

**China, India and the Palermo Protocol:**

Consent, Compliance and the Influence of International Law on Domestic Policy

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## **Abbreviations Key**

ACWF – All-China Women’s Federation

AHTU – Anti-Human Trafficking Taskforce

CCP – Chinese Communist Party (also known as the CPC, or Communist Party of China)

CEDAW – Convention on the Elimination of All Forms of Discrimination against Women

CLA – India’s Criminal Law (Amendment) Act

CRC – Convention on the Rights of the Child

CSE – Commercial sexual exploitation

CTOC – United Nations Convention against Transnational Organized Crime

ILO – International Labour Organization

IOM – International Organization for Migration

IPC – Indian Penal Code

ITPA – Immoral Trafficking (Prevention) Act

MFA – Ministry of Foreign Affairs

MHA – Ministry of Home Affairs

NCRB – National Crimes Record Bureau

NPA – National Plan of Action

NPC – National People’s Congress

PRC – People’s Republic of China

RTL – Reeducation through Labor camps

TIP – Trafficking in persons

TVPA – U.S. Trafficking Victims Protection Act

UNHCR – United Nations High Commissioner for Refugees

UNIAP – United Nations Inter-Agency Project on Human Trafficking

UNODC – United Nations Office on Drugs and Crime

China ratified the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children on 26 December 2009, as did India a year and a half later on 5 May 2011.<sup>1</sup> Since ratification, both countries have undergone changes in their domestic legislation which have brought them closer to compliance with the international treaty. However, throughout these changes, each country has continued to be deemed by the United States to “not fully comply with the minimum standards for the elimination of trafficking.”<sup>2</sup> In its 2013 annual *Trafficking in Persons Report* (TIP Report), the United States downgraded China from the Tier 2 Watch List to Tier 3, the lowest ranking in the four-tiered system.<sup>3</sup> India, on the other hand, maintained its Tier 2 ranking because, while it “does not fully comply with the minimum standards for the elimination of trafficking..., it is making significant efforts to do so.”<sup>4</sup> China’s ratification of the Protocol in 2009 did not impact its TIP ranking, yet when India ratified the treaty in 2011, the United States upgraded India’s ranking, viewing ratification as a strong sign of the government of India’s commitment to combat trafficking. Such rankings might prompt one to assume that China only ratified the treaty superficially, whereas India had truer initial intentions and has since maintained a higher level of compliance.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereafter, either the Palermo Protocol or the Trafficking Protocol) is one of three protocols supplementing the United Nations Convention against Transnational Organized Crime (CTOC).<sup>5</sup> Ratification of the Protocol first requires ratification of the parent Convention. The

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<sup>1</sup> The Protocol officially entered into force on 25 December 2003, See Status of Ratification for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (UN CTOC), Available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en).

<sup>2</sup> United States Department of State, *Trafficking in Persons Report*, Office of the Under Secretary for Democracy and Global Affairs (2013), See China and India Country Narratives, 129, 195.

<sup>3</sup> The US State Department’s Office to Monitor and Combat Trafficking in Persons was established by the Trafficking Victims Protection Act (TVPA) in 2000 (initially called the Victims of Trafficking and Violence Protection Act of 2000 [P.L. 106-386]). The legislation set up a four-tier ranking system whereby countries are ranked against their own individual progress on an annual basis (the TIP Report is not a comparative ranking process between countries). Tier 1: countries who fully comply with the U.S. TVPA minimum standards; Tier 2: countries who do not fully comply with TVPA minimum standards but are making significant effort to do so; Tier 2 Watch List: similar to Tier 2 countries, but also have an increasing domestic problem with human trafficking, have failed to produce evidence of their attempts to move into compliance, or efforts towards compliance are as yet unrealized plans for the future year; Tier 3: countries who do not comply with TVPA minimum standards and are not making significant effort to do so.

<sup>4</sup> 2013 TIP Report, *supra* note 2, 195.

<sup>5</sup> The Trafficking Protocol and the Protocol against the Smuggling of Migrants by Land, Sea and Air were opened simultaneously for States signature December 2000. The third protocol on the Illicit Manufacturing of and

two are to be interpreted together, with the provisions of the Convention applying to the Protocol. CTOC, though, does not establish a mandatory self-reporting system built into the Conference of Parties nor does it provide for any other authorized way within the Convention itself to assess and make determinations on member states' treaty compliance levels. Some scholars, therefore, have used the U.S. TIP Report to evaluate countries' efforts to combat trafficking in persons.<sup>6</sup> Even assuming no bias in the drafting of the TIP Report, the use of it to assess state behavior measured against the Protocol is problematic. The TIP rankings and "minimum standards" are based on U.S. legislation in the Trafficking Victims Protection Act (TVPA) in 2000, and are only loosely connected to norms codified in international law in the Palermo Protocol. This difference renders the TIP Report insufficient in determining member states' compliance with the international treaty. This paper is not concerned with whether or not China and India are complying with standards established by U.S. national legislation to which neither country ever consented. Instead, this paper seeks to understand each country's level of compliance with the Trafficking Protocol, as well as the reasons behind that compliance or the lack thereof.

Ultimately, this paper questions whether international law in the form of the Trafficking Protocol has had any impact on shaping state behavior on the part of the Chinese and Indian governments. Is the treaty inciting compliance by China and India, and is the treaty having a positive impact on the governments' respective efforts to combat trafficking in persons within their jurisdictions? To answer this question, this paper will begin with an overview of the literature on theories of compliance. Compliance here is understood as the "state of conformity or identity between an actor's behavior and a specified rule."<sup>7</sup> It is worth pondering why a state

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Trafficking in Firearms was adopted by the United Nations General Assembly May 2001. China is a signatory member of the Convention against Transnational Organized Crime and formally ratified the convention two years later on 23 September 2003. China never signed nor ratified the Smuggling Protocol, though it did become a signatory to the Arms Trafficking Protocol on 9 December 2002. India ratified all three protocols and the convention simultaneously on 5 May 2011. See UN Office on Drugs and Crime, Status of Ratification, Available at <http://www.unodc.org/unodc/treaties/CTOC/>.

<sup>6</sup> Laura Shoaps, "Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act," 17 *Lewis and Clark Law Review* (2013), 937; Mary Catherine Hendrix, "Enforcing the U.S. Trafficking Victims Protection Act in Emerging Markets: The Challenge of Affecting Change in India and China," 43 *Cornell International Law Journal* (2010).

<sup>7</sup> Kal Raustiala and Anne-Marie Slaughter, "International Law, International Relations and Compliance," in *Handbook of International Relations*, Ed. Walter Carlsnaes, Thomas Risse-Kappen, Thomas Risse, and Beth A Simmons (2002), 539.

would wait eight years or more to ratify an international legal instrument if it were not fully committed to the ideals set forth in the document and desirous of implementing the treaty provisions within its domestic jurisdiction. Indeed, it would seem logical that a sovereign state would only consent to being bound by a treaty if it already anticipated itself fulfilling whatever action the treaty required. However, the theory shows that this is not always the case, explaining why some states initially consent to treaties and later either comply or act in violation of their international obligations.<sup>8</sup>

The second and third sections will test these theories, first by looking at the Protocol itself as an international legal instrument, what it encompasses, what it excludes, the nature of the obligations it imposes, and the tools it establishes to encourage compliance among member states. Treaty design is essential to understanding the incentive structure of states for compliance. This discussion will cover the context in which the Protocol was negotiated and give an overview of the development of human trafficking discourse by the academic and practitioner communities. Trafficking in persons has been hotly debated by the international community in two core areas: one as to which acts should be criminalized under the comprehensive international legal definition, and two whether a human rights or law enforcement approach is more appropriate and effective. In the first case, groups are deeply divided over distinctions between migrant smuggling versus human trafficking and between sex work versus sex trafficking. Secondly, the international community has struggled to balance rights protections of victims with cracking down on transborder crime. Most member states came to the negotiating table interested in protecting their sovereign borders, preventing illegal migration, and fighting transnational organized crime.<sup>9</sup> The compromises that were made to encourage a higher level of universal acceptance established shallow obligations for human rights protections with more robust provisions for law enforcement. This context of the legal and political discourse surrounding human trafficking explains the legal mechanisms that were set up for the monitoring and enforcement of the treaty, which are weak to nonexistent.

The third section will continue to test the various compliance theories through looking at China and India as two case studies, lining up their state behavior with specific legal obligations

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<sup>8</sup> See Abram Chayes and Antonia Chayes, "On Compliance," 47 *International Organization* (1993); Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (2009).

<sup>9</sup> Anne T. Gallagher, *The International Law of Human Trafficking*, New York: Cambridge University Press (2010), 2.

and internationally agreed upon norms and rules in the Trafficking Protocol. This section will explore the degree of their compliance by as a simple matter of state behavior, absent any causality with intent. As Raustiala and Slaughter point out, this will not merely be an exercise in assessing implementation, as compliance may occur without implementation, such as in instances where the international commitment already matches current practice.<sup>10</sup> Since this paper seeks to understand the effectiveness of the international law upon member states, though, an effort will be made to distinguish between pre- and post-ratification policies towards human trafficking to see what and how much has actually changed in each country pursuant to their deliberate choice to join the Protocol. Has ratification been followed up by drawing the countries further into compliance?

The final analysis section of the paper will revisit the theory to answer the initial question of why China and India are complying with certain aspects of the treaty and not with others. What explains their compliance or noncompliance, and can international law be credited for the changes within these countries towards combating human trafficking? One thing to bear in mind throughout this analysis is that China and India have only been party to the Trafficking Protocol for five and three years, and that they may still be in the process of synthesizing the international law with their own domestic law and state practice. Even so, to the extent possible, this section will try to parse the intent behind state behavior, considering the process of state socialization and the role that domestic politics and domestic political structures play.

## **I. Theories of Compliance**

To answer the question of whether and to what extent the Trafficking Protocol may be influencing state behavior in China and India, it is important to understand the broader theory concerning treaty compliance. The international legal field generally agrees that international law positively influences states' actions,<sup>11</sup> but the nature, extent, and causes for this influence are less clear. Even definitions for what qualifies as "compliance" are variable depending on how scholars try to distinguish between levels of states' acceptance of established international norms

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<sup>10</sup> Raustiala and Slaughter, *supra* note 7, 539.

<sup>11</sup> Louis Henkin, *How Nations Behave* (1979) 47.

for behavior. For example, at its most basic level, compliance can be described as a state bringing its behavior into alignment with a particular international rule, where causality or state intent is unimportant.<sup>12</sup> Harold Koh describes “compliance” as conformity with the international rule for instrumental reasons, such as a desire to avoid punishment. He contrasts this with “obedience” which is behavior resulting from the internalization of norms. States pass through a three-step process where they first interact with the international legal norms, interpret them, and finally internalize them into their own domestic legal systems.<sup>13</sup> Similarly, Ann Kent separates “compliance” as a legal term from “cooperation” as a political term. The former speaks to the implementation of specific norms, binding principles and rules, whereas cooperation digs deeper to indicate state action which “promotes the object and purpose of a treaty or regime, and, in particular, their non-binding norms.”<sup>14</sup>

Scholars are also divided on the causes of compliance. Some argue that states are naturally inclined towards compliance, others that enforcement mechanisms are necessary, that compliance occurs over a gradual socializing process, or that domestic institutions and domestic politics bear heavily on how a state approaches its international obligations. Managerialists reason that since states must consent to be bound by international treaties, it follows that they will only ratify treaties which are in their own interests and which they have every intention of upholding. Since the negotiation and ratification process is protracted and costly, consenting states will find future compliance to be more efficient and cost-effective than internal recalculation. Noncompliance is not a punishable offence in need of coercive sanctions, but rather the result of ambiguity in the treaty language, limitations in state capacity, or uncontrollable changes in the domestic social or economic situation of states. The states themselves desire to be in compliance; they just need more support to fulfill treaty obligations.<sup>15</sup> Critics of the managerial school observe that the theory does not account for the depth of cooperation stipulated for in the treaty. If the treaty only requires state action which member states are already pursuing, then the international law is not having much of an effect on state

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<sup>12</sup> Raustiala and Slaughter, *supra* note 7, 539.

<sup>13</sup> Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 *Yale Law Journal* (1997).

<sup>14</sup> Ann Kent, *Beyond Compliance: China, international organizations, and global security*, Stanford: Stanford University Press, 2007, 17.

<sup>15</sup> Chayes and Chayes, *supra* note 8.



behavior. These scholars try to unravel the correlation between a treaty's depth of cooperation and the level of enforcement mechanisms needed to prevent cheating.<sup>16</sup>

A second group of scholars argue that compliance can be understood through an analysis of the international agreement's architecture. There are three features of an agreement which influence later compliance by member states: legality, structure and substance. Legality means whether or not the treaty is legally binding – is the treaty a contract between member states or simply a pledge. Structure indicates the existence or type of monitoring and enforcement mechanisms provided for in the treaty. Lastly, substance is the depth of cooperation and deviation from the status quo required.<sup>17</sup> Raustiala points out that when the form of legal contract is used in international agreements, states parties “often compensate for the risk of their own noncompliance by weakening monitoring or watering down commitments.”<sup>18</sup> Both the Palermo Protocol and its parent document the CTOC are legal contracts, yet as will be seen, many of the provisions lack clear enforcement features and state vague or imprecise commitments. In the negotiation and ratification of treaties, there is a tradeoff between the depth of cooperation or substance of the treaty and the universality of its acceptance by states. The less an international agreement demands of states in terms of action to be taken outside of their current status quo, the more likely states will be to sign on and comply. The downside of broader universality of a treaty is a weaker treaty with shallow obligations.

Another group of scholars posit that states may be socialized into compliance with international legal norms. Goodman and Jinks argue that states are positively impacted through their engagement and interaction with the international community. Regime design influences state practice through the three mechanisms of material inducement, persuasion and acculturation.<sup>19</sup> In the first case, states tend to look after their own self-interests, responding to reputational costs and direct sanctions which may result from violations of the law.<sup>20</sup> Likewise, they may see incentives to compliance, such as the strategic dimensions of cooperation,

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<sup>16</sup> George Downs, David Rocke and Peter Barsoom, “Is the Good News about Compliance Good News about Cooperation,” 50 *International Organization* 3 (1996).

<sup>17</sup> Kal Raustiala, “Form and Substance in International Agreements,” *The American Journal of International Law*, Vol. 99, No. 3 (2005), 581.

<sup>18</sup> *Id.*, 582.

<sup>19</sup> Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights through International Law* (2013).

<sup>20</sup> Andrew Guzman, “A Compliance-Based Theory of International Law,” 90 *California Law Review* (2002) 1827.

expecting material or reputational benefits to accrue through greater coordination with other states.<sup>21</sup> Persuasion refers to a state being convinced through reasoned arguments of the validity and legitimacy of the international legal standards. The state internalizes the international law domestically, coming to not only comply with the law, but to also believe in the law.

Acculturation speaks to the social element of international law, where states are pressured to assimilate and to adopt the beliefs of their surrounding culture. States adopt certain behavioral patterns, not because they have been convinced of the intrinsic merit of such behavior, but rather because they have chosen to identify with a specific reference group or culture. Acculturation tries to account for the value which states assign to the relationship they may have with each other or with the international community. Much of Goodman and Jinks' ideas are rooted in Iain Johnston's socialization theory, which he developed specifically looking at the case of China. Johnston also sees three causes for compliance. His concept of acculturation is "social influence," where a state pursues certain behavior, hoping to be rewarded socially for doing so. The international community, of course, hopes to eventually socialize all states to persuade them of the normalcy and correctness of specific behavior. This is the ultimate internalization of international legal precepts, where states come to believe a law "normal, given and normatively correct," following the norm for internal reasons instead of external pressures.<sup>22</sup> Johnston's third point is that even should a state not be persuaded rationally to internalize a law nor view pro-group behavior as a sufficient incentive, this state may still choose to comply due to emulation or mimicking. States may adopt and emulate laws they perceive to be best practices by others, or they may mimic others simply because they do not know any better way.

Another body of literature looks at the role that domestic politics and institutions play on a state's aptitude towards compliance. Empirical research shows that treaty compliance is more likely in democratic societies with strong domestic civil societies, and that this is especially true with regards to human rights treaties.<sup>23</sup> Domestic politics influence the negotiation and

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<sup>21</sup> Raustiala and Slaughter, *supra* note 7, 543.

<sup>22</sup> Alastair Iain Johnston, *Social States: China in International Institutions 1980-2000* (2008), xxv.

