1).

⁶¹⁷ *Id.* at art. 298(2).

⁶¹⁸ *Id.*

of abduction was for profit or where the intent was to commit an act of sexual violence against the abductee.⁶¹⁹ Moreover, the court could also impose a heavy financial sanction on individuals found guilty of the abducting of women for purposes other than marriages,⁶²⁰ or of receiving, concealing or causing the said abducted woman to remain hidden.⁶²¹

Central to these legal changes was the idea that an adult woman was an individual of her own agency, who not only had the same rights as her husband to initiate divorces and inherit property, but also pursue her choice of marriage or employment. This was particularly illustrated by Article 298, which only criminalised the forcing of women, by physical abductions, into marriage or other exploitative situations. Otherwise, the adult women were assumed to have acted under full responsibility, even if their choice of employment was prostitution. In this way, the criminal law of Republican China notably departed from the ideology of the preceding government. Prostitution, under the Republican era, was not regulated as illicit sexual activities and marked by tones of impropriety. Moreover, because the government's view on sex work was not a determinant of public morality, this allowed Republican China to experiment with a wide array of policies on sex work. These efforts, such as abolition, government monopoly, taxation and regulation alongside a system of health checks, were so varied that one scholar has described China of this period as “a kind of laboratory for understanding the conditions under which different approaches [towards prostitution] prevailed.”⁶²²

The laws of Republican China undoubtedly made significant strides towards eliminating discrimination on the basis of gender by giving women greater legal status than they had been previously allowed. While the laws gave women greater autonomy, it also had the unintended consequence of creating a legal lacuna, wherein Article 298 of the Criminal Code of 1935 did not recognise any kind of selling of adult women that did not involve the use of force, as in cases of abductions. The legal reasoning underpinning this limited interpretation on the abduction of women for marriage or for other for-profit purposes was explained as:

⁶¹⁹ *Id.* at arts. 298(1) and 298(2).

⁶²⁰ *Id.* at art. 298(2).

⁶²¹ *Id.* at art. 300.

⁶²² Elizabeth J. Remick, *Police-Run Brothels in Republican Kunming*, 33 *Modern China* 423, 425 (2007).

Adult women were presumed to be active agents who could not be made to do what they did not want to do. They had to have been forced against their will; otherwise, they were assumed to be acting on their own volition. There was no intermediate gray area of seduction with consent. If the men involved had not resorted to force, they were not in any way criminally liable.⁶²³

Therefore, with regards to the criminalisation of the trafficking of women for marriage or other gainful purposes during Republican China, the initial act of recruitment by the more covert means, such as threats, coercion, fraud, deception—or even the abuse of power or of a position of vulnerability as reflected by the contemporary definition of human trafficking in Article 3(a) of the Trafficking Protocol of 2000—were excluded from the scope of criminalisation. This meant that Republican criminal law did not recognise the possibility of adult women having being led away and sold without the use of overwhelming force because the law considered them as fully independent, cognisant agents. Instead, trafficking by the more covert and fraudulent means—translated into English in one version as “seduces away”⁶²⁴—could only be established if the victim was under the age of majority, then defined as 20 years.⁶²⁵

According to Article 240 of the 1935 Criminal Code, the leading away by covert means of a male or female person under twenty years of age was punishable with penal servitude of three years or less, while the same involving a minor under 16 years of age would be treated *de jure*, under Article 241, as a case of abduction. In both of these scenarios, if the victims were transported abroad, the traffickers would be liable to penal servitude between seven years to life,⁶²⁶ potentially a much heavier sentence than the minimum five-year sentence for individuals convicted for transporting abroad abducted victims of full age under Article 299. Republican criminal law also offered more protections for victims not yet of majority age by penalising those who trafficked male minors, as both Articles 240 and 241 remained gender inclusive. However, trafficking enabled by covert means, even in cases of victims who were minors, were treated by Republican criminal law as less of an offense than the physical abduction of adult

⁶²³ Huang, *supra* n. 611, at 187-188.

⁶²⁴ *The Criminal Code of the Republic of China: Embodying the Law Governing the Application of the Criminal Code and the Penal Code of Army, Navy and Air Forces of the Republic of China* 90-91 (Chao-Yuen C. Chang trans., Kelly & Walsh, Limited 1935).

⁶²⁵ *The Civil Code of the Republic of China: Book I on General Principles*, art. 12. For an English reference, see *The Civil Code of the Republic of China: Book I General Obligations, Book II Obligations, Book III Rights over Things* (Ching-Lin Hsia, James L. E. Chow & Yukon Chang trans., Kelly & Walsh, Limited 1930).

⁶²⁶ *The Criminal Code of the Republic of China of 1935*, *supra* n. 613, at Chapter XVII, at art. 242.

female victims. Whereas the penalty for the physical abduction of an adult women “for lucrative purposes, or with intent that an indecent act may be committed against her or that carnal knowledge may be had of her” was a minimum sentence of one to seven years,⁶²⁷ the criminal sentence for the same offense involving the seduction of a minor was six months to a maximum of five years.⁶²⁸ The result of this interpretation on the criminal liability associated with the trafficking of female victims was that, effectively, the law offered a two-tiered protection, based on the victims’ age and method of recruitment. For victims of adult age, only women fell within the law’s protective scope and only those who were physically abducted by traffickers. In comparison, minors of both sexes came under the scope of Articles 240 and 241. Nevertheless, despite that both overt (abduction) and covert (seduction) means were recognised by the law as possible means of recruitment for minor victims, the criminal liability of traffickers employing fraudulent and deceptive means to procure victims of minor age remained comparatively lower than that for the physical abduction of adult women.

The implementation of these criminal provisions on the trafficking of women and children was also further complicated by judicial interpretations on the age of majority, which added to the confusion surrounding the enforcement of Articles 240, 241, 298 and 300. Even though Article 12 of the Civil Code defined the age of majority at 20 years, the confusion stemmed mainly from the succeeding article, which carried a caveat for married minors. It stated that minors who were married would thereby acquire full disposing capacity;⁶²⁹ hence, they would be treated by the law as having reached the age of majority. This was somewhat problematic because a considerable gap existed between the legal age of marriage for a female minor and the age of majority; female minors could be legally married at the age of 16—male minors at 18—with the permission of their legal guardians.⁶³⁰

The result was that because a wife was considered to be of legal age, regardless of whether or not she had reached the age of 20, the selling of a wife younger than 20 was treated by the law as the selling of an adult woman, where the broader scope of criminal liability to include deceptive means in addition to physical abduction would not apply. For these cases, only those involving the physical abductions for marriage or

⁶²⁷ *Id.* at Chapter XXIX, art. 298.

⁶²⁸ *Id.* at Chapter XVII, art. 240.

⁶²⁹ *The Civil Code of the Republic of China: Book I on General Principles*, *supra* n. 625, at art. 13.

⁶³⁰ *The Civil Code of the Republic of China: Book IV on Family Law*, *supra* n. 606, art. 980. Agreement for such a marriage between minors could be made and recognised to have legal effect when the male and female minors had reached 17 and 15 years of age, respectively; *id.* at art. 973.

other exploitative purposes would be considered as within the reach of the criminal law under Articles 298 and 300. The judicial branch of the Republican national government, when asked by a provincial higher court in 1931 on whether the seduction of a married woman under 20 still constituted a criminal act, affirmed that the case did not present a valid basis for criminal prosecution because a married woman, regardless her physical age, was held to be of legal age.⁶³¹ The same judicial interpretation, however, did not apply to concubines. Because polygamy was no longer accepted under Republican China's new conception of family and social order,⁶³² a concubine under 20 years of age was still treated as a minor, despite the prevailing social custom of viewing her as a concurrent spouse. Therefore, the trafficking using deceptive means of a concubine under the age of 20 for marriage or other exploitative purposes would continue to be treated as a criminal act because her marriage was held to have no legal force.⁶³³

Effectively, the discrepancy in how Republican law treated the trafficking of female married minors based on their marriage status epitomised the wide gap between the idealistic legal intent and the practical reality. Strong customs—such as concubinage—continued to dominate and limit the independent agency of Chinese women as envisioned by early Republican lawmakers. Where concubines were a concrete example of the effects of one such legal lacuna, the special vulnerabilities of female minors who fell outside legally-sanctioned marriage arrangements came to the fore with the practice of childhood betrothal known as *tungyanghsi*. *Tungyanghsi* was where young girls from poor families were taken in by affluent families, with money exchanged often through an intermediary, to work in the new household until they reached puberty and could marry the sons of the foster families.⁶³⁴ The practice of *tungyanghsi* was very similar to another custom called *mui tsai* that received considerable attention by Western

⁶³¹ Guo Wei [郭衛], *Sifayuan Jieshili Quanwen* [Full Texts of the Judicial Yuan's Explanations of Case Examples; 司法院解釋例全文] vol. 1, 446 (Shanghai Faxue Bianyishe: n.d.) (cited in Huang, *supra* n. 611, at 187).

⁶³² *The Civil Code of the Republic of China: Book IV on Family Law*, *supra* n. 606, art. 985. It has been argued that concubinage was not the same as polygamy because concubinage was a practice of cohabitation without a valid marriage. However, such legal distinctions were not seen in practice. For example, while Vermier Chiu wrote that a concubine was only “married in the sense of being taken into the family by the paterfamilias and not in the sense of a legal marriage”, he also described a concubine as “a married woman...[who was] liable to suffer the same miseries and perplexities that [were] likely to befall the wife and [was] just vulnerable as, if not more vulnerable than, the wife”; see Vermier Y. Chiu, *Marriage Laws and Customs of China* 21, 32-33 (The Chinese University of Hong Kong 1966).

⁶³³ This too was affirmed in a reply from the judicial branch to a provincial court in 1932, which had sought clarification for a case involving the seduction of a concubine of minor age; in Guo Wei [郭衛], *supra* n. 631, at 517.

⁶³⁴ *Tungyanghsi* was also known by its Cantonese name of *sai po tsai*. James L. Watson, *Transactions in People: The Chinese Market in Slaves, Servants, and Heirs*, in *Asian and African Systems of Slavery* 223, 244 (James L. Watson ed., Basil Blackwell 1980).

missionaries and advocates as a form of child slavery, owing to the abuse that some *mui tsai* suffered at the hands of their families.⁶³⁵

While one may expect that because a *mui tsai* was never taken in from the outset as a future daughter-in-law, their position in the new household would be more precarious than that of a *tungyanghsi*. In reality, such distinction of vulnerabilities was difficult to make. Both suffered a strong stigma of having been sold by their natal families and were vulnerable to abuses in the domestic setting. As once described: “[T]he position of a little [*tungyanghsi*] daughter-in-law [was] no more secure than that of a *mui jai* [*tsai*]. If for any reason the marriage [did] not materialise the girl [could] be resold or exchanged in the nearest market town.”⁶³⁶ Therefore, these two phenomena of *tungyanghsi* and *mui tsai* must not be seen as mutually exclusive but considered together as a fluid spectrum of vulnerabilities that could change as the situation of the pledged girl evolved. Nonetheless, more than the issue of *mui tsai* because it explicitly involved a betrothal from the initial sell of the girl, *tungyanghsi* came to underscore the tension that arose from the new legal order of Republican China and its efforts to outlaw “almost by a stroke of the pen” what the government then saw as socially detrimental practices.⁶³⁷ The practical consequences of this reform approach, in light of the persistence of these customs, meant that *tungyanghsi* were seen as legal non-persons under Republican law.

6.1.3. *Tungyanghsi* as Legal Non-Persons

Because women were seen as equal and independent agents under Republican law, a valid marriage had to be based on the free will of the man and woman to marry. In cases where either party was of minor age, permission first had to be obtained from his or her legal guardians.⁶³⁸ However, permission from the guardians did not imply a legal recognition of their right to arrange a marriage on behalf of their dependents, and this juridical interpretation was consistently held by the Supreme Court of Republican China in appellate cases challenging the validity of such marriage contracts. In 1933, a Supreme Court decision held that, in order for a marriage contract between minors to

⁶³⁵ Maria Jaschok & Suzanne Miers, *Women in the Chinese Patriarchal System: Submission, Servitude, Escape and Collusion*, in *Women and Chinese Patriarchy: Submission, Servitude and Escape* 1, 11 (Maria Jaschok & Suzanne Miers eds., Hong Kong University Press 1994).

⁶³⁶ Watson, *supra* n. 634, at 244.

⁶³⁷ Editorial: *Recent Legislation in China*, *supra* n. 603, at 118.

⁶³⁸ *The Civil Code of the Republic of China: Book IV on Family Law*, *supra* n. 606, art. 974.

have legal effect, it must have been arranged by the minors themselves with the subsequent consent of their guardians.⁶³⁹ The Court then proceeded to specify, a year later, that the expressed right given to the guardians for such marriage arrangements, where one or both parties were minors, was only in the right to give or refuse consent.⁶⁴⁰ Within the broader context of legal reforms during the Republican era, these decisions were consistent with the overall aim of the government to affirm individuals' freedom of marriage and sought to provide safeguards against undue interferences in this aspect of a person's private sphere. Subject to some narrowly prescribed limitations in marriage arrangements involving minors, a woman had power to enter into a marriage contract as her own person. This new conceptualisation of gender equality, as seen by a woman's freedom to arrange her marriage, ran counter to the customary practice of *tungyanghsi*, where a family could foster a young girl, often from an impoverished background, as a future daughter-in-law. It was then not unexpected that this practice of child betrothals was simply not recognised as giving rise to valid marriage contracts under Republican law.⁶⁴¹

Consistent rulings from the Supreme Court of Republican China affirmed the illegality of *tungyanghsi* practices, despite it being a popular custom in localities with a significant presence of extremely poor families that struggled to provide for their children. In 1931, the Court held that all *tungyanghsi* contracts, on the basis that they were arranged by the girls' natural and foster parents and not by the marriage parties themselves, contravened Article 972 of the Civil Code.⁶⁴² As such, these marriage agreements were void and had no legal effect. This ruling was expanded a year later in another appellate case, wherein the Supreme Court held that Article 972 of the Civil Code was to be retroactively applied to all marriage contracts arranged by the parents on their children's behalf prior to the promulgation of the Civil Code between 1929 and 1930.⁶⁴³ The same interpretation on retroactive application was given to Article 973 on the validity of marriage contracts arranged by a male under the age of 17 or a female under 15.⁶⁴⁴ Nevertheless, despite such juridical consistency on the illegality of

⁶³⁹ Chiu, *supra* n. 632, at 112.

⁶⁴⁰ *Id.*

⁶⁴¹ The use of the term 'child betrothals', or even 'child brides', for *tungyanghsi* is disputed. Vermier Chiu, for instance, argued that "while to some extent it partakes of the characteristics [of] both, it differs much in substance and purpose from both [because the reason for *tungyanghsi* was]...primarily economic". A *tungyanghsi* was neither a bride nor a betrothed because there was no betrothal or a wedding to mark her joining the new household; in *id.* at 41-42.

⁶⁴² Supreme Court Case Appeal No. 2307 of 1931; in *id.* at 111.

⁶⁴³ Supreme Court Case Appeal No. 1893 of 1932; in *id.* at 110.

⁶⁴⁴ Supreme Court Case Appeal No. 3037 of 1932; in *id.* at 111.

tungyanghsi marriage arrangements, it has been argued that Republican law did little to actually improve the situation faced by these fostered and betrothed girls. Philip Huang described the legal lacuna faced by the *tungyanghsi* during the Republican era and how it affected their actual welfare:

[T]he new rights afforded [them] by the Guomindang [Republican Nationalist] laws were quite limited...[because] the new laws denied them what little legitimacy they could claim under Qing law as betrothed brides-to-be. Now considered neither betrothed nor adopted, they were in effect of the same legal status as a concubine, which is to say, they had no standing at all under the law. The only protection they could claim was as a member of the household. But in that they fared no better than concubines, coming in priority after brothers and sisters, and entitled to support only if they could not make a living.⁶⁴⁵

The idealistic intent of gender equality and women's full franchise hid a wide gap between legal intent and practical reality. Republican family law simply did not tolerate the practice of *tungyanghsi*, even if such an approach overlooked the harsh reality faced by these young girls, who often came from extremely poor families that simply could not raise them to lead the type of independent and fulfilled lives envisaged by Republican lawmakers as equal members of society. Similarly under the Qing, such marriage practices were also not recognised by the law, but Qing courts came to tolerate it in the name of compassion for the poor by treating it as tantamount to a betrothal, which gave the fostered girl some minimum protection from arbitrary expulsions by her adopted family.⁶⁴⁶ In this way, Republican legislators departed from the approach of their Qing predecessors, but it remains questionable how effective this strict prohibition actually was in terms of curtailing the practice of *tungyanghsi*. At the minimum, Republican law established the normative framework that marriages must be directly arranged by the two consenting adults or minors, subject in the latter case only to the consent of their adult guardians, and that any financial gain, in the forms of money and presents exchanged between the parents on behalf of their children, could not be regarded as their children's consent to the intended marriage.⁶⁴⁷

Despite this normative legal framework, the social custom of *tungyanghsi* persisted. In anthropologist Fei Hsiao-Tung's seminal work on Chinese rural life in the 1930s, he reported finding, on average, one *tungyanghsi* for every 2.7 households in the

⁶⁴⁵ Huang, *supra* n. 611, at 194.

⁶⁴⁶ *Id.* at 184.

⁶⁴⁷ Supreme Court Case Appeals No. 4051 of 1934 and No. 83 of 1935; in Chiu, *supra* n. 632, at 110.

village of his field study and that there had been a general increase in the number of *tungyanghsi* in the preceding decade.⁶⁴⁸ Proving that social customs were difficult to abolish in actual practice, cases of *tungyanghsi* continued to be reported as late as the 1950s.⁶⁴⁹ In fact, issues on the minimum age of marriage and labour exploitation raised by the practice of child betrothals and the related custom of *mui tsai* were greatly discussed during the negotiations for the drafting of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.⁶⁵⁰ These discussions were reflected not only in the *travaux préparatoires* but also in the numerous field observations sent to the preparatory *Ad Hoc* Committee on Slavery of 1951 to assist panel experts in their work. One such communication from missionaries in present-day Beijing attested to this continued practice of “[e]xploitation of girls, usually secured by purchase, to be reared in homes for betrothal to sons” as late as June 1950, despite that such a custom had become “more and more under social disfavor and under legal ban” in the preceding Republican years.⁶⁵¹ Furthermore, this same observation shared the optimism of the time in the founding of the People’s Government in 1949, for it represented a “time of strong agitation for the freeing of the down-trodden classes from oppression.”⁶⁵² In this way, the political rhetoric of mid-twentieth century China was not unlike that expressed during the earlier transition from Qing to Republican governance, for the Republican government also had inveighed against what it saw as backwards social customs and used the continued existence of such practices as a justification for a change from imperial rule.

6.2. Boys for Sale

It is important to state that the human trafficking situation during the Republican period was not confined to the female gender. As during the Qing dynasty, young boys

⁶⁴⁸ Hsiao-Tung Fei, *Peasant Life in China: A Field Study of Country Life in the Yangtze Valley* 53-54 (E. P. Dutton & Company 1939). Due to local dialect variations, *tungyanghsi* was referred to as *siaosiv* in Fei’s study. Fei later became widely known in the Western literature as Fei Xiaotong.

⁶⁴⁹ James Hayes, *San Po Tsai (Little Daughters-in-Law) and Child Betrothals in the New Territories of Hong Kong from the 1890s to the 1960s*, in *Women and Chinese Patriarchy: Submission, Servitude and Escape* 45, 48-49 (Maria Jaschok & Suzanne Miers eds., Hong Kong University Press 1994).

⁶⁵⁰ Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* 295, 304-322, 326-349 (Martinus Nijhoff Publishers 2008).

⁶⁵¹ Committee on Slavery of the United Nations Economic and Social Council, *Communication from Rev. Elmer W. Galt of North China Kung Li Hui, Peiping, China on Exploitation of Adopted Children and Prostitution Involving Ownership*, UN Doc. SOA 317/10/02(7) (1950).

⁶⁵² *Id.*

during Republican China were also commonly sold to other families as heirs and, sometimes, as domestic servants. In one of the most thorough examinations on the phenomenon of people selling in China, ethnographer James Watson commented that China, until 1949, had “one of the largest and most comprehensive markets for the exchange of human beings in the world.”⁶⁵³ In particular, he wrote:

A unique feature of the Chinese market [in slaves] was its concentration on children, especially those under the age of ten...For ordinary peasants the market was directed exclusively at children—male and female—who were sold for cash and were rarely, if ever, returned to their birth parents...Male children thus sold had two main uses: first as designated heirs of the buyer, and second as domestic slaves for the owner’s household. A purchased heir had most of the rights and privileges of a normal son (subject to the adopting father’s pleasure); a slave had minimal rights—he was, in fact, a chattel whose descendants remained the hereditary property of the owner’s family. Girls, on the other hand, could be used in several ways in the buyer’s household and were not categorised, or ‘typed’, with the same rigidity as their male counterparts.⁶⁵⁴

In many ways, Watson’s description of the Chinese trafficking institution echoed the many accounts of child selling by destitute parents that took place during the Qing dynasty, and this simply affirmed that deep-rooted social customs were difficult to eliminate despite the founding of the Republican government and its new legal order in 1912. What was most notable about Watson’s observation, however, was that he equally emphasised the selling of children of both sexes and did not predominantly focus on the female gender, as was often the case for studies and reports during the Republican era on the issue of trafficking and exploitation. For instance, the Chinese delegation to the League of Nations’ Bandoeng Conference on the Traffic in Women and Children in February 1937 focused almost exclusively on the various exploitations of women and the female child and raised very little about the selling of young boys, either for adoption or domestic servitude.⁶⁵⁵

Many possible reasons exist for this almost exclusive focus on female victims. First, because the remit for the League of Nations examination on the issue of trafficking was limited to that of women and children, it was not unexpected that the

⁶⁵³ Watson, *supra* n. 634, at 223.

⁶⁵⁴ *Id.* at 223-224.

⁶⁵⁵ *Zhongguo Daibiaotuan Chuxi Guolian Yuandong Jinfanfuru Huiyijingguo Baogaoshu* [Meeting Records of the Chinese Delegation at the League of Nations’ Conference on the Traffic in Women and Children in the Far East; 中国代表团出席国联远东禁贩妇孺会议经过报告书], 3 Republican Archives [民国档案] 15 (2007) [hereinafter *Zhongguo Daibiaotuan*].

exploitation of the girl-child would naturally warrant special attention, given that there were many similarities in the exploitation she faced as a minor and later as an adult. This was particularly true in cases of the sexual exploitation of female minors, where being under the age of majority did not protect them from being sold or pawned into brothels as discussed in Chapter Four. In fact, the prevalence of underaged Chinese girls in brothels was a serious problem during Republican China,⁶⁵⁶ despite the prohibition on the “induce[ment of] any male or female person under sixteen years of age to commit any indecent act against, or to have illicit intercourse with, another person” under Article 233 of the Criminal Code of 1935. The criminalisation included Article 227, which prescribed heavier penalties for those who acquired carnal knowledge of a female minor below 16 and above 14 years of age; and Article 221 on the criminal charge of rape for cases of sexual offences against a girl under 14 years. In spite of these criminal provisions, cases of very young Chinese girls under 16, sold or pawned to work in brothels during the Republican years, were not uncommon.

In comparison, the fate of a male child sold as an adopted heir was generally not seen as an undesirable outcome for the child and both his natal and adopted families. Given the special status of the male child in the traditional Chinese family structure, “boys were invariably the last to be sold,” and his birth family would not have likely considered such a sale unless out of extreme destitution.⁶⁵⁷ The transaction, thus, lessened the burden on an already impoverished family, while giving another family a much desired heir. Furthermore, the new legal framework of Republican China protected the rights of adopted heirs within the family. This was the explicit aim of Article 1077 of the Civil Code, which affirmed that, unless it was otherwise provided for by law, the relation between an adopted child and his adoptive parents was the same as that between a legitimate child and his parents. The same principle was seen in the laws governing succession and inheritance. Article 1142 stated that, while the inheritance portion might differ for an adopted child in cases involving other natural descendants, the order of succession for an adopted child was the same as that for a legitimate child.⁶⁵⁸

⁶⁵⁶ Half of the 500 prostitutes surveyed in Shanghai in 1948 had first begun work between the ages of 10 and 19; Yu Wei and Amos Wong, *A Study of 500 Prostitutes in Shanghai*, 2 *Intl. J. Sexology* 234, 236 (1949).

⁶⁵⁷ Watson, *supra* n. 634, at 235.

⁶⁵⁸ While assuring the lineal relationship between that of an adopted child and his or her adopted parents, Article 1142 limited his or her inheritance portion to half as that for a direct descendant in cases where the adopted parents had other natural heirs.

Interestingly, even though Articles 1077 and 1142 of the Civil Code did not exclude on the basis of gender the rights extended to the adoptees, the reality was that the *tungyanghsi* girls were not considered as part of the family in the same sense as the adopted boys. The role of a purchased *tungyanghsi* girl was very different from that of an heir, and her position in the new setting was precarious because it fell outside the usual lineal relationship. For example, a likely progression for a *tungyanghsi* as she transitioned to adulthood was one where she could “be purchased as a daughter in infancy, exploited like a slave during adolescence, and married to one of her buyer’s own sons in adulthood.”⁶⁵⁹ In this regard, even though children of both genders could have entered their new family situations through purchase, the reality for an adopted boy was likely much more acceptable than for a *tungyanghsi*. Moreover, as discussed in the earlier section, a *tungyanghsi* girl had very little protection under Republican law because her betrothal into the adopted family was not a valid marriage arrangement as recognised by law. Therefore, the marginalised status of Chinese girls sold into other families naturally raised more child protection concerns and advocacy attention than similar transactions in the selling and purchasing of Chinese boys.

At the same time, the full picture that emerges of the Chinese market for the exchange of children is not straightforward and defies a simple characterisation based on gender. First, it is important to note that the practice of selling and purchasing children was not unique to the Republican era, since Qing law also prohibited such practices under Article 275 of its code. However, a few studies during the mid-twentieth century have pointed to a particular form of male slavery that persisted in China until the mid-twentieth century. Under this practice, wealthy families would purchase young boys to raise not as heirs but specifically as household servants. In fact, what was most unusual about this form of Chinese male slavery was that their work was solely confined to the domestic setting—where most chores also could have been filled by female servants—and did not extend into agriculture or manufacturing, where more rigid gender roles would have applied to their physical labour.⁶⁶⁰ Because of this, these male servants actually constituted a net drain on the local economy as a result of their non-productive roles outside the domestic realm.⁶⁶¹ Hence, the explanation for this form of Chinese male slavery did not conform to traditional ideas of slavery as an economic system, a slave-based mode of production. Rather, it was what these acquisitions of

⁶⁵⁹ Watson, *supra* n. 634, at 224.

⁶⁶⁰ James L. Watson, *Chattel Slavery in Chinese Peasant Society: A Comparative Analysis*, in *Village Life in Hong Kong: Politics, Gender, and Ritual in the New Territories* 125, 140-141 (James L. Watson & Rubie S. Watson eds., The Chinese University Press 2004).

⁶⁶¹ *Id.* at 125.

male domestic servants ultimately symbolised—the extraordinary wealth of families who could afford such a purchase, since a male child for sale was invariably in shorter supply and about four or five times more expensive than a girl.⁶⁶² In this way, the purpose of these male servants was in the social prestige that they came to ostentatiously represent: “a luxury, a symbol of wealth obtainable only by the very wealthy.”⁶⁶³

This class of male servants and, indeed, the practice of buying a young boy from a poor family to raise as a slave servant was referred to as *hsi-min* in Hugh Baker’s *A Chinese Lineage Village: Sheung Shui* published in 1968. Because it was then not possible for researchers to access China in the decades after the founding of the Communist government in 1949, Baker’s study was geographically limited to the area of Hong Kong that bordered China. Nonetheless, it was believed that this practice of male enslavement had a wider geographical reach and dated back to the seventeenth and eighteenth centuries amongst elite lineages in southeast China.⁶⁶⁴ In one of the most detailed accounts of life in nineteenth-century China, American missionary Justus Doolittle described an unusual practice of male slavery whereby the “male children and grandchildren [of the purchased male slave] ‘belong,’ so to speak, to his owner, and must do according to his bidding” in south China.⁶⁶⁵ It is not clear how long this practice lasted, and evidence suggests that this might have significantly varied by locality. Some believed that the practice ended with the fall of the Qing Dynasty in 1912,⁶⁶⁶ but there were indications that the practice continued well into the Republican era in other areas of southeastern China. For example, according to the studies of sociologist Woon Yuen-fong, most of the *hsi-min* households in one Guangzhou village remained after the 1930s and did not try to escape their situation, since they benefitted from the increased prosperity of the village brought on by the wealth of the returning emigrants.⁶⁶⁷ On this, Woon observed that perhaps “the economic benefit obtained by remaining ... outweighed their feelings of social inferiority.”⁶⁶⁸

⁶⁶² Watson, *supra* n. 634, at 235.

⁶⁶³ Hugh D. R. Baker, *A Chinese Lineage Village: Sheung Shui* 157 (Frank Cass & Co. Ltd 1968).

⁶⁶⁴ Watson, *supra* n. 660, at 126.

⁶⁶⁵ Justus Doolittle, *Social Life of the Chinese: With Some Account of Their Religious, Governmental, Educational, and Business Customs and Opinions* vol. II, 211 (Ch’eng-wen Publishing Company 1966) (originally published 1865).

⁶⁶⁶ Watson, *supra* n. 660, at 133.

⁶⁶⁷ Yuen-fong Woon, *Social Organization in South China, 1911-1949: The Case of the Kuan Lineage in K’ai-p’ing County* 84 (Center for Chinese Studies of the University of Michigan 1984).

⁶⁶⁸ *Id.*

To understand the extent of the discrimination and exclusion faced by the *hsi-min*, it is important to underscore that *hsi-min*, for all practical purposes, were considered as property of the household. Upon the death of the master patriarch, his *hsi-min*, like other forms of assets, would be divided and transferred amongst his heirs.⁶⁶⁹ Moreover, the status of *hsi-min* was inheritable through patriline. Male descendants of a *hsi-min* were effectively “servants in perpetuity,”⁶⁷⁰ a permanent underclass whose social separation would be further enforced through marriage and accommodation. For example, there was no intermarriage between a *hsi-min* and daughter from an elite family. *Hsi-min* were usually married to disabled women, female servants or daughters of other *hsi-min*, thus perpetuating their inferior status and that of their descendants.⁶⁷¹ Their lower social status was also reinforced by their physical separation from other villagers. *Hsi-min* accommodation was restricted to smaller, inferior houses near the rear of the village that were described by local residents in the same context as storage sheds or animal stalls.⁶⁷² As might be expected, the position of *hsi-min* was precarious, since they could be exploited not only by their master household but by any one of their master’s lineage, who could order them to carry out the most degrading and labourious work without any expectation of financial remuneration.⁶⁷³ One study of an elite lineage in southern China observed that the *hsi-min* there were not owned by individual families but shared amongst all families belonging to the common ancestral hall.⁶⁷⁴ Their servile status was further reflected in how they were addressed by members of the elite lineage: their name plus the suffix *nu*, meaning “slave.”⁶⁷⁵

The female dependents of *hsi-min*, his wife and unmarried daughters, were vulnerable to unwanted sexual advances by male members of the elite lineage. Indicative of the sense of entitlement towards the women of *hsi-min* families by male members of the elite lineage, a group of elderly men from such an elite lineage village in Hong Kong was observed to have made the following comment on female members

⁶⁶⁹ Watson, *supra* n. 660, at 129-130.

⁶⁷⁰ Baker, *supra* n. 663, at 156.

⁶⁷¹ James L. Watson, *Chattel Slavery in Chinese Peasant Society: A Comparative Analysis*, 15 *Ethnology* 361, 365 (1976).

⁶⁷² *Id.* and Jack M. Potter, *Capitalism and the Chinese Peasant: Social and Economic Change in a Hong Kong Village* 20 (University of California Press 1968). Potter used the term ‘ha fu’ (or ‘hsia fu’) to denote this group of Chinese male slave.

⁶⁷³ Baker, *supra* n. 663, at 156.

⁶⁷⁴ Woon, *supra* n. 667, at 25.

⁶⁷⁵ *Id.*

of a *hsi-min* household: “If you wanted her, you merely had to tell the woman to leave her door open at night.”⁶⁷⁶ Further, the power dynamic between the master household, the elite lineage and the *hsi-min* also heightened the vulnerabilities of *hsi-min*’s female dependents to sexual exploitation. This was because men of the elite lineage could justify their sexual exploitation of the *hsi-min* women on the basis that it granted some measure of honour to the women—they could “gain face by having the master lineage men as their sleeping partners.”⁶⁷⁷

It is unclear why awareness of this Chinese system of male slavery was not more extensive. Much less has been written on this male aspect of domestic servitude than the comparative phenomenon of the female *tungyanghsi*, even though their respective household responsibilities were not drastically different. Lack of knowledge of this practice of male hereditary slavery could have stemmed from several reasons. First, similar to the practice of *tungyanghsi* for girls from poor families, the phenomenon of *hsi-min* was known by different names depending on the local dialect and the system used for their romanisation into English. Whereas *hsi-min* represented one categorisation, several other variations were used in the academic literature or within the writings of the same author. Watson, for example, had used three different versions in his writings on Chinese male hereditary slavery: *hsi min* in Mandarin in the 1970s;⁶⁷⁸ the Cantonese *sai man* in the 1980s;⁶⁷⁹ and *xi min* based on another system of Mandarin phonetic romanisation later in his career.⁶⁸⁰ Adding to the confusion is a host of other terms, such as: *ha fu* (or *hsia fu*);⁶⁸¹ *sia-wu*;⁶⁸² or *hsi-tzu*,⁶⁸³ which most likely all described the same phenomenon. Furthermore, the translation of these Chinese terms into English was not uniform. Owing to the lack of full knowledge on the exploitation of these Chinese male slaves, studies in English have referred to them as “servants, serfs

⁶⁷⁶ Baker, *supra* n. 663, at 157 n. 8.

⁶⁷⁷ *Id.*

⁶⁷⁸ Watson, *supra* n. 671, at 363-373.

⁶⁷⁹ Watson, *supra* n. 634, at 236-240, 245-250. *Sai man* also could be romanised as *sai mahn*, which Watson later crossed referenced with *xi min*.

⁶⁸⁰ Watson, *supra* n. 660, at 128-141.

⁶⁸¹ See Potter, *supra* n. 672, at 20-22. Potter noted that *ha fu* also could be known as *hsia fu* in Mandarin.

⁶⁸² Chen Han-seng, *Landlord and Peasant in China: A Study of the Agrarian Crisis in South China* 57-58 (Hyperion Press, Inc. 1973) (originally published 1936).

⁶⁸³ Woon, *supra* n. 667, at 25 n. 15.

or chattel slaves;”⁶⁸⁴ “servile families” or “servile households;”⁶⁸⁵ or “hereditary tenants.”⁶⁸⁶ As can be expected, such different terminologies result in a layer of confusion over labels and definitions and render accurate, comparative studies very difficult.

Another reason for the underemphasis on male aspects of domestic slavery can be that it was simply not as widespread as the selling of girls and women and was localised to southern China. One estimate of this form of male domestic servitude, generous by the researcher’s own reckoning, constituted no more than two percent of the total population in the Hong Kong region at the turn of the century, and “there [was] little reason to think that other parts of South China were substantially different.”⁶⁸⁷ While the lesser prevalence of *hsi-min*, as compared to the exploitation of Chinese women, must have contributed to the dearth of information on the sale of boys and their exploitation in the domestic setting, it is unlikely that this was the only factor at play: there seemed to have been a complete lack of awareness of domestic male slavery in southern China that cannot be wholly explained by their low prevalence. For instance, there are observations from anthropological studies that give support to the explanation that awareness of this particular form of male servitude was hampered by the strong stigma attached to these hereditary enslaved men and the deep shame experienced by the families forced by circumstances into selling their sons. One anthropological field study reported meeting several elderly Chinese women in rural Hong Kong, not from elite lineages, “who admitted, in a flood of tears, that their husbands had sold one or more of their sons during bad harvest years.”⁶⁸⁸ Given this context, it must then be asked whether the widely-held belief of the time that male children were not sold into servitude was itself subjected to some bias on domestic gender roles or insufficient understanding of the evolving trafficking phenomenon.

The question remains whether this bias in domestic gender roles continues to colour our interpretation of practices of human exploitation during early twentieth

⁶⁸⁴ A recurring theme in Watson’s writing on Chinese male slavery over the many decades was the question of its accurate labelling in English. See Watson, *supra* n. 671, at 368-369; Watson, *supra* n. 634, at 239-240; and Watson, *supra* n. 660, at 134-135.

⁶⁸⁵ Baker, *supra* n. 663, at 155; and Woon, *supra* n. 667, at 25.

⁶⁸⁶ Chen Han-seng, *supra* n. 682, at 57-58. Chen described these ‘servile families’ as a group of hereditary tenants who were “subjected to a sort of extreme exploitation.” Watson, however, disagreed with this labelling and argued that Chen had conflated hereditary tenants with the *hsi-min*; at Watson, *supra* n. 671, at 369-370.

⁶⁸⁷ Watson, *supra* n. 634, at 250.

⁶⁸⁸ *Id.* at 228.

century China. As a point of contrast, while there was no shortage of slavery references to the plight experienced by young Chinese girls during the upheavals of early twentieth-century China,⁶⁸⁹ the labelling of male hereditary servants as slaves had seen a more defensive tone. In a study published in 1980 on exclusions experienced by these purchased male servants and their descendants, the author justified his categorisation of *hsi-min* as slaves:

I would argue that the *sai man* [*hsi-min*] were clearly and unambiguously ‘slaves’. *Sai man* were owned as chattels by specific masters and their labour power was extracted by coercion...They were definitely of a lower hereditary status than ordinary ‘free’ peasants, both socially and politically. In addition, *sai man* marriages were never given legal recognition and the owners would never grant their slaves the status of kinsmen, even in a symbolic sense.⁶⁹⁰

Notably, the underemphasis on the exploitation of Chinese male domestic labourers of this time was also reflected in the lack of historical memory associated with the traffic in Chinese men to the Americas during the Qing period. For example, in a domestic law review article of 1926 on the extraterritorial seizures of slave-carrying ships,⁶⁹¹ the Chinese jurist did not once mention the problem that had greatly vexed Chinese officials during the mid-nineteenth century: how to halt the shipping of Chinese coolies out of Macao, which was used by Western powers to evade Chinese emigration controls owing to the port’s extraterritoriality status. As discussed earlier, the Chinese coolie trade was a much neglected area for much of Qing’s reign, since imperial law was predominantly focused on the exploitation of Chinese women in the domestic setting. However, the lack of historical prominence given to issues concerning Chinese male exploitation, occurring within or outside of China, was also seen during the Republican period, when the government’s engagement with the issue on the traffic in women and children was an important aspect of China’s diplomatic history at the League of Nations.

6.3. International Law and Diplomacy

One of the key differences between the approach of the government of Republican China to that of its predecessor was how it viewed the role of foreign

⁶⁸⁹ See L. Forster, *The Girl-Slaves of China* (The Anti-Slavery and Aborigines Protection Society 1930); and Sarah Paddle, *The Limits of Sympathy: International Feminists and the Chinese ‘Slave Girl’ Campaigns of the 1920s and 1930s*, 4 *J. Colonialism & Colonial Hist.* 1 (2003).

⁶⁹⁰ Watson, *supra* n. 634, at 240.

⁶⁹¹ Kung Shih, *Extraterritorial Seizure of Slave Vessels*, 3 *China L. Rev.* 68 (1926).

diplomacy, particularly in the area of international lawmaking. Whereas the Qing had engaged with Western powers with considerable ambivalence—and sometimes with heightened suspicion and animosity—foreign relations during Republican China “ultimately forc[ed] their way into every part of Chinese society” and had an all-prevailing presence in domestic politics.⁶⁹² A concrete example of this active engagement was in the overarching political objective of Republican China to rescind foreign extraterritoriality, seen not only as an “obsession [that] permeate[d] and warp[ed] the entire Chinese law reform process” at the domestic level but also internationally.⁶⁹³ For instance, regarding the proposal by the League of Nations (the “League”) to create an international penal court in 1936, the main objection of the Chinese government did not center on the usual contention over definition, state criminality or scope of the political offense exception;⁶⁹⁴ rather, the main Chinese objection aimed at the failure of the League to adopt proposals to try foreign nationals under local jurisdiction.⁶⁹⁵ Because abolishing extraterritoriality was such a dominant political priority for the Republican Chinese government, much of the examination on the foreign affairs of this period, particularly from a domestic standpoint, has focused on this one issue that has had a profound impact on the history of modern China.⁶⁹⁶

Parallel to active diplomatic activities of the Republican government on the issue of extraterritoriality were important initiatives in other areas, such as treaty codification, international adjudication, international drug policy and criminal justice cooperation.⁶⁹⁷ Republican China had one of the highest number of registrations of international treaties during the first decade of the League; compared to other non-European countries, China was only surpassed by Canada and Japan in the total number of treaties signed.⁶⁹⁸ Hence, much of the focus on the history of an internationalised China during the Republican era has remained on these diplomatic priorities against the

⁶⁹² Kirby, *supra* n. 586, at 179.

⁶⁹³ Randle Edwards, *Book Review: China Law Review, Vol. I, Nos. 1-9 (1922-24)*, 67 *China Q.* 630 (1976).

⁶⁹⁴ See Ben Saul, *The Legal Response of the League of Nations to Terrorism*, 4 *J. Intl. Crim. Just.* 78 (2006).

⁶⁹⁵ *Legal Miscellanies: China Accepts the Proposal of an International Penal Court*, 9 *China L. Rev.* 271, 286-287 (1936).

⁶⁹⁶ Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan 182-185* (Oxford University Press 2012).

⁶⁹⁷ See William B. McAllister, *Drug Diplomacy in the Twentieth Century: An International History* 67-70, 115 (Routledge 2000). McAllister noted that while the Chinese Republican government was participating in international narcotic controls, it was dependent on illegal proceeds from the trafficking in opium to fund a large portion of its budget.

⁶⁹⁸ Dikötter, *supra* n. 587, at 58.

backdrop of the government's consistent efforts to rescind extraterritoriality. Nevertheless, amongst these separate international priorities was yet another significant area of China's engagement with the international system, namely on collective efforts to combat the international traffic in women and children. For instance, historian Frank Dikötter pointed out that China was an early supporter in Asia of the 1922 International Convention for the Suppression of the Traffic in Women and Children.⁶⁹⁹ China later signed the International Convention on the Suppression of the Traffic in Women of Full Age in October 1933. Moreover, with regard to the broader issue of human trafficking beyond a specific focus on the exploitation of women and children, the Republican era also saw China ratifying the 1926 Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention in April 1937. This section examines China's diplomacy in this thematic area, in particular, its participation in two key international conferences organised by the League on the traffic in women and children.

6.3.1. Traffic and the League of Nations

In the 1920s, the phenomenon of human trafficking underwent several changes in terminology. Originally called "white slavery" with a more limited scope at the beginning of the twentieth century, its usage later gave way to the term "traffic" as a more inclusive way of referring to the phenomenon beyond the forced prostitution of European women.⁷⁰⁰ This change in terminology was not only seen in official League reports but also in the way that various international voluntary campaigns came to refer to the phenomenon. For example, a key international advocacy association of the time was the International Bureau for the Suppression of the White Slave Traffic, which later renamed itself to the International Bureau for the Suppression of the Traffic in Women and Children as its advocacy broadened to include non-European women and children.⁷⁰¹ The expansion of the scope from European female victims had a significant impact on trafficking in the Chinese context during the early twentieth century, and the League would come to devote significant resources to examine the traffic situation of women and children in East Asia by the 1930s. Highlighted by a key League report in

⁶⁹⁹ *Id.* China subsequently ratified this Convention in February 1926. Dikötter wrote that China was only one of two Asian countries to have signed the convention, with Siam (Thailand) being the other early supporter. However, along with China and Siam, Japan also signed the 1922 Convention, which it ratified in December 1925.

⁷⁰⁰ See League of Nations, *Records of the International Conference on Traffic in Women and Children*, Official No. C.484.M.339.1921.V., at 55 (1921) [hereinafter *Records of the International Conference*].

⁷⁰¹ Stephanie A. Limoncelli, *The Politics of Trafficking: The First International Movement to Combat the Sexual Exploitation of Women 6* (Stanford University Press 2010).

1932, the problem of trafficking in Chinese women for prostitution was extensive by this time, with Chinese women representing the single largest group of victims of transnational traffic in Asia.⁷⁰²

Early intergovernmental activities spearheaded by the League to examine and combat the trafficking of women and children were marked by two prominent international conferences on the topic: the International Conference on Traffic in Women and Children (the “1921 Conference”), which took place in Geneva from 30 June to 5 July 1921; and the Conference of Central Authorities in Eastern Countries (the “Bandoeng Conference”) to examine specifically the trafficking situation in Asia, in Bandoeng, Java from 2 to 13 February 1937. In the intervening years marked by these two conferences, the engagement of the Chinese government evolved from terse replies—or the complete absence of—to official requests for information to active representation. China’s measured participation in the international politics of trafficking during the 1920s was in stark contrast to the level of engagement seen at the Bandoeng Conference in 1937, which was attended by an eight-membered delegation of the Chinese government. Moreover, because these anti-traffic activities during the 1930s took place at a time when there were more pressing political priorities for the Chinese government—such as protecting its territorial integrity against Japanese incursions in Manchuria—the government’s engagement was indicative of the official importance given to it, if not on the merits of the issue of the traffic in women and children than certainly in the projection of modernity and responsibility that such an official engagement would represent on the international stage.⁷⁰³ V. K. Wellington Koo, one of the most distinguished statesman in modern Chinese history, affirmed in 1933 the complementary nature of both the political and humanitarian aims of the League: “[W]hile the primary function of the League was to maintain and promote world peace, [the Chinese] Government was nevertheless convinced that its social and humanitarian activities [such as in efforts to address the international traffic in women and children] also constituted an indispensable factor in its constructive efforts towards peace.”⁷⁰⁴

⁷⁰² League of Nations, *Commission of Enquiry into Traffic in Women and Children in the East: Report to the Council*, Official No. C.849.M.393.1932.IV., 21, 37 (1932) [hereinafter *Commission of Enquiry Report*].