<sup>23</sup> Beth Simmons, *Mobilizing for Human Rights* (2009); Eric Neumayer, "Do International Human Rights Treaties Improve Respect for Human Rights?" 49 *Journal of Conflict Resolution* 6 (2005); Linda Camp Keith, "The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?" 36 *Journal of Peace Research* (1999).

ratification of international treaties by dictating the size and overlap of possible win-sets,<sup>24</sup> and those treaties in turn shape domestic politics “to the extent that they empower individuals, groups, or parts of the state with different rights preferences that were not empowered to the same extent in the absence of the treaties.”<sup>25</sup> Human rights treaties do not involve reciprocal compliance, there are no mutual gains or reciprocity at stake. The incentives to comply at the international level are negligible as peer enforcement is weak and noncompliance on a human rights agreement does not necessarily translate to a reputational hit as an unreliable trade partner or military ally.<sup>26</sup>

This distinction in incentives for compliance between human rights treaties and other types of contracts which do involve joint gains is critical for understanding the Trafficking Protocol. This treaty raises interesting compliance theory questions due to its hybrid nature as both a fighting crime and a human rights treaty. On one side, the treaty seeks to coordinate state behavior in a global attempt to combat transnational organized crime. Here states are encouraged towards cooperation, whether through information sharing, coordination of law enforcement and border officials, or repatriation of foreign victims. States find themselves in a repeated multiplayer game where transnational cooperation and coordination could benefit all players as long as the incentive structure to cooperate is greater than the rewards of cheating.<sup>27</sup> The other side of the Protocol, though, is similar to an international human rights treaty, where there are no strong reciprocal cooperation principles at stake. States are merely expected to act to the best of their abilities to guarantee certain rights and protections to victims residing in and passing through their jurisdictions. As will be discussed further in the following section, the Protocol’s provisions for rights protections remain aspirational and shallow, without requiring much of any strong commitment by member states. The Protocol’s duality of purpose bifurcates compliance incentives and causes states to follow different approaches in response to the two sides of the treaty.

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<sup>24</sup> Robert Putnam, “Diplomacy and Domestic Politics: The Logic of Two-Level Games,” *International Organization*, Vol. 42, No. 3 (1988).

<sup>25</sup> Beth Simmons, *supra* note 23, 125.

<sup>26</sup> George Downs and Michael Jones, “Reputation, Compliance and International Law,” 33 *Journal of Legal Studies* (2002).

<sup>27</sup> Downs, Rocke and Barsoom, *supra* note 16.

Because human rights treaties lack strong international incentives for compliance and are heavily dependent on the activism of domestic players to ensure the government follows through on its international commitment, domestic institutions are vitally important. Beth Simmons argues that treaties can impact state behavior by altering the national agenda, leveraging litigation, and empowering political mobilization.<sup>28</sup> Treaties facilitate changes in domestic law which would not otherwise have occurred. The international treaty sets the domestic agenda, whether by raising the issue in the public discourse and consciousness, or by giving advocates of the issue additional material to use in pushing through their policy initiatives.<sup>29</sup> The treaty convinces people of the worth of the value in question, thus inspiring them to fight for it.<sup>30</sup> While political consciousness on an issue can be heightened within almost any system of government, Simmons's other two mechanisms of litigation and political mobilization will be most effective within democratic societies. In order for treaties to help leverage litigation on human rights issues and thus bring about change, the system needs to have an independent judiciary and the political culture needs to possess a high respect for judicial decisions. Likewise, political mobilization has a higher probability of success within democracies, which by their nature, are responsive to citizens' demands.<sup>31</sup>

The following three sections will test these theories in analyzing if, how and to what extent the Trafficking Protocol is affecting state behavior in China and India. First, this paper takes up the notion of the form and substance of the Protocol as an international legal instrument. The next section walks through the two case studies of China and India, looking at the different ways each has either complied or not complied with the treaty. The final section analyzes both states' behaviors in light of the discussed compliance theory. Are China and India being socialized into the international community, and where are they in the process of internalizing the norms for combating trafficking as specified in the Palermo Protocol? What is the role that domestic institutions and domestic politics are playing on influencing compliance? China with a centralized authoritarian government lacking a robust civil society would be expected to react

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<sup>28</sup> Beth Simmons, *supra* note 23, 148.

<sup>29</sup> *Id.* at 127-129.

<sup>30</sup> *Id.* at 144.

<sup>31</sup> *Id.* at 150-151.

internally to a treaty differently from India with its democratic institutions and culture of civil society activism.

## **II. Constructing an International Legal Instrument to Combat Trafficking in Persons**

### **A. Negotiation and Ratification**

The 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children has as of February 2014, been ratified by 159 states parties.<sup>32</sup> The Protocol marked the first time that the international community agreed to a harmonized definition for human trafficking, thus creating a common language through which to discuss the issue, and organized a legal and political framework by which to address such crimes. The Protocol had three main objectives as laid out in Article 2:

- a) To prevent and combat trafficking in persons, paying particular attention to women and children;
- b) To protect and assist victims of such trafficking, with full respect for their human rights; and
- c) To promote cooperation among States Parties in order to meet those objectives.<sup>33</sup>

The Protocol was the result of United Nations attention being drawn to the crime of trafficking in persons. Member states increasingly saw human trafficking as a growing threat to national and human security, enhanced by changes to the international system brought about by the effects of globalization where transnational organized crime groups were able to build networks spanning continents and easily elude national border controls.<sup>34</sup> On 9 December 1998, the United Nations General Assembly adopted resolution 53/111, calling for an intergovernmental ad hoc committee for the purpose of crafting a convention against organized crime. Three additional legal instruments were to be established to deal with trafficking in persons, trafficking in firearms and

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<sup>32</sup> See United Nations Treaty Collection, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en), Accessed 26 February 2014.

<sup>33</sup> United Nations Office on Drugs and Crime, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (15 November 2000), Article 2.

<sup>34</sup> Kristina Touzenis, "Trafficking in Human Beings: Human Rights and Transnational Criminal Law, Developments in Law and Practice," *UNESCO Migration Studies* 3 (2010), 67.

human smuggling. At the first session of the Ad Hoc Committee in January 1999, delegates from both Argentina and the United States submitted draft protocols to combat international trafficking in women and children. Throughout the mid-1990s, Argentina had been lobbying for a new convention against the trafficking in minors, intent on mitigating crimes in child prostitution and child pornography. Argentina was frustrated by the slow negotiating pace to make this happen within the framework of the Convention on the Rights of the Child (CRC), and believed that a comprehensive approach was needed so as to address not just the human rights concerns but also the transnational organized crime aspects.<sup>35</sup> The issue of human trafficking had also been gaining salience on a policy level in the United States following a 1998 presidential memorandum on measures to be taken by the Clinton administration.

The Ad Hoc Committee met over the next several months to integrate and revise the two protocol drafts, negotiating through eleven sessions with participation from over 120 states.<sup>36</sup> A large question arose as to whether the UNGA mandate allowed for the protocol to address all forms of trafficking in persons or was limited more narrowly to trafficking in women and children.<sup>37</sup> In the end following a recommendation submitted by the Ad Hoc Committee, the GA agreed to expand the scope of the protocol to cover all trafficking in persons, though with a particular focus on “women and children.”<sup>38</sup> This initial discussion as to whom would qualify for protection under the international legal instrument continues to have relevance today, as it has been a long-standing source of contention between the United States with both China and India.

## **B. Defining the Term and Definitional Disputes**

Arguably the largest accomplishment of the Palermo Protocol was in harmonizing the international legal definition of human trafficking. In the process, the ad hoc committee evaluated twenty-four different definitions, wading through distinctions of human trafficking

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<sup>35</sup> Anne T. Gallagher, “Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis,” 23 *Human Rights Quarterly* (2001), 982.

<sup>36</sup> *Id.*, 975.

<sup>37</sup> Shoaps, *supra* note 6, 937.

<sup>38</sup> 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, U.N. GAOR 55th Sess., Agenda Item 105, at 1, U.N. Doc. A/55/383 (2000).

versus human smuggling and sex trafficking versus sex work.<sup>39</sup> These distinctions are essential both for identifying the problem and for purposes of measuring compliance.

In the first place, academics, practitioners and policy makers struggle to even identify the population under discussion. Due to the invisibility of the crime, no one knows precisely how many people are being trafficked or living in situations of coerced exploitation.<sup>40</sup> The inherent nature of human trafficking to be underreported coupled with ongoing definitional ambiguity over the term's inclusiveness of different actions means that estimates for the total global number of people trafficked annually ranges from 600,000<sup>41</sup> to 27 million.<sup>42</sup> Secondly, and of greater relevance for the purpose of this study, making the language clear and straightforward is essential to later monitoring and assessing state compliance. States parties need to know precisely to what they are being expected to comply. This entails first identifying the “wrong of trafficking,” and second understanding the precise obligations of states under the Protocol which are capable of measurable implementation.<sup>43</sup> This section will first discuss the international definition of trafficking in persons before going into the definitional challenges which have influenced the development of the term since 2000.

The *UN Convention on Transnational Organized Crime (UN TOC) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* Article 3(a) defines three aspects of human trafficking: action, means and purpose. The *action* includes the “recruitment, transportation, transfer, harbouring or receipt of persons.” The *means* can encompass “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.” All of this is done “for the *purpose* of exploitation [which] shall include,

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<sup>39</sup> *Background Information: Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime*, United Nations Office on Drugs and Crime, Available at <http://www.unodc.org/unodc/en/treaties/CTOC/background/adhoc-committee.html>, Accessed 26 February 2014.

<sup>40</sup> Because trafficking in persons is a hidden crime beyond the purview of public view, all estimates for the number of individuals trafficked annually are merely that – estimates and guesswork. Trying to trace the actual data which any of the numbers use ends up being a cyclical process of all organizations and state agencies citing each other.

<sup>41</sup> Touzenis presents this as a low estimate for the number trafficked annually across international borders. See Touzenis, *supra* note 34.

<sup>42</sup> In 2011, the U.S. State Department estimated there to be 27 million trafficking victims worldwide. The ILO announced in 2012 the use of a new methodology which placed global human trafficking at 20.9 million, hedging this as a “conservative estimate.” See *ILO Global Estimate of Forced Labour*, International Labour Office Special Action Programme to Combat Forced Labour (2012).

<sup>43</sup> Anne T. Gallagher, *supra* note 9, 8.

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.”<sup>44</sup>

Act	Means	Object / Purpose
“recruitment, transportation, transfer, harbouring or receipt of persons”	“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”	“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”

The protocol goes on to expand on this definition in two ways. In the first, “The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.”<sup>45</sup> In other words, consent is vitiated if the trafficker uses force, fraud or coercion to induce an individual into a blatantly exploitative situation. A person may freely consent to be in an exploitative situation, but the moment coercion is applied to obtain that “consent,” the situation becomes one of human trafficking.<sup>46</sup> Secondly, “The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article.”<sup>47</sup> By international law, then, the exploitation of a child<sup>48</sup> will always be viewed as trafficking.

Today, despite the UN definition, there is still dispute over what actually qualifies as “trafficking in persons,” and what should not be included. While numerous international

<sup>44</sup> Palermo Protocol, *supra* note 33, Article 3(a).

<sup>45</sup> Palermo Protocol, *supra* note 33, Article 3(b).

<sup>46</sup> Touzenis, *supra* note 34, 28.

<sup>47</sup> Palermo Protocol, *supra* note 33 Article 3(c).

<sup>48</sup> Article 3(d) of the Palermo Protocol defines a child as “any person under eighteen years of age” in accordance with the definition laid out in the *Convention on the Rights of the Child*.



agencies (INTERPOL,<sup>49</sup> Council of Europe,<sup>50</sup> International Organization for Migration,<sup>51</sup> Organization for Security and Cooperation in Europe,<sup>52</sup> International Development Law Organization, the Arab League,<sup>53</sup> and the North Atlantic Treaty Organization) have each accepted the Palermo definition, individual states parties have been slower to harmonize their own domestic laws with the Protocol as required of them in Article 5 of the Protocol. This has led to inconsistent application and treaty compliance, as will be discussed below in the context of China and India.

Lack of clarity in the trafficking definition comes from disagreements over exact meanings of words such as “coercion,” “exploitation” or “position of vulnerability,” leading to wide-ranging interpretations for what should and should not fall under the label of trafficking in persons. Differing opinions on the matter have led some governments, journalists and researchers at times to conflate human trafficking with human smuggling or trafficking in persons with prostitution and the sex trade.<sup>54</sup> Both of these distinctions are important to understand as they impact how member states choose to implement and enforce provisions of the Trafficking Protocol.

### **1. Human Trafficking versus Human Smuggling: Coercion versus Consent**

In 2000, the international community made a deliberate attempt through the two sister protocols of UN CTOC to distinguish trafficking from smuggling. Though the distinction is still not always recognized by member states, the separation of terms is vital in order to guarantee rights protections for trafficking victims. The Trafficking Protocol grants trafficking victims special rights and privileges, recognizing that they have been exploited and are in need of

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<sup>49</sup> INTERPOL, Trafficking in Human Beings, <http://www.interpol.int/Crime-areas/Trafficking-in-human-beings/Resources>, Accessed 26 February 2014.

<sup>50</sup> Council of Europe Convention on Action Against Trafficking in Human Beings and Its Explanatory Report, Article 4(a), <http://conventions.coe.int/Treaty/EN/Treaties/Html/197.htm>, Accessed 26 February 2014.

<sup>51</sup> “Key Trafficking Terms,” International Organization for Migration, <http://www.iom.int/cms/en/sites/iom/home/about-migration/key-migration-terms-1.html#Trafficking-in-persons>, Accessed 26 February 2014.

<sup>52</sup> Special Representative and Coordinator for Combating Trafficking in Human Beings, Organization for Security and Cooperation in Europe, “Combating Trafficking as Modern-Day Slavery: A Matter of Rights, Freedoms and Security,” 21 N. 69 (2010), <http://www.osce.org/cthb/74730>, Accessed 26 February 2014.

<sup>53</sup> “The Arab Initiative for Building National Capacities for Human Trafficking,” Doha Foundation Forum 2010, Available at <http://www.unodc.org/unodc/en/human-trafficking/2010/arab-initiative.html>.

<sup>54</sup> Min Liu, *Migration, Prostitution, and Human Trafficking: the voice of Chinese women* (New Brunswick: Transaction Publishers, 2011), 35-36.

protection rather than punishment. On the other hand, illegal immigrants smuggled across borders are held responsible for violating a state's sovereign borders and are subject to detention and deportation.

International law and successive work by scholars in the field define human smuggling separately from trafficking in persons. According to the *Protocol against the Smuggling of Migrants by Land, Sea and Air*, "Smuggling of migrants' shall 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."<sup>55</sup> Human smuggling is essentially "willing and fee-paying illegal immigrants who are in search of opportunities to improve their lives."<sup>56</sup> Both smuggling and trafficking are forms of irregular migration and represent illegal employment, though smuggling emphasizes the illegal nature of the migration and employment more so than trafficking. Smuggling must be transnational and ends with the arrival to the final destination. Human trafficking on the other hand, implies coercion and fraud for the purpose of ongoing economic or sexual exploitation to realize a profit, and does not necessitate a border crossing.<sup>57</sup> Makarenko disaggregates the two by comparing them along a scale of several metrics including coercion, human rights violation, exploitation, irregular migration and illegal employment. The International Labor Organization (ILO) emphasizes the role of consent in its own human trafficking definition: "(1) the work or service is extracted under the menace of penalty, and it is (2) undertaken involuntarily."<sup>58</sup> Thus trafficking in persons entails coercion and a large degree of exploitation and human rights violations. Human smuggling, on the other hand, assumes consent, implying no coercion, and usually involves a smaller measure of human rights violations and exploitation of the

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<sup>55</sup> United Nations Office on Drugs and Crime, *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime* (15 November 2000).

<sup>56</sup> Sheldon X. Zhang, *Smuggling and Trafficking in Human Beings: all roads lead to America* (Connecticut: Praeger Publishers, 2007), 106.

<sup>57</sup> A. Bajrektarevic names four key distinctions between human smuggling and trafficking in persons: (1) smuggled persons always begin their journey voluntarily, whereas a trafficked person may have been coerced or kidnapped, (2) trafficked persons are exploited over a long period of time, (3) there is an interdependency between the trafficked person and organized criminal group, and (4) trafficked persons are eligible for further networking and criminal purposes. See A. Bajrektarevic, *Trafficking in and Smuggling of Human Beings: Linkages to Organized Crime: International Legal Measures: Statement Digest* (Vienna, Austria: International Centre for Migration Policy Development, 2000), 16.

<sup>58</sup> International Labor Organization, "A Global Alliance against Forced Labor," *International Labor Conference 93<sup>rd</sup> Session*, 2005, Available at <http://www.ilo.org/>.

individual.<sup>59</sup> That said, Gallagher points out that cases of “aggravated smuggling” involve “inhuman or degrading treatment, including for exploitation,” making such a “human rights / exploitation” argument difficult.<sup>60</sup>

The line between smuggling and trafficking further blurs, as what starts out as a consensual agreement can often turn into a trafficking relationship, and as when something that appears as consent may actually be coerced action. Article 3(b) of the Trafficking Protocol states that consent is irrelevant when the trafficker has used force, fraud or coercion to induce an individual into an exploitative situation.<sup>61</sup> Jacqueline Bhabha believes the distinction between consent and coercion to be based on “a flawed conception of human agency,” for a person might *consent* to something if they see no other way out, but their lack of other options might then mean they were in fact *coerced*.<sup>62</sup> In terms of exploitation, trafficking encompasses both the bringing of a person into exploitation and the continued maintenance of that person in a situation of exploitation, whereas a smuggling operation is thought to terminate once the migrant is moved across the border (no continued long-term exploitation).<sup>63</sup> When the migrant is forced to work long hours in unsafe conditions in order to pay off the smuggling fee, though, the difference between them and a trafficked victim disappears.<sup>64</sup> The situation has now turned into blatant exploitation through coercion and constitutes trafficking.<sup>65</sup> Aronowitz believes the distinction between smuggling and trafficking can only be identified once the individual has arrived in the destination country and has the choice to either walk away or is placed under further debt bondage.<sup>66</sup> Other legal scholars, though, have queried whether the qualitative distinction is even valid, or whether trafficking and smuggling are “mere points on a poorly defined continuum.”<sup>67</sup>

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<sup>59</sup> Tamara Makarenko, “Organized Crime or Crimes Organized? Isolating and identifying actors in the human trafficking chain,” in *Human Trafficking and Human Security*, Ed by Anna Jonsson (New York: Routledge, 2009), 27.

<sup>60</sup> Gallagher, *supra* note 9, 52.

<sup>61</sup> Palermo Protocol, *supra* note 33, Article 3(b).

<sup>62</sup> Jacqueline Bhabha, “Trafficking, Smuggling and Human Rights, *Migration Information Source* (1 March 2005), 5.

<sup>63</sup> Gallagher, *supra* note 9, 47.

<sup>64</sup> Louise Shelly, “Human security and human trafficking,” in *Human Trafficking and Human Security*, Ed Anna Jonsson (New York: Routledge, 2009), 14.

<sup>65</sup> Liu, *supra* note 54, 35-36.

<sup>66</sup> Alexis Aronowitz, “Smuggling and Trafficking in Human Beings,” *European Journal on Criminal Policy and Research*, Vol. 9, No. 2 (2001), 167.

<sup>67</sup> Gallagher, *supra* note 9, 53.

The perception that there does exist a distinction between consent and coercion is what allows countries to view human smuggling as a punishable crime against the state while viewing trafficking in persons also as a crime against the fundamental human rights of the individual.<sup>68</sup> Both sets of people are irregular migrants, but the former are now classified as illegal immigrants to be thrown out from whence they came, whereas the latter are victims in need of assistance.<sup>69</sup> In cases of human trafficking, the traffickers alone are committing the crime against the state, and those being transported across state borders are merely hapless victims. As will be seen in the cases of China and India, this understanding of trafficked individuals as victims in need of state assistance and protection, and *not* as criminals threatening sovereign borders, must be internalized by the Protocol's member states before they will be able to uphold their treaty obligations in Articles 6 and 7 discussed below. Otherwise, there is a risk that trafficking victims will be treated as illegal immigrants and deported back to their country of origin where they might face persecution or be vulnerable to re-trafficking.<sup>70</sup>

## **2. Sex Trafficking versus Sex Work: the legality of prostitution**

The second debate arising out of the Palermo trafficking definition which has implications for enforcement of the Protocol surrounds the legality of prostitution and sex work. Throughout the negotiating sessions leading up to the passage of the Trafficking Protocol in December of 2000, delegates found themselves at an ideological impasse on the intersection of prostitution with human trafficking.<sup>71</sup> Abolitionist states such as Sweden, Norway and Iceland conflated the two, arguing that prostitution is inherently coercive. There is no such thing as a voluntary commercial sex worker, as "any woman's choice to enter the sex industry is the product of previous psychological abuse or social coercion."<sup>72</sup> These delegates lobbied for an expansive interpretation of the trafficking definition to include all forms of prostitution. On the

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<sup>68</sup> Gallagher calls it a "strange legal fiction...that 'trafficking' and 'migrant smuggling' are two completely different crimes involving helpless virtuous victims on the one side, and foolish or greedy adventurers, complicit in their own misfortune, on the other." See Gallagher, *supra* note 9.

<sup>69</sup> Fabio Paolini, "Legal Frameworks on Trafficking in Persons," *Lex ET Scientia International Journal*, Vol. 19 (July 2012), 8.

<sup>70</sup> Joseph Dunne, "Hijacked: How Efforts to Redefine the International Definition of Human Trafficking Threaten Its Purpose," *Willamette Law Review*, Vol. 48 (2011-2012), 408.

<sup>71</sup> LeRoy G. Potts, "Global Trafficking in Human Beings: Assessing the Success of the UN Protocol to Prevent Trafficking in Persons," *George Washington International Law Review*, Vol. 35 (2003), 237-238.

<sup>72</sup> Dunne, *supra* note 70, 412.

other side, regulatory states such as Germany, the Netherlands and New Zealand, saw a division between coerced and voluntary sex work.<sup>73</sup> They believed that the latter ought to be regulated as a legitimate profession in the same way as any other labor market, whereas the former qualified as coercive exploitation, thus falling within a narrower definition for human trafficking.

The end compromise was to agree that trafficking would include “exploitation of the prostitution of others” or “other forms of sexual exploitation.” These are the only two terms in the trafficking definition intentionally left undefined and which are not defined elsewhere in international law.<sup>74</sup> The UN Interpretive Note on this clause specifically states that the *travaux preparatoires* should clarify that the Protocol only addresses prostitution in the context of trafficking in persons, thus without prejudice as to how states parties address the issue in their own respective domestic laws.<sup>75</sup> This ambiguity in the Palermo definition has allowed leeway for furious debate to ensue within member states. China and India have each wrestled with the distinction between sex work and sexual exploitation, influencing both how they have implemented the Protocol and the degree to which they have complied.

### **C. Prioritizing enforcement over protection: crime prevention above human rights**

The Palermo Protocol was significant not only for codifying an internationally recognized definition of trafficking, but also for pushing the issue out of the “amorphous framework” of international human rights into the realm of international criminal law and organized crime prevention.<sup>76</sup> By embedding the Trafficking Protocol under its parent instrument the United Nations Convention against Transnational Organized Crime to be supervised by the United Nations Office on Drugs and Crime, the international community shifted the issue into a

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<sup>73</sup> *Id.*, 410.

<sup>74</sup> “Forced labour” is defined in Article 2.1 of the International Labor Organization Convention Concerning Forced Labour No. 29. “Slavery” is defined in Article 1.1 of the UN Slavery Convention. “Practices similar to slavery” are defined in the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery to include debt bondage, serfdom, forced marriage and exploitation of child labor.

<sup>75</sup> International Human Rights Law Group, “The Annotated Guide to the Complete UN Trafficking Protocol, Consisting of ‘The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,’ ‘The UN Convention Against Transnational Organized Crime,’ ‘The *Travaux Preparatoires*,’ and Unofficial Annotations,” May 2002, 8.

<sup>76</sup> Elizete D. Velado, “Shifting Gears: Improving Anti-Trafficking Efforts through a Shift in Policy Focus,” *Journal of Transnational Law and Policy*, Vol. 22 (2012-2013), 188.

law enforcement paradigm. Previous international attention to the issue had always come from a rights-centered approach,<sup>77</sup> recognizing the right of an individual not to be enslaved and the duty of the nation-state to protect the rights of victims. By casting trafficking in persons as a criminal issue, the Palermo Protocol shifted the focus to fighting transnational organized crime and prosecuting human traffickers.<sup>78</sup>

Early on, human rights advocates expressed their dismay over the lack of victim protection measures in the Protocol.<sup>79</sup> Many felt that by allowing the UN Crime Commission to draft the first international legal instrument on trafficking in the past fifty years amounted to a failure of the human rights community and a failure of the international community to fully protect the human rights of trafficking victims.<sup>80</sup> Others feared that human security had been sacrificed for state security. The Special Rapporteur on Violence against Women voiced a concern that the criminal justice framework would allow governments to justify increased restrictions on immigration on the pretense of protecting trafficked persons.<sup>81</sup> In 2004, the UN Special Rapporteur on Trafficking in Persons criticized the Protocol's over-emphasis on crime prevention which she saw as influencing member states to criminalize and prosecute cross-border trafficking victims as illegal aliens and undocumented workers.<sup>82</sup>

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<sup>77</sup> 1904 Convention on the Suppression of White Slave Trade; 1921 International Convention for the Suppression of Traffic in Women and Children; 1933 International Convention for the Suppression of the Traffic in Women of Full Age; 1948 Universal Declaration of Human Rights (Article 4); 1949 Convention for the Suppression of the Traffic in Persons and of Exploitation of the Prostitution of Others; 1966 International Covenant on Civil and Political Rights (Article 8); 1979 Convention on the Elimination of All Forms of Discrimination Against Women; 1989 Convention on Rights of the Child; 1999 Worst Forms of Child Labor Convention; 2000 Optional Protocol to the Convention on Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography. For an overview of the history of trafficking throughout international human rights treaty law, see Gallagher, *supra* note 9, 54-68.

<sup>78</sup> Velado, *supra* note 76, 191.

<sup>79</sup> See Melissa Ditmoreen and Marjan Wijers, "The Negotiations on the UN Protocol on Trafficking in Persons – Moving the Focus from Morality to Actual Conditions," *Nemesis*, Art. 4 (2003), 79-88; and Human Rights Caucus, *Recommendations and Commentary on the draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against International organized Crime*, A/AC.254/4/Add.3/Rev.2 (July 1999).

<sup>80</sup> Janie Chuang, "The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking," *Michigan Journal of International Law*, Vol. 27 (2005-2006), 446.

<sup>81</sup> See Radhika Coomaraswamy, Special Rapporteur on Violence against Women, Keynote Speech at the NGO Consultation with UN/IGOs on Trafficking in Persons, Prostitution and the Global Sex Industry, Geneva, Switzerland (21 June 1999).

<sup>82</sup> See Sigma Huda, Special Rapporteur on Trafficking in Persons, Especially Women and Children, *Rep. of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, 10, Comm'n on Human Rights, UN Doc. E/CN.4/2005/71 (22 Dec. 2004).

While these fears have been realized to some extent in the implementation of the Protocol by some member states, other human rights advocates have also taken notice of the benefits ensuing from the criminal justice approach. Anne T. Gallagher, representative of the High Commissioner for Human Rights during the Vienna negotiations of 1998 and 1999 and former UN Adviser on Human Trafficking, has since commented that:

“There is no way the international community would have a definition and an international treaty on trafficking if this issue had stayed within the realms of the human rights system...No human rights treaty...would have been able to link itself to a parent instrument that set out detailed obligations for tackling corruption, exchanging evidence across national borders, and seizing assets of offenders. No human rights treaty would have received the necessary number of ratifications to permit its entry into force a mere two years after its adoption...[or] prompted the raft of international, regional and national reforms that we have witnessed over the past decade...[or] focused the same level of global attention and resources on debt bondage, forced labor, sexual servitude, forced marriage, and other exploitative practices.”<sup>83</sup>

For good or for ill, Palermo established a weak human rights protection regime for trafficking victims, with states’ efforts instead focused on prosecution of criminal activity. The Protocol promoted a three-pronged approach to combatting human trafficking, known as the three “P’s”: prosecution, protection, and prevention. The language surrounding each of these provisions in the Protocol ranges from mandatory when discussing criminalization and prosecution of the traffickers to weak recommendations when itemizing victim assistance and protection policies.

Article 5 of the Protocol on “Criminalization” imposes the highest bar of mandatory action for states parties.<sup>84</sup> “Each State Party *shall adopt* such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally”<sup>85</sup> (emphasis added). Furthermore, “Each State Party *shall also adopt* such legislative and other measures as may be necessary to establish as criminal offences...(1) attempting to commit an offense established in accordance with paragraph 1 of this article; (2) participating as an accomplice in an offense... and (3) organizing or directing other persons to commit an offence”<sup>86</sup> (emphasis added). At its core, Palermo obligates member states to harmonize their domestic laws with the Protocol, both adopting the definition and

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<sup>83</sup> Gallagher, *supra* note 9, 4.

<sup>84</sup> Annotated Guide, *supra* note 75, 14.

<sup>85</sup> Palermo Protocol, *supra* note 33, Article 5(1).

<sup>86</sup> *Id.*, Article 5(2).

criminalizing the act of trafficking. The language of the Protocol is silent on what constitutes “as may be necessary,” but experts in the trafficking field have long argued that the crime must have higher penalties in order to establish a proper crime-punishment match. Human trafficking literature cites the low-risk, high-payoff business model as reason for its high attractiveness to criminal groups. Trafficking expert Siddharth Kara argues that one of the most effective ways of combating trafficking is to invert this business model, significantly increasing economic penalties and costs.<sup>87</sup>

A number of provisions mandating other acts related to trafficking which ought to be criminalized are laid out in the Convention against Transnational Organized Crime (CTOC).<sup>88</sup> All ratifying member states of the Protocol are required to first ratify the parent Convention. Article 1 paragraphs 1 and 2 of the Trafficking Protocol incorporate all relevant provisions of the Convention into the Protocol, specifying that “provisions of the Convention shall apply, *mutatis mutandis*, to this Protocol,”<sup>89</sup> and that the Protocol “shall be interpreted together with the Convention.”<sup>90</sup> Additional legal weight is thrown behind the Protocol itself, as “the offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.”<sup>91</sup> With this synthesis of the two legal instruments in mind, member states also have a legal obligation to criminalize corruption,<sup>92</sup> enable confiscation of proceeds of crime derived from offences,<sup>93</sup> and dispose of the proceeds of crime or property confiscated in accordance with its domestic law and administrative procedures.<sup>94</sup> States parties are instructed to return confiscated proceeds of crime or property to any requesting state party desirous of compensating the trafficking victims or of returning said confiscated items to their

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<sup>87</sup> Siddharth Kara, “Designing More Effective Laws Against Human Trafficking,” *Northwestern Journal of International Human Rights*, Vol 9, No 2, Spring 2011.

<sup>88</sup> United Nations Office on Drugs and Crime, *United Nations Convention against Transnational Organized Crime*, A/RES/55/25 (2000) (hereinafter CTOC).

<sup>89</sup> Palermo Protocol, *supra* note 33, Article 1(2).

<sup>90</sup> *Id.*, Article 1(1).

<sup>91</sup> *Id.*, Article 1(3).

<sup>92</sup> States parties “shall adopt” legislative and other measures to criminalize the offering to a public official of an undue advantage as well as the solicitation or acceptance by a public official of an undue advantage. CTOC, *supra* note 88, Articles 8-9.

<sup>93</sup> This provision also enables “confiscation of property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.” State governments are required to adopt laws to confiscate the assets of traffickers. See UN TOC, Article 12(1).

<sup>94</sup> CTOC, *supra* note 88, Article 14(1).



legitimate owners.<sup>95</sup> The International Human Rights Law Group criticizes the Convention for not explicitly incurring an obligation upon member states to enact domestic legislation which would ensure that confiscation of proceeds of crime or property would go towards paying “compensation, restitution and damage awards to trafficked persons and to support services for trafficked persons” within their own jurisdictions.<sup>96</sup> This is one of the first examples of how the Convention and Protocol are both weak in victim protection and assistance provisions.

In contrast to the firm and concrete legal obligations states parties are expected to uphold in terms of criminal prosecution, Palermo’s victim assistance provisions come across as aspirational recommendations. Articles 6, 7 and 8 of the Protocol<sup>97</sup> combined with the Convention’s general witness and victim provisions in Articles 24 and 25 together comprise the complete body of obligations upon states parties with regards to the provision of assistance to and protection of victims. However, the mushiness of the Protocol’s text gives states plenty of leeway for individual interpretation. Instructions to states parties to act are couched in phrases such as “in *appropriate* cases and *to the extent possible* under its domestic law;”<sup>98</sup> “shall *consider* implementing measures...in *appropriate* cases,”<sup>99</sup> “shall *endeavor*,”<sup>100</sup> or “shall give *appropriate* consideration to humanitarian and compassionate factors” (emphasis added).<sup>101</sup> Essentially, if the state never thinks the case is appropriate or considers such protections incompatible with its domestic law, then it need not feel beholden.

The Convention language, though, does issue somewhat stronger binding obligations upon states in Articles 24 and 25. Article 24 for witness protection holds important implications for trafficking victims. Each state party is required that it “shall take appropriate measures within its means to provide effective protection for potential retaliation or intimidation for witnesses in

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<sup>95</sup> *Id.*, Article 14(2).