⁷⁰³ On the League of Nations’ examination of the Sino-Japanese conflict over the region of Manchuria, see League of Nations, *Appeal by the Chinese Government: Report of the Commission of Enquiry*, Official No. C.663.M.320.1932.VII (1932); also known as the “Lytton Report.”

⁷⁰⁴ *Fifth Meeting (Public, Then Private) Seventieth Session of the Council: Work of the Commission of Enquiry on Traffic in Women and Children in the East* § 3232, 14 League Nations Off. J. 247, 249 (1933) [hereinafter *Work of the Commission of Enquiry*].

The extent of the government's engagement on the issue of trafficking was an example of the gradual internationalisation of China in the aftermath of World War I "to win for itself an equal place in the international order...[and] claim its full membership [therein]." ⁷⁰⁵ Underscoring this adoption to international diplomacy, China's early entry to the global politics of trafficking was an official reply to a nine-part questionnaire from the Assembly of the League on national legislative measures to combat the traffic in women and children, which formed part of the preparatory work for the 1921 Conference. ⁷⁰⁶ The Chinese reply to this official request for information was markedly short and substantively incomplete. Barely a page, the Chinese communication was one of the most terse replies from governments and belied significant diplomatic experience on the subject matter. This was underscored by the fact that the Chinese government had only addressed the first question, out of nine, on the criminal scope and punishments of trafficking provisions and even then neglected the secondary request under the first question for statistics on prosecution and conviction rates. ⁷⁰⁷ The incomplete nature of the Chinese reply was raised in the proceeding of the 1921 Conference. ⁷⁰⁸ However, it did not solicit a more robust representation from the two-membered Chinese delegation at the conference. In fact, Chinese engagement at this first international gathering of 34 states, under the aegis of the League, to address the traffic in women and children was not significant. At the 1921 Conference, the single reference to Chinese participation was in its support for a proposal put forward by the delegation of the Netherlands to link the traffic in women to regulated prostitution, which failed to secure the necessary three-fourths majority to pass. ⁷⁰⁹

6.3.2. Growing Assertiveness

While the early 1920s was marked by the relatively measured participation of the Chinese government concerning the international traffic in women and children, the assertiveness of its diplomacy on this topic grew in the late-1920s and reached its height during the 1930s, especially at the Bandoeng Conference of 1937. While part of this

⁷⁰⁵ Zhang Yongjin, *China in the International System, 1918-1920: The Middle Kingdom at the Periphery* 2 (St. Martin's Press 1991).

⁷⁰⁶ *Traffic in Women and Children: Questionnaire Addressed to All Governments by the Secretary-General of the League with Reference to the Measures Already Taken or Proposed to be Taken to Combat the Traffic in Women and Children*, 2 League Nations Off. J. 230 (1921).

⁷⁰⁷ *Traffic in Women and Children: Further Replies to the Questionnaire of the Secretariat* § XVI, 2 League Nations Off. J. 534, 575-576 (1921).

⁷⁰⁸ *Records of the International Conference*, *supra* n. 700, at 77.

⁷⁰⁹ *Id.* at 71.

shift was due to Republican China's growing experience in the realm of foreign affairs, the practical reality was that, by the end of the 1920s, the traffic in women and children in Asia had become an important issue for the League of the Nations. This issue had reached such prominence that, in May 1930, the Secretary-General of the League prepared and submitted a proposal to the Council for an official mission to examine the traffic situation in the East.⁷¹⁰ The mission consisted of two expert bodies: the Travelling Commission with three appointed members to undertake the lengthy itinerary between October 1930 and March 1932; as well as a committee in Geneva, the Commission of Enquiry into Traffic in Women and Children in the East. As result of this political momentum and the fact that a significant portion of the traffic in the East involved Chinese women, active engagement of the Chinese government on issues relating to the protection of women and children was largely inevitable. Between February to June 1931, the Travelling Commission had a significant itinerary in China, covering eleven cities over the four-month period; in addition, the government appointed two senior diplomats to receive the mission and facilitate official communication.⁷¹¹ The official report of the Commission of Enquiry into Traffic in Women and Children in the East, published in 1933, highlighted the extensiveness of this Chinese engagement, with the country report for China forming one of the report's longest sections.

In 1937, the League convened the first international conference on the traffic in women and children to be held in Asia, at Bandoeng of then Dutch East Indies. In contrast to the 1921 Conference, the Chinese government was well represented at the Bandoeng Conference by a strong eight-membered delegation. Statements on the traffic situation in China were separately delivered by four members of the delegation, with each addressing a specific focus of the conference agenda. As seen in Bandoeng, by the 1930s the Chinese government not only had learned to engage on the substance of the international traffic issue, but its political maneuvering had grown more sophisticated as the government deflected criticisms of its traffic situation by attributing causality to the practice of extraterritoriality on international settlements in China. This strategic maneuvering was to minimise the negativities associated with China being seen as “the epicenter of the traffic in women in the Far East,” while also promoting the

⁷¹⁰ *Annex 1216: Note by the Secretary-General Regarding the Extension to the East of the Enquiry Regarding the Traffic in Women and Children*, Official No. C.285.1930.IV., 11 League Nations Off. J. 780-781 (1930).

⁷¹¹ *Commission of Enquiry Report*, *supra* n. 702, at 12, 15.

government's overarching political objective of rescinding extraterritoriality.⁷¹² This political narrative was delivered on the second day of the conference by adviser Ho Chin Chen of the Chinese delegation:

[T]he Chinese authorities, which were so active in the interior, had no power in the Chinese territories under foreign jurisdiction. It was known that at Shanghai, for instance, the greatest number of prostitutes were found in the international settlement and the French concession...It was known that...traffic was carried on particularly in the places which were not under the authority of the Chinese government.⁷¹³

This political representation of the traffic situation in China due to the practice of extraterritoriality, however, was not completely accurate. Current scholarly works on prostitution in Shanghai during the early to mid-twentieth century both found that, similar to the present-day situation of female trafficking in China, traffic and exploitation within the country was a more extensive problem than transnational cases. Historian Christian Henriot, for instance, has written that the transfer of Chinese women abroad was “a small and even marginal aspect” of the extensive market in women that existed within China.⁷¹⁴

From the outset of the Bandoeng Conference, the delegation consistently represented China as a rapidly changing and modernising country, committed to the international system and its laws, and that China's engagement with the League on the issue of traffic was a key component of the country's participation in the international realm. Other aspects of the political maneuvering by the Chinese government at Bandoeng included the projection of the country as an active participant of an emerging global coalition of governments, advocacy and charity organisations to combat the traffic in women and children.⁷¹⁵ Yet, a closer examination of the domestic laws of Republican China revealed that substantial gaps existed between international legal standards of the time and China's domestic law on offenses related to the traffic in women and children. These were not just legal lacuna as result of imprecise definitions but were serious differences on the scope of the crime.

⁷¹² Christian Henriot, *Prostitution and Sexuality in Shanghai: A Social History, 1849-1949*, at 320 (Noël Castelino trans., Cambridge University Press 2001).

⁷¹³ League of Nations, *Traffic in Women and Children: Conference of Central Authorities in Eastern Countries, Bandoeng (Java), February 2nd to 13th, 1937, Minutes of Meetings*, Official No. C.476.M. 318.1937.IV., at 17 (1937) [hereinafter *Bandoeng Conference Meeting Minutes*].

⁷¹⁴ Henriot, *supra* n. 712, at 320.

⁷¹⁵ *Zhongguo Daibiaotuan*, *supra* n. 655, at 29-30.

The most notable contradiction was the disconnect between the Republican China's domestic legal approach towards tolerating sex work of adult women on the basis of legal equality versus its abolitionist position on regulated prostitution at international political forums. This was evident in the official reply of the Chinese government to the questionnaire submitted in preparations for the 1937 Bandoeng Conference, wherein it stated unequivocally that "licensed or tolerated brothels are prohibited under Chinese law" and that the government was not considering any new policy in connection with the abolition of tolerated or licensed brothels.⁷¹⁶ In reality, however, a system of regulated prostitution in the form of licensed brothels commonly existed in Republican China. An examination of local policies on prostitution during the Republican China indicated that, instead of banning prostitution, most local governments regulated and profited from the taxes levied on prostitution. As such, this system of regulated prostitution served both as a way of control and as a revenue stream for important local state building projects, such as schools, militias, roads and police.⁷¹⁷ Moreover, the prevalence of this local approach towards prostitution—official licensing, minimal regulation and taxation—led to political scientist Elizabeth Remick to label it effectively as the "national model" of early twentieth-century China.⁷¹⁸

What explains this incongruence between Republican China's domestic position on prostitution versus the abolitionist position it advocated internationally? One likely explanation pointed to China's diplomatic aim at the time to deflect international criticisms by underemphasising the reality of its traffic situation and then attributing causality to the practice of extraterritoriality. These political maneuvers sought to mask the true extensiveness of China's problem of the traffic in women and children, but in so doing, it also introduced dissonance in the way the issue was properly understood and presented on both domestic and international fronts. Nevertheless, it was within the ordinary to have contradictions between a country's domestic and international policies. Even in the present-day political fora of the United Nations, which succeeded the League in 1945, such tensions between national sovereignty and international law are common. What was most significant, however, about Republican China's evolution of its involvement in the international politics of trafficking was how the government used this topical engagement to assert its place on the international stage. It showed a maturing assertiveness of the Chinese foreign service. This was best illustrated in the official comments of the Chinese government in 1933 to the presentation of the Report

⁷¹⁶ *Bandoeng Conference Meeting Minutes*, *supra* n. 713, at 81-82, 85-86.

⁷¹⁷ Elizabeth J. Remick, *Taxes and Local State Building in Republican China*, 29 *Modern China* 38, 39, 43 (2003).

⁷¹⁸ Remick, *supra* n. 622, at 425.

of the Commission of Enquiry into Traffic in Women and Children in the East to the Council of the League. As expected, the Chinese delegate raised the usual issue of extraterritoriality as “giv[ing] encouragement to the international traffic in women” in China,⁷¹⁹ but this was a prelude to the more substantive point that followed regarding the structural issue of committee representations—namely the lack of Chinese representation on the Advisory Commission for the Protection and Welfare of Children and Young People, which was then considering the report. The statement of the Chinese delegate conveyed this political confidence by first referencing the Council’s existing plans of reorganising the commission and then timely lobbied the Council to increase Chinese representation “for the purpose of enabling China, not only to participate fully in the discussion on the report, but also to contribute her part towards the accomplishment of its tasks.”⁷²⁰

* * *

Within the broader international political climate of the 1930s, what was particularly noteworthy about this aspect of China’s diplomatic efforts on the issue of traffic was that it took place at a time of growing Chinese disillusionment with the League, especially in its inability to resolve breaches of peace and security as in the cases of Abyssinia and Manchuria. The disappointment was gradual but remarkable, given the early idealism of the Chinese government when it first sought to fully join the international system on equal footing with the West in the immediate years after World War I.⁷²¹ Despite this, there was no move from the government to completely disengage from the international arena. Even after the dissolution of the League, China remained an integral part of international efforts to establish the United Nations as the League’s political successor. From April to June 1945, China, along with the United States, United Kingdom and the USSR, was one of the four governments to sponsor the landmark United Nations Conference on International Organization in San Francisco, which concluded with the signing of the Charter of the United Nations and Statute of the International Court of Justice on 26 June 1945.⁷²² Three months later, China ratified the Charter on 28 September 1945 and became one of the earliest countries to be legally bound to this pivotal treaty. The drafting of the bedrock document of international

⁷¹⁹ *Work of the Commission of Enquiry*, *supra* n. 704, at 249.

⁷²⁰ *Id.*

⁷²¹ Zhang Yongjin, *supra* n. 705, at 2.

⁷²² Charter of the United Nations and Statute of the International Court of Justice (the “UN Charter”) (26 June 1945), 1 U.N.T.S. XVI. The UN Charter currently has 193 ratifications as of 12 February 2014.

human rights law, the Universal Declaration of Human Rights from 1947 to 1948 also saw a strong and indispensable Chinese participation through the contribution of Peng-chun Chang, whose unique “adept[ness] at translating across cultural divides” helped to mediate conceptual differences that arose during the drafting process.⁷²³ However, the international codification work of the Chinese government during this time did not take place in domestic calm. A year after the Universal Declaration of Human Rights was adopted by the UN General Assembly in December 1948, the bitter conflict between the Chinese Communists and Nationalists resulted in another seismic shift of power, with the Chinese Communist Party founding the People’s Republic of China in October 1949 and the Nationalists retreating to Taiwan and peripheral islands.

What followed was an intense period of isolation for mainland China, as the People’s Republic of China disengaged from the international realm and most bilateral ties. This change of power and political landscape was drastic and seemingly defied explanation. Historian William Kirby, in his analysis of the internationalisation of China during the Republican era, asked simply: “If the Republican era was indeed such a high tide of internationalism, how can one account for what followed it? In the first years of the People’s Republic, China cut off formal relations with all but one Western power and then was diplomatically derecognized by the rest.”⁷²⁴ Until 1971, China at the United Nations was formally represented by the Chinese Nationalist government of the Republic of China that claimed—but did not have effective—territorial control over the mainland and its vast population. The Communist Chinese government also turned its back on international engagement and did not assume treaty obligations held by the previous Republican government.⁷²⁵ The government’s skepticism of international politics was mirrored in its mistrust of the new legal order that the Republican government had built. In the first thirty years of its existence, the People’s Republic of China operated without a criminal law. With only the Marriage Law to regulate issues of family and sexuality morality, this would come to have significant impact on how the issue of trafficking was perceived and addressed by the community and society-at-large. This would change in the 1970s with two significant events. First was the adoption of the People’s Republic’s first criminal law in 1979, a move necessitated by the country’s economic and political opening in the previous year. Second was the UN General

⁷²³ Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* xx, 146-148 (Random House 2001).

⁷²⁴ Kirby, *supra* n. 586, at 203.

⁷²⁵ See *Note Concerning Signatures, Ratifications, Accessions, etc. on Behalf of China*, in *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions: List of Signatures, Ratifications, Accessions, etc. as at 31 December 1973*, UN Doc. ST/LEG/SER.D/7, at iii (United Nations 1974).

Assembly's decision in October 1971 to recognise the People's Republic of China, not the Nationalist government on Taiwan, as the only lawful representative of China to the United Nations, thereby ushering in China's reengagement with the international system.⁷²⁶ The following chapter analyses this evolution in the People's Republic of China's response to the issue of trafficking from both domestic and international perspectives.

⁷²⁶ Restoration of the Lawful Rights of the People's Republic of China in the United Nations, GA Res. 2758 (XXVI), UN GAOR, 26th Sess., Supp. No. 29, at 2, U.N. Doc. A/8429 (1971).

7. Break and Make Anew: Communist Founding

The founding of the People's Republic of China in October 1949 signaled the long-sought victory of the Chinese Communists over the Nationalists, in a conflict that had embroiled the country in decades of chaos and population displacement. It ushered in a new beginning, a new government that was to have profound changes in all areas of the law and society. With regard to the system of laws and legal institutions built by the preceding Republican Nationalists, the new government was clear in its views of these ground-laying efforts. On 29 September 1949, at the first plenary session of the Chinese People's Political Consultative Conference, a political body under the authority of the Chinese Communist Party, the answer was a complete severance from the laws of the Republican era.⁷²⁷ This position was mirrored at the international level, with the decision of the People's Republic to not assume previously held treaty obligations.⁷²⁸ This clean slate approach is in marked contrast to the previous transition from the Qing to the Republican era, which saw the early Republican government continuing with a program of domestic legal reforms initiated by the late-imperial government. Whereas a revised version of the Qing Code was actually used as the provisional criminal code of early Republican China as a transitory measure, the People's Republic's prompt and complete abrogation of the laws of the Republican government meant that a functioning judicial machinery was not immediately available to oversee the incredible program of social, economic and political reforms that it had envisaged for a new China. Inherent to

⁷²⁷ Jerome Alan Cohen, *The Criminal Process in the People's Republic of China, 1949-1963: An Introduction* 298 (Harvard University Press 1968).

⁷²⁸ See *Note Concerning Signatures, Ratifications, Accessions, etc. on Behalf of China*, in *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions: List of Signatures, Ratifications, Accessions, etc. as at 31 December 1973*, UN Doc. ST/LEG/SER.D/7, at iii (United Nations 1974) [hereinafter *Note Concerning China*].

all these reforms efforts would be the continuing evolution of China's interpretation of the crime of trafficking in persons, particularly of women, and the immense challenge associated with combating a form of exploitation with dimensions in both the public and private domains.

Amongst the literature on the radical social transformations that came with founding of the Communist Chinese government in October 1949, the Marriage Law of the People's Republic of China (the "Marriage Law") has a prominent place.⁷²⁹ The Marriage Law, promulgated on 1 May 1950, was the first law of the new government, and it was conceptually intertwined with the far-reaching Land Reform Law, which came into effect in June 1950.⁷³⁰ The official view at the time was that the Marriage Law would not only elevate the position of women, but it would also increase women's economic determinants and facilitate their mobilisation into productive labour following the ambitious reforms in land redistributions.⁷³¹ The aims of these two laws, therefore, were to counter the detrimental, so-called "feudal" vestiges of imperial and Republican China, particularly in rural communities, and serve as the foundation of a new China. Other than the three promulgated statutes that separately proscribed the offenses of counterrevolutionary, currency fraud and corruption,⁷³² there was no complete, promulgated criminal code in China until 1979. Consequently, the Marriage Law was the only source of codified law in the early People's Republic for close to 30 years that addressed some issues of trafficking and exploitation, particularly those that involved familial relationships.

⁷²⁹ Central People's Government Council, *Marriage Law of the People's Republic of China* [中华人民共和国婚姻法], adopted on 13 April 1950 and promulgated by the Chairman of the Central People's Government on 1 May 1950.

⁷³⁰ Central People's Government Council, *Land Reform Law of the People's Republic of China* [中华人民共和国土地改革法], adopted on 28 June 1950 and promulgated by the Chairman of the Central People's Government on 30 June 1950.

⁷³¹ Kay Ann Johnson, *Women, the Family and Peasant Revolution in China* 89 (University of Chicago Press 1983).

⁷³² Central People's Government Council, *Act for Punishment of Counterrevolution of the People's Republic of China* [中华人民共和国惩治反革命条例], adopted on 20 February 1951 and promulgated by the Chairman of the Central People's Government on 21 February 1951; Central People's Government Council, *Provisional Act for Punishment of Crimes that Endanger State Currency* [中华人民共和国妨害国家货币治罪暂行条例], adopted and promulgated by the Chairman of the Central People's Government on 19 April 1951; and Central People's Government Council, *Act for Punishment of Corruption of the People's Republic of China* [中华人民共和国惩治贪污条例], adopted on 18 April 1952 and promulgated by the Chairman of the Central People's Government on 21 April 1952.

7.1. The Marriage Law of 1950

The Marriage Law proclaimed its general principles in two concise articles. Article 1 abolished forthwith “the feudal marriage system based on the arbitrary and compulsory arrangements and supreme act of man over woman, and in the disregard of the interests of children,” while Article 2 specified what the law considered as prohibited practices under its reach. These included “[b]igamy, concubinage, child betrothal [*tungyanghsi*], interference with the re-marriage of widows and the exaction of money or gifts in connection with marriage”.⁷³³ On the basis of these two articles, the political campaigns of the early 1950s to promote the Marriage Law assailed the five types of “feudal marriages,” namely, bigamy or polygamy, slave girls, *tungyanghsi* and marriage by purchase or parental imposition.⁷³⁴ Because the Marriage Law was not a criminal code that penalised specific offenses that involve trafficking in persons, such as abductions, illegal detentions, threats of physical harm or profiteering, its legislative effect with regard to trafficking was narrowly focused on marriage practices that could have had an exploitative element. For example, this would include the system of *tungyanghsi*, as discussed in Chapter Four.

Moreover, legal scholar M. J. Meijer notes that Article 2 of the Marriage Law of 1950 should not be seen as an exhaustive articulation of prohibited marriage practices. Instead, Meijer argues that it would be more accurate to view similar practices, such as the adoption of foster-sons-in-law and the pawning of wives, as implicitly falling within the article’s scope.⁷³⁵ This would then widen the range of prohibitive practices under the law’s applicable scope. In addition, Article 2 could be interpreted to have a wider reach beyond the nuptials itself to include all aspects of the marital union. Here, the problem of interpretation arose from the difficulty of Chinese-English legal translation. Whereas the widely-referenced English translation of Article 2 prohibited “the exaction of money or gifts in connection with marriage,”⁷³⁶ an alternative English rendering of “using the

⁷³³ As raised earlier, it is problematic to use “child betrothals” as the English rendering for the Chinese term *tungyanghsi* because it denotes a narrower range of exploitation from what it could have entailed in practice. More than a betrothal or marriage, *tungyanghsi* girls were taken in by other families, often at a young age and under the exchange of money. They were required to work in the household until they reached puberty and then could marry the sons of the foster families. English translation of the Marriage Law is from *The Marriage Law of the People’s Republic of China: Together with Other Relevant Articles* 1-12 (Foreign Language Press 1950) [hereinafter *The Marriage Law*].

⁷³⁴ Philip C. C. Huang, *Chinese Civil Justice, Past and Present* 240 (Rowman & Littlefield Publishers, Inc. 2010).

⁷³⁵ M. J. Meijer, *Marriage Law and Policy in the Chinese People’s Republic* 72 (Hong Kong University Press 1971).

⁷³⁶ *The Marriage Law*, *supra* n. 733, at 2.

pretense of [solving] marital-related problems to exact money or gifts” would have been closer to the original Chinese text. The latter would make the provision applicable to all aspects of the marital union. Addressing this same point, Meijer interpreted this provision broadly to cover not only the prohibition on the exaction of gifts as a prerequisite for parental consent but also, for instance, the use of an intermediary to address any marriage issue.⁷³⁷

Central to the Marriage Law of 1950 was the tenet of a valid marriage founded on free choice, gender equality, monogamy and the protection of the lawful interests of women and children.⁷³⁸ The Marriage Law, with its requirement of an administration registration, sought to vet unions that did not conform with the provisions of the new law.⁷³⁹ The Marriage Law was reportedly successful in eradicating some of the worst marriage practices that led to exploitation in familial relationships, such as those that involved the “buying and selling” of wives. For example, a newspaper article in 1952 celebrated the complete eradication of “feudal marriage practices of buying and selling [wives] that used to plague the rural villages [of Shanxi Province].”⁷⁴⁰ The article further lauded the instrumental role played by the Marriage Law in ending the *tungyanghsi* system of child betrothals and preventing female suicides or homicides arising from family disputes, such as disagreements between the couple or discord between the wife and her marital family. However, data on these practices, during the early founding years of the People’s Republic are “fragmentary and usually specific to small areas,” thus making it impossible to comprehensively verify.⁷⁴¹ One assessment of the law’s impact cautiously noted that most reports were modest in their claims, “indicating one-third to one-half of the marriages in a particular locality were free, or providing free-choice figures without reference to the number of traditionally arranged or ‘buying and selling’ marriages for the same area.”⁷⁴²

Beyond the prohibited marriage practices of Articles 1 and 2, the Marriage Law was noted for its ambitious scope, scale and complexity, described by one political scientist as “one of the most dramatic efforts ever by a state to change the ‘traditional’

⁷³⁷ Meijer, *supra* n. 735, at 72.

⁷³⁸ *Id.* at 71.

⁷³⁹ *Marriage Law of the People’s Republic of China*, *supra* n. 729, at art. 6.

⁷⁴⁰ *People’s Daily* [人民日报], *Shanxisheng Wuxiangxian zai Hunyinguanxi shang de Xinqixiang* [New Developments on Marital Relationships in Wuxiang County, Shanxi Province; 山西省武乡县在婚姻关系上的新气象] (6 March 1952).

⁷⁴¹ Johnson, *supra* n. 731, at 118.

⁷⁴² *Id.* at 119.

family into one more suited to the ‘modern world’ and to a particular political ideology”.⁷⁴³ Beyond concerns on the marriage itself, the law sought to have a bearing on other aspects of family life, such as intergenerational relationships,⁷⁴⁴ alimony and inheritance.⁷⁴⁵ The relationship between the married couple and parents-in-law also came under the ambit of the Marriage Law. Even though this was not specifically stated in any of the Marriage Law’s 27 articles, Meijer argues that Chapter 3 on the rights and duties of the married couple established a moral norm that was actually broader than its articulated scope. By linking the private duties of the individuals to the struggle for Communism, “[t]he legal specification and description of duties becomes superfluous” and any member whose behaviour causes tensions in the family unit would also be failing in his or her duty towards the society-at-large.⁷⁴⁶ After the promulgation of the Marriage Law, reports of mother-in-law maltreating the wife, as was often the case in traditional *tungyanghsi* marriages where the young betrothed girl had few avenues of seeking recourse, took on an increased prominence in official coverage of the Marriage Law. For instance, an editorial appearing in the state publication, *People’s Daily*, two days after the Marriage Law had come into effect, highlighted the eradication of cruelty and violence meted out against the wife by her mother-in-law as an integral aim of the Marriage Law to promote the status of women in Chinese society.⁷⁴⁷

7.1.1. Constructed Legal Revolution of Equality

The commitment towards gender equality was a paramount goal for the newly established government. Article 48 of the Constitution of the People’s Republic of China affirms: “Women in the People’s Republic of China enjoy equal rights with men in all spheres of life, in political, economic, cultural, society and family life. The State protects the rights and interests of women”. Further, it asserts the equal status of women

⁷⁴³ Neil J. Diamant, *Re-examining the Impact of the 1950 Marriage Law: State Improvisation, Local Initiative and Rural Family Change*, 161 *China Q.* 171, 171 (2000).

⁷⁴⁴ *Marriage Law of the People’s Republic of China*, *supra* n. 729, at Ch. IV (Relations Between Parents and Children).

⁷⁴⁵ *Id.* at arts. 12 and 14; and arts. 15, 21 and 22.

⁷⁴⁶ Meijer, *supra* n. 735, at 200-201.

⁷⁴⁷ Zhang Jie [张节], *People’s Daily* [人民日报], *Xie Sunshi ying shou Falu Zhicai; Bisi Erxifu yi bei Jingshi Renmenfayuan Kouya* [Xie Sunshi Detained by People’s Court in Beijing for Driving her Daughter-in-Law to Commit Suicide and Should Be Punished by Law; 谢孙氏应受法律制裁逼死儿媳 妇已被京市人民法院扣押] (3 May 1950).

in production and within the Chinese Communist Party.⁷⁴⁸ Mao Zedong, Chairman of the Chinese Communist Party until his passing in 1976, was a strong advocate for women's rights. Described by one academic as perhaps "the most radical and enthusiastic advocate of women's equality" amongst male feminist thinkers in early twentieth-century China,⁷⁴⁹ Mao's proclamation that women "hold up half the sky" remains a popular saying in contemporary Chinese society.⁷⁵⁰ The Marriage Law of 1950, therefore, was founded on this aim of eliminating gender inequality and discrimination. Nonetheless, the goal of full legal equality between the sexes was a source of popular skepticism, and much of the local education initiatives on the Marriage Law sought to correct the misconception that gender equality meant that the law "had an extreme bias for [the rights of] women" or "had nothing to do with male cadres."⁷⁵¹ Such tensions and misinterpretations in the intent of the law to promote gender equality, however, were not unexpected. For instance, historian Gail Hershatter, in her state-of-the-field analysis on the study of Chinese women in the twentieth century, notes that the depth of resistance to the changes proposed in the Marriage Law reflected in part the radical and sweeping nature of this first legislative act of the People's Republic.⁷⁵²

At the same time, it is important to assess the legislative progress of the Marriage Law not only in its contemporary context but also in the fullness of Chinese legal history that spanned three successive regime changes in the twentieth century. From this perspective, it is worth noting that, political rhetoric aside, many of the fundamental elements of the Marriage Law had antecedents in the laws of Republican China. The most significant of these parallels was gender equality, which was central to the legal reform agenda of the preceding Republican government as discussed in Chapter 6. More than any other domestic legal issue, the fundamental shift in viewing women as full, independent agents engendered extensive changes in all aspects of the law, both civil and criminal, during the Republican era from 1912 to 1949. Amongst

⁷⁴⁸ *Constitution of the People's Republic of China* 43 (The Legislative Affairs Work Committee of the the Standing Committee of the National People's Congress ed. and trans., People's Publishing House 2004); Article 48.

⁷⁴⁹ Lijun Yuan, *Reconceiving Women's Equality in China: A Critical Examination of Models of Sex Equality* 51 (Lexington Books 2005).

⁷⁵⁰ *The Writings of Mao Zedong, 1949-1976* vol. 2, at 558 n. 1 (John K. Leung & Michael Y. M. Kau eds., M. E. Sharpe 1992).

⁷⁵¹ Yuan Bo [袁渤], Zhang Yanying [章燕英] & He Ping [贺炳], *People's Daily* [人民日报], *Beijingshi Gequ Ganbu Xuexi ji Xuanchuan Hunyinfu* [Every District Cadres' Unit in Beijing to Study and Promote the Marriage Law; 北京市各区干部学习及宣传婚姻法] (23 May 1950).

⁷⁵² Gail Hershatter, *State of the Field: Women in China's Long Twentieth Century*, 63 *J. Asian Stud.* 991, 999 (2004).

these legal changes, the most prominently felt were in the area of family law, which, akin to similar provisions in the Marriage Law of the People's Republic, also affirmed a woman's right to choose her marriage partner;⁷⁵³ divorce;⁷⁵⁴ and inherit the properties of her husband.⁷⁵⁵ Similar to the conception of a proper marriage under Communist China, Republican family law prohibited polygamy as a marriage arrangement,⁷⁵⁶ and practices such as concubinage and *tungyanghsi* also had no legal basis during the Republican era.

Historian Susan Glosser is one of the few voices that place the Marriage Law of 1950 in its legal historical context by emphasising that “the [Chinese Communist Party's] Marriage Law closely resembled the [Republican] code of 1931 in both its particulars and objectives, but the two parties' ideological differences and adversarial relationship have obscured the commonalities.”⁷⁵⁷ The challenge of properly assessing the impact of the provisions on gender equality and family life in the 1950 Marriage Law, therefore, lay in the need to separate elements of a constructed legal revolution from genuine legislated innovations. At one end is the standard criticism levied by the Chinese Communist Party against their former rival, of a categorically repressive society under the Nationalists during the preceding Republican era. This sentiment was often depicted by boilerplate statements, attributing gender inequality to “the evil result of feudal power and women's continuous devaluation and oppression under Nationalist rule.”⁷⁵⁸ In this political narrative, the founding of the People's Republic of China symbolised “a clear line between...the oppressive, feudal society of the Nationalist era and the new society put in place by the Communists.”⁷⁵⁹ At the other end are criticisms of the Marriage Law as containing “nothing new,” owing to its lack of legal specificity, internal inconsistency and similarities with Republican-era laws on marriage and family,

⁷⁵³ *The Civil Code of the Republic of China: Book IV on Family Law*, art. 972. For an English reference, see *The Civil Code of the Republic of China, Book IV, Family Law*, 5 China L. Rev. 170 (Ching-Lin Hsia trans. 1932).

⁷⁵⁴ *Id.* at art. 1052. In a disputed divorce, Article 17 of the *Marriage Law of the People's Republic of China* required both marriage parties to attend a mandatory reconciliation and mediation session. In contrast, this requirement of mediation was not mandated by the family law of Republican China.

⁷⁵⁵ *The Civil Code of the Republic of China: Book V on Succession*, art. 1144(1). For an English reference, see *The Civil Code of the Republic of China, Book V, Succession*, 5 China L. Rev. 220 (Ching-Lin Hsia trans. 1932).

⁷⁵⁶ *The Civil Code of the Republic of China: Book IV on Family Law*, *supra* n. 753, art. 985.

⁷⁵⁷ Susan L. Glosser, *Chinese Visions of Family and State, 1915-1953*, at 170 (University of California Press 2003).

⁷⁵⁸ Sara L. Friedman, *Intimate Politics: Marriage, the Market, and State Power in Southeastern China* 78 (Harvard University Press 2006).

⁷⁵⁹ *Id.*

such as the principle of gender equality.⁷⁶⁰ Vermier Y. Chiu, for example, criticised that the Marriage Law was neither landmark nor original, for he argued that it only gave the false impression “of emancipating the Chinese women from the so-called ‘feudal marriage system’ which no longer existed” by the 1950s.⁷⁶¹

Neither of the two polarised axes of interpretation on the impact of the Marriage Law is correct: the depiction of the complete oppression of women under Republican China at one extreme or the opposite view that completely belied the legislative impact of the Marriage Law. Regardless of the interpretation of positive or negative effect, the Marriage Law is credited with raising the age of marriage, continuing a practice that had first begun in urban China during the Republican period.⁷⁶² Furthermore, the Marriage Law’s statutory requirement, under Article 17, of couples in disputed divorces to engage in mandatory mediation has had a broader impact on legal developments in China. Even though the requirement of mediation in contested divorces was primarily aimed at saving the marriage and frequently resulted in a forced and untenable reconciliation, the process and the machinery of mediation gradually evolved and became the precursor to a unique system of court mediation in China.⁷⁶³ Despite the fact that mandatory mediation is no longer used in the context of marital disputes to exert pressure on the couple to reconcile, China’s system of judicial mediation has become a unique feature of its domestic legal system by serving as a viable alternative to litigation for dispute resolution.⁷⁶⁴

Nonetheless, echoing the profound difficulty of implementing laws on gender equality during Republican China, the Communist government also faced problems in changing long-held beliefs on the status of women in society. This was particularly seen by the fact that, although the Marriage Law guaranteed the freedom to choose one’s marriage partner, in reality exercising this right, at times, could be subjected to intense, societal expectations of sexual propriety, especially on the part of the women. As illustrated by a case reported in September 1951, two young couples experienced the weight of this societal expectation of sexual propriety when the four individuals together tried to annul the arranged marriages of the two women. On the way to the

⁷⁶⁰ Vermier Y. Chiu, *Marriage Laws and Customs of China* 191 (The Chinese University of Hong Kong 1966).

⁷⁶¹ *Id.* at 233.

⁷⁶² Hershatter, *supra* n. 752, at 1000.

⁷⁶³ Huang, *supra* n. 734, at 241.

⁷⁶⁴ See Philip C. C. Huang, *Court Mediation in China, Past and Present*, 32 *Modern China* 275 (2006).

local administrative office, both couples were detained by the police on the supposed charge of “abduction and conducting illicit sexual relations.” The two men were accused of disturbing the public order, while their respective female partners were reprimanded for “having dubious character and freely roaming the streets.”⁷⁶⁵ In this way, the Marriage Law was unable to completely eradicate social biases on a woman’s role in society and her perceived propriety, ideas that had long held sway prior to the founding of the People’s Republic in 1949.

7.1.2. Sexual Morality and Counterrevolution

During the early decades of the People’s Republic, proper relationships in accordance with the Marriage Law were not only a private decision between consenting individuals, but also one that served the goal of state consolidation and legitimacy. Susan Glosser goes further and argues that the Marriage Law of 1950 defined the relationship between state and society, thereby “successfully pushing the state deeper into the interior of the family unit.”⁷⁶⁶ This was due to the fact that Communist China claimed political and moral superiority over previous governments, especially the Republic era under the governance of its political antagonists, the Nationalists. Early Chinese Communist Party supporters thus assailed the sexual decadent practice of keeping concubines and mistresses by the Nationalists and wealthy bourgeois, proclaiming how “it was precisely this kind of decadence and selfish sexual gratification” that led to the decline of China.⁷⁶⁷ In this context where sexual impropriety and counterrevolution were politically linked, sexual immorality could be conversely interpreted as an individual’s challenge to the state, thus held as counterrevolutionary.

Here, it is important to emphasise that the severely-punishable offense of counterrevolutionary behaviour was never defined by the Act for Punishment of Counterrevolution of the People’s Republic of China. Hence, it was widely applicable to any behaviour deemed incompatible with the goals of the new Communist

⁷⁶⁵ *People’s Daily* [人民日报], *Dingxiangxian Renminzhengfu jing Ganshe Qingnian Hunyinziyou Feifa Kouya Sandui Qingnian Nannu* [People’s Government of Dingxiang County Interferes with Freedom of Marriage and Illegally Detains Three Young Couples; 定襄县人民政府竟干涉青年婚姻自由非法扣押三对青年男女] (29 September 1951).

⁷⁶⁶ Glosser, *supra* n. 757, at 171.

⁷⁶⁷ Gary Sigley, *Sex, Politics and the Policing of Virtue in the People’s Republic of China*, in *China, Sex and Prostitution* 43, 46 (Elaine Jeffreys ed., RoutledgeCurzon 2006).

government.⁷⁶⁸ Mao Zedong succinctly categorised in 1950: “Whoever stands on the side of the revolutionary people is a revolutionary. Whoever stands on the side of imperialism, feudalism and bureaucratic capitalism is a counter-revolutionary.”⁷⁶⁹ It then mattered little that concerns of sexual impropriety were not specifically referenced as an element of the crime of counterrevolution. In reality, perceived sexual misconduct was sufficient to skirt closely to the offense’s nebulous boundaries and become subjected, even retroactively or by the use of analogy, to arbitrary interpretations on the scope of this crime.⁷⁷⁰

Interpretations on what constituted sexual immorality, and thus anti-feudal and counterrevolutionary behavior, lacked consistency. References to class struggle against the wealthy and the unpredictability of such accusations featured prominently in the determination of criminal sanctions for these perceived social, moral and political transgressions. In Wu Zhou’s work on the history of prostitution in China, he recounts a case where two brothel-owners were sentenced to immediate execution by a military judge on 6 April 1950.⁷⁷¹ As reported, their executions were celebrated by the prostitutes who were formerly under their control. Two of the women, in describing their reaction to the public trial, directly linked the execution of the brothel-owners to the eradication of social evils and state legitimacy:

The government we have today is really one for the people...[It] has revenged our injustice. Now we need to learn new skills and find good employments. We need to fundamentally change our thoughts and beliefs. Then, [we can] become new women in this new society.⁷⁷²

⁷⁶⁸ The criminal sanction of life imprisonment or the death penalty was given to most cases of counterrevolution. In limited circumstance, the penalty could be a termed imprisonment of three to ten years; see *Act for Punishment of Counterrevolution of the People’s Republic of China*, *supra* n. 732, at arts. 6-13.

⁷⁶⁹ *Chairman Mao’s Closing Speech (An Abridged Text)*, 2 *People’s China* 24 (1 July 1950).

⁷⁷⁰ Where an individual commits a crime not specifically covered by the Act for Punishment of Counterrevolution of the People’s Republic of China, Article 16 permits the use of analogy in sentencing. Article 18 allows the retroactive application of the Act to activities committed prior to it coming into effect. See Hungdah Chiu, *Criminal Punishment in Mainland China: A Study of Some Yunnan Province Documents*, 68 *J. Crim. L. & Criminology* 374, 379 (1977); and an English translation of the Act appears in Cohen, *supra* n. 727, at 299-302.

⁷⁷¹ Wu Zhou [武舟], *Zhongguo Jindu Wenhua Shi* [A Cultural History of Chinese Prostitutes; 中国妓女文化史] 362 (Shanghai East Publishing Center 2006).

⁷⁷² *Id.* For this case, the sentence of death by immediate and public execution was the most extreme. However, in another similar case in January 1950 cited by Wu in the same passage, the sentence for a group of 81 brothel-owners and -keepers was imprisonment, labour or the payment of rice and money.

Interpretations of what constituted sexual immoral behaviour also saw a schism between legal opinions and what was popularly believed and implemented at the local level, where public meetings to denounce class struggle and counterrevolutionary activities took place. On the issue of adultery, for example, a legal article published in 1957 to influence the drafting of the criminal code, argued that adultery should not be treated as a crime because, unlike bigamy, it did not contravene the Marriage Law.⁷⁷³ The article based its reasoning on the fact that the damage from adultery is the discord between the married couple, which is not irreversible and should be best addressed outside the realm of criminal liabilities, since “[p]unishment actually is unable to resolve problems involving the quality of people’s affection, thinking, and morality.”⁷⁷⁴ However, this legal reasoning did not reflect widely-held societal opinions on adultery. For example, in 1956, the adulterous relationship of a male Communist Party member, whose wife had written to a popular women’s magazine to complain of his unfaithfulness, was widely discussed and used as an editorial to assail the incongruence between his commitment to Communist ideology and conduct in marriage.⁷⁷⁵ A typical reader response conveyed the sentiment that “a disloyal husband is also a disloyal [Communist] cadre...and [that] there can be no separation between the realms of politics and private life.”⁷⁷⁶

The same judgment of counterrevolution could be passed for conduct that arose suspicions of sexual impropriety. On 14 May 1950, Deng Yingchao, an avid supporter of women’s rights and wife of China’s first Premier Zhou Enlai, criticised undue interference and malicious judgments passed against consenting, courting adults. In an important speech to promote the Marriage Law, Deng called for the right of unmarried adults to enter into a relationship be respected and protected from rampant gossip and meddling.⁷⁷⁷ Giving emphasis to Deng’s position that such intrusions into a couple’s relationship could undermine the goals of the Marriage Law, a case emerged in November 1951 that indicated the voracity of these public condemnations of suspected

⁷⁷³ Tung Ch’ing-chih et al., *On Bigamy and Adultery*, 4 Fa-hsüeh 36 (1957) (cited in Jerome Alan Cohen, *The Criminal Process in the People’s Republic of China, 1949-1963: An Introduction* 318-320 (Harvard University Press 1968)).

⁷⁷⁴ *Id.*

⁷⁷⁵ *Editorial Note*, 11 Hsin Chungkuo Funü [New China’s Women] 6 (November 1955).

⁷⁷⁶ Shen Yan [慎言], *Wenti Taolun: Womenfufu guanxi weisheme polie? Wo dui Luo, Liu Hunyin Wenti de Kanfa* [Issue of Discussion: Why is Our Marital Relationship Falling Apart? My Opinion on the Marital Problems of Luo and Liu; 問題討論:我們夫婦關係為什麼破裂? 我对罗,刘婚姻问题的看法], 12 Hsin Chungkuo Funü [New China’s Women] 5 (December 1955).

⁷⁷⁷ *People’s Daily* [人民日报], *Deng Yingchao Tongzhi Guanyu Hunyinfa de Baogao* [Cadre Deng Yingchao’s Speech on the Marriage Law; 邓颖超同志关于婚姻法的报告] (26 May 1950).

sexual impropriety.⁷⁷⁸ The case involved two women employed at a public clinic, who were accused by the clinic's personnel officer Yu Wen of having an improper relationship with a male veterinary. With the consent of the clinic director, Yu convened two public meetings to force them to confess of engaging in immoral behaviour, an accusation denied by both women. However, placed under persistent intimidation, which included threats of a gynaecological examination, surveillance, restrictions on their freedom of movement and communication and job termination, one woman relented. The other, however, refused to admit to any wrongdoing and remained in detention. After 19 days, she was finally released after the intervention of a local women's chapter, who brought charges against Yu. The Beijing's People's Court later sentenced Yu to six months' imprisonment for her "extreme feudal behaviour and abuse of power."⁷⁷⁹

Another reported case in 1953 underscored the intensity of collective harassment against a woman perceived to be of immoral character.⁷⁸⁰ Wang Chengpei was a popular, nineteen-year-old cashier at a state timber company, whose friendship with male colleagues arose the resentment of other colleagues. Wang suffered a year-long campaign of harassment at her workplace for her purported ill-repute, including meetings of open denunciations against her, threats of job termination and refusal to let her graduate from her revolutionary education class. Wang was forced to confess to having sexual relations and to sign a letter stating her intent of never entering into a romantic relationship. However, when a Communist party member proposed to her for marriage, assuring her that it was within her rights under the Marriage Law to accept, Wang came under renewed pressure to resign. Specific criticisms of Wang's alleged improper behaviour extended to her "open pursuit of men" and conduct unbecoming of a woman.⁷⁸¹ Wang eventually resigned on account of the open hostility. The local

⁷⁷⁸ *People's Daily* [人民日报], *Dui Huabei Daxue Gongxueyuan Fuyuanzhang Ceng Yi Ouda Qiangqi deng Sanan Beijingshi Renmin Fayuan Juxing Gongkai Shenpan* [Beijing People's Court Holds a Public Trial for Three Cases, One Involving the Vice-Director of Huabei University's Engineering Institute Beating His Ex-Wife; 对华北大学工学院副院长曾毅殴打前妻等三案北京市人民法院举行公开审判] (21 November 1951).

⁷⁷⁹ *People's Daily* [人民日报], *Beijingshi Renmin Zhengfu Pizhun Shijiancha Weiyuanhui Yijian yu Yang Deqing deng yi Chezhi Chufen* [Municipal Government of Beijing Approves City Supervisory Commission's Proposal to Dismiss Yang Deqing and Others as Punishment; 北京市人民政府批准市监察委员会意见予杨德庆等以撤职处分] (21 November 1951).

⁷⁸⁰ *People's Daily* [人民日报], *Zhongnanlinye Zongju, Senlingongyeju Fuzeganbu Ganshe Hunyinziyou Yingbi Nuganbu Wang Chengpei Lizhi* [Management at China South Forestry Administration and Forest Industry Bureau Interfered in Freedom of Marriage of Female Cadre Wang Chengpei and Forced Her to Quit Job; 中南林业总局, 森林工业局负责干部干涉婚姻自由硬逼女干部王诚佩离职] (2 March 1953).

⁷⁸¹ *Id.*

procurator's office later investigated Wang's claims of harassment and intervened on her behalf, but those responsible denied culpability and refused to reinstate her to her job. No more was known about Wang's case, but it is reasonable to assume that these two reported cases of public judgment, shaming and harassment in direct contravention of the Marriage Law represented only a small fraction of the problems experienced by consenting adults, more often women, in countering societal expectation of sexuality propriety.