<sup>96</sup> Annotated Guide, *supra* note 75, 17.

<sup>97</sup> Article 6 “Assistance to and protection of victims of trafficking in persons,” Article 7 “Status of victim in receiving states,” and Article 8 “Repatriation of victims of trafficking in persons,” See Palermo Protocol, *supra* note 33.

<sup>98</sup> *Id.*, Article 6(1) in regards to protecting the privacy and identity of trafficking victims.

<sup>99</sup> *Id.*, Article 6(3) in regards to the physical, psychological and social recovery of victims through the provision of housing, legal counseling and information, interpreter services, medical and psychological assistance, employment and educational opportunities; and Article 7(1) in regards to permitting trafficking victims to remain within a state’s territory.

<sup>100</sup> *Id.*, Article 6(5) in regards to provision of physical safety of victims while within state’s domestic territory.

<sup>101</sup> *Id.*, Article 7(2).

criminal proceedings.”<sup>102</sup> However, it is still unclear which measures are “appropriate,” or who gets to determine which measures are “within a state’s means.” The article goes on to lay out specific measures for witnesses which “may [be] include[d]” under subparagraph 1 such as physical protection, explicitly stating that the protections shall also extend to “victims insofar as they are witnesses.”<sup>103</sup> In the human trafficking context, this article should be used to prevent trafficking victims’ rapid deportation. States often need to depend on witness testimony from the victims in order to successfully prosecute the traffickers. The Protocol itself never actually obliges states parties to ensure the legal rights of victims within their state boundaries without the threat of deportation. Instead, it simply asks states parties to “consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.”<sup>104</sup> States parties are also expected to “facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.”<sup>105</sup> The key phrase here is “with due regard for the safety of that person,” implying that no trafficking victim should be deported without first ensuring that their home country circumstances will not set them at risk for further exploitation or retrafficcking.

Article 25 of the Convention similarly provides stronger obligations and victim rights protections than those found in Article 6 of the Protocol, again mandating that each state party “*shall take* appropriate measures within its means.”<sup>106</sup> Since the Trafficking Protocol is subordinate to the main Convention, this stronger obligation should apply to victims of trafficking as well. Here, states are obliged to act when able, whereas the Protocol merely asks states to “consider” acting “in appropriate cases.”<sup>107</sup> The Convention also mandates that each state party “shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.”<sup>108</sup> When applied to the Protocol, trafficked persons have a right to compensation and restitution, which may be interpreted as

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<sup>102</sup> CTOC, *supra* note 88, Article 24(1).

<sup>103</sup> *Id.*, Article 24(2), Article 24(4).

<sup>104</sup> Palermo Protocol, *supra* note 33, Article 7(1).

<sup>105</sup> *Id.*, Article 8(1).

<sup>106</sup> CTOC, *supra* note 88, Article 25(1).

<sup>107</sup> Palermo Protocol, *supra* note 33, Article 6(3).

<sup>108</sup> CTOC, *supra* note 88, Article 25(2).

going beyond money to include court access and legal assistance.<sup>109</sup> Article 9 of the Protocol, like the Convention language, seems to provide a higher bar of victims' rights protection, expecting that "states parties shall establish comprehensive policies, programmes and other measures... to protect victims of trafficking in persons, especially women and children, from revictimization."<sup>110</sup> Looking backwards through the text, the list of recommended victim protection measures in Article 6 could be interpreted as programmatic and policy options which could be used to fulfill the treaty obligation laid out in Article 9. Unfortunately, Article 9 focuses mostly on prevention of human trafficking than on taking up the protection of victims.

The Protocol's measures for prevention and cooperation in combatting trafficking in persons use stronger language, such as that found in Article 5 on criminalization, implying real obligations upon states parties. Human trafficking prevention, like the prosecution of traffickers, requires broader cooperation between countries and their respective law enforcement officials. As a result, the negotiations leading up to the passage of the Palermo Protocol resulted in clear state responsibilities for the prevention of trafficking in persons. States parties *shall* conduct research, information and mass media campaigns and social and economic initiatives,<sup>111</sup> cooperate with NGOs and other elements of civil society,<sup>112</sup> cooperate bilaterally and multilaterally to alleviate factors such as poverty and underdevelopment which make persons vulnerable to trafficking,<sup>113</sup> adopt legislation and pursue educational, social and cultural policies which discourage the demand facilitating the exploitation of persons,<sup>114</sup> cooperate with other states parties by exchanging information amongst law enforcement and immigration authorities,<sup>115</sup> provide training for law enforcement and immigration officials in the prevention of human trafficking,<sup>116</sup> and strengthen border controls to prevent and detect trafficking.<sup>117</sup> Here again there is a strong emphasis on law enforcement and criminal prosecution for the purpose of

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<sup>109</sup> Annotated Guide, *supra* note 75, 25.

<sup>110</sup> Palermo Protocol, *supra* note 33, Article 9(1).

<sup>111</sup> *Id.*, Article 9(2).

<sup>112</sup> *Id.*, Article 9(3).

<sup>113</sup> *Id.*, Article 9(4).

<sup>114</sup> *Id.*, Article 9(5).

<sup>115</sup> *Id.*, Article 10(1).

<sup>116</sup> *Id.*, Article 10(2).

<sup>117</sup> *Id.*, Article 11(1).

maintaining safe and secure borders, whether in the exchange of information between border and immigration officials or in the maintenance of the integrity of travel documents.<sup>118</sup>

#### **D. Treaty Design: tools for monitoring and enforcement**

Before moving on to the case studies of China and India and the final analysis of what explains their compliance and noncompliance with the Trafficking Protocol, it is helpful to understand what mechanisms the Protocol and CTOC contain for monitoring and enforcement. The Trafficking Protocol itself does not contain any articles related to enforcement. Since the Protocol is to be interpreted together with its parent Convention, though, the monitoring and implementation mechanisms provided for in CTOC apply.<sup>119</sup>

Article 32 of the Convention establishes a Conference of the Parties for the purposes of improving states' capacity to combat transnational organized crime and of reviewing implementation of the Convention and its protocols. The Conference met for the first time in Vienna in 2004, and has continued to meet at least once every two years since, with the seventh session scheduled for October 2014. The Conference has no enforcement powers, but is tasked to establish "supplementary review mechanisms" in order to acquire the "necessary knowledge" for the periodic review of the Convention's implementation by states parties." States parties are obligated to report their efforts towards implementation to the Conference of Parties.<sup>120</sup> Furthermore, the Conference is empowered to facilitate "training and technical assistance," "implementation of the Convention through economic development," "the exchange of information among State Parties on patterns and trends in transnational organized crime and on successful practices for combating it," and cooperation with relevant organizations.<sup>121</sup> In 2008 during its fourth session, the Conference of the Parties to CTOC established a working group to advise and assist the conference in monitoring and assisting states' implementation of the Trafficking Protocol. This working group has now met five times, most recently in November

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<sup>118</sup> *Id.*, Article 12.

<sup>119</sup> Annotated Guide, *supra* note 75.

<sup>120</sup> CTOC, *supra* note 88, Article 32.

<sup>121</sup> *Id.* Articles 29, 30, 32(3)(a).

2013.<sup>122</sup> The working group seeks to identify gaps and challenges in the Protocol's implementation, facilitate the exchange of expertise and knowledge between member states, make recommendations to the Conference for better implementation by states, provide guidance to the secretariat on implementation activities, and advise the Conference on how it may better coordinate with other international bodies to better combat trafficking.<sup>123</sup>

The Palermo Protocol provides for the settlement of disputes in Article 15. The treaty first directs disputing member states to work through their disagreements through negotiation. If negotiation fails, the states may submit their disagreement to arbitration. If after six months, the states remain unable to agree on the organization of the arbitration, any one of the member states involved may refer the dispute to the International Court of Justice. However, in a classic gesture towards universality, the treaty also contains a provision permitting member states to opt out of the dispute resolution procedure altogether. While India remains subject to the treaty in its entirety, China has entered a reservation to Article 15(2) on the settlement of disputes by the ICJ, declaring itself not bound to ICJ arbitration on disputes arising from the Protocol.

### **III. Are China and India complying?**

China and India have now both been party to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children for five and three years.<sup>124</sup> While China ratified CTOC in 2003 and signed onto the Convention's third protocol against the illicit manufacturing and trafficking of firearms in 2002 (still has not ratified this protocol), it never became a signatory to either the first or second protocols on the trafficking or smuggling of persons. China's accession to the Trafficking Protocol in December 2009 was followed a year

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<sup>122</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Trafficking in Persons, CTOC/COP/WG.4/2013/4, Available at [http://www.unodc.org/documents/treaties/organized\\_crime/2013\\_CTOC\\_COP\\_WG4/CTOC\\_COP\\_WG.4\\_2013\\_4\\_E.pdf](http://www.unodc.org/documents/treaties/organized_crime/2013_CTOC_COP_WG4/CTOC_COP_WG.4_2013_4_E.pdf).

<sup>123</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Trafficking in Persons, CTOC/COP/WG.4/2009/2, Available at [http://www.unodc.org/documents/treaties/organized\\_crime/Final\\_report\\_English\\_TIP.pdf](http://www.unodc.org/documents/treaties/organized_crime/Final_report_English_TIP.pdf).

<sup>124</sup> The Protocol officially entered into force on 25 December 2003, See Status of Ratification for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en).

and a half later by India's ratification of not only the Trafficking Protocol, but also the parent convention and the other two sister protocols all simultaneously. India had signed onto all four of these international agreements in 2002, but then waited nine years before ratifying the treaties.<sup>125</sup>

This section compares China and India's efforts in combatting trafficking in persons, lining their state behavior up against the internationally agreed upon norms and rules in the Palermo Protocol. Both countries have affected important anti-trafficking legislation since their accession to or ratification of the Protocol. In China, the 2010 Opinions on Severely Punishing Trafficking in Women and Children according to Law, 2013-2020 National Plan of Action against Trafficking in Persons, and the Third Plenum reforms have all been movements to bring Chinese domestic law closer into harmonization with the treaty. In India, domestic efforts to combat human trafficking picked up speed following the horrific Delhi rape case, prompting nation-wide introspection into violence against women through the Justice Verma Committee Report and the subsequent amendments to the Indian Penal Code. In considering each of these countries' respective behavior, the question becomes whether they are just putting new anti-trafficking rules on their books, or whether they are internalizing the treaty's rules both through domestic law and through domestic practice? A careful study of these states' compliance must include understanding their pre- and post- ratification policies towards human trafficking, as well as an analysis of changes in domestic law and domestic practice.

An important aspect to consider is that the Palermo Protocol applies strictly to cases of trafficking in persons, "where those offences are transnational in nature and involve an organized criminal group."<sup>126</sup> In other words, the drafters of the Protocol were not trying to mandate state behavior on purely domestic issues, but to address the crime of trafficking as it impacts the larger international community. However, it is difficult to separate out purely domestic from international trafficking cases. What is more, states do not alter their behavior when handling international versus domestic cases. Therefore, to understand the treaty compliance of China and India in their efforts to combat human trafficking, this paper will not make any effort to distinguish state behavior on solely international cases. This paper assumes that how the states

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<sup>125</sup> United Nations Office on Drugs and Crime, "Signatories to the United Nations Convention against Transnational Organized Crime and its Protocols," Available at <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>.

<sup>126</sup> Palermo Protocol, *supra* note 33, Article 4.

handle domestic trafficking cases reflects on larger national policy, thus demonstrating their compliance level with the Protocol.

### **A. Article 3 Compliance: harmonizing the trafficking definition**

*Moving beyond limited definitions of trafficking which stigmatize women and children to adopting a comprehensive definition of the crime*

#### **1. China**

Combating human trafficking has been a part of China's political consciousness for over two decades now since the 1991 Decision of the Standing Committee of the National People's Congress Regarding the Punishment of Criminals Who Abduct and Traffic In or Kidnap Women or Children. This initial criminal law document defined the abducting and trafficking in women and children 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."<sup>127</sup> In 1992, China passed the Law on the Protection of Rights and Interests of Women to prohibit further the abduction, trafficking and buying of women.<sup>128</sup> "The trafficking, abduction and kidnapping of women shall be prohibited; buying of women who have been trafficked, abducted or kidnapped is prohibited."<sup>129</sup> China's 1997 amendments to the 1979 criminal code identified and criminalized a range of other exploitative activities which are today encompassed in the international legal definition of trafficking in persons. These illegal activities included the unlawful detention or deprivation of freedom, particularly for detention to coerce payment of a debt;<sup>130</sup> forced labor and the restriction of physical freedom;<sup>131</sup> the abduction and trafficking of women and children;<sup>132</sup> the buying of abducted women and children;<sup>133</sup> and the organizing, forcing, seducing, harboring or

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<sup>127</sup> *Decision of the Standing Committee of the National People's Congress Regarding the Punishment of Criminals Who Abduct and Traffic In or Kidnap Women or Children*, Article 1(6) (4 September 1991), Available at <http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200211/20021100053260.html>.

<sup>128</sup> After outlawing the trafficking of women, Article 36 goes on to mandate that governments rescue these women in a "timely" fashion and prevent any societal discrimination against them. *Law of the People's Republic of China on the Protection of Rights and Interests of Women*, Article 36 (1992), Available at [http://www.no-trafficking.org/content/pdf/uniap\\_china\\_law\\_of\\_prc\\_on\\_the\\_protection\\_of\\_rights\\_and\\_inter.pdf](http://www.no-trafficking.org/content/pdf/uniap_china_law_of_prc_on_the_protection_of_rights_and_inter.pdf).

<sup>129</sup> *Id.*, Translation from: "禁止拐卖，绑架妇女：禁止收买被拐卖，绑架的妇女。"

<sup>130</sup> Criminal Law of the People's Republic of China, Chapter IV, Article 238, Available at [http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content\\_1384075.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384075.htm).

<sup>131</sup> Chapter IV, Article 244.

<sup>132</sup> Chapter IV, Article 240.

<sup>133</sup> Chapter IV, Article 241.

introducing of prostitution.<sup>134</sup> Each of these crimes came with a range of penalties based upon the severity of the act.

In 2008, the PRC announced its first five-year National Plan of Action on Combating Trafficking in Women and Children (2008-2012).<sup>135</sup> The NPA did not offer a specific definition for trafficking in persons, but did announce the document's intended cohesion with other international human rights treaties such as the Convention on the Rights of the Child (CRC),<sup>136</sup> the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>137</sup> the Convention against Transnational Organized Crime (CTOC),<sup>138</sup> and the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.<sup>139</sup> The focus of the 2008 NPA, as in the 1992 law, was solely on women and children.<sup>140</sup> As with the international community during the United Nations negotiations throughout the late 1990s, China has struggled with wanting to focus its laws on women and children whom it perceives to be the most vulnerable to exploitation and the most in need of protection. Crimes targeted under the umbrella term "human trafficking" generally mean sex trafficking and prostitution, bride trafficking and child kidnappings and forced adoptions. This

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<sup>134</sup> Chapter VI, Section 8, Articles 358-359.

<sup>135</sup> State Council of China, *China National Plan of Action on Combating Trafficking in Women and Children, 2008-2012* (13 December 2007), Available at [http://www.humantrafficking.org/uploads/publications/China\\_National\\_Plan\\_of\\_Action\\_on\\_Combating\\_Trafficking\\_in\\_Women\\_and\\_Children\\_December\\_2007.pdf](http://www.humantrafficking.org/uploads/publications/China_National_Plan_of_Action_on_Combating_Trafficking_in_Women_and_Children_December_2007.pdf) (hereinafter 2007 NPA).

<sup>136</sup> Article 32 recognizes "the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development;" Article 34 protects the child "from all forms of sexual exploitation and sexual abuse;" Article 35 instructs states parties to "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." See CRC, ratified by the PRC government in April 1992. Also see Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, ratified by the PRC government in December 2002.

<sup>137</sup> Article 6 instructs that "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women," See CEDAW, ratified by the PRC government in November 1980.

<sup>138</sup> Since September 2003, China has been a member of the Palermo Protocol's parent document, the UN CTOC.

<sup>139</sup> Article 3 defines "the worst forms of child labour" as: "(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour;" and "(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances." See Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, ratified by the PRC government in 2002.

<sup>140</sup> "Crimes of trafficking in women and children seriously violate the individual rights of women and children and greatly harm the physical and psychological health of trafficked women and children." See 2007 NPA, *supra* note 135.



understanding of the legal definition of human trafficking therefore excludes forced labor, indentured servitude and all adult male victims.<sup>141</sup>

Four months after ratifying the Palermo Protocol at the end of 2009, the National People's Congress (NPC) passed the 2010 Opinions on Severely Punishing Trafficking in Women and Children according to Law. Despite its recent international commitment to accept the broader Palermo definition for trafficking, the 2010 Opinions again only included women and children within its scope. Finally, in March 2013, after a multi-month delay, China passed a new eight-year National Plan of Action on Combating Human Trafficking, expanding its domestic legal definition to include men and forced labor.<sup>142</sup> According to the General Office of the State Council (China's Cabinet), the 2013-2020 NPA was "created in accordance with relevant international conventions and Chinese laws."<sup>143</sup> However, China continues to emphasize women and children. In the same government announcement for the new NPA, two examples are given to illustrate the crime of human trafficking, one being young women kidnapped and sold into forced marriages, and the other being babies kidnapped and sold to sterile couples. The article then lists the 2011 official figures released on human trafficking cases in China, citing police activity rescuing 8,660 abducted children and 15,458 women, and breaking up 3,195 criminal circles engaged in human trafficking.<sup>144</sup> No mention is made of men or forced labor.

Every year in the annual U.S. Trafficking in Persons (TIP) Report, China is criticized for its improper definition of human trafficking. Not only has China up until last year largely ignored forced labor and the trafficking of men, but it has consistently included child abductions and forced adoptions. While these are serious crimes, they are not recognized in the Palermo definition as "trafficking," since exploitation is not always present. Following China's adoption of the broader definition in March 2013, a US government official within the Office to Monitor and Combat Trafficking in Persons (J/TIP) commented to the author that "definitions are important to us – they allow us to plot progress in countries. As Americans, we like to compare

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<sup>141</sup> 2013 TIP Report, *supra* note 2, China Country Narrative.

<sup>142</sup> State Council of China, *China National Plan of Action on Combating Human Trafficking, 2013-2020* (2 March 2013), Available at [http://wenku.baidu.com/link?url=cMcKAir7YEoMxYD28anYlxVO7wrydIPcGVmwX8PelkBzUec9\\_aik3QXAGLrOb9Vy\\_eNGXCU\\_3FWGZLBQ38ujykwHkUIEnEBa-e\\_VUvB26pS](http://wenku.baidu.com/link?url=cMcKAir7YEoMxYD28anYlxVO7wrydIPcGVmwX8PelkBzUec9_aik3QXAGLrOb9Vy_eNGXCU_3FWGZLBQ38ujykwHkUIEnEBa-e_VUvB26pS) (hereinafter 2013 NPA).

<sup>143</sup> Chen Zhi, "China vows harsher crackdowns on human trafficking," *Xinhua*, 8 March 2013, Available at [http://news.xinhuanet.com/english/china/2013-03/08/c\\_132219276.htm](http://news.xinhuanet.com/english/china/2013-03/08/c_132219276.htm).

<sup>144</sup> *Id.*

apples to apples, so by having countries adopt our definitions, it allows us to do that. When it comes to China, the child abduction issue will always be an issue. Not that they should not be collecting those statistics, but they need a way to assess them separately.”<sup>145</sup>

China has been gradually reworking its domestic legal definition of human trafficking over the past few years, but it still has a ways to go in order to fully internalize the Palermo definition. As will be seen below, failure to emphasize forced labor and forms of trafficking other than sex trafficking resulting from internal irregular migration has allowed these other forms of abuse to continue unchecked. Outside of the American recommendations for change to deemphasize forced marriages and child abductions while elevating focus on forced labor and trafficking of men,<sup>146</sup> the Office of the High Commissioner on Human Rights also offered recommendations in its 2013 Universal Periodic Review. In light of frequent labor human rights violations, particularly against international migrants, the Human Rights Committee advised China to “include certain practices regarding foreign domestic workers in the definition of the crime of human trafficking.”<sup>147</sup>

A final definitional problem faced by both China and India and mirroring the larger international community’s own lack of consensus is the conflation of voluntary sex work with forced sex trafficking.<sup>148</sup> In combating sex trafficking, China operates under unhelpful mindsets rooted in the criminalization of prostitution. Prostitution today, while technically illegal, is everywhere in modern Chinese society.<sup>149</sup> Numbers for how many prostitutes work today in China vary from three million (Chinese official number) to over ten million (US State

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<sup>145</sup> Personal Interview with U.S. government official.

<sup>146</sup> 2013 TIP Report, *supra* note 2, China Country Narrative, 120.

<sup>147</sup> Human Rights Council Working Group on the Universal Periodic Review China Report, A/HRC/WG.6/17/CHN/2 (2013), 10.

<sup>148</sup> See Min Liu, *supra* note 54, for an analysis of the “regulationist” versus “abolitionist” debate, as well as a discussion of the Rational Choice Perspective.

<sup>149</sup> Prostitution has a long history in China, dating back more than 2000 years. It was so rampant when the Communist Party came to power in 1949, that the government initiated drastic campaigns, “officially” eradicating it for the next thirty years. Since China’s opening and reform in the 1980s, the commercial sex industry has again flourished and grown exponentially. Between 1982 and 1997, the Public Security Department reported processing over two million cases related to prostitution. See Xin Ren, *Prostitution: an International Handbook on trends, Problems, and Policies* (Westport, CT: Greenwood Press, 1993); Jinghao Zhou, “Chinese Prostitution: Consequences and Solutions in the Post-Mao Era,” *China: An International Journal*, Vol. 4 (2006), 238-262; Fang Fu Ruan, *Sex in China: Studies in Sexology in Chinese Culture* (New York: Plenum, 1991); and Suiming Pan, “Study on Underground Red Light District in Mainland China,” *Research Report on Mainland Chinese Sex Workers* (Hong Kong: Zi Teng, 2000) for the development of prostitution in ancient and modern China.

Department).<sup>150</sup> As the government has fought unsuccessfully to minimize prostitution in the country, it has adopted a criminal justice approach of outlawing not just the purchase of sexual services, but also the selling. The 1991 CPC Standing Committee “Decision Strictly Forbidding the Selling and Buying of Sex” criminalized the selling of sex with the aim “to educate and redeem prostitution offenders and also to prevent the spread of sexually transmitted diseases.”<sup>151</sup> However, a look at what the system has evolved to today shows that it is neither educational nor particularly helpful in preventing STDs or HIV/AIDS. This definitional confusion and blanket criminalization of prostitution has large implications for victim protection.

## 2. India

Like China, India has also struggled in adopting a comprehensive definition for the crime of trafficking in persons. In fact, the term was only defined for the first time in the Criminal Law (Amendment) Act of 2013. The concept of trafficking for exploitation or slavery has been in the legal parlance of India for much longer, though, mentioned in the Indian Penal Code of 1860<sup>152</sup> and the Indian Constitution of 1949.<sup>153</sup> After India ratified the 1950 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others in 1956, the Indian Parliament passed into domestic legislation the Immoral Traffic (Prevention) Act (ITPA). By the early 2000s, it was obvious that none of these documents were being successfully utilized to combat trafficking, due in large part to a lack of consensus over which specific actions were actually criminalized. On 23 January 2013, two years after India’s ratification of the Palermo Protocol, the Justice Verma Committee released their Report on Amendments to Criminal Law recommending India’s full adoption of the Protocol’s definition into domestic law in the Indian context since:

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<sup>150</sup> Liu, *supra* note 54, 10.

<sup>151</sup> *Id.* at 178.

<sup>152</sup> The Indian Penal Code (IPC) adopted under British colonial rule outlawed various “offences affecting the human body,” such as: the buying or disposing of any person as a slave, including the import, export, removal, sale, acceptance, receipt or detention of the person (Section 370), the kidnapping and abduction of a person (Sections 361-363, 365), and the kidnapping and abduction of a person for slavery or to subject a person to grievous injury (Section 367). See Indian Penal Code (1860).

<sup>153</sup> “Traffic in human beings and begar and other similar forms of forced labour are prohibited,” Article 23(1), Indian Constitution, 1949.

“[T]he lack of definition of trafficking and the ineffective law enforcement in relation to trafficking and in particular the non-application of the provisions contained in the Indian Penal Code in relation to the same have actually made trafficking a huge industry which has not been brought to any critical gaze of law enforcement for reasons already cited. We believe that in order to protect the dignity of women in particular, it is necessary that the definition of trafficking as contained above must be incorporated as an independent definition in the Penal Code as a separate offence.”<sup>154</sup>

The Criminal Law (Amendment) Act (CLA) was signed into law April 2, 2013, officially adopting the Palermo definition for trafficking in persons into the Indian Penal Code (IPC), replacing the original Section 370. The new amendment to Section 370 followed the same format of the Palermo definition, using the three-part definition for trafficking: purpose, action and means. The purpose is “exploitation,” which could entail “physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.”<sup>155</sup> There are five specific actions that fall under the composite “trafficking in persons” offense, including recruitment, transportation, harboring, transferring and receipt. And finally, any of these actions when done for the purpose of exploitation may be done through the means of threats, the use of force or coercion, abduction, fraud, deception, abuse of power, or inducement through the giving or receiving of payments or benefits.<sup>156</sup> As the director of the local Indian NGO STOP<sup>157</sup> commented, “Today India has a unified vocabulary with which to discuss trafficking. Before in the 1990s, human trafficking was still happening, but no one knew how to discuss it.”<sup>158</sup>

India’s adoption of the amendment to Section 370 of the IPC was influenced by both former case law and state level legislation on trafficking. In April 2011, the Supreme Court of India ruled in *Bachpan Bachao Andolan v. Union of India* that child trafficking could encompass a long laundry list of forms and purposes. The judgment first quoted the Palermo Protocol as the standard definition in international law for trafficking in persons, and then went on to recognize specific forms of trafficking such as bonded labor, domestic work, agricultural labor, employment in construction activity, carpet industry, garment industry, fish/shrimp export,

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<sup>154</sup> Justice J.S. Verma, Justice Leila Seth, and Gopal Subramaniam, *Report of the Committee on Amendments to Criminal Law* (23 January 2013), 165 (hereinafter Justice Verma Report).

<sup>155</sup> Lok Sabha, Criminal Law (Amendment) Act, Section 370(1) Explanation 1 (19 March 2013).

<sup>156</sup> *Id.*, Section 370(1).

<sup>157</sup> STOP Trafficking and Oppression of Women and Children, see <http://www.stopindia.org>.

<sup>158</sup> Personal Interview with Roma Debabrata (31 December 2014), notes in author’s possession.

criminal activity such as begging or organ trade or drug peddling and smuggling, sexual exploitation such as forced prostitution or sex tourism or pornography, entertainment in sports such as circus/dance troupes or camel jockeying, marriage, and adoption.<sup>159</sup> The judgment also referenced The Goa Children's Act, July 2003, stating that it “must be viewed as a model legislation.”<sup>160</sup> This state level-legislation enacted seven months after India became a signatory to the Palermo Protocol essentially adopted the Palermo language whole-sale into its text.<sup>161</sup> The usage of the Palermo definition by both the *Bachpan Bachao Andolan v. Union of India* case and Goa Children’s Act was noted by the Justice Verma Committee in pressing upon Parliament the need to update the national laws surrounding human trafficking.

The final draft of the amendment to Section 370 as it was passed by the Lok Sabha (Indian Parliament) departs from the Palermo Protocol language in two important ways, betraying two definitional controversies that proved insurmountable for the Indian Parliament in the passage of the Criminal Law (Amendment) Ordinance into law. The Ordinance was released on February 3, 2013, in reaction to the Report of the Committee on Amendments to Criminal Law, which had been commissioned by the Government of India via Notification No. SO (3003) E on December 23, 2012, for the purpose of looking into possible changes to the IPC which would better protect women from violence and sexual assault. In its definition of human trafficking in Section 370(1), the accepted CLA digressed from the language of the Ordinance on the issues of forced labor and prostitution.

India’s official definition of trafficking in persons as stated in the CLA Section 370 does not include the words “forced labor” or “bonded labor.” This deliberate decision to not recognize forced labor defies the Palermo Protocol’s definition and standard international law. The International Labour Organization states that “human trafficking can also be regarded as forced

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<sup>159</sup> *Bachpan Bachao Andolan v. Union of India* (18 April 2011), opinion written by J. Dalveer Bhandari, 6-10, Available at <http://indiankanoon.org/doc/1849142/>.

<sup>160</sup> *Id.*, 27.

<sup>161</sup> The Goa Children’s Act also added that child trafficking could happen whether or not any of the “actions” were done “legally or illegally, within or across borders.” This was important to define the scope of the law within Goa more broadly, as the Palermo Protocol’s handling of trafficking is solely limited to offenses which are transnational in nature. See The Goa Children’s Act, Goa Act No.18 of 2003 (8 July 2003), Available at [http://www.childrightsgoa.org/protection/Goa\\_Childrens\\_Act\\_2003.pdf](http://www.childrightsgoa.org/protection/Goa_Childrens_Act_2003.pdf).

labour...or what some call ‘modern-day slavery.’”<sup>162</sup> The ILO estimates that globally there are currently 20.9 million people trapped in conditions of forced labor, 14.2 million for labour exploitation, 4.5 million for sexual exploitation, and 2.2 million languishing under state-imposed forced labour.<sup>163</sup> Of this 20.9 million, the ILO estimates that that over half, or 11.7 million, are bonded laborers in India.<sup>164</sup> The 2013 U.S. TIP Report posits an even higher figure, estimating that 20-65 million Indians are trapped in conditions of forced labor.<sup>165</sup> Despite the vastness of the issue in India<sup>166</sup> and India’s past legal recognition of the gravity of the offense through its 1976 passage of the Bonded Labour System (Abolition) Act<sup>167</sup> and 1986 passage of the Child Labour (Prohibition and Regulation) Act,<sup>168</sup> when the Ordinance went to the Parliament for debate, there was huge resistance to including the term “forced labor” in Section 370. According to one of the advising lawyers who drafted the original language for the Ordinance, certain members of Parliament were resistant to recognize the extent of “forced labor” in the country, not wanting to codify it as a crime on the same level as slavery and sexual exploitation.<sup>169</sup> Other scholars have suggested that the resistance to including the term “forced labor” derives from 1980s Indian Supreme Court decisions where the Court used an expansive interpretation of the term “force” to include “any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action,” be it hunger, starvation or poverty. Since this time, the Indian state has preferred to treat forced labor and bonded labor issues under labor law instead of criminal law. This has led many egregious instances of bonded labor to be ignored, even where the bonded labor in question clearly fits a broader definition of trafficking in persons.<sup>170</sup>

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<sup>162</sup> International Labour Organization, *2012 Global Estimate of Forced Labour* (2012), Available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_181953.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_181953.pdf).

<sup>163</sup> *Id.*

<sup>164</sup> Urmi Goswami, “Bonded Labour System Still a Reality,” *The Economic Times* (12 August 2014), Available at [http://articles.economictimes.indiatimes.com/2013-08-12/news/41332905\\_1\\_national-labour-institute-bonded-labour-system-mgnrega](http://articles.economictimes.indiatimes.com/2013-08-12/news/41332905_1_national-labour-institute-bonded-labour-system-mgnrega).

<sup>165</sup> 2013 TIP Report, *supra* note 2, India Country Narrative.

<sup>166</sup> See Siddharth Kara, *Bonded Labor: Tackling the System of Slavery in South Asia* (2012); Human Rights Watch, *Small Change: Bonded Child Labor in India’s Silk Industry*, Vol. 15, No. 2 (January 2013), Available at <http://www.hrw.org/sites/default/files/reports/india0103.pdf>

<sup>167</sup> Government of India, Bonded Labour System (Abolition) Act, Act 19 of 1976 (9 February 1976), Available at <http://www.vakilno1.com/bareacts/bondedlaboursystemact/bondedlaboursystemact.html>.

<sup>168</sup> Government of India, Child Labour (Prohibition and Regulation) Act (1986).

<sup>169</sup> Personal Interview, notes in author’s possession.

<sup>170</sup> Prabha Kotiswaran, “An innocent omission? Forced labour and India’s anti-trafficking law,” *London School of Economics and Political Science* (10 June 2013), Available at <http://blogs.lse.ac.uk/indiaatlse/2013/06/10/an-innocent-omission-forced-labour-and-indias-anti-trafficking-law/>.