Communal judgment of female morality and propriety also undercut the goal of equality in the political participation of women. On this point, Kay Ann Johnson, in her work on women and the peasant revolution in China, describes how the Communist Party had failed, out of concerns of immorality, to properly tap the political activism of marginalised and "familyless [*sic*] lumpen women (sorcerers, prostitutes, beggars)" who were amongst the first women to enter and support the Communist reforms.⁷⁸² She notes:

In some cases, as we have seen, the Party's failure to steadfastly support the activism of "vagrant" women (as they were sometimes referred to in Party documents) because male peasant activists considered them morally suspect may have suppressed the most readily available source of political activism among women."⁷⁸³

This need for a society defined by proper sexual conduct was highlighted by the intensity of Communist China's early anti-prostitution campaigns in the 1950s. Although much of this anti-prostitution campaign was a political statement against the perceived vices and corruptions of Republican China, the rehabilitation of former prostitutes during these early years of the People's Republic was a national priority on a scale that was not previously seen. As described by historian Gail Hershatter, the new government "[e]schew[ed] the licensing campaigns to which both abolitionists and regulationists had resorted [and] moved directly and forcefully to eliminate brothels in the name of national renewal."⁷⁸⁴

By linking the control of prostitution to an effective government, the campaign against brothels and prostitution served as a powerful symbol of state legitimacy, a way in which Communist government could differentiate itself from the preceding

⁷⁸² Johnson, *supra* n. 731, at 107.

⁷⁸³ *Id.* at 107-108.

⁷⁸⁴ Gail Hershatter, *Dangerous Pleasures: Prostitution and Modernity in Twentieth-Century Shanghai* 303 (University of California Press 1997).

Republican era.⁷⁸⁵ Within the domestic literature, the success of national efforts to eradicate prostitution is often extolled not only as a victory for public order and security but also a moral triumph against the vestiges of old China. One Chinese scholar labelled the eradication of prostitution as “a miracle for China and all the countries worldwide.”⁷⁸⁶ The legacy of this portrayal extends to the current situation of prostitution in China, where the revival of prostitution is framed as a phenomenon that the Chinese government has “successfully eliminated in the 1950s and must eliminate once again to demonstrate its continued moral and political legitimacy.”⁷⁸⁷ However, this assessment of the complete elimination of prostitution, or even exploitative marriage practices, in the early decades of the People’s Republic is not completely accurate.

Already by 1970, there were reports of young Chinese women being sent to the countryside, under an official program of transferring young urbanites to remote areas for their own populist education during the Cultural Revolution, and then returning to the cities to work as prostitutes.⁷⁸⁸ A Chinese professor, who in her youth was sent to work in a remote village in the 1970s, recounts that marriages in the village were arranged by the parents according to how much money they could get for a potential bride; consequently, “[s]ome [wives] were treated as an object bought at an expensive price.”⁷⁸⁹ An instruction issued by the provincial administrative authority of Guangdong and obtained by the *New York Times* in 1970 also confirmed that some of the young women sent to live and work in the countryside were being “coerced into having sexual relations” with rural farmers and, in some cases, forced into marriage.⁷⁹⁰ Giving some indication as to the prevalence of this problem, this directive ordered local authorities to curb “increasing moral laxity,” pay special attention to cases of forced marriages and to organize public “struggle and criticism” meetings to denounce and punish the offenders.⁷⁹¹

⁷⁸⁵ *Id.*

⁷⁸⁶ Wu Zhou [武舟], *supra* n. 771, at 369.

⁷⁸⁷ Elaine Jeffreys, *Advanced Producers or Moral Polluters? China’s Bureaucrat-Entrepreneurs and Sexual Corruption*, in *The New Rich in China: Future Rulers, Present Lives* 229, 234 (David S. G. Goodman ed., Routledge 2008); see also Pan Sui-Ming [潘绥铭], *Research on Prostitution in the Last Century* [近百年来关于娼妓的研究], 26 *J. Hunan U. Sci. & Engineering* [湖南科技学院学报] 74, 79 (2005).

⁷⁸⁸ *Chinese City Girls Sent to Countryside Turn to Prostitution*, *N.Y. Times* 6 (23 August 1970) [hereinafter *Chinese City Girls*].

⁷⁸⁹ Lijun Yuan, *supra* n. 749, at 92.

⁷⁹⁰ *Chinese City Girls*, *supra* n. 788.

⁷⁹¹ *Id.*

In the way that a woman's exercise of her agency was judged through the lens of sexual impropriety, even though such behaviour was not condoned by the laws of the People's Republic, it echoed some elements of late-Qing's response to the issue of the traffic in women. As discussed in Chapter 5, a central characteristic of the Qing government's response to the traffic in persons was to address it through the lens of strict Confucian morality. Consequently, these provisions in the Qing Code that dealt with aspects of human trafficking bore this heavy influence of familial and sexual morality, where the perception of impropriety was sufficient to taint a woman's honour of chastity. This was especially seen on the issue of prostitution during the Qing, where it came under the category of "illicit sexual intercourse" as conduct that threatened morality and the social order, with little emphasis on any profiteering or exploitative element that may be present. At the same time, the analogy of sexual morality between Qing and early Communist China only extends so far because, unlike the Qing Code, neither the Marriage Law nor the Act for Punishment of Counterrevolution of the People's Republic specified sexual immorality as a criminal offense. Insofar as perceived sexual impropriety of women was censured by the community, this was the dominant social context, regardless of legislation to promote gender equality. As it had been under the Republican era, full legal equality did not mean the absence of societal discrimination on the basis of sex.

The problem lay in the fact that the crime of counterrevolution was not defined with precision. Therefore, the interpretation and imposition of criminal punishments were based "on vague terminology, general [Communist] party policy, and unpublished regulations," which allowed for maximum discretionary power by law enforcement bodies and the judiciary.⁷⁹² Legal scholar Hungdah Chiu believed that this flexibility in the interpretation of criminal sanctions was actually regarded as an advantage, and this partly explained why the People's Republic chose to operate without a promulgated criminal law for close to thirty years.⁷⁹³ This would change, however, in 1979 when China made an important step towards *nullum crimen sine lege, nulla poena sine lege* with the promulgation of its first criminal code. In contrast to earlier decades, it then became an issue of juridical importance for a criminal offense to be provided for and defined by law, with the sanctioned punishment specified for the said offense. The following section examines the two provisions on human trafficking in China's

⁷⁹² Hungdah Chiu, *supra* n. 770, at 391.

⁷⁹³ *Id.*

Criminal Law of 1979 and their evolution in the context of the country's domestic legal reform.

7.2. Criminalisation of Human Trafficking

During the early years of the People's Republic, the criminal process was “a blunt instrument of terror” used by the Chinese Communist Party to purge political opposition and to rid society of any element seen to undermine the public order.⁷⁹⁴ Law and the legal system were tools for absolute state control; hence, they could be subjected to political abuse. This was evidenced by the fact that, in many localities, the power to investigate, detain, prosecute and convict was vested in the single authority of the police.⁷⁹⁵ Military control commissions administered punishments in large parts of the country, in addition to *ad hoc* “people's tribunals” that dispensed their own version of communal justice.⁷⁹⁶ Vigilante and arbitrary justice befell many individuals, including high-ranking Communist officials. In 1978, under the leadership of Deng Xiaoping, China officially embarked on economic reforms and transitioned to a market economy. Developing the country's legal system was seen as instrumental to this transformation because it “help[ed] create an atmosphere of security and to overcome the ‘disease of lingering fear’” that characterised the unrest during the Cultural Revolution.⁷⁹⁷ In July 1979, the National People's Congress, China's highest legislative body, adopted the Criminal Law of the People's Republic of China (the “1979 Criminal Law”), the first criminal code of the land.⁷⁹⁸ To provide for greater predictability in the application of the criminal law, it was later significantly revised and expanded at the Fifth Session of the Eighth National People's Congress on 14 March 1997 (the “1997 revised Criminal Law”), which came into effect on 1 October the same year. Since then, eight further amendments have been passed.⁷⁹⁹ Thus, the evolution of how Chinese criminal law deals with the crime and punishment of trafficking in persons needs to be framed within this larger process of domestic legal reforms.

⁷⁹⁴ Cohen, *supra* n. 727, at 9.

⁷⁹⁵ *Id.* at 10.

⁷⁹⁶ *Id.*

⁷⁹⁷ Shao-chuan Leng & Hungdah Chiu, *Criminal Justice in Post-Mao China: Analysis and Documents* 36 (State University of New York Press 1985).

⁷⁹⁸ Fifth National People's Congress (Second Session), *Criminal Law of the People's Republic of China* [中华人民共和国刑法] (the “1979 Criminal Law”), adopted on 1 July 1979 and came into effect on 1 January 1980.

⁷⁹⁹ The *Criminal Law of the People's Republic of China* was amended in 1999, August and December 2001, 2002, 2005, 2006, 2009 and 2011.

7.2.1. Criminal Law of 1979

After a thirty-years absence of a statutory mechanism to specify criminal conducts and corresponding punishments by the state, the offense of “trafficking in human beings” first appeared in Article 141 of the 1979 Criminal Law, which enacted the following: “A person who engages in abduction for purposes of trafficking in human beings shall be sentenced to fixed-term imprisonment for not more than 5 years. In a serious case, the offender shall be sentenced to fixed-term imprisonment for not less than 5 years.”⁸⁰⁰ However, the article struggled with the issue of definition, since neither the offense of “trafficking in human beings” nor the criteria used to determine serious circumstances were defined. The lack of a definition for the crime also confounded what the phenomenon actually entailed. For instance, it would seem that the drafters of the 1979 Criminal Law considered “forced prostitution” outside the reach of Article 141 on human trafficking. This is due to the fact that while the scope of Article 141 was not gender specific and potentially encompassed any individual who might have been abducted and trafficked, Article 140 only targeted the perpetrators who forced women to engage in prostitution.

This approach appeared to exclude the initial process of trafficking prior to victims being coerced into prostitution, such as the act of abduction or the intermediary steps of being sold and transferred to a go-between before reaching the threshold of Article 140. Article 169 criminalised the offenses of luring or sheltering women in prostitution for the purpose of profit, but it is unclear whether this would apply to all cases of prostitution or only in cases of forced prostitution. However, the placement of Article 169 under the category of crimes that obstruct the administration of public order, as opposed to crimes that fundamentally infringe the personal or democratic rights of citizens, as with Articles 140 and 141, seems to suggest that Article 169 approaches the issue of prostitution more as a problem of vice rather than a deprivation of personal liberties as in cases of forced prostitution.⁸⁰¹ Further contributing to the conceptual confusion of Article 141 on the traffic in human beings in the 1979 Criminal Law was the issue of translation. Whereas the official English translation of the 1979 Criminal

⁸⁰⁰ English translation of the *Criminal Law of the People’s Republic of China* of 1979 is from Leng & Chiu, *supra* n. 797, at 192-211.

⁸⁰¹ Whereas Articles 140 and 141 were categorised under Chapter 4 on offenses of infringing on the personal or democratic rights of the citizens, Article 169 appeared in Chapter 6 of the 1997 Criminal Law on crimes that obstruct the administration of public order, which also included gambling (Article 168) and producing and selling pornographic materials (Article 170).

Law enacted the offense of “abduction for purposes of trafficking in human beings,” the original Chinese text for this corresponding English text, *guaimai renkou*, actually denoted a much narrower scope of criminal activity by only referencing the elements of abducting and selling of individuals.⁸⁰²

In the absence of a definition for trafficking in persons, it would seem from the delineation of Articles 140 and 141, that the drafters of the 1979 Criminal Law confined the crime of human trafficking first to the acts of abduction and sale of individuals and then to the specific exploitation of the forced prostitution of women. Underpinning these two provisions in the 1979 Criminal Law was the beginning of a divergent concept of criminal responsibility based on the partition of offenses committed in human trafficking. The abduction and sale of trafficked victims (Article 141) during the earlier stages in the process of trafficking would be considered separately from the subsequent role played by other individuals in the exploitation of a subset of victims (Article 140). For instance, under Article 140, the criminal activity by pimps and brothel-owners in forcing women to engage in prostitution would be considered distinctly and sanctioned differently from those who had carried out the initial abduction or sale of the victim. While Article 141 prescribed the penalty of imprisonment of five years or less for perpetrators of human trafficking, barring serious cases, those who forced women to engage in prostitution could be imprisoned from three to ten years. This created a potential loophole where a trafficker who abducts and sells a woman could be treated more leniently by the law by claiming to have no responsibility in her ensuing situation, even if he or she had reasonable knowledge at the outset that forced prostitution was the likely outcome of her sale and transfer.

7.2.2. National People’s Congress Decisions of 1983 and 1991

In the People’s Republic of China, lawmaking authority is vested in the National People’s Congress. Nonetheless, the Constitution allows for certain delegation of this legislative authority to a permanent body—the Standing Committee of the National People’s Congress—when the congress is not in session and only in instances where the

⁸⁰² *Guaimai renkou* [拐卖人口] only recognises the abduction, kidnapping and sale of the victims as the actions of trafficking, whereas the international standard is actually much more expansive by including other actions, such as transporting, transferring, harbouring and receipt of persons in the definition for trafficking—as reflected by the new translation of *fanyun renkou* [贩运人口]; in International Organization for Migration, *International Migration Law No. 13: Glossary on Migration* [国际移徙法 No. 13: 移徙词汇] 71 (2008) (available at http://publications.iom.int/bookstore/free/IML_13_CHI.pdf).

responsibility is not within the direct purview of the congress.⁸⁰³ The legislative authority of the Standing Committee is often asserted through decisions that can amend or supplement existing laws. In the decades after China's economic and political opening in 1978, new types of economic crimes, along with a growing rate of juvenile delinquency and organised crime, presented a significant challenge of public confidence and order for the Communist government.⁸⁰⁴ The government's response was a *Strike Hard* campaign against crimes.⁸⁰⁵ Three rounds of *Strike Hard* were initiated between 1983 and 2003 to crackdown on criminality, with the first campaign beginning in August 1983 to target threats to public security.⁸⁰⁶ Within this framework, the Standing Committee of the National People's Congress promulgated two key decisions as the legislative basis for these law enforcement campaigns. Forcefully addressing the perception that the 1979 Criminal Law was insufficiently stringent to deter the commission of the crime of trafficking in persons and other types of crimes targeted by the first round of the *Strike Hard* campaign, the body promulgated the *Decision of the Standing Committee of the National People's Congress on Severely Punishing Criminals Who Gravely Endanger Public Security* (the "1983 Decision") in September 1983.⁸⁰⁷

The 1983 Decision elevated the status of human traffickers to a group of six categories of criminals who were considered to pose special threats to public security. These were individuals who led criminal hooligan groups; intentionally inflicted serious bodily harm; illegally manufactured guns, ammunition or explosives; organised reactionary secret societies or counterrevolutionary activities; lured or forced a woman

⁸⁰³ *Constitution of the People's Republic of China*, *supra* n. 748, at Ch. 3, § 1, at 45-60. The legislative responsibilities of the Standing Committee of the National People's Congress are specified in arts. 62, 64 and 67. See also *China: Core Document Accompanying the Second Report of the People's Republic of China on its Implementation of the International Covenant on Economic, Social and Cultural Rights* (30 June 2010), UN Doc. HRI/CORE/CHN/2010, I.B.3(a), at 11-12 (2011).

⁸⁰⁴ Bin Liang, *Severe Strike Campaign in Transitional China*, 33 *J. Crim. Just.* 387, 389-390 (2005).

⁸⁰⁵ Various English translations exist for this intense campaign against criminality. "Strike Hard" is a popular designation and reflects its official name of "Strike Hard and Rectification Struggle." The same campaign has also been referred to as "Severe Strike," "Severe Blow" or "Severe Punishment." In Chinese, it was 严打 or *yanda* as its romanisation equivalent.

⁸⁰⁶ After the conclusion of the first round of "Strike Hard" in January 1987, the second wave of "Strike Hard" was initiated in April 1996 to focus on armed and violent crimes, including prostitution. The third round, starting in April 2001, was a two-year nationwide crackdown on gangs and organised criminal organisations; see Bin Liang, *The Changing Chinese Legal System, 1978—Present: Centralization of Power and Rationalization of the Legal System* 91-92 (Routledge 2008).

⁸⁰⁷ Standing Committee of the Sixth National People's Congress, *Decision of the Standing Committee of the National People's Congress on Severely Punishing Criminals Who Gravely Endanger Public Security* [人民代表大会常务委员会关于严惩严重危害社会治安的犯罪分子的决定] (the "1983 Decision"), promulgated and came into effect on 2 September 1983. It has since been annulled by the passage of China's revised Criminal Law in 1997. Annex I of the 1997 revised Criminal Law included the 1983 Decision amongst a list of invalidated regulations, supplementary provisions and decisions.

into prostitution; and “[t]he ringleader of a group engaging in abduction for purposes of trafficking in human beings or a person who abducts in a particularly serious way.”⁸⁰⁸ Under this legislative act, offenses committed by these six specific categories of criminals could warrant harsher punishment than the maximum penalty stipulated by the relevant provisions in the 1979 Criminal Law, up to and including the death penalty.⁸⁰⁹ The 1983 Decision, however, also reflected the worst excesses of the *Strike Hard* campaign, in terms of its overriding priority to punish severely and swiftly at the cost of flouting procedural protections in the criminal justice process. Whereas the “swiftness” of *Strike Hard* was represented by the process of “speedy arrests, speedy indictments and speedy trials,” the political expediency of imposing heavy punitive measures to deter crime led to overzealous implementation at the local level.⁸¹⁰

Arbitrary interpretation by local authorities on the scope of the 1983 Decision soon became a problem, as it “became a textbook example of how local officials can reinterpret and stretch Beijing’s directive” on severe punishment.⁸¹¹ Local courts routinely meted out the harshest punishment for all *Strike Hard*-targeted crimes to show enthusiasm and to avoid criticism of inadequate enforcement, with reports of mass trials and public executions.⁸¹² Furthermore, this tendency to impose the death sentence was compounded by the fact that provisions in the criminal law on “serious circumstances” were often not defined and had no interpretative meaning for the courts, as highlighted by Article 141 which enacted increased penal sanctions for the unspecified serious cases of the trafficking in persons. So long as the penalty remained in the range provided for by law, even if at the maximum prescribed limit of the death sentence, mitigating or aggravating circumstances rarely influenced sentencing.⁸¹³ Within the context of China’s legislative framework on human trafficking, the practical effect of this lack of specificity of both the definition and what constituted serious circumstances for the abduction and trafficking in persons meant that all offenders convicted of trafficking-related charges—either as the ringleader of a group engaging in trafficking or forcing a woman to engage in prostitution—could be sentenced to the death penalty on the legislative basis of the 1983 Decision.

⁸⁰⁸ *Id.* at ¶ 1(A) - ¶ 1(F).

⁸⁰⁹ *Id.* at ¶ 1.

⁸¹⁰ Susan Trevaskes, *Severe and Swift Justice in China*, 47 *British J. Criminology* 23, 28 (2007).

⁸¹¹ Murray Scot Tanner, *State Coercion and the Balance of Awe: The 1983-1986 “Stern Blows” Anti-Crime Strategy*, 44 *China J.* 93, 115 (2000).

⁸¹² Trevaskes, *supra* n. 810, at 27; and Bin Liang, *supra* n. 804, at 389-393.

⁸¹³ Trevaskes, *supra* n. 810, at 27, 35-36.

It is then unsurprising that these factors resulted in a very high number of executions during this period, owing to the fact that the wide use of the death penalty expressed the popular sentiment that severe punitiveness deterred crime. Overall, this harshness has had a brutalising effect on the criminal justice system.⁸¹⁴ Because there are no official numbers on death sentences in China, some sources estimate that the number of state executions between 1983 to 1987 could be as high as 30,000,⁸¹⁵ out of which about 10,000 were believed to have been carried out in the first six months of the *Strike Hard* round in 1983, based on conversations with Chinese jurists.⁸¹⁶ The lack of official data extends to the number of convictions on the offense of trafficking in persons during this period. This was in part due to the fact that the offense of trafficking in persons was not included in the breakdown of criminal cases by type filed by public security organs.⁸¹⁷ Nonetheless, one localised study pointed to a fourfold increase in the number of trafficked women and children in the immediate years before and following the onset of the first round of *Strike Hard* in 1983; whereas the average number of trafficked women and children in a county in southwestern China was 336 per year from 1974 to 1979, the average soared to 1,369 per year from 1980 to 1982.⁸¹⁸

The heightened status given to the crime of trafficking in persons in the state's *Strike Hard* campaign to combat threats to public security did little to improve the vagueness of the offense as it was enacted by the 1979 Criminal Law. Due to the inconsistent application of the criminal law during *Strike Hard*, trafficking in persons and other targeted crimes during the campaign became conceptualised by society less as criminal offenses and more “in terms of ‘enemies’ of the people...who are said to have endangered the very success of socialist modernization programmes in the reform

⁸¹⁴ Børge Bakken, *Moral Panics, Crime Rates and Harsh Punishment in China*, 37 *Austral & N.Z. J. Criminology* 67, 85 (2004). Most assessments on China's legacy of *Strike Hard* centers on how the flouting of domestic law for political expediency during this period had weakened the stability of the Chinese legal system. It was during this time that the review powers of the Supreme People's Court for all death penalty cases were delegated to the provincial higher people's courts, contravening procedural protections in the Criminal Procedural Law. This led to several high-profile cases of miscarriage of justice; see Harold M. Tanner, *Strike Hard! Anti-Crime Campaigns and Chinese Criminal Justice, 1979-1985*, at 93-99 (Cornell East Asia Program 1999). In an effort by the government to address criticisms of China's death penalty policy, the Supreme People's Court “regained” its death penalty review power in January 2007.

⁸¹⁵ Amnesty International, *When the State Kills...The Death Penalty v. Human Rights* 122-123 (1989).

⁸¹⁶ Amnesty International, *China: Violations of Human Rights. Prisoners of Conscience and the Death Penalty in the People's Republic of China* 55 (1984).

⁸¹⁷ Tanner, *supra* n. 814, at 120.

⁸¹⁸ *Id.*

era.”⁸¹⁹ This view hindered further juridical interpretation on the meaning of the offense of trafficking and the corresponding issue of penal proportionality for “serious circumstances.” This would change in 1991 with the promulgation of another decision to supplement the criminal law by the Standing Committee of the National People’s Congress after the conclusion of the first round of *Strike Hard* in 1987.

The *Decision of the Standing Committee of the National People’s Congress Regarding the Severe Punishment of Criminals Who Abduct and Traffic in or Kidnap Women or Children* was adopted and promulgated by the Standing Committee of the Seventh National People’s Congress and came into immediate effect on 4 September 1991 (the “1991 Decision”); this was a pivotal development in China’s anti-trafficking legislative framework.⁸²⁰ Most importantly, the 1991 Decision provided the first definition of trafficking in the Chinese context, as “any act of abducting, buying, trafficking in, fetching or sending, or transferring a woman or a child, for the purpose of selling the victim.”⁸²¹ Trafficking was then considered by the 1991 Decision to be a combination of criminal elements carried out with the intent of selling the woman or child victim, and it represented a significant improvement over the earlier vague provisions on trafficking in both the 1979 Criminal Law and 1983 Decision. Nonetheless, the scope of this new definition of trafficking only extended to victims who were women and children, thereby excluding adult men from its reach. Ignoring scenarios where the trafficked victims could have been adult men, the decision simply enacted: “Whoever abducts and traffics in a woman or a child shall be sentenced to fixed-term imprisonment of not less than five years and not more than ten years, and shall concurrently be punished with a fine of not more than 10,000 yuan.”⁸²²

The 1991 Decision was a key development as it provided a definition for the trafficking in women and children, but it also created an area of confusion for the implementation of two separate legislative acts on the trafficking in persons, arising from the fact that the 1991 Decision enacted a new crime of trafficking in women and

⁸¹⁹ Trevaskes, *supra* n. 810, at 31.

⁸²⁰ In contrast to the 1983 Decision, the *Decision of the Standing Committee of the National People’s Congress Regarding the Severe Punishment of Criminals Who Abduct and Traffic in or Kidnap Women or Children* (the “1991 Decision”) [全国人民代表大会常务委员会关于严惩拐卖、绑架妇女、儿童的犯罪分子的决定] is retained by the 1997 revised Criminal Law. Annex II of the 1997 revised Criminal Law lists it amongst eight previous National People’s Congress enactments incorporated into the 1997 revised Criminal Law. In the absence of an official English version, the translation of this decision is sourced from Peking University’s *LawChinaInfo.com*, a bilingual depository of Chinese law.

⁸²¹ *Id.* at ¶ 1.

⁸²² *Id.*

children and not as an amendment to Article 141 of the 1979 Criminal Law. In enacting this new crime and adopting such a gender-specific view of trafficking, the 1991 Decision created a legal ambiguity in which there were two separate and concurrent crimes of human trafficking: Article 141 of the 1979 Criminal Code on the trafficking in persons and the 1991 Decision's criminalisation of the specific trafficking in women and children. The 1991 Decision, however, did not address this issue of overlapping scope. Resulting from this legal ambiguity was the disproportionate sentencing depending on the gender of the trafficked victims. Whereas those who trafficked in women and children could be sentenced to five to ten years of imprisonment based on the 1991 Decision, those who trafficked adult men, barring serious circumstances, would only be imprisoned for half that time, five years or less, under Article 141.

In an attempt to clarify the intent of the 1991 Decision, the Supreme People's Court and Supreme People's Procuratorate jointly issued the *Interpretation on Several Issues Regarding the Implementation of the People's Republic of China's "Decision of the Standing Committee of the National People's Congress Regarding the Severe Punishment of Criminals Who Abduct and Traffic in or Kidnap Women or Children"* on 24 December 1992 ("1992 Interpretation").⁸²³ Coming into immediate effect, the 1992 Interpretation addressed potential areas of conflict with the criminal law arising from the National People's Congress' promulgation of the 1991 Decision. Recognising that the 1991 Decision's definition for the trafficking in women and children could exclude potential victims from its scope, the 1992 Interpretation stated:

Whoever abducts or traffics in a person other than a woman or child shall be punished under the crime of trafficking in persons according to Article 141 of the Criminal Law and Article 1, paragraph 3, of the [1983] *Decision of the Standing Committee of the National People's Congress on Severely Punishing Criminals Who Gravely Endanger Public Security*.⁸²⁴

The 1992 Interpretation, therefore, underscored that trafficking in women and children and trafficking in persons other than women or children—adult men—were two separate crimes, each with its own punishment regime based mainly on the gender

⁸²³ Supreme People's Court and Supreme People's Procuratorate, *Interpretation on Several Issues Regarding the Implementation of the People's Republic of China's "Decision of the Standing Committee of the National People's Congress Regarding the Severe Punishment of Criminals Who Abduct and Traffic in or Kidnap Women or Children"* [最高人民法院、最高人民检察院关于执行《全国人大常委会关于严惩拐卖、绑架妇女、儿童的犯罪分子的决定》的若干问题的解释] (the "1992 Interpretation"), adopted and came into effect on 24 December 1992. This Interpretation is still in effect.

⁸²⁴ Author's translation in the absence of an official English version or one provided by Peking University's bilingual law depository, *LawChinaInfo.com*.

of the trafficked victims. The 1992 Interpretation further reinforced this distinction by providing the much-needed elaboration on what constituted serious circumstances in the trafficking in women and children, but failed to extend the same interpretation to Article 141 of the 1979 Criminal Law, which had a similar reference to serious circumstances with increased penalties. This contradiction, where the law focused predominantly on female victims of trafficking, marks the divergence from a gender-neutral approach towards the country's anti-trafficking legislative framework. Because the 1991 Decision was directly incorporated into China's 1997 revised Criminal Law, subsequent legal developments would continue this gender bias, to the exclusion of adult males from the scope of human trafficking provisions in the country's criminal law.

7.2.3. Criminal Law of 1997

In 1997, China's criminal law was significantly revised to provide wider coverage of crimes, as seen by the fact that the number of articles in the criminal law was greatly expanded from 192 to 452. Within the context of China's anti-trafficking legislative framework, the 1997 revised Criminal Law sought to rectify many of the earlier shortcomings by defining the crime of trafficking and criminalising more associated offenses, such as obstructing the rescue of victims.⁸²⁵ The revisions also sanctioned more stringent punishments and specified what situations constituted serious circumstances warranting increased penalties. Most significantly, Article 240 of the 1997 revised Criminal Law states: "By abducting and trafficking in a woman or child is meant any of the following acts: abducting, kidnapping, buying, trafficking in, fetching, sending, or transferring a woman or child, for the purpose of selling the victim."⁸²⁶ This reflects almost verbatim the definition of trafficking in women and children in the 1991 Decision, with the addition of kidnapping as a constituting act of the crime. However, in contrast to the gender-neutral scope of Article 141 of the 1979 Criminal Law, this definition excludes adult male victims from its reach. The fact that China's new criminal law follows the 1991 Decision in viewing human trafficking as a gender-specific crime is significant because the 1997 revised Criminal Law had effectively annulled Article 141 of the 1979 Criminal Law. From 1997 onwards, the broader crime of trafficking in persons was replaced by the crime of trafficking in women and children and ceased to exist in China's domestic law.

⁸²⁵ 1997 revised Criminal Law, art. 242. Official English translation of the 1997 Criminal Law in *Chinese-English Series with Laws and Regulations of China: Criminal Laws & Criminal Procedure Laws of China* 1-193 (Law Press China 2007).

⁸²⁶ *Id.* at art. 240.

The 1997 revised Criminal Law prescribes harsher punishment for trafficking. Compared with the 1979 Criminal Law, the statutory penalties are more stringent and may include life imprisonment and the death penalty for serious cases. Whereas Article 141 in the 1979 Criminal Law sanctioned a maximum five-year imprisonment for human traffickers, barring serious circumstances, this is only the minimum punishment for those convicted of trafficking in women or children.⁸²⁷ While Article 141 did prescribe more severe punishment than five years' imprisonment for serious circumstances, these situations were not defined in 1979 or in any succeeding legislative enactment by the National People's Congress. In contrast, Article 240 of the 1997 revised Criminal Law moves towards greater legal specificity by identifying the types of serious situations that would warrant a heavier penalty than the provided five to ten years of imprisonment. Mirroring Articles 1 and 2 of the 1991 Decision, these specified serious situations are varied and contain different factors as the basis of determination, including: the status of the defendant in a criminal trafficking gang; the number of victims trafficked; the means used in the kidnapping; the manner in which a trafficked baby or infant was acquired; and extent of the injury caused.⁸²⁸ Other factors rest on: whether a sexual assault was committed; if the victim was sold abroad; or if the trafficked woman was forced or enticed into prostitution, either directly or indirectly, by the defendant.⁸²⁹ If the convicted person falls under any of these eight serious categories, he or she would receive a sentence of imprisonment of more than ten years or life, along with the confiscation of property; the sentence could be the death penalty in especially grave circumstances.⁸³⁰

Another key development of the 1997 revisions to the criminal law is its strict demarcation of the criminal liability for the two acts of selling and buying a trafficked victim, where each carries a different punitive sanction. Article 240 is devoted to the act of selling a trafficked woman or child, which calls for a minimum sentence of five to ten years of imprisonment. In contrast, the succeeding article on the purchase of an abducted woman or child only prescribes a sentence of "fixed-term imprisonment of not

⁸²⁷ *Id.*

⁸²⁸ *Id.* at arts. 240(1), 240(2), 240(5), 240(6) and 240(7).

⁸²⁹ *Id.* at arts. 240(3), 240(8) and 240(4).

⁸³⁰ Although Article 240 does not specify the circumstances that would meet the threshold for "especially serious" circumstances, Paragraph (6) of the 1992 Interpretation does clarify that the intent of this clause was meant to be applied to circumstances, wherein the abduction method was especially cruel and abominable, causing grave bodily harm, death or other serious consequences to the victim or relatives, or there were several women and children abducted under situations that would present a threat to public safety and order.

more than three years, criminal detention or public surveillance.” It is not clear what legal reasoning underpins the reduced sentence for a buyer versus a seller of a trafficked woman or child, especially since both actions are required for this transaction and the exchange of person to take place. Nonetheless, the 1997 revised Criminal Law is internally consistent on this interpretation of penal disproportionality of these two criminal offenses. For instance, if the buyer of a trafficked woman or child under Article 241 resells the victim after purchase, then the offender can be prosecuted on the basis of Article 240 for abduction and trafficking for the purpose of selling the victim. However, such an interpretation is problematic, not only for its somewhat contradictory reasoning that buying a trafficked victim warrants lighter sanctions than the act of selling, but also that it creates potential loopholes for the prosecution of offenders—“a great opportunity for [the offenders] to take advantage of the vagaries” of the law by claiming to have had no prior knowledge of the status of the trafficked woman or child.⁸³¹

Changes to China’s legislative framework to combat the trafficking in women and children have led to greater legal specificity since the promulgation of the country’s first criminal law in 1979. Hence, the 1991 Decision and its subsequent incorporation into the 1997 revised Criminal Law have earned a certain praise for how China’s new definition for trafficking is similar to the international definition under Article 3 of the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the “Trafficking Protocol”).⁸³² This view is misplaced, for there are significant gaps between China’s domestic definition and international standards on the trafficking in persons, beyond the problem of gender exclusivity. The Trafficking Protocol, which China acceded to in February 2010, concretely obliges states parties to criminalise, at the minimum, the full range of conduct covered by the international definition of trafficking in persons.⁸³³ This has not happened to date in China. Much focus, therefore, has been directed at bringing about a change in China’s domestic definition of trafficking. At the international level, the evolution of China’s interpretation of its international obligation on the prohibition of the trafficking in persons is best captured by the treaty-body reviews under CEDAW. China has been a longstanding State Party to this treaty and has made five periodic reports over the last three decades of domestic implementation.

⁸³¹ Gracie Ming Zhao, *Challenging Traditions: Human Rights and Trafficking of Women in China*, 6 J. L. & Soc. Challenges 167, 182 (2004).

⁸³² *Id.* at 178.

⁸³³ United Nations Office on Drug and Crime, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto* 267 (2004) [hereinafter *Legislative Guides*].

7.3. International Reengagement and Human Rights

The People's Republic of China's engagement with the United Nations started in 1971 when the General Assembly passed Resolution 2758, transferring the lawful representation of China at the United Nations from the Nationalist government on Taiwan to Communist China.⁸³⁴ This ushered in a new chapter in China's reengagement with the international system after some twenty years of relative isolationism. Similar to its abrogative approach toward the domestic laws and legal institutions of the earlier Republican period, the People's Republic also formally communicated to the United Nations at this time that it would not assume previously-held international treaty obligations.⁸³⁵ China thus began its reengagement with the United Nations with a completely clean slate, and it was significant, in this context, that the first human rights treaty signed by the government was the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Moreover, China's ratification of CEDAW was markedly expeditious: China signed CEDAW on 17 July 1980, four months after the convention had opened for signature, and ratified it on 4 November 1980. The speed with which China became a State Party to CEDAW—the political commitment given to this human rights treaty in the context of China's nascent international reengagement—was remarkable, given that China had only started to send observers to the Commission on Human Rights in 1979.⁸³⁶

Since then, China has consciously joined the international human rights arena, demonstrating the acceptance of many of the regime's norms by becoming a State Party to a host of major international human rights instruments. As of April 2014, China has ratified six of the ten human rights treaties designated by the Office of the High Commissioner for Human Rights as those constituting the core set of international human rights instruments.⁸³⁷ Amongst those not ratified by China, it has been the International Covenant on Civil and Political Rights (ICCPR) that has received the most

⁸³⁴ Restoration of the Lawful Rights of the People's Republic of China in the United Nations, GA Res. 2758 (XXVI), UN GAOR, 26th Sess., Supp. No. 29, at 2, U.N. Doc. A/8429 (1971).

⁸³⁵ *Note Concerning China*, *supra* n. 728, at iii.

⁸³⁶ Ann Kent, *China, the United Nations, and Human Rights: The Limits of Compliance* 43 (University of Pennsylvania Press 1999).

⁸³⁷ There are ten core international human rights instruments: the nine main human rights treaties and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT); in Office of the United Nations High Commissioner for Human Rights, *The Core International Human Rights Instruments and Their Monitoring Bodies*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (accessed 21 April 2014).

attention. China has been reluctant to become a full-pledged State Party to it following its signature in October 1998.⁸³⁸ Nevertheless, China's long engagement in the form of periodic reviews with the Committee on the Elimination of Discrimination against Women (CEDAW), the body of independent experts that monitors implementation of the convention also known by the same acronym, reflects the evolution of the country's human rights diplomacy at the United Nations.

China submitted its first country report to CEDAW in 1983, which was considered by the committee in 1984 at its third session. After this, China has submitted four more reports on the domestic implementation of CEDAW over the last thirty years. Similar to reports to other treaty bodies, China's periodic reports to CEDAW can provide important insights as to how the government views the general legal framework within which human rights treaty obligations are protected and promoted at the domestic level. Specifically, China's state reports to CEDAW have a unique role in tracing the evolution of how the government, in general, has addressed the issue of trafficking in women and viewed the broader phenomenon of trafficking in persons. This is because Article 6 of CEDAW concretely obliges States Parties to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women." Given that the Trafficking Protocol lacks a formal procedure to monitor state implementation, CEDAW is an important treaty-based mechanism that allows the Chinese government and independent experts to engage in a constructive dialogue on the measures the country has adopted to give full effect to the convention's prohibition on the trafficking of women, as well as potential areas of improvement. Therefore, an analysis of China's periodic reports to the committee can trace key legal and policy developments in how the country has addressed the problem of trafficking, in addition to political shifts in China's human rights diplomacy at the United Nations over the last three decades.

7.3.1. CEDAW and Trafficking in Women

China's ratification of CEDAW in 1980 was swiftly followed by the country's first report to the Committee in 1983, examined a year later during its third session. This report has a special prominence within the context of China's participation in the

⁸³⁸ The other three core treaties not yet ratified by China are: the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; International Convention for the Protection of All Persons from Enforced Disappearance; and OP-CAT. For a recent discussion on China and the ICCPR, see Katie Lee, *China and the International Covenant on Civil and Political Rights: Prospects and Challenges*, 6 Chinese J. Intl. L. 445 (2007).

international human rights regime because it was one of the first two reports submitted by the government to a human rights treaty body. Both of these reports were submitted within a few months of each other. The first was China's first periodic report of 7 April 1983 to the Committee on the Elimination of Racial Discrimination, the treaty body for the International Convention on the Elimination of All Forms of Racial Discrimination, which China acceded to in 1981. A month later, in May 1983, China submitted its first State Party report to CEDAW. Given these reports' symbolic importance, it is unsurprising that China's first periodic report to CEDAW was mainly proclamatory. It carried a heavy focus on the ideology of the Chinese Communist Party and their achievements in the promotion of women and their equality in education, employment and healthcare since the founding of the People's Republic in 1949. China's report thus begun with the following declaration:

[A] new social system [of the People's Republic of China] has been established, which removed the political and economic bases that sustained restrictions on women, and which abolished all the laws that perpetuated oppression and constraining of women, thus creating the social preconditions for their complete emancipation. In the last 34 years since the birth of New China, the status of the Chinese women has undergone enormous changes. We fully realize from our own experience the significance of signing the "Convention on the Elimination of All Forms of Discrimination against Women." We hold that the underlying principles of the Convention is in agreement with the principle of equality between men and women in all fields as laid down in our Constitution, and that the Convention, with its worldwide significance to the further improvement and enhancement of the status of women, is of practical value to the Chinese women as well.⁸³⁹

On the substance of the issue of female trafficking under Article 6 of the Convention, there was actually very little discussion beyond two references to prostitution in the 1979 Criminal Law.⁸⁴⁰ In fact, the term "trafficking in women" was not mentioned in the report. Instead, a large part of the report was devoted to the proclaimed successes of the 1950 Marriage Law, amended in 1980, in the promotion of gender equality.⁸⁴¹ Perhaps it seemed somewhat extraordinary that China's report for its CEDAW treaty-implementation review in 1984 focused so heavily on political ideology, especially the rhetorics surrounding the country's founding and promulgation of the

⁸³⁹ *Initial Reports of States Parties: People's Republic of China*, Committee on the Elimination of Discrimination against Women, 2nd Sess., UN Doc. CEDAW/C/5/Add.14, at 2 (1983) [hereinafter *Initial Report China*, UN Doc. CEDAW/C/5/Add.14].

⁸⁴⁰ *Id.* at 4.

⁸⁴¹ *Id.* at 13-16.

Marriage Law three decades earlier. However, this is consistent with the observation that China was operating on the assumptions of an earlier period when it first entered the United Nations in the 1970s, owing to the purge of intelligentsia and suppression of education during the Cultural Revolution, negatively resulting in the “prevent[ion of] further conceptualization of Chinese theories [on international law] in the late 1960s and 1970s.”⁸⁴²

The first formal consideration of China’s treaty-compliance by CEDAW in 1984 was mainly proclamatory, with no real and meaningful exchange on the country’s progress in implementation. In recognition of the symbolic importance attached to this early report from China to a human rights treaty body, CEDAW was forthright in commending China for the report’s submission and the vast improvements towards gender equality since the government came into power in 1949.⁸⁴³ On issues related to the trafficking in women, the experts treaded lightly. One expert sought a clarification from the Chinese delegation on the legal status of prostitution in China.⁸⁴⁴ China replied to this question in substance in its second periodic report of 1989, considered at CEDAW’s eleventh session in 1992, that prostitution has been prohibited in the country since its founding and further that Article 169 of its 1979 Criminal Law made it an offense for anyone who lures women into or shelters them in prostitution.⁸⁴⁵ However, it is interesting to note that, beyond citing Article 169, which was formally listed as an offense that obstructs the administration of public order, China’s second report failed to reference other provisions in the criminal law that treat the trafficking and prostitution of women as fundamental breaches of personal or democratic rights of individuals. These include the one article where the term “trafficking in persons” actually appeared in its criminal law (Article 141) and Article 140 on forced female prostitution.

In many ways, due to the lack of substance in these early reports, these initial reviews of China’s treaty-compliance of CEDAW support the interpretation of Oona Hathaway that governments mainly ratify human rights treaties for their expressional purpose, rather than for their effects of implementation.⁸⁴⁶ This was most evident in

⁸⁴² Kent, *supra* n. 836, at 35.

⁸⁴³ *Consideration of Reports and Information Submitted by States Parties under Article 18 of the Convention (continued)*, Committee on the Elimination of Discrimination against Women, 3rd Sess., 34th Meeting, UN Doc. CEDAW/C/SR.34, ¶ 1, 3, 6, 11, 18, at 2-4 (1984).

⁸⁴⁴ *Id.* at ¶ 16, at 4.

⁸⁴⁵ *Second Periodic Reports of States Parties Addendum: China*, Committee on the Elimination of Discrimination against Women, UN Doc. CEDAW/C/13/Add.26, at 6 (1989) [hereinafter *Second Periodic Report Addendum China*, UN Doc. CEDAW/C/13/Add.26].

⁸⁴⁶ Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 Yale L. J. 935, 2007 (2002).

China's first periodic report of 1983, in which the government emphasised CEDAW's alignment with China's own domestic goals of advancing gender equality as the main reason for its ratification of the treaty.⁸⁴⁷ Furthermore, these first two reports reflected China's tentative approach during the first decade of its engagement with the international human rights system, where it kept a low but constructive profile.⁸⁴⁸ This changed with the government's militarised response to the Democracy Movement of 1989, inflicting casualties amongst the civilian population of Beijing and protesters who had gathered at Tiananmen Square to call for greater governmental transparency and personal freedoms.⁸⁴⁹ China's crackdown sparked widespread international condemnation. In August 1989, China became the first permanent member of the Security Council to be censured by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in Resolution 1989/5.⁸⁵⁰ As result of the international opprobrium, China found itself in an unfamiliar place and "los[ing] control over the nature of its participation in the human rights regime."⁸⁵¹ With strong protective interests to avoid further criticisms, China could no longer maintain a low-profile approach to participation and engagement with international bodies. The government thus adopted a highly defensive diplomatic stance after 1989, most notably in its interaction with human rights bodies.

Within the treaty monitoring of CEDAW, this noticeable shift towards strong protective interests was seen in China's combined third and fourth report of 1997, its first State Party report prepared after the Tiananmen crackdown. In contrast to earlier reports, where references to national efforts to counter female trafficking were generally nondescript, China's report of 1997 was a significantly more detailed and substantive examination of its domestic implementation. For example, in the preceding report, the Chinese government merely described its national efforts to implement Article 6 of CEDAW as: "competent departments and non-governmental organizations are closely following these incidents [of prostitution and the patronising of brothels] and taking

⁸⁴⁷ *Initial Report China*, UN Doc. CEDAW/C/5/Add.14, *supra* n. 839, at 2.

⁸⁴⁸ Sonya Sceats & Shaun Breslin, *China and the International Human Rights System* 4 (Chatham House 2012).

⁸⁴⁹ The number of casualties resulting from the government's crackdown on the Democracy Movement of 1989 on the night of 3 June 1989 is heavily contested. Casualty numbers are in the range of 700 to 2,000; see James Mann, *About Face: A History of America's Curious Relationship with China, From Nixon to Clinton* 192 n. 43 (Vintage Books 2000).

⁸⁵⁰ See *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-First Session*, Commission on Human Rights, UN Doc. E/CN.4/SUB.2/1989/58, at 23 (1989); and *Encyclopedia of Human Rights* 249 (Edward Lawson, Jan K. Dargel & Mary Lou Bertucci eds., 2d ed., Taylor & Francis 1996).

⁸⁵¹ Kent, *supra* n. 836, at 50.

comprehensive measures to hold them in check by both legal and educational means.”⁸⁵² On the trafficking of women, the combined third and fourth report referred to the adoption of the 1991 Decision and the 1997 revised Criminal Law, which prescribed heavier penalties for the trafficking in women and children than the 1979 Criminal Law, as the basis of its law enforcement campaign against trafficking and other serious disturbances of public order.⁸⁵³ Although the report does not refer to the national *Strike Hard* campaign by name, it is within this intense anti-crime context that the report calls attention to successes in this area, where “[c]ases of abuse of women have declined, and some of the worst cases have been dealt with in a timely fashion.”⁸⁵⁴

As an example of its defensive positioning, China asserted that trafficking and forced prostitution was not a significant problem for the country, citing a decrease in the number of reported female trafficking cases.⁸⁵⁵ Further deflecting criticisms on the extent of its domestic trafficking, the government drew attention to foreign elements of criminality in emerging cases of transborder female trafficking:

In recent years some Chinese traffickers had colluded with foreigners in luring young Chinese women in border areas with the offer of working abroad, marrying a foreigner or working in tourism. The women were taken through Burma to be prostitutes in Thailand. Almost 100—mostly from Shanghai, Hong Kong and Macao—had been rescued by Thai police in 1995 and 1996 and had been returned to China by Thai charitable organizations.⁸⁵⁶

The information provided on national efforts allowed for a more meaningful consideration with the committee on China’s progress in the implementation of CEDAW. For example, government’s statistics indicating a downward trend in female trafficking cases raised an observation from a committee expert that there was a wide gap between the number of reported versus prosecuted cases; for example, only 3,600

⁸⁵² *Second Periodic Report Addendum China*, UN Doc. CEDAW/C/13/Add.26, *supra* n. 845, at 6.