After protracted debate on whether or not to include the term “forced labor,” the Parliament vote on the CLA came down to a compromise of either keeping the words “forced labor” or including a punishment for the crime of up to life imprisonment. The aforementioned lawyer explained that making provision for life imprisonment was more important. The coalition pushing for a more inclusive trafficking definition ended up winning on both accounts, for as this lawyer pointed out, the drafters reverted to using the term “physical exploitation,” an even more inclusive offense than “forced labor.” Furthermore, the final law kept the language of “slavery or practices similar to slavery, servitude,” which again essentially means “forced labor.”<sup>171</sup>

The second definitional difference in Section 370 between the February Ordinance and the April Law is the deletion of the word “prostitution.” The Palermo Protocol defines exploitation as “the exploitation of the prostitution of others or other forms of sexual exploitation,”<sup>172</sup> and the Ordinance took this a step further to say “prostitution or other forms of sexual exploitation,”<sup>173</sup> attempting to lump in *all* prostitution. This generated great controversy, not just in the Parliament, but among all manner of civil society and lobby groups.<sup>174</sup> The same debate over sex work versus sex trafficking which has already been discussed in the context of the international legal discourse and within China has also divided efforts in India to efficiently address the issue. Many of the legal and law enforcement prejudices in India surrounding sex work are rooted in the 1956 Immoral Traffic (Prevention) Act, which “aimed to rescue exploited women and girls, to prevent the deterioration of public morals and to stamp out the evil of prostitution,”<sup>175</sup> conflating the terms “prostitute” and “trafficked person,” and turning all sex workers into helpless victims. While efforts to revise the law in 2006 were unsuccessful,<sup>176</sup> the All India National Network of Sex Workers again lobbied the Lok Sabha in 2013, this time concerning the Criminal Law (Amendment) Act. The efforts of sex workers unions and other women’s rights groups to distinguish between prostitution and sexual exploitation eventually met

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<sup>171</sup> Personal Interview, notes in author’s possession.

<sup>172</sup> Palermo Protocol, *supra* note 33.

<sup>173</sup> Criminal Law (Amendment) Ordinance (3 February 2013).

<sup>174</sup> “Criminal Law (Amendment) Bill 2013: ‘Prostitution’ Omitted from Anti-Rape Law,” *International Business Times India* (25 March 2013), Available at <http://www.ibtimes.co.in/articles/449944/20130325/criminal-law-amendment-bill-2013-prostitution-anti.htm>.

<sup>175</sup> P.M. Nair and Sankar Sen, *Trafficking in Women and Children in India* (New Delhi: Orient Longman Pt. Ltd., 2005), 194.

<sup>176</sup> “Is Consensual Sex Work a Crime?” *The Telegraph India* (23 October 2013), Available at [http://www.telegraphindia.com/1131023/jsp/opinion/story\\_17483745.jsp#.U1GdDVVdWSp](http://www.telegraphindia.com/1131023/jsp/opinion/story_17483745.jsp#.U1GdDVVdWSp).

with success.<sup>177</sup> The initial drafters of the law, though, saw all prostitution as coercive exploitation.<sup>178</sup> The Justice Verma Committee report, the precursor to the Ordinance, took a position solidly in the abolitionist camp while trying to recognize the nuance and complication of consent versus coercion:

“It now stands undisputed that one of the main reasons for human trafficking is for Commercial Sexual Exploitation (CSE) of these children and women... Offenses committed initially on them never come to light. Over time the sexual abuse becomes part of their life. It then gets termed as prostitution and then the abuse borders on being consensual. It is this vicious circle of missing children/women-trafficking-abuse-prostitution which needs to be curbed with urgent measures.”<sup>179</sup>

The Lok Sabha’s passage of the Criminal Law (Amendment) Act ultimately rejected the black and white picture painted in the Ordinance, but did not settle the divide of opinion on what should fit under the umbrella terms sexual exploitation and sex trafficking, and whether or not prostitution could be fully voluntary and consensual minus any trace of exploitation and coercion. Neither side disputes the scale of sex work in India nor the high level of sexual exploitation. The India National Human Rights Commission estimates that around 200 girls and women enter prostitution daily, of which 20% are below 15 years of age. Fifteen percent of all commercial sexual workers in India are believed to be below 15 years old, and 25% are estimated to be between the ages of 15 and 18.<sup>180</sup> However, the two sides disagree on how best to care for the women and girls employed in the sex industry. Madhu Mehra, a lawyer with Partners in Law and Development, applauded the revised amendment language of April 2013, saying, “The distinction between sexual exploitation and consensual adult sex work is very significant as it enables the sex workers and their advocates to legally contest oppressive and forced sex work towards creation of safe and dignified work conditions for sex workers.”<sup>181</sup>

The international community’s inability to agree on whether or not all forms of prostitution constitute trafficking in persons has left the issue up to individual states to hash out

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<sup>177</sup> “Distinction between consensual sex work and sexual exploitation welcomed,” *The Hindu* (24 March 2013), Available at <http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/distinction-between-consensual-sex-work-and-sexual-exploitation-welcomed/article4543360.ece>.

<sup>178</sup> Personal Interview, notes in author’s possession.

<sup>179</sup> Justice Verma Report, *supra* note 154, 152-153.

<sup>180</sup> India National Human Rights Commission.

<sup>181</sup> “Indian activists welcome distinction between consensual sex work and sexual exploitation,” *Global Network of Sex Work Projects* (26 March 2013), <http://www.nswp.org/news-story/indian-activists-welcome-distinction-between-consensual-sex-work-sexual-exploitation>.



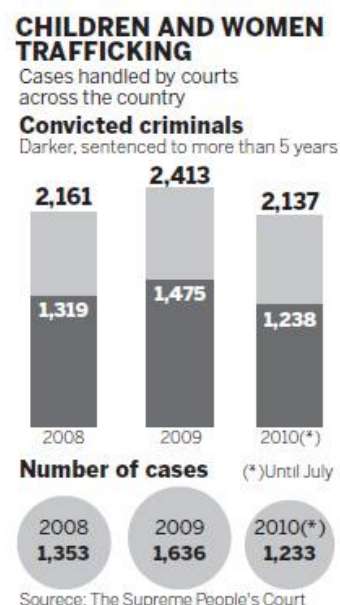
in their own domestic legislation. At the moment, India's laws mirror the Protocol in criminalizing the exploitation of the prostitution of others, but does not claim that all solicitation of commercial sex is intrinsically exploitative, coercive or synonymous with trafficking. Only a year into the implementation of this law, it remains to be seen whether this definitional distinction in India will be effective in protecting the rights of all individuals working in the sex industry, whether trafficking victims or those who identify as voluntary sex workers.

## B. Article 5 Compliance: criminalizing and prosecuting the act

*Creating the right disincentives for traffickers through criminalization of particular behavior, assigning sufficiently severe penalties to the crime, and ensuring rule of law throughout the prosecution process*

### 1. China

Even before ratifying Palermo and becoming party to Article 5 obligations for the criminalization of human trafficking as defined in Article 3, China had criminalized many elements of trafficking and was prosecuting traffickers. As detailed in the 2010 Opinions, "In 2008, courts nationwide decided 1353 cases of trafficking in women and children... 2161 offenders were sentenced and their sentences had legal effect... Of those who were sentenced, 1319 were sentenced to more than 5 years of fixed-term imprisonment or life imprisonment or death... The proportion of heavy penalties was 61.04%, or 45.27% higher than the proportion of heavy penalties in all the [total] criminal cases of the same period. In 2009, courts nationwide decided 1636 cases of trafficking in women and children... 2413 offenders were sentenced and their sentences had legal effect... Of those who were sentenced, 1475 were sentenced to more than 5 years of imprisonment or life imprisonment or death."<sup>182</sup>



China's criminalization of human trafficking has moved towards greater compliance with Palermo in the past few years since signing on to the Protocol. Article 5 of the Protocol states

<sup>182</sup> Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security and Ministry of Justice, *Laws and Regulations: Opinions on Severely Punishing Trafficking in Women and Children according to Law*, Sec 1.0 (March 2010), Available at [http://www.no-trafficking.org/reports\\_docs/china/china\\_guidelines\\_2010\\_en.pdf](http://www.no-trafficking.org/reports_docs/china/china_guidelines_2010_en.pdf), 3.

that: “Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in Article 3 of this Protocol, when committed intentionally.” China has steadily been increasing penalties for human trafficking, and the 2010 Opinions on Severely Punishing Trafficking in Women and Children according to Law is a reflection of this, possibly inspired by ratification of the Protocol months earlier which again raised national consciousness of the issue. The Opinions were circulated among the courts and government offices of all provinces, autonomous regions and municipalities for the purpose of “increas[ing] judicial protection of the legal rights and interests of women and children and fully implement[ing] China's National Plan of Action on Combating Trafficking against Women and Children.”<sup>183</sup> Among the thirty-four “opinions,” or requirements, on punishing human trafficking crimes, there is a substantial increase in “heavy penalties”<sup>184</sup> including the death penalty<sup>185</sup> “according to law where the circumstances of the crime are particularly heinous.”<sup>186</sup> The number of convicted criminals has increased each year, as has the severity of sentences.<sup>187</sup> Even so, aspects of the law still remain too lenient and according to some, could still be bolstered. Sun Xiaoying, a researcher with the Research Institute of Southeast Asia at the Guangxi Academy of Social Sciences, says that additional legislation is still needed to deter buyers of trafficking victims: “Under the current Chinese law, traffickers are heavily punished, while purchasers are not held responsible.”<sup>188189</sup>

Another post-Palermo potential change to the criminal code involves what has been termed the “child rape law.” The changes to the criminal law in 1997 sentenced those convicted

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<sup>183</sup> *Id.*

<sup>184</sup> “Severe sentences” meaning a jail sentence of over 5 years, a life sentence, or a death sentence.

<sup>185</sup> China regularly enacts capital punishment for various crimes, annually executing thousands of individuals. Amnesty International claims that China executes more people than the rest of the world combined, and refuses to report the government figures from the PRC, arguing that their numbers are vastly underreported. See Amnesty International, “Reporting on the death penalty: executions in 2012” (4 September 2013), Available at <http://www.amnesty.org.uk/2012-death-penalty-executions-report-capital-punishment-data#.U39XJ2deHcs>.

<sup>186</sup> *Opinions on Severely Punishing Trafficking*, *supra* note 182, at Sec. 8.28.

<sup>187</sup> Wang Jingqiong and Yan Jie, “More convicted for human trafficking,” *China Daily*, 1 September 2010, Available at [http://www.chinadaily.com.cn/usa/2010-09/01/content\\_11240406.htm](http://www.chinadaily.com.cn/usa/2010-09/01/content_11240406.htm).

<sup>188</sup> Zhu Ningzhu, “Xinhua Insight: Vietnam-China human trafficking a growing malady,” *Xinhua*, 19 November 2013, Available at [http://news.xinhuanet.com/english/indepth/2013-11/19/c\\_132901132\\_2.htm](http://news.xinhuanet.com/english/indepth/2013-11/19/c_132901132_2.htm).

<sup>189</sup> Chapter IV, Article 241 of the 1997 Criminal Law has a maximum three-year sentence for purchases, but later undermines even this penalty by saying that as long as the purchaser does “not obstruct bought women” from returning home and does “not abuse and not obstruct children” from returning home, such purchasers will not be investigated for their criminal liability.

of rape to a minimum sentence of three years. However, sexual relations with a girl under the age of 14 was considered rape and carried a sentence of no less than ten years up to life imprisonment and execution.<sup>190</sup> Yet in Chapter VI, Section 8, Articles 359 and 360, anyone “seducing young girls under 14 years of age into prostitution” or “visiting young girl prostitutes under 14 years of age” can get off with a minimum five-year sentence. In other words, as long as the man can prove that he paid or otherwise compensated an eight-year-old child for sex, he will face a more lenient punishment than if he raped a sixteen-year-old girl. Critics have long argued that this crime of “spending the night in a brothel with a young girl” provides incentives to sexual predators to rape younger girls, encourages men to bribe the girl’s family to testify that she was “paid,” and stigmatizes these young girls by labeling them as prostitutes. In early 2013, another scandal involving public servants and underage girls pushed public outrage to a tipping point,<sup>191</sup> finally culminating in the Chinese Supreme Court’s announcement in December 2013 that the National People’s Congress would be suspending the law. Zhang Rongli, a law professor at the China Women’s University, called the announcement a “really, really positive change... an example of the government listening to public opinion. This law was very unpopular throughout society. Surveys showed that 98 or 99 percent of people opposed it. The government listened.”<sup>192</sup> While in this case domestic pressures and public opinion seem to be the core drivers for legal change, the end result is to further harmonize Chinese domestic law with the Palermo Protocol. The internationally accepted definition of human trafficking at stated in Article 3 classifies the exploitation of any child<sup>193</sup> as trafficking in persons,<sup>194</sup> and asserts that the “consent of a victim of trafficking in persons to the intended exploitation... shall be irrelevant...”<sup>195</sup> By eliminating its child rape law, China will be moving into compliance with the Protocol by recognizing that no child can offer its legal consent to be raped, prostituted or trafficked.<sup>196</sup>

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<sup>190</sup> Chapter IV: Crimes infringing upon the rights of the person and the democratic rights of citizens, Article 236, 1997 Criminal Law.

<sup>191</sup> Sophie Song, “China’s ‘Child Rape Isn’t Rape’ Law Is Sparking Outrage,” *International Business Times*, 13 May 2013, Available at <http://www.ibtimes.com/chinas-child-rape-isnt-rape-law-sparking-outrage-1255417>.

<sup>192</sup> Didi Kirsten Tatlow, “China to End Loophole in Child Rape Law, Experts Say,” *New York Times*, 9 December 2013, Available at [http://sinosphere.blogs.nytimes.com/2013/12/09/china-to-end-loophole-in-child-rape-law-experts-say/?\\_r=0](http://sinosphere.blogs.nytimes.com/2013/12/09/china-to-end-loophole-in-child-rape-law-experts-say/?_r=0).

<sup>193</sup> Palermo Protocol, Article 3(d): “Child shall mean any person under eighteen years of age.”

<sup>194</sup> Article 3(c).

<sup>195</sup> Article 3(b).

<sup>196</sup> Child sex trafficking is distinct from child rape as it entails a commercial aspect to the sexual exploitation. Strong anti-rape laws, though, are important in establishing a strong anti-trafficking regime. Currently, China’s rape laws

## 2. India

In terms of criminalizing the offense of human trafficking in accordance with Section 5 of the Palermo Protocol, India is highly compliant. As one of two crimes punishable by law in the 1949 Indian Constitution and outlawed in the original 1860 Indian Penal Code (IPC), the offense of “trafficking in persons” or “slavery” has long been viewed in India as a punishable crime. The Indian Constitution declares that “Traffic in human beings and *begar* and other similar forms of forced labour are... an offence punishable in accordance with the law,”<sup>197</sup> enforceable against both the state and private citizens.<sup>198</sup> The law referenced, the IPC, covers a long list of crimes including everything from buying a slave, to kidnapping for wrongful confinement or abduction for forced marriage, to habitually dealing in slaves, to unlawful compulsory labor. Each crime comes with punishment of imprisonment for a term of up to 7 or 10 years along with the possibility of a fine.<sup>199</sup> As already discussed, this criminal code was updated in the 2013 CLA. Other laws through the past few decades have continued to prohibit and criminalize various facets of trafficking: the 1956 Immoral Traffic (Prevention) Act, the 1976 Bonded Labour System (Abolition) Act, the 1986 Child Labour (Prohibition and Regulation) Act, the 2000 Juvenile Justice (Care and Protection of Children) Act, and the 2012 Protection of Children from Sexual Offences among others.

The problem in India lies not with the law but with implementation of the law. According to Dr. Abhilasha Kumari, the executive director for Aapne Aap: Women Worldwide, “India now has fabulous laws, but lacks strong and consistent implementation.”<sup>200</sup> Roma Debabrata, the President of the local NGO STOP, claims that “India’s laws are wonderful, but implementation is lacking. Justice is so often delayed that it is ultimately denied. All the judicial

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do not offer protection to underage boys. The rapists of boys can at most be charged with child molestation, carrying a five year maximum sentence. Research by the University of Hong Kong and UBS Optimus Foundation has found that boys are 2.7% more likely to suffer sexual offenses in China than girls. The Guangdong provincial center for disease control and prevention issued a 2013 report showing that 2-3% of boys suffer rape, compared to only 1% of girls. See Xie Caifeng, “Reality of Male Rape Needs Legal Recognition,” *Global Times* (5 November 2013), Available at <http://www.globaltimes.cn/content/822737.shtml#.U0eq1qhdWSo>.

<sup>197</sup> The Constitution of India, Part III Fundamental Rights, Section 23 Right against Exploitation.

<sup>198</sup> Nair and Sen, *supra* note 175, 194.

<sup>199</sup> Indian Penal Code, Available at

<http://www.advocatekhoj.com/library/bareacts/indianpenalcode/index.php?Title=Indian%20Penal%20Code,%201860>. Section 374 on Unlawful Compulsory Labor has a shorter term of imprisonment of only up to one year.