⁸⁵³ *Third and Fourth Periodic Reports of States Parties: China*, Committee on the Elimination of Discrimination against Women, UN Doc. CEDAW/C/CHN/3-4, at 5 (1997) [hereinafter *Third and Fourth Periodic Report China*, UN Doc. CEDAW/C/CHN/3-4]; and *Third and Fourth Periodic Reports of States Parties Addendum: China*, Committee on the Elimination of Discrimination against Women, UN Doc. CEDAW/C/CHN/3-4/Add.1, at 4-5 (1998).

⁸⁵⁴ *Third and Fourth Periodic Report China*, UN Doc. CEDAW/C/CHN/3-4, *supra* n. 853, at 5.

⁸⁵⁵ Numbers cited by China for the reduction in the number of trafficking in women: 13,934 women rescued for 1995; 11,000 for 1996; and 7,051 for 1997; in *Consideration of Reports Submitted by States Parties under Article 18 of the Convention (continued): Combined Third and Fourth Periodic Reports of China*, Committee on the Elimination of Discrimination against Women, 20th Sess., 419th Meeting, UN Doc. CEDAW/C/SR.419, ¶ 47, at 7 (2002).

⁸⁵⁶ *Id.* at ¶ 48, at 7.

cases were prosecuted out of 10,531 reported cases in 1995.⁸⁵⁷ Information on cross-border trafficking between China and neighbouring countries also naturally expanded the discussion on China's transnational criminal justice cooperation, with one expert querying whether China had bilateral agreements in place to deal with such cases and the potential effect of cross-border trafficking on the spread of HIV/AIDS.⁸⁵⁸

China's next report to CEDAW was its combined fifth and sixth report, submitted in 2004 and considered at the committee's 36th session in 2006. This report followed the preceding report's emphasis on national institutions and programmes to combat the trafficking of women by focusing on the following six themes: national legislative and administrative framework; law enforcement campaigns against prostitution; interagency cooperation and coordination; human rights promotion and education; international cooperation and mutual legal assistance; and victim rescue and rehabilitation.⁸⁵⁹ Continuing the discussion on transborder trafficking of women from the previous consideration in 1999, the Chinese government affirmed that this remained an important area of interregional cooperation.⁸⁶⁰ Moreover, this cooperation was not only in the form of mutual legal assistance but also extended to technical cooperation with international specialised agencies, such as UNICEF and the International Labour Organization.⁸⁶¹ Nevertheless, the importance of this review centered on one fundamental issue with regard to the trafficking of women that was not previously examined by earlier reviews: legal lacunae in the definition of trafficking under Chinese criminal law.

⁸⁵⁷ *Consideration of Reports Submitted by States Parties under Article 18 of the Convention (continued): Combined Third and Fourth Periodic Reports of China (continued)*, Committee on the Elimination of Discrimination against Women, 20th Sess., 420th Meeting, UN Doc. CEDAW/C/SR.420, ¶ 34, at 5 (2002).

⁸⁵⁸ *Id.* at ¶ 48, at 6.

⁸⁵⁹ *Combined Fifth and Sixth Periodic Report of States Parties: China*, Committee on the Elimination of Discrimination against Women, UN Doc. CEDAW/C/CHN/5-6, at 17-23 (2004) [hereinafter *Combined Fifth and Sixth Periodic Report China*, UN Doc. CEDAW/C/CHN/5-6].

⁸⁶⁰ *Introductory Statement by H. E. Mme. Huang Qingyi, Head of the Chinese Delegation at the Consideration of the Combined 5th and 6th Periodic Report of the People's Republic of China on the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women*, http://www.un.org/womenwatch/daw/cedaw/cedaw36/intro_statement_china.pdf (10 August 2006), at 8-9 (accessed 23 April 2014).

⁸⁶¹ *Combined Fifth and Sixth Periodic Report China*, UN Doc. CEDAW/C/CHN/5-6, *supra* n. 859, at 20.

7.3.2. Fundamental Issue of Definition

The definition of the term “trafficking in persons” in the 2000 Trafficking Protocol was an important step in international law because it provided a common definition that was “to form the basis of domestic criminal offences that would be similar enough to support efficient international cooperation in investigating and prosecuting cases.”⁸⁶² The agreed definition not only would serve as the bedrock for a concerted global counterstrategy against the trafficking in persons, but also inform research and allow for more accurate comparisons of cross-national data.⁸⁶³ Therefore, the government’s commitment to remedy substantial gaps between its domestic law and international standards on the trafficking in persons could provide an important indication as to how it views the domestic implementation of its international human rights obligations assumed through treaty ratification. This is particularly significant in the Chinese context because current practices by the government have shown that it implements its obligations under human rights treaties indirectly through a transformative process, whereby the National People’s Congress adopts laws that seek to replicate the content of human rights treaties.⁸⁶⁴ In this way, the government aims “to harmonise domestic law with international standards” to the extent that such standards could be accepted by the political system and applied by domestic courts.⁸⁶⁵ Therefore, the dialogues between China and treaty monitoring bodies is a part of this ongoing process that aims to give domestic juridical meaning to international legal standards. Without this, China’s ratification of CEDAW and other human rights treaties would remain a nominal and costless means of expressing support, as opposed to one that brings about full legal effects of treaty compliance and implementation.

The main point raised by CEDAW during its formal consideration in 2006 with regard to China’s obligations under the convention’s Article 6 on trafficking is the country’s limited definition of what constitutes the purpose of trafficking in women and children. Whereas the international definition under Article 3 of the Trafficking Protocol covers a wide range of purposes of labour exploitation, including “the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery [or] servitude,” the Chinese definition of trafficking, under Article 240(4) of China’s 1997 revised Criminal Law, recognises

⁸⁶² *Legislative Guides*, *supra* n. 833, at 269.

⁸⁶³ *Id.*

⁸⁶⁴ Björn Ahl, *Statements of the Chinese Government before Human Rights Treaty Bodies: Doctrine and Practice of Treaty Implementation*, 12 *Austral. J. Asian L.* 82, 83 (2010).

⁸⁶⁵ *Id.*

prostitution as the only type of labour exploitation for trafficking. One committee member spoke of his concerns during the review that “the limited definition of trafficking contained in Chinese criminal law...only defined trafficking for purposes of prostitution and not for other purposes.”⁸⁶⁶ Other labour exploitative practices, such as forced labour, debt bondage, or involuntary servitude, are then excluded from the scope of China’s definition. At the conclusion of the review, one of CEDAW’s main recommendations for China was for it to “increase its efforts to combat all forms of trafficking in women and girls [and]... bring its domestic legislation into line with international standards.”⁸⁶⁷

Interestingly, China did not address the issue of the limited scope of its domestic definition of trafficking in its next State Party report. China submitted the combined seventh and eighth periodic report in 2012, which had not been considered at the time of writing. In this lengthy document, 75 pages in total, China’s survey of its implementation progress of Article 6 focuses on the policy framework to address the prohibition of trafficking in women at the national level and lacks a substantial discussion on the shortfalls in the country’s legislation to combat trafficking.⁸⁶⁸ Moreover, a reading of this most recent periodic report seems to suggest that there has been no noticeable shift in the government’s interpretation of its obligations under Article 6, namely that the trafficking in women remains, in the Chinese legislative context, an offense that targets the commercial sexual exploitation of women and not for other purposes. This view is captured in the concluding paragraph of its report on the implementation of Article 6, in which the government reiterates its stance on the illegality of prostitution and describes law enforcement measures to regulate entertainment venues suspected of hosting illicit sexual activities.⁸⁶⁹ Questions submitted from CEDAW to China in advance of its next review have indicated that the harmonisation of China’s domestic law with international standards on trafficking will again be scrutinised. In March 2014, the committee formally requested that China provide clarifications on the concrete steps taken to amend the definition of trafficking

⁸⁶⁶ *Consideration of Reports Submitted by States Parties under Article 18 of the Convention (continued): Combined Fifth and Sixth Periodic Report of China*, Committee on the Elimination of Discrimination against Women, 36th Sess., 743rd Meeting, UN Doc. CEDAW/C/SR.743, at (B), ¶ 70, at 11 (2006).

⁸⁶⁷ *Concluding Comments of the Committee on the Elimination of Discrimination against Women: China*, Committee on the Elimination of Discrimination against Women, 36th Sess., UN Doc. CEDAW/C/CHN/CO/6, ¶ 20, at 5 (2006).

⁸⁶⁸ *Combined Seventh and Eighth Periodic Report of States Parties: China*, Committee on the Elimination of Discrimination against Women, UN Doc. CEDAW/C/CHN/7-8, ¶ 100-115, at 26-29 (2013).

⁸⁶⁹ *Id.* at ¶ 115, at 29.

in women in its criminal law for the upcoming consideration of the country's treaty-implementation progress.⁸⁷⁰

Much of this issue, the harmonisation of domestic law with international standards, is very much an evolving process with a complicated interplay, not only at the international reviews of China's treaty compliance but also domestically in the ways that academics and others can use the consideration of these periodic reports to call for concrete policy and legal changes. Prominent Chinese sociologist Pan Sui-Ming, for instance, has called for the decriminalisation of prostitution in China, citing CEDAW's concluding comments on China's combined third and fourth periodic reports considered by the committee in 1999.⁸⁷¹ Other scholars are also advocating for changes in the way that trafficking is defined in the criminal law. Chinese legal scholar Yang Wenlong would like to see the reinstatement of a gender-neutral definition of trafficking, more in line with the original provision in the 1979 Criminal Law before efforts to increase legal specificity in 1997 narrowed the scope of the trafficking offense to only address cases involving women and children.⁸⁷² In recent years, international legal scholars with an interest in Chinese law are examining the issue of women and trafficking from a comparative perspective. For example, Rangita de Silva de Alwis, wrote in 2010, that the Philippines' Anti-Trafficking in Persons Act of 2003, which is based on the international and gender-neutral definition of trafficking in persons, could serve as a useful legislative guide for China, by adding specificity to provisions on trafficking under Chinese domestic law and, thus, mitigating the tendency by local authorities to arbitrarily interpret and implement such measures.⁸⁷³ These discussions on amending the definition of trafficking in the criminal code give support to the liberal theory in explaining state's compliance with human rights treaties, in the sense that international obligations can be appropriated by domestic interest groups to effect change and bring

⁸⁷⁰ *List of Issues and Questions in Relation to the Combined Seventh and Eighth Periodic Reports of China*, Committee on the Elimination of Discrimination against Women, 59th Sess., UN Doc. CEDAW/C/CHN/Q/7-8, ¶ 11, at 3 (2014).

⁸⁷¹ Pan Sui-Ming [潘绥铭], *supra* n. 787, at 79; and *Report of the Committee on the Elimination of Discrimination against Women: Twentieth Session (19 January - 5 February 1999) Twenty-First Session (7-25 June 1999)*, General Assembly, 54th Sess., UN Doc. A/54/38/Rev.1, ¶ 288-289, at 30 (1999).

⁸⁷² Yang Wenlong [杨文龙], *Lun "Guaimairenkouzui" de Huifu* [A Discussion On Reinstating the Crime of the Trafficking in Persons; 论“拐卖人口罪”的恢复], 3 Hubei Soc. Sci. [湖北社会科学] 150 (2008).

⁸⁷³ Rangita de Silva de Alwis, *Opportunities and Challenges for Gender-Based Legal Reform in China*, 5 E. Asia L. Rev. 197, 281-283 (2010); and Congress of the Philippines, *An Act to Institute Policies to Eliminate Trafficking in Persons Especially Women and Children, Establishing the Necessary Institutional Mechanisms for the Protection and Support of Trafficked Persons, Providing Penalties for its Violations and for Other Purposes* (the "Anti-Trafficking in Persons Act of 2003") (Republic Act No. 9208), adopted on 12 May 2003 and came into effect on 19 June 2003.

about compliance with those obligations.⁸⁷⁴ Current examinations on the limits of China's definition of trafficking is then a snapshot of this process to bring China into conformity with its international human rights obligations.

* * *

It is too early to draw a conclusive statement on whether China's growing sophistication in the treaty monitoring process, as seen by its more substantive reports, truly represents compliance with its human rights obligations. If one uses the prohibition of trafficking in women as the prism with which to analyse how China views the issue of compliance to a human rights treaty, the picture is ambiguous and very much evolving. Much also depends on how CEDAW and other treaty bodies, such as the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities that address similar issues of vulnerability and exploitation of marginalised groups, continue to engage with the Chinese government. For example, at China's first periodic review under the Convention on the Rights of Persons with Disabilities in 2012, the committee expressed its concerns for cases of the "abduction and forced labour of thousands of persons with intellectual disabilities, especially children" and urged the Chinese government to implement comprehensive measures to prevent further cases from taking place.⁸⁷⁵ Meanwhile, the CEDAW review process will continue to reveal how both the government and committee view the fundamental issue of definition, for there are other substantive gaps relating to China's definition of trafficking not yet raised by either party. These include the limited scope on the variety of acts and means that can constitute the offense of trafficking in the criminal law, which neglects the role that the more covert elements can have in the process of trafficking, such as recruitment by misinformation and deception or by means of the abuse of power or of a position of vulnerability.

These lacunae in the definition have a considerable impact on policies implemented to combat trafficking. For example, China's official 5-year national anti-trafficking plan from 2008 to 2012 was exclusively focused on the trafficking in women and children and only once indirectly referred to the potential trafficking in adult men

⁸⁷⁴ Hathaway, *supra* n. 846, at 1954.

⁸⁷⁵ *Concluding Observations on the Initial Report of China*, Committee on the Rights of Persons with Disabilities, 8th Sess., UN Doc. CRPD/C/CHN/CO/1, ¶¶ 29-30, at 5 (2012).

by using the term “trafficking in migrants.”⁸⁷⁶ This has a large impact on governmental statistics captured on the situation of human trafficking in the country. For instance, the *2013 U.S. Trafficking in Persons* report criticises the Chinese “government’s continued conflation of human smuggling, child abduction, and fraudulent adoption with trafficking offenses” in the criminal law, thereby rendering it difficult to accurately assess China’s anti-trafficking law enforcement efforts.⁸⁷⁷ Nonetheless, there are encouraging signs of change, as seen last year when China released its succeeding national anti-trafficking policy, *China National Plan of Action on Combating Trafficking in Persons (2013-2020)*. Importantly, the title indicates a shift of viewing women and children as the only potential victims of human trafficking in China. It remains to be seen whether a legislative amendment will follow to enact the corresponding change of “trafficking in persons” in Article 240 of the 1997 revised Criminal Law. Since amendments to the criminal law are legislated through a rather opaque process in the Legislative Affairs Committee of the National People’s Congress, there is no public indication of its impending legislative agenda. Nonetheless, the terse statement in China’s current national anti-trafficking action plan that “the crime of ‘trafficking in persons,’ will be strictly enforced in accordance with the law” is highly interesting.⁸⁷⁸ Given that there is no such corresponding offense in its criminal law that covers trafficked victims of both genders, this may be a harbinger of what is to come within the constant, evolving context of China’s domestic legal reforms.

⁸⁷⁶ General Office of the State Council of the People’s Republic of China, *Notice of the General Office of the State Council of the People’s Republic of China on China National Plan of Action on Combating Trafficking in Women and Children (2008-2012)* [国务院办公厅关于印发中国反对拐卖妇女儿童行动计划(2008—2012年)的通知], No. 69 (2007), adopted on 13 December 2007 and came into effect on 1 January 2008. English translation is available from the Chinese web portal of the UN-Inter Agency Project on Human Trafficking in the Greater Mekong Sub-region at <http://www.notip.org.cn/UserImages/00000570.pdf>.

⁸⁷⁷ United States Department of States’ Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report 2013*, at 130 (U.S. Department of State Publication 2013).

⁸⁷⁸ General Office of the State Council of the People’s Republic of China, *Notice of the General Office of the State Council of the People’s Republic of China on China National Plan of Action on Combating Trafficking in Persons (2013-2020)* [国务院办公厅关于印发中国反对拐卖人口行动计划(2013—2020年)的通知], No. 19 (2013), Pt. 2, Sec. 2(1), promulgated and came into effect on 2 March 2013. The cited statement is based on the author’s translation, as there is no official English version of this action plan to date.

8. Conclusions

A verse from the *Confucian Analects*, a work that had a most profound influence on Chinese civilisation, advocated for viewing knowledge as a continuum that links the past and the present; a worthy educator was one who “cherish[es] his old knowledge, so as continually to be acquiring new.”⁸⁷⁹ In recent scholarship on Chinese law, such an approach has been advocated by legal historians working on this area. For instance, the leading Chinese legal historian, Philip Huang has taken an expansive and comparative approach towards the jurisprudence of the Qing and the Republican eras, as well as the present-day People’s Republic. On the absence of a systematic exploration of Chinese legal history by domestic historians, he writes: “There can be no lasting vitality to a field of study in which the subject of study itself views its history as irrelevant to the present.”⁸⁸⁰ As a result of China’s tumultuous twentieth century, this lack of academic interest is driven and reinforced by an inherent political tendency towards historical shortsightedness, as a means of maintaining state legitimacy and superiority over preceding governments.

It is unrealistic, however, to expect that issues that have deep cultural, social and economic roots, as seen in the phenomenon of human trafficking, can be easily addressed by a shift in power and political representation. A good example of this issue is the trafficking in women in China. As explored in Chapter Three, the trafficking in women for marriage and prostitution features strongly in the contemporary Chinese

⁸⁷⁹ *The Four Books with English Translation and Notes: Confucian Analects, the Great Learning, the Doctrine of the Mean, and the Works of Mencius* Confucian Analects Book II, Chapter XI, at 18 (James Legge trans., Commercial Press, Ltd. 1930).

⁸⁸⁰ Philip C. C. Huang, *Chinese Civil Justice, Past and Present* 253 (Rowman & Littlefield Publishers, Inc. 2010).

context, and these same problems in both the domestic setting and the commercial sex trade were also seen with regard to the exploitation of Chinese women in the mid-nineteenth to early twentieth century, as illustrated in Chapter Four. There were differences in the process of trafficking that set apart the similarities between present and past dynamics. For instance, the practice in the past of pledging or pawning a daughter or wife into prostitution so that her family could receive parts of her generated income is no longer reported as a pathway into the commercial sex trade in present-day China. Nevertheless, there have been reports of women in twenty-first century China abducted and sold into situations of sexual exploitation or forced marriage, as was in the past.⁸⁸¹ The challenge for both law enforcement and for those who study human trafficking is to accurately identify the elements in the trafficking process that might have evolved and adapted to the modern context, without viewing the overall phenomenon of female trafficking in China as an invention of modernity and a direct result of the country's economic opening in 1978. This was the first question of this body of research, which posits that there were important historical antecedents to the human trafficking situation of modern twenty-first century China and frames the examination for Part One of this research.

With the present détente between mainland China and Taiwan, there has been a renewed interest to examine the Republican Nationalist rule from 1912 to 1949 in a more neutral, and even somewhat positive, light.⁸⁸² Such momentum to re-examine the legacy of this period, if sustained, could well represent “a genuinely viable Chinese modernity” based on a broad perspective that does not dislocate the present from its history.⁸⁸³ This shift is a positive development, not only in terms of rigorous scholarship on Chinese history or as a political tool to improve the cross-strait relationship, but it allows for a more critical examination of lessons learnt in counter-trafficking strategies of the past and a more in-depth understanding of the human trafficking situation in China. For instance, as examined in Chapter Five, societal expectations of sexual morality limited the Qing imperial government’s efforts to address the trafficking of women for sexual exploitation because its laws held prostitution as “illicit sexual

⁸⁸¹ See Juliet Shwe Gaung, *The Myanmar Times, Forced Marriages Driving Human Trafficking, UN Says*, <http://www.mmmtimes.com/2010/news/512/n51206.html> (Volume 26, No. 512; accessed 19 June 2012); and International Labour Organization, *Girls for Sale: Preventing Trafficking within China* (25 November 2005) (available at http://www.ilo.org/global/about-the-ilo/press-and-media-centre/news/WCMS_075555/).

⁸⁸² See Zhang Qiang & Robert Weatherley, *The Rise of 'Republican Fever' in the PRC and the Implications for CCP Legitimacy*, 27 *China Info*. 277 (2013); Minnie Chan, *South China Morning Post, Historians on Mainland Give Credit to KMT*, <http://www.scmp.com/article/979073/historians-mainland-give-credit-kmt> (15 September 2011); and Li Xin, *The Project on the History of the Republic of China: A Brief Introduction*, 5 *Modern China* 531 (1979).

⁸⁸³ Huang, *supra* n. 880, at 261.

activities” without addressing any potentially exploitative aspects. Decades later, the same tenor was felt in early Communist China, where opprobrium against perceived sexual transgressions, especially on the part of women, undermined key aspects of the Marriage Law of 1950 that aimed to improve the status of women and to outlaw certain practices of trafficking and labour exploitation in the domestic setting. The intensity of the political campaigns for the implementation of the Marriage Law, as described in Chapter Seven, also was a continuation of efforts that first began during the Republican era to legislate gender equality, although this connection is not widely acknowledged. Part Two of the work presented here explored these connections in the various policy and legal approaches of the succeeding governments and addressed the second research question of how various Chinese governments of the nineteenth to the twentieth century responded to this multifaceted problem of human exploitation.

Slavery scholar Kevin Bales once observed, “It is very difficult to solve a problem you do not understand, and more so if the problem is called by a different name every generation.”⁸⁸⁴ The portrayal of human trafficking as a uniquely modern predicament thus misses an opportunity to learn from past endeavors that tackled variations of this complex problem. Even if past efforts were flawed in certain aspects, whether it was due to conflicting laws or inadequate enforcement, they could still hold valuable insights for constructing and implementing a more effective contemporary counter-trafficking strategy. For example, one such lesson that could be adopted in the contemporary setting is the proactive monitoring of male emigration patterns as a way of anticipating the outward flow of female trafficking cases. A key observation made by the League of Nations Commission of Enquiry in 1931 concerning the traffic of Chinese women was that their movement was not arbitrary and distinctly responded to the ebb and flow of Chinese male emigration.⁸⁸⁵ For example, at the height of the male emigration to North America during the 1860s, Chinese female migration to the United States greatly outnumbered those to the British Straits Settlements by almost a factor of ten to one.⁸⁸⁶ The pattern drastically changed following the passing of the Chinese Exclusion Act of 1882 in the United States. As the majority of Chinese male emigrants then moved to the British Straits Settlements, female migration also reversed its earlier

⁸⁸⁴ University of Pennsylvania Press, *Newsletter*, http://www.upenn.edu/pennpress/news/newsletter/ppnl_06_11.html (June 2011).

⁸⁸⁵ League of Nations, *Commission of Enquiry into Traffic in Women and Children in the East: Report to the Council*, Official No. C.849.M.393.1932.IV., 50-52 (1932).