<sup>200</sup> Personal Interview with Abhilasha Kumari (3 January 2014), notes in author’s possession.

levels are there, but the judicial process takes so long.”<sup>201</sup> Bhuwan Ribhu, child rights activist and national secretary of Bachpan Bachao Andolan (BBA), credits changes to the law in recent years with persistent judicial activism and a strong civil society.<sup>202</sup> However, he blames many of these same civil society groups for not staying more up to date on the current laws and using the legal system to their own advantage to fight for justice. Civil society needs to do a better job of knowing the standard operating procedures for trafficking cases and to be more persistent in holding the government accountable for upholding the law.<sup>203</sup>

One way in which to see India’s failure to implement the law is in its low conviction rate of traffickers. According to the National Crimes Record Bureau (NCRB), from 2008 to 2012, the total number of annual sex trafficking cases in India increased by 17% from 3,029 to 3,554, yet from 2010 to 2012, the number of annual convictions declined from 2,292 to 1,611. Between 2010 and 2012, police arrested 25,730 individuals for sex trafficking. Of



these, only 6,123 persons were convicted, for a conviction rate of 24% nationwide. The rate of convictions varied greatly between states. For example, in 2012, West Bengal had the highest number of registered sex trafficking cases at 549, with a dismal conviction rate of 4%. Assam, Goa and Gujarat had the lowest convictions rates of all at 1% (6 out of 501 cases), 3% (6 out of 193 cases) and 3% (18 out of 516 cases) respectively. Uttar Pradesh and Delhi had the highest conviction rates in 2012, at 73% (448 out of 615 cases) and 68% (232 out of 342 cases).<sup>204</sup> The vast disparity in conviction rates for sex trafficking cases across the country raises questions as

<sup>201</sup> Personal Interview with Roma Debabrata (31 December 2014), notes in author’s possession.

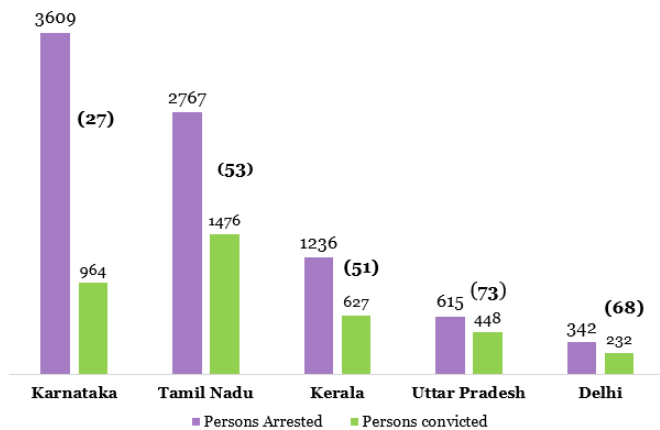
<sup>202</sup> See UNODC, *India Country Assessment Report: Current Status of Victim Service Providers and Criminal Justice Actors on Anti Human Trafficking* (2013), for a full list of landmark Supreme Court cases over the past thirty years which have brought positive change in how India protects and rehabilitates trafficking victims as well as prevents and punishes trafficking in persons crimes (*hereinafter* UNODC 2013 Report).

<sup>203</sup> Personal Interview with Bhuwan Ribhu (3 January 2014), notes in author’s possession.

<sup>204</sup> Pranav Garimella, “Human Trafficking Cases Jump in India; Convictions Decline!” *India Spend* (27 September 2013), Available at <http://www.indiaspend.com/investigations/human-trafficking-cases-jump-in-india-convictions-decline-23536>.

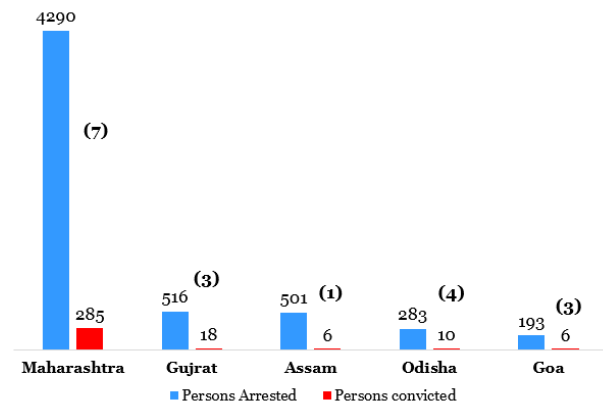
to what is causing these courtroom outcome differences. Are certain states lacking in legal resources, is corruption more prevalent in some states?

**Best 5 States For Arrests/Conviction Rates In 2010-2012**



Figures in brackets are Conviction Rate (%)  
Source: NCRB

**Worst 5 States For Arrests/Conviction Rates In 2010-2012**



Figures in brackets are Conviction Rate (%)  
Source: NCRB

Also of concern is the fact that the NCRB data on national trafficking convictions is limited in scope to sex trafficking cases, completely ignoring the much greater issue of the 126,000 cases of child labor trafficking<sup>205</sup> reported in 2012.<sup>206</sup> The NCRB statistics suggest that while India may be in near complete compliance with the Palermo Protocol in terms of its domestic laws on the books, it has yet to take seriously the prosecution and conviction of traffickers. As one anti-trafficking lawyer said, “Convictions send a strong message. We must work hard on every single case,”<sup>207</sup> explaining the reason for his commitment to see human trafficking cases through to the end and to achieve convictions which might serve as a deterrent to other traffickers and criminal organizations.

In speaking with litigation lawyers and anti-human trafficking organizations as to why there is this huge gap between arrests and convictions, three reasons were brought forth. Understanding these underlying factors helps point to how and why India is not yet fully complying with its treaty obligations “to prevent and combat trafficking in persons.”

<sup>205</sup> *Id.*

<sup>206</sup> UNODC 2013 Report, *supra* note 202.

<sup>207</sup> Personal Interview with Ravi Kant (2 January 2014), notes in author’s possession.

One reason for the low number of convictions is the lack of resources and capacity on both the law enforcement and judicial sides. In discussing the police force's ability to investigate and collect evidence for trafficking cases, an officer with the International Organization for Migration in Delhi complained that the police are recruited and trained for physical prowess. Based on his experience interacting with them, he did not believe that they possessed the nuanced knowledge and skills to deal with such a complicated issue.<sup>208</sup> Ravi Kant from Shakti Vahini commented that investigating officers lack motivation. Financial resources are hard to come by, so police investigations rarely go beyond the initial raid or brothel bust.<sup>209</sup> Roma Debabrata echoed this sentiment, stating that combating trafficking is often not a priority for the over-burdened government and police force.<sup>210</sup> The *Trafficking in Women and Children in India*<sup>211</sup> reported in 2005 that police officers when polled cited lack of adequate manpower, lack of women police officers, lack of legal awareness and lack of training as top reasons for shortcomings in enforcement of Indian law in combating human trafficking.<sup>212</sup> P.M. Nair, former Director General of Police and nodal officer for Anti-Human Trafficking National Human Rights Commission, pointed out that in 2004, "only 6.6% of police officers had some exposure to the anti-trafficking law. If the police are not trained, where does the fault lie?"<sup>213</sup>

The government of India has recognized lack of capacity and skills training as challenges in its police force. In 2009, two years before signing the Palermo Protocol, the Ministry of Home Affairs developed a new scheme for "Strengthening the law enforcement response in India against Trafficking in Persons through Training and Capacity Building," creating Anti-Human Trafficking Units (AHTU) and training trainers for police courses on trafficking.<sup>214</sup> By March 2012, a total of 225 AHTUs had been set up across the country, with a budget of 17,055,000 rupees (307,000 USD), and training 8000 investigating officers.<sup>215</sup> The state-level AHTUs have

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<sup>208</sup> Personal Interview with IOM officer, notes in author's possession.

<sup>209</sup> Personal Interview with Ravi Kant (2 January 2014), notes in author's possession.

<sup>210</sup> Personal Interview with Roma Debabrata (31 December 2014), notes in author's possession.

<sup>211</sup> This nationwide study was commissioned by the National Human Rights Commission, and carried out with the support of the New Delhi Institute of Social Sciences and UNIFEM.

<sup>212</sup> Nair and Sen, *supra* note 175, 216.

<sup>213</sup> Nidhi Surendranath, Train police to improve handling of human trafficking cases, says ex-DGP," *The Hindu* (29 September 2013), Available at <http://www.thehindu.com/news/cities/Kochi/train-police-to-improve-handling-of-human-trafficking-cases-says-exdgp/article5180119.ece>.

<sup>214</sup> "India sets up special units to tackle human trafficking," *Dalit Freedom Network UK*, Available at <http://www.dfn.org.uk/news/news/169-india-sets-up-special-units-to-tackle-human-trafficking.html>.

<sup>215</sup> UNODC 2013 Report, *supra* note 202, 30.



become instrumental in joint investigations and the sharing of information across state borders within India.<sup>216</sup> While the Indian government is taking steps to train officers and build capacity, comments by preeminent activists, lawyers and police officers in the field show that it will still take a lot of persistent effort and time to make the law work as it ought. In fact, there are complaints that in the past year, the quality of the AHTUs and training of AHTU police has actually declined. AHTUs are imbedded into local-level police departments and funded by the federal government, yet many in the country lack clearly defined roles and a dedicated staff.<sup>217</sup> What is more, these units often focus on sex trafficking and child labor crimes to the exclusion of labor trafficking and debt bondage cases.<sup>218</sup>

Furthermore, judges and public prosecutors also lack sensitivity and the judicial capacity to know how to properly handle trafficking cases. Several NGOs such as Shakti Vahini and Bachpan Bachao Andolan (BBA) work closely with investigators to build up a case. These NGOs share their legal expertise, sending lawyers to brief the public prosecutors, who ordinarily carry heavy caseloads and do not have the time to dedicate to in-depth research on individual cases. Especially since the laws surrounding human trafficking have been changing rapidly in recent years, both Shakti Vahini and BBA have found their specialized legal knowledge on trafficking cases to be highly needed and influential in the courtroom.<sup>219</sup>

Another reason for the low conviction rates is the complicity of police and government officials in the trafficking cases. In a 2004 survey of 852 police officers, 14.4% of respondents thought that corruption in the police force was the leading cause behind the low number of arrests and convictions for trafficking crimes.<sup>220</sup> One human rights lawyer investigating cases of missing children explained how his NGO often receives tips from the public on instances of child trafficking. He first goes in person to investigate the situation himself, before submitting information to local police for them to go in and make an arrest. In domestic labor cases, his NGO has entirely stopped sharing detailed information with the police upfront. They discovered that when too much information was given to the police before a raid, they would arrive to

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<sup>216</sup> *Id.*, 81.

<sup>217</sup> 2013 TIP Report, *supra* note 2, India Country Narrative.

<sup>218</sup> *Id.*

<sup>219</sup> Personal Interview with Ravi Kant (2 January 2014), notes in author's possession.

<sup>220</sup> Nair and Sen, *supra* note 175, 214.



rescue the child, only to find nothing there. The lawyer attributed this to a matter of reputation. The police do not like making these raids and arrests, as higher reported crime rates make their jurisdictions look bad.<sup>221</sup> The problem of official complicity in trafficking has remained unaddressed by the Indian government.<sup>222</sup>

The third reason NGOs and litigation lawyers discussed in explaining the low conviction rate was the organized crime element of human trafficking. The 2004 police officer survey sited lack of information and witnesses as the largest barrier in obtaining convictions,<sup>223</sup> and in personal interviews conducted by the author, this barrier was linked to the organizational power and reach of the traffickers. For one thing, these criminal rings are highly organized with lots of resources, both financial and manpower. When they are not directly paying off the police, they are able to take advantage of the legal loopholes in the justice system. Because of the power these organized crime groups wield, they are able to coerce action by inflicting fear on both victims and NGOs.<sup>224</sup> The traffickers particularly target victims and witnesses in order to hide evidence and obstruct investigations. Several NGOs mentioned the tactic of traffickers either to brainwash victim witnesses, to threaten them into submission so that they will not appear in court to testify against the traffickers, or else to buy them off with silence money of around 5000-10,000 rupees.<sup>225</sup> The government's inability to "provide effectively for the protection from potential retaliation or intimidation for witnesses in criminal proceedings" is a violation of India's CTOC obligations, thus also a violation of the Palermo Protocol.<sup>226</sup> Fear of retribution from traffickers which could affect family members in different states coupled with a general distrust of the police keeps many victims and potential witnesses from volunteering essential information to successfully prosecute the traffickers.<sup>227</sup> Similarly, traffickers are able to afford

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<sup>221</sup> Personal Interview with Bader Um (2 January 2014), notes in author's possession.

<sup>222</sup> US 2013 TIP Report, *supra* note 2, India Country Narrative.

<sup>223</sup> 44% of officers reported as such. See Nair and Sen, *supra* note 175, 214.

<sup>224</sup> One NGO shared a recent case where they themselves were targeted by the organized criminal group. The key witness in the case, after months of prepping, turned against the NGO in the courtroom, suddenly "speaking the language of the traffickers." She testified on oath that she had not been coerced, that she wanted to go back to her life in the brothel, and that the NGO assisting in the prosecution had been harassing her, resulting in the NGO coming under a lengthy police investigation. Other NGOs mentioned this same story as a warning of the power trafficking organizations hold and how it has already deterred many groups from assisting in actual courtroom litigation and prosecution, choosing instead to focus their efforts on victim protection and rehabilitation. Personal Interview, notes in author's possession.

<sup>225</sup> Personal Interview, notes in author's possession.

<sup>226</sup> UN CTOC, *supra* note 88, Article 24(1) Protection of witnesses.

<sup>227</sup> Personal Interview with local NGO staff, notes in author's possession.

good defense lawyers, who use stalling tactics to prevent the deposition of witness testimony in the courts, which can result in dropped cases.<sup>228</sup> However, in the courtroom, this picture of large organized trafficking networks is not addressed. Trafficking cases do not make use of legal provisions relevant to organized crime.<sup>229</sup> While India has taken great strides to strengthen its law in dealing with human trafficking, one advocacy lawyer thought that an area where the legal code is still lacking when measured against the Palermo Protocol is in its failure to see human trafficking as an organized crime. When trafficking cases do make it to the courts, each trafficking crime is viewed as an isolated event instead of potentially linked with a larger national or transnational organized criminal group.<sup>230</sup>

### **C. Article 6 Compliance: assisting and protecting victims of trafficking**

*Providing the bare minimum of services and protection to victims, constrained by legal obstacles, corrupt officials and government apathy*

#### **1. China**

As already discussed in the first section, Article 6 of the Protocol on assistance and protection to victims requires little to no concrete action on the part of member states. Each of the six assistance and protection measures are posed as optional recommendations instead of as firm legal obligations, thus giving states loopholes to avoid responsibility.<sup>231</sup> States parties should clearly be doing *something*, since victim protection and assistance is one of the three stated purposes of the treaty. Nevertheless, the weak language leaves it up to states parties to decide when and what kinds of protection and assistance measures may be unnecessary, inappropriate, too cumbersome or impossible to implement.

The U.S. TIP Report labels China's victim protection efforts "inadequate," mostly because of a lack of transparency and public reporting on the part of the Chinese government,<sup>232</sup> meaning that American officers are unable to deduce what if anything the Chinese are doing for trafficking victims. One clear area where China struggles is in Article 6(3), where the Protocol

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<sup>228</sup> Personal Interview with local human rights lawyer, notes in author's possession.

<sup>229</sup> Sarasu Esther Thomas, *Responses to Human Trafficking in Bangladesh, India, Nepal and Sri Lanka* (New Delhi: UNODC, 2011), 36 (*hereinafter* UNODC 2011 Report).

<sup>230</sup> Personal Interview with local human rights lawyer, notes in author's possession.

<sup>231</sup> Bhabha, *supra* note 62, 3.

<sup>232</sup> 2013 TIP Report, *supra* note 2, 130.

requests it to “consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including... in particular, the provisions of: (a) appropriate housing; (b) counselling and information; (c) medical, psychological and material assistance; (d) employment, educational and training opportunities.”<sup>233</sup> China fails to adequately provide victims with services such as housing, counseling, information regarding legal rights, medical and psychological assistance, and employment and educational training. The offering of these services usually comes from local NGOs, not government offices.

Kunming, the capital of Yunnan province, is considered a hub for human trafficking and transnational organized crime due to its strategic geographic location as the gateway from Southeast Asia into China, sharing a 4000 kilometer border with Myanmar, Laos and Vietnam. Kunming would be the ideal place for a government-sponsored safe house for trafficking victims, yet there is little evidence that such protective housing exists. The executive director of one local NGO working with victims of sex trafficking in the city for over a decade indicated that she had been approached multiple times in recent years by local officials about overseeing a jointly-run safe house for women, but turned down this proposal for reasons discussed below.<sup>234</sup> Another anti-trafficking NGO in Kunming also stated that they were unaware of any government sponsored housing for trafficking victims in the whole of Yunnan.<sup>235</sup> However, the U.S. 2013 TIP Report states that Yunnan has a shelter dedicated to assisting foreign trafficking victims.<sup>236</sup> What is more, according to a Ministry of Foreign Affairs official in Beijing, the Yunnan provincial government does operate a local shelter in Kunming with capacity for up to 30 trafficking victims.<sup>237</sup> This official toured the shelter back in September 2012 as part of an IOM-sponsored anti-trafficking training session for provincial Yunnan border police. The official remarked that while the shelter was empty the week they visited, all of the delegates had been impressed by the quality of the home and the amenities provided (exercise room, common recreation room, library and reading room). When the existence of this shelter was mentioned to the previous two local NGOs, they both expressed surprise at never having heard of it and

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<sup>233</sup> Palermo Protocol, *supra* note 33, Article 6(3).

<sup>234</sup> Personal Interview, notes in author’s possession.

<sup>235</sup> Personal Interview, notes in author’s possession.

<sup>236</sup> The report states that the Chinese government has established two shelters for foreign trafficking victims, the other being in Guangxi province. See U.S. 2013 TIP Report, *supra* note 2, 130.

<sup>237</sup> Personal Interview, notes in author’s possession.

skepticism as to its actual use. One NGO repeated multiple times that China has zero victim support and no rehabilitation process for victims. Multiple staff members from this NGO reported never having seen an instance where the government provided victims with mental, emotional, physical or monetary support.<sup>238</sup>

Beyond its questionable performance at providing trafficking victims with material assistance and support, China's efforts to provide the victims with legal remedy and restitution for injuries suffered is also lacking. Article 6 sections 2(b) and 3(b) of the Protocol assert member states' responsibility to provide victims with legal assistance, implying legal counseling and legal representation in court.<sup>239</sup> Section 9 directs states parties to ensure victims at least the "possibility of obtaining compensation for damage suffered,"<sup>240</sup> and twice within this section the Protocol directs states to consider the "psychological" recovery of the victims which must take place.<sup>241</sup> The parent Convention further obliges states to provide victims of transnational organized crime with access to compensation and restitution,<sup>242</sup> and directs states to give compensation to victims by returning the proceeds of the crime to the legitimate owner.<sup>243</sup> However, past litigation on trafficking cases in China has demonstrated a gap in the domestic law for providing full compensation and restitution to victims. In 2012, the Supreme People's Court issued a ruling on a civil suit for damages in a child abduction and illegal adoption case.<sup>244</sup> In 1993, 6-year-old Gan Lin had been kidnapped from his birth parents and sold to another family. It took him 17 years before he was able to reunite with his birth parents, at which point, his father brought a criminal and civil case against the trafficker, suing in the civil case for both material and mental damages.<sup>245</sup> The Supreme People's Court ruled that Gan Lin could only receive material and economic damages valued at 28 RMB,<sup>246</sup> but rejected the granting of

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<sup>238</sup> Personal Interview, notes in author's possession.

<sup>239</sup> Palermo Protocol, *supra* note 33, Article 6(2)(b) and 6(3)(b).

<sup>240</sup> *Id.*, Article 6(9).

<sup>241</sup> *Id.*, Article 6(3).

<sup>242</sup> UN CTOC, *supra* note 88, Article 25(2).

<sup>243</sup> *Id.*, Article 36.

<sup>244</sup> Tang Zinan, "Boy abducted for 17 years receives only 28 RMB in compensation; Experts say court judgment is unreasonable but legal," *Blog.Sina* (25 September 2013), Available at [http://blog.sina.com.cn/s/blog\\_7f7dff6c0101m7h5.html](http://blog.sina.com.cn/s/blog_7f7dff6c0101m7h5.html).

<sup>245</sup> Wang Aitong, "How can 28 RMB compensation make up for 17 years of injury," *China Jinlin Paper* (16 June 2011), Available at [http://www.chinajilin.com.cn/zhuanti/content/2011-06/16/content\\_2255620.htm](http://www.chinajilin.com.cn/zhuanti/content/2011-06/16/content_2255620.htm).

<sup>246</sup> 28 RMB was the approximate value of the clothes Gan Lin was wearing when he was abducted in 1993.

reparations for mental and emotional injury valued at 170,000 RMB.<sup>247</sup> As a basis for this decision, the Court cited an earlier judicial opinion issued in 2002. The 2002 decree stated that in civil suits brought subsequent to criminal proceedings, the court will not accept petitions to obtain civil compensation for mental damages; the court will only grant compensation for material injury.<sup>248</sup> Chinese law does ordinarily recognize the ability to obtain compensation for mental damages,<sup>249</sup> the exception being in civil suits tandem to criminal proceedings.<sup>250</sup> Since trafficking in persons is a criminal offense, Chinese domestic law makes it impossible for trafficking victims to receive mental damages compensation. Victims are legally denied access to full restitution for injuries suffered.

Another questionable area of compliance with the Protocol is in China's treatment of NGOs. Article 6(3) requests State Parties to "consider" implementing such social services as already discussed "in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society."<sup>251</sup> However, none of the NGOs spoken with

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<sup>247</sup> 28 RMB is approximately 4.50 USD. 170,000 RMB is approximately 27,322 USD.

<sup>248</sup> "The Supreme People's Court official reply to the People's Court on whether or not to accept civil appeals from victims of criminal cases requesting compensation for mental damages" (15 July 2002), Available at <http://law.lawtime.cn/d411455416549.html>.

<sup>249</sup> Article 120 of the "General Principles of the Civil Law of the People's Republic of China" adopted by the Sixth National People's Congress in its Fourth Session on 12 April 1986 states: "If a citizen's right of personal name, portrait, reputation or honor is infringed upon, he shall have the right to demand that the infringement be stopped, his reputation be rehabilitated, the ill effects be eliminated and an apology be made; he may also demand compensation for losses." See Zhai Jianxiong, "Compensation for Mental Injury: an Analysis to a New Judicial Interpretation of the Supreme People's Court of China" (2004), Available at [http://article.chinalawinfo.com/Article\\_Detail.asp?ArticleID=25294](http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=25294).

<sup>250</sup> The reason for this exception has to do with the history of the development of civil procedure law in China. During the Qing Dynasty and under the Republic of China (1912-1949), the legal code recognized an individual's right to sue for mental damages compensation, even in civil suits tandem to criminal proceedings. Following the establishment of the People's Republic of China in 1949, the ancient Chinese civil legal code was thrown out in favor of adopting the Soviet legal code. In accordance with the Soviet legal theory that granting mental damages was too bourgeois, the entire concept was dropped out of legal conversations. The concept did not reappear until 1986, when the PRC wrote an entirely new civil legal code: "The General Principles of the Civil Law." At this point, though, mental damages for civil cases tandem to criminal proceedings were not recognized. For a history of the development of mental damages compensation in Chinese law, see "精神损害赔偿" ("Mental Damages Compensation"), Available at [http://baike.baidu.com/link?url=EtmjWUE9hpxuAsCq6BqsLm1qerNhs2yt5tExoilTPfU\\_BVRjt0\\_miMHY\\_ZqZM3a1](http://baike.baidu.com/link?url=EtmjWUE9hpxuAsCq6BqsLm1qerNhs2yt5tExoilTPfU_BVRjt0_miMHY_ZqZM3a1). This understanding of the rule was reaffirmed in the 2002 Court edict, and again in 2012 in the Amendments to China's Civil Procedure Law. See Standing Committee of The National People's Congress, "Civil Procedure Law of The People's Republic of China" (31 August 2012), Available at <http://www.inchinalaw.com/wp-content/uploads/2013/09/PRC-Civil-Procedure-Law-2012.pdf>.

<sup>251</sup> Palermo Protocol, *supra* note 33, Article 6(3).

by the author expressed ever receiving any type of support for carrying out victim assistance.<sup>252</sup> In fact, all of them instead told stories of instances where Chinese government authorities were hindering their work. Many local NGOs choose to register themselves in China as private businesses instead of as official non-governmental organizations for two main reasons. First, obtaining official NGO status in China has historically been extremely difficult if not altogether illegal, meaning that the majority of NGOs in China are unregistered, and thus illegal.<sup>253</sup> Secondly, until 2012, all official NGOs needed a sponsoring organization, usually a government agency, with expertise in the NGO's area of interest. With this comes the requirement for a CCP government official to be embedded into the organization in order to give supervision over projects.<sup>254</sup> The presence and interference of the CCP officials in their work is often not appreciated by NGOs. One NGO staff worker discussed another organization's failed attempt to establish a local shelter project for street children due to a souring of relations with the CCP official.<sup>255</sup>

Other civil society groups mentioned additional challenges of trying to operate in China. The NGO who had turned down the government offer to open a jointly-run shelter for trafficking victims cited excessive bureaucracy within the local government which often doomed projects before they began. Anti-trafficking projects by the government are also usually short-term, which this NGO believed to be more harmful than constructive. Based on their own work with women coming out of prostitution and sexual exploitation, this NGO only wanted to invest in long-term projects that would provide sustained assistance to trafficking victims.<sup>256</sup> Another NGO with offices in multiple provinces expressed deep frustration with the work environment in China for anti-trafficking organizations. This individual complained that the government would regularly block information and refuse to share data with NGOs working to combat trafficking in persons.

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<sup>252</sup> One NGO mentioned newfound cooperation with a province-level official for initiating a trafficking prevention program in local junior high and high schools. The curriculum was designed entirely by the NGO and has received full support from local education officials.

<sup>253</sup> As of 2013, China had 500,000 NGOs registered with the state, and another estimated 1.5 million unregistered. See "Beneath the Glacier: Chinese civil society," *The Economist* (12 April 2014), 34.

<sup>254</sup> In 2011, China allowed four types of groups to directly register with the government without the need for a state sponsor: industry associations, science and technology organizations, charities, and those providing social services. Initially, this privilege was only granted to NGOs operating in specific provinces, but in 2014, it will be becoming a nation-wide policy. *Id.*, 35.

<sup>255</sup> Personal Interview, notes in author's possession.

<sup>256</sup> Personal Interview, notes in author's possession.

Even when this NGO in question would come across a trafficking case and flag it for the government's attention, the government's standard procedure was to take over immediately and tell the NGO to back off, effectively shutting them out of the process. This NGO alluded that UN agencies and IGOs (intergovernmental organization) working in China might experience better treatment than local or private NGOs because of their long-standing relationship with government authorities as well as their international reputation.<sup>257</sup>

Despite the Protocol having only one article on criminalization compared to three articles on victim protection, States do not necessarily mimic this ratio in where to devote their energies. China seems to be using the Protocol to support their prosecution efforts at the expense of ensuring human rights protections and victim services. Nowhere is this more evident than in their treatment of prostitution.

China's standard practice in combating sex trafficking has been a policy of "raid and rescue" into the brothels. Tiantian Zheng, a social scientist who has done significant ethnography field work with sex workers in China, argues that:

"[Raids] are predicated on the belief that prostitution is a form of violence against women and a woman will not voluntarily choose a profession that violates her own human rights. By conflating and confusing trafficking and prosecution, stories of the rescue of suffered women highlight women as naive, passive, and innocent. Due to the failure in the dominant trafficking discourse... to make distinctions between voluntary migrant sex workers and forced sex workers, anti-trafficking strategies focus on raid and rescue. By declaring that a woman who engages in prostitution is a victim requiring help to escape, anti-trafficking campaigns enable law enforcement officials to exercise force to raid brothels, detain, rehabilitate and deport women and children detected and identified as illegal migrant sex workers. Usually when a woman is rescued from the sex trade and put into police custody, she is subject to possible sexual assault by the police, deportation to her hometown, and forced relocation into more dangerous working areas... Raid and rescue techniques have pushed sex work underground and made it more dangerous, exacerbating the violence, exploitation and abuse which sex workers encounter, including discrimination, continued police harassment, and physical violence by local gangsters without any legal redress."<sup>258</sup>

Brothel raids during the periodic "strike-hard" campaigns push prostitution farther underground, making it harder for NGOs to do their work in providing sex workers with medical assistance

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<sup>257</sup> Personal Interview, notes in author's possession.

<sup>258</sup> Statement by Tiantian Zheng, "China and Human Trafficking: Updates and Analysis," Roundtable before the Congressional-Executive Commission on China, 111<sup>th</sup> Congress, Second Session (20 August 2010), Available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg62288/pdf/CHRG-111shrg62288.pdf>.

and HIV/AIDS treatment. Because of fears of arrest, fines and detention should their identity become known, sex workers avoid free testing and treatment provided by NGOs and public clinics.<sup>259</sup> These “strike-hard” campaigns generally occur before public holidays or major political events. An NGO in Beijing providing assistance to women coming out of sex trafficking reported that in the fall of 2012 during the CCP leadership transition, most brothels and sex shops within the Fourth Ring Road were shut down, with women either working underground, moved out past the outskirts of the city, or returning to their hometowns on extended “holiday.” During this time, the NGO lost touch with many of the women. Even today, the NGO staff related that they have not reestablished contact with many of those women and remain concerned about their current welfare and whereabouts.<sup>260</sup>

Following the November 2013 Third Plenum announcement abolishing Reeducation through Labor, Asia Catalyst produced a report assessing the Custody and Education system to which sex workers are subjected.<sup>261</sup> Like Reeducation through Labor (RTL), Custody and Education (C&E) does not have a clear legal basis, being established through regulations as a coercive administrative education measure. Sex workers may be detained from six months to two years.<sup>262</sup> Administered by the Ministry of Public Security, there is no judicial oversight, and detainees are denied a fair trial, the right to a defense and a hearing, and the recourse to appeal. Furthermore, detainees face heavy fines and mandatory forced labor to cover their own upkeep costs while also being subjected to compulsory STD testing. According to the report, any “educational” objective has long since been turned into a profit-making scheme for officers, as women are forced to manual labor generating profits for the C&E centers rather than spending their time learning technical skills which could change their future employment opportunities. At no point throughout this detention process is there a way to screen out sex trafficking victims.<sup>263</sup> These individuals are in need of assistance and rehabilitation, not coercive “moral” reeducation or worse, further exploitation, this time at the hands of the government.

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<sup>259</sup> Joan Kaufman, “HIV, Sex Work, and Civil Society in China,” *The Journal of Infectious Diseases* (2011), 204 (suppl 5), 1219, Available at [http://jid.oxfordjournals.org/content/204/suppl\\_5/S1218.full](http://jid.oxfordjournals.org/content/204/suppl_5/S1218.full).

<sup>260</sup> Personal Interview, notes in author’s possession.

<sup>261</sup> “Custody and Education: Arbitrary Detention for Female Sex Workers in China,” Asia Catalyst, December 2013, Available at [http://asiacatalyst.org/blog/AsiaCatalyst\\_CustodyEducation2013-12-EN.pdf](http://asiacatalyst.org/blog/AsiaCatalyst_CustodyEducation2013-12-EN.pdf).

<sup>262</sup> Liu, *supra* note 54, 179.

<sup>263</sup> Asia Catalyst, *supra* note 261, 8.



Depending on the local governing authorities for different parts of the country, sex workers may be hauled off to prison after being arrested during a brothel raid. A volunteer with a prison outreach program in a city in southern China explained that the arrest process centers on humiliation as part of the shaming culture. After being arrested, the women are first taken to a police station, and later to the city jail. They never see a lawyer or go before a judge. When caught with the first offense of sex work, they are locked up for six months. The second offense is twelve months. Without any judge overseeing the process, the police often perpetuate and participate in the exploitation against the women. After arrest, the women are stripped naked, have their hair shaved off, and are paraded in front of the police. Before arrest, police are allowed to frequent brothels and sleep with the women as “evidence.”<sup>264</sup> This means that the police can never be accused of abusing the girls, because they will always claim that their solicited sex was part of an investigation. Supposing the woman was a victim of sex trafficking and not a willing sex worker,<sup>265</sup> this city had no system in place to tag her differently. By treating all prostitutes as criminals in violation of the law, the local officials failed to take into account the root causes of the situation and the many coercive circumstances which could push a woman into sex work. Such treatment of the women is a clear violation of the government’s Palermo obligation to protect and assist victims of trafficking. China’s criminalization of the engagement in sex work versus focusing prosecution on the act of soliciting sex as other countries have done has had the end result of heaping further suffering and exploitation upon the heads of the trafficking victims.

## 2. India

In India, government-sponsored victim protection is evolving, both through statutory law and judicial rulings. Many of the rights guaranteed to victims in the domestic law have been established through judicial decisions. *Prajwala v. Union of India* demanded the implementation of a victim protocol. *Bodhisattwa Gautam v. Subhra Chakraborty* ordered that compensation be paid by a perpetrator of crimes to the victims. This principle was later also applied to trafficking

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<sup>264</sup> Personal Interview, notes in author’s possession.

<sup>265</sup> Assuming for the moment that there is a difference, while also recognizing that such abrasive treatment violates the human rights of the woman regardless of her crime.

cases in *PUCL v. Union of India*, demanding that children who have been trafficked receive compensation. *