⁸⁸⁶ Wu Zhou [武舟], *Zhongguo Jinu Wenhua Shi* [A Cultural History of Chinese Prostitutes; 中国妓女文化史] 286 (Shanghai East Publishing Center 2006). During the 1860s, according to Wu’s figures based on an earlier Japanese study, 3,434 Chinese women emigrated to the United States and 397 left for the British Straits Settlements.

pattern and increased in great numbers to Southeast Asia. By the 1890s, one study placed the migration of Chinese women to the British Straits Settlements at 54,752, compared with 1,059 to the United States.⁸⁸⁷

Today, such gendered Chinese emigration pattern is not as obvious, given that cases of human trafficking out of China cover an extensive list of countries and span every continent.⁸⁸⁸ Nonetheless, two recent cases of Chinese women trafficked to Africa give some indication that the migration patterns of modern Chinese female trafficking, as in the past, respond to the movement of the main, male-dominated emigration. In November 2010, police in the Democratic Republic of the Congo, acting on intelligence received by China's Anti-Trafficking Office in Beijing from four rescued victims of sex trafficking to Congo, raided a bar in Kinshasa that was believed to have recruited Chinese women for forced prostitution, servicing mainly the 5,000 to 6,000 Chinese workers in the mining industry.⁸⁸⁹ The police rescued 11 Chinese women from this raid and arrested three Chinese suspects, who were repatriated to face prosecution on trafficking charges. This rescue, heralded as an exemplary special operation by China's Ministry of Public Security, received wide domestic coverage. A similar raid took place in October 2011 in Angola, where local police and a special unit of the Anti-Human Trafficking Office in Beijing undertook a joint raid of a local establishment suspected of holding Chinese trafficked women. A total of 19 Chinese women were rescued, who were forcibly held in a compound with three gates and wired fence and guarded by armed men to prevent their escape.⁸⁹⁰

⁸⁸⁷ *Id.*

⁸⁸⁸ See United States Department of States' Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report 2013*, at 128-129 (U.S. Department of State Publication 2010). Destination countries for Chinese trafficking victims were either explicitly mentioned in China's country narrative or cross-referenced in the narratives of other countries.

⁸⁸⁹ Yan Deliang [鄢德良] & Gou Ming [苟明], *Chengdu Business Daily* [成都商报], *Kinshasa "Taohuadao" Jiuchu Beiguai Zhongguo Jiemei* [Abducted Chinese Women Rescued from Kinshasa's Bar "Peach Blossom Island"; 金沙萨“桃花岛”救出被拐中国姐妹], http://news.chengdu.cn/content/2010-12/23/content_609204.htm (23 December 2010). This case illustrates the difficulty of properly identifying victims of forced prostitution. The 11 women rescued in the raid all refused repatriation, citing better remunerations in Kinshasa; in *Deutsche Welle*, *Zai Feizhou Zhongguo Jinu Jujue Fanxiang* [Chinese Prostitutes in Africa Refused to Return Home; 在非洲中国妓女拒绝返乡], <http://dw.de/p/QLj9> (1 January 2011). Hence, the actual number of trafficked victims in this case arguably were the first four women who escaped and provided intelligence for the subsequent raid.

⁸⁹⁰ Chinanews [中国新闻网], *Zhongguo yu Angolan Jingfang Cuihui Guaipian Zhongguo Funu Qiangpo Maiyin Tuanhuo* [Chinese and Angolan Police Dismantle Gang Trafficking in Chinese Women for Prostitution; 中国与安哥拉警方摧毁拐骗中国妇女强迫卖淫团伙], <http://www.chinanews.com/gn/2011/11-16/3463058.shtml> (16 November 2011).

Amongst various reports of human trafficking and China, these two cases of Chinese women trafficked to Africa have received prominent domestic coverage because they involved active transnational cooperation on the part of Chinese law enforcement. However, it is significant to note that prior to the late 1990s, before Chinese economic emigration to Africa became a sizeable migratory trend, there were virtually no reported cases of Chinese women trafficked to the continent. As the Chinese presence in Africa has increased, it has led to more reported cases of Chinese women being trafficked for sexual exploitation to Africa. Hence, these two cases of Chinese women trafficked to Africa not only illustrate the extensive geographic coverage of Chinese trafficking cases, but they also indicate that the migration patterns of modern Chinese female traffic, as in the past, are not sporadic and random. The practical implication of this understanding means that governments, the Chinese and its bilateral counterparts in Africa, can be proactive, since this migration of Chinese men to work in the continent's agriculture, construction, mining and trade sectors is regulated and known to the authorities. The governments then, instead of reacting to cases of trafficking through organised rescues and repatriation, can adopt a proactive anti-traffic strategy based on preventative measures.

The legacy of China's past endeavors to address issues of trafficking and human exploitation has also resulted in a heavy focus on the trafficking of women and children, much to the neglect of the labour exploitation of adult men. During the late-Qing period, the contract recruitment of Chinese coolies abroad masked cases of forced emigration, where some men were abducted and shipped to the Americas. Others might have emigrated voluntarily but later found themselves bound to their contracts in a manner of exploitation akin to chattel slavery and without access to recourse. In southern China, a form of male domestic servitude known as *hsi-min*, which shared similarities with the *mui tsai* practice of selling girls into domestic servitude, took hold in certain localities during the Republican period and possibly earlier. However, knowledge of the *hsi-min* practice was scant, despite it being a much more exploitative practice than the *mui tsai*, in the sense that *hsi-min* was an inheritable status passed through the patriline. As represented by both of these cases, the exploitation of men was largely an area of neglect during both the late-Qing and Republican periods.

The vulnerabilities of adult men also do not feature heavily in People's Republic of China's efforts to tackle labour exploitation in various forms. The Marriage Law of 1950, for instance, only addressed potential practices of exploitation associated with women and girls in the family setting. The country's current criminal code, revised in 1997, formalised this focus on the exploitation of women and children by completely

excluding men from the scope of Article 240 on the criminalisation of abduction and trafficking. Such an approach inevitably sidelines the concerns of other victims of human trafficking, despite that there is no lack of reported cases of trafficking in Chinese men. For example, one of the most egregious cases of human trafficking and labour abuse, exposed in 2007, involved male labourers at brick kilns in northern China. In what is widely labelled as the “brick-kilns slaves” case in China, more than three hundred male victims of human trafficking, including 15 children and 121 persons with disabilities, were rescued from the brick kilns of China’s Shanxi Province from May to June 2007.⁸⁹¹ Each victim was reportedly sold and forced to work under heavy guard for at least 16 hours a day in dire conditions and without pay.⁸⁹² Victims’ testimonies revealed that one labourer was beaten to death for working too slowly by a kiln supervisor, who was later convicted for manslaughter and sentenced to the death penalty.⁸⁹³

The “brick-kilns slaves” case not only illustrated that victims of trafficking can be both men and women, it also indicates that the fluidity of trafficking is such that different protection concerns can simultaneously arise within one reported case. For instance, the trafficking in the mentally disabled continues to feature prominently in discussions on the exploitation of workers at these brick kilns. Their vulnerability to become victims of human trafficking is seen by the experiences of one “[Chinese] reporter [who] disguised himself as a mentally disabled individual and roamed a city’s railway station, soon after which he was thrown into a car and sold by human traffickers for \$78 to brick kiln owners to work in their kiln.”⁸⁹⁴ The case further highlights serious child protection concerns in China, as the rescue efforts were triggered by the online petition signed by 400 parents of abducted children, whose search led them to suspect

⁸⁹¹ There are different figures on the number of rescued victims. These numbers cited are from an official, joint government briefing by the Shanxi provincial government and a special working group of the State Council. There was no indication, from media or government reports, that any of the victims was female; *Website of the Central People’s Government of the People’s Republic of China* [中央政府门户网站], *Shanxi Daji “Heizhuanyao” Xinwentongqihui* [News Briefing on Efforts to Combat “Illegal Brick Kilns” in Shanxi; 山西打击“黑砖窑”新闻通气会], <http://www.gov.cn/wszb/zhibo122> (13 August 2007).

⁸⁹² Wang Xuejiang [王学江], *Xinhua News* [新华网], *Xinhua Shiping: Shishui rang Shanxi Heizhuanyaozhumen Ruci Siwujidan* [Xinhua Commentary: Who Condoned the Wanton Behaviors of Shanxi’s Illegal Brick Kilns Owners; 新华时评: 是谁让山西黑砖窑主们如此肆无忌惮], http://www.gov.cn/zwhd/2007-06/17/content_651555.htm (17 June 2007).

⁸⁹³ *China Daily*, *Man Gets Death for Kiln Slavery*, http://www.chinadaily.com.cn/china/2007-07/17/content_5438028.htm (17 July 2007).

⁸⁹⁴ Liu Xiangrui, *China Daily*, *Brick Kilns Enslaving Disabled Workers*, http://www.chinadaily.com.cn/china/2011-09/06/content_13625804.htm (6 September 2011); and *Henan Television* [河南卫视], *Yige Jizhe de Sitian Zhizhang Nugong Tiyan* [Experiences of One Journalist Impersonating a Disabled Slave Worker for Four Days; 一个记者的四天智障奴工体验], <http://roll.sohu.com/20110906/n318501671.shtml> (6 September 2011).

the brick kilns as exploiters of forced child labour.⁸⁹⁵ Underlining these diverse protection concerns, however, is the important role that investigations and convictions play in effectively combating all forms of human trafficking in China. In the aftermath of the “brick-kilns slaves” in 2007, there were wide suspicions that local officials were colluding with brick kiln operators, especially after the subsequent conviction of a key kiln operator, who was also the son of a local Communist Party official. Official inquiry later cleared 95 low-level officials of corruption but punished them for the dereliction of duty.⁸⁹⁶ Fanned by the fact that the inquiry had not scrutinised more senior party officials and that similar stories of forced labour at the brick kilns have continued to emerge as recently as 2011, widespread skepticism remains that such egregious abuses could have occurred without local officials’ sustained complicity.⁸⁹⁷

Beyond re-examining the vulnerabilities of male labourers to trafficking, a historical perspective to the trafficking situation in China also has important implications for how we view the link of causality to the trafficking problem in the country. As trafficking involves multifaceted aspects of vulnerability and exploitation, it is inherently challenging to determine the relationship between these different variables in order to determine causation. Yet, many academic works on female trafficking in China attribute causality to China’s One-Child Policy and its distorting effects on the

⁸⁹⁵ Xinhua News, *More than 1,000 Rescued from Forced Labor in China*, http://news.xinhuanet.com/english/2007-08/13/content_6524290.htm (13 August 2007).

⁸⁹⁶ Hu Yongping [胡永平], *China.com.cn* [中國網], *Shanxi ‘Heizhuanyao’ an Sheji 2 shi 8 xian 95 ren Shoudangji Zhengjichufen* [95 Individuals in Eight Provinces and Two Cities Received Party Punishment for Shanxi “Illegal Brick Kilns”; 山西“黑砖窑”案涉及2市8县 95人受党籍政纪处分], http://www.china.com.cn/city/txt/2007-07/16/content_8530994.htm (16 July 2007); Zhang Yanling [张艳玲], *China.com.cn* [中國網], *‘Heizhuanyao’ an Zhuyao Chachuduixiang shi Xianji ji Yixia Lingdao* [Officials Below the Provincial Level Are the Principal Targets of Investigation into the “Illegal Brick Kilns”; “黑砖窑”案主要查处对象是县级及以下领导], http://www.china.com.cn/city/txt/2007-07/16/content_8530996.htm (16 July 2007); and Zhang Yanling [张艳玲], *China.com.cn* [中國網], *Weifaxian yu ‘Heizhuanyao’ shijian Youguan de Quanjian Jiaoyiwenti* [Financial Misconduct and Corruption Was Not Found in Investigations into “Illegal Brick Kilns”; 未发现与“黑砖窑”事件有关的权钱交易问题], http://www.china.com.cn/city/txt/2007-07/16/content_8530995.htm (16 July 2007).

⁸⁹⁷ See *ChinaReviewNews.com* [中国评论通讯社], *Guowuyuan Gongzuozu: You Guanyuan Canyu Heizhuanyao de Shengchanjingying* [State Council’s Special Working Group: There Were Some Officials Who Participated in the Operation of Illegal Brick Kilns; 国务院工作组: 有官员参与黑砖窑的生产经营], <http://www.chinareviewnews.com/doc/1003/9/4/4/100394445.html> (23 June 2007); and Gao Feng [高风], *Xinhua News* [新华网], *Zhongguo Jiangyancha Shanxi ‘Heizhuanyao’ Shijian Shizhiduzhi Renyuan* [China Will Investigate Derelict Officials in Shanxi’s “Illegal Brick Kilns”; 中国将严查山西“黑砖窑”事件失职渎职人员], http://news.xinhuanet.com/politics/2007-06/22/content_6278761.htm (22 June 2007).

gender ratio.⁸⁹⁸ One law review directly holds the effects of the One-Child Policy as the “root causes of trafficking” in China.⁸⁹⁹ This sentiment is echoed in another work that states: “[C]urrently, there is a rise in the trafficking of women [in China] due to the [country’s] tremendous shortage of women.”⁹⁰⁰ The link of causality pivots on the fact that whereas the natural human sex ratio at birth is 105.9 male births for every 100 female births, in China this ratio has steadily increased during the past three decades of the One-Child Policy.⁹⁰¹ According to the information released by the National Bureau of Statistics of China in 2011, the sex ratio at birth currently stands at 117.78 male for every 100 female births.⁹⁰² Some rural areas, however, report a significantly higher sex ratio at birth. A study of 20 rural towns, for example, found that there were 159 male for every 100 female births.⁹⁰³ In light of such distorted gender ratio, such interpretation of causation may be intuitively sound, but it does not explain the existence of a significant trafficking problem in China prior to the country’s implementation of the One-Child Policy in 1979.

In many ways, attributing causality of the prevalence of female trafficking in China to the heavily-skewed gender ratio is not without reason, given that it is projected to result in 30 million more men than women by 2030, thus affecting marriage and population patterns.⁹⁰⁴ Yet this postulation of a direct correlation should warrant a more thorough examination, beyond anecdotal evidence or *a priori* deduction. Some scholars from population studies have begun to question this assumption. Writing in 2006, Therese Hesketh and Zhu Wei Xing advocated for more rigorous research on the relationship between sex trafficking and gender imbalance:

⁸⁹⁸ See Mary H. Hansel, *China’s One-Child Policy’s Effect on Women and the Paradox of Persecution and Trafficking*, 11 S. Cal. Rev. L. & Women’s Stud. 369 (2002); Nicole M. Skalla, *China’s One-Child Policy: Illegal Children and the Family Planning Law*, 30 Brook. J. Intl. L. 329 (2004); Susan Tiefenbrun, *Human Trafficking in China*, 6 U. St. Thomas L.J. 247 (2008); and Susan Tiefenbrun, *Decoding International Law: Semiotics and the Humanities* Ch. 9 (Oxford University Press 2010).

⁸⁹⁹ Tiefenbrun, *Human Trafficking in China*, *supra* n. 898, at 247, 258.

⁹⁰⁰ Hansel, *supra* n. 898, at 394.

⁹⁰¹ See Therese Hesketh & Zhu Wei Xing, *Abnormal Sex Ratios in Human Populations: Causes and Consequences*, 103 Proc. Natl. Acad. Sci. 13271, 13271 (2006); and C. Zhou et al., *The High Sex Ratio in China: What Do the Chinese Think?*, 44 J. Biosoc. Sci. 121, 121 (2011).

⁹⁰² National Bureau of Statistics of China, *Statistical Communiqué of the People’s Republic of China on the 2011 National Economic and Social Development*, http://www.stats.gov.cn/english/newsandcomingevents/t20120222_402786587.htm (22 February 2012).

⁹⁰³ Zhuochun Wu, Kirsi Viisainen & Elina Hemminki, *Determinants of High Sex Ration among Newborns: A Cohort Study from Rural Anhui Province, China*, 14 Reproductive Health Matters 172, 175 (2006).

⁹⁰⁴ See Mara Hvistendahl, *Has China Outgrown The One-Child Policy?*, 329 Science 1458 (2010).

A number of other consequences of an excess of men have been described, but there is very little evidence for causation. It is intuitive that if sexual needs are to be met this will lead to a large expansion of the sex industry, including its more unacceptable practices such as coercion and trafficking. The sex industry has expanded in both India and China in the last decade...[but] the part played by a high sex ratio is impossible to isolate without specific research addressing this question.⁹⁰⁵

They further noted that, in fact, the highest numbers of sex workers in China are in areas where the sex ratio is least distorted.⁹⁰⁶ This is not consistent with the interpretation of a direct causation between the prevalence of sex work and gender imbalance, unless other variables such as greater population mobility, increased socioeconomic inequality, and a relaxation in sexual attitudes are further taken into account.⁹⁰⁷ It may very well be that trafficking figures in China seriously underestimate the true extent of the problem, which is a likely scenario given the difficulties of obtaining accurate numbers, or that the effects of the One-Child Policy exacerbate the extent of its trafficking problem. Nevertheless, a straightforward label of causation does not appear to hold when taking into account the historical evidence or emerging findings from the field of population studies. This is a distinct area where more research is critically needed.

A key study on the situation of women in traditional Chinese patriarchy concluded with observations that the pecuniary transfers of women and girls are not confined to the past, for there is a resurgence of customary and early marriages in modern-day China.⁹⁰⁸ Echoing the traditional practice of child betrothals, *tungyanghsi*, are contemporary accounts of the illegal adoption of baby girls in China by parents who want to secure future brides for their sons.⁹⁰⁹ In 2006, a case of domestic servitude similar to the historical *mui tsai* arrangement was reported in Hong Kong, involving the rescue of an eleven-year-old Chinese girl who was sold by her parents to work as a servant in a relative's home, where she sustained serious physical abuse, neglect and

⁹⁰⁵ Hesketh & Zhu, *supra* n. 901, at 13273.

⁹⁰⁶ *Id.* at 13273-13274.

⁹⁰⁷ *Id.* at 13274.

⁹⁰⁸ Maria Jaschok & Suzanne Miers, *Traditionalism, Continuity and Change*, in *Women and Chinese Patriarchy: Submission, Servitude and Escape* 264, 264-265 (Maria Jaschok & Suzanne Miers eds., Hong Kong University Press 1994); see also Hill Gates, *Buying Brides in China—Again*, 12 *Anthropology Today* 8 (1996).

⁹⁰⁹ Minnie Chan, *South China Morning Post*, *Baby Traffickers Shift Focus to Girls*, <http://www.scmp.com/article/510885/baby-traffickers-shift-focus-girls> (4 August 2005).

psychological abuse.⁹¹⁰ Her victimisation, labelled as a case of “child slavery,” led to broader questions as to the possible reemergence of this historical form of child exploitation.

In contrast to the protection concerns immediately raised for cases of trafficked women and children, the labour exploitation of migrant workers, as in the past, remains a neglected area, largely because the initial consent on the part of the migrant can prevent a deeper probe of the potential abuses in their employment conditions. For example, a study of both Chinese male and female migrant workers in the United Kingdom in 2011 had found that “most of the workers [interviewed had] experienced elements of forced labour” and that some “were on the verge of being in a [sustained] forced-labour situation.”⁹¹¹ Domestically, the prevalence of prolonged wage arrears amongst rural migrant workers continues to be a significant problem. Official figures released by the central government indicate that of the 70 million Chinese migrant workers who travelled back home for the Chinese New Year in early 2009, about 4.2 million of them were owed wage arrears by their employers; about eight percent of those who had lost their jobs before the holidays had not been fully paid before the job termination.⁹¹²

The past not only offers an interesting vantage point on which to view the human trafficking situation of twenty-first century China, but also the extent and impact of China’s engagement with the international community on issues related to human exploitation. Broadly, such an exploration ultimately concerns the diplomatic history of China, whether on a bilateral basis as during the late-Qing when the plight of coolie labourers led to the imperial government’s landmark decision to post diplomatic representations in the Americas, or internationally with the League of Nations and United Nations. At its heart, the examination is one of how China interprets its human rights obligations with regard to the issue of trafficking and exploitation. Beyond the immediate examination of the Convention on the Elimination of All Forms of Discrimination Against Women and its prohibition on the trafficking of women as previously discussed, is the broader question on the tension between the expressive

⁹¹⁰ ACW Lee & KT So, *Child Slavery in Hong Kong: Case Report and Historical Review*, 12 H.K. Med. J. 463 (2006).

⁹¹¹ Carolyn Kagan et al., *Joseph Rowntree Foundation, Experiences of Forced Labour Among Chinese Migrant Workers* 41, <http://www.jrf.org.uk/publications/chinese-experiences-forced-labour> (2011).

⁹¹² *National Bureau of Statistics of China* [國家統計局], *2008 nianmo Quanguo Nongmingong Zongliang wei 22542 wan Ren* [Chinese Peasant Workers Totaled 225.42 Million at the End of 2008; 2008年末全国农民工总量为22542万人], http://www.stats.gov.cn/tjfx/fxbg/t20090325_402547406.htm (25 March 2009).

versus instrumental roles of human rights treaties in the Chinese context. This dichotomy is exemplified by China's signing of the International Covenant on Civil and Political Rights (ICCPR) in 1998 and its continued reluctance to ratify this important human rights treaty. At the conclusion of the country's second Universal Periodic Review in 2013, China rejected the recommendation to ratify the ICCPR by formally stating its position, citing reasons of instrumentality, as the following: "China is now prudently carrying out its judicial and administrative reform to actively prepare for the ratification of the ICCPR. No specific timetable for the ratification of the ICCPR could be set out so far."⁹¹³

As in the past, what will be in the background of this engagement is the question of domestic effect: what are and what will be the domestic impacts of China's international human rights engagement? Nevertheless, in recent years, a separate but related question has come to the fore, which asks what is the general implication of China's increasingly confident engagement with international human rights bodies as result of its growing diplomatic sophistication in this area?⁹¹⁴ While one view believes that "China's burgeoning economic and political power will have mounting ramifications for international human rights by providing the opportunity to dictate the extent to which human rights are defended outside and inside its borders,"⁹¹⁵ others are more cautious and believe the change is more in approach than in actual merit. Sceats and Breslin, for example, write: "For now at least, China is not operating as a norm-maker in this [human rights] corner of the international system, but...it is not a passive norm-taker either."⁹¹⁶ Just where China will sit on the spectrum of positions between norm-maker and norm-breaker is an important question that will reverberate beyond the specialised field of international human rights. Nevertheless, the potential for China to affect the current discussion on the trafficking in persons is considerable in both directions: either as norm-maker that gives more focus to the labour abuses of male trafficked victims or as a norm-breaker that continues to conflate, in general, all prostitution and fraudulent, but non-exploitative, adoption of children with trafficking offenses outside the scope of the international definition of trafficking in persons. It very much remains to be seen which interpretation China will follow and how it

⁹¹³ United Nations General Assembly, *Report of the Working Group on the Universal Periodic Review: China Addendum. Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review*, UN Doc. A/HRC/25/5/Add.1, at 2 (2014).

⁹¹⁴ See Sonya Sceats & Shaun Breslin, *China and the International Human Rights System* (Chatham House 2012); and David Kampf, *China's Rise and the Implications for International Human Rights*, China Rights Forum 43 (2007).

⁹¹⁵ Kampf, *supra* n. 914, at 43.

⁹¹⁶ Sceats & Breslin, *supra* n. 914, at 2.

continues to treat its legacy of sustained efforts in the past to address issues of trafficking and exploitation. However, either way, it will have an impact that extends beyond the territory of China on the priorities of any meaningful and concerted, regional or international, counterstrategy to tackle the trafficking in persons.

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Others

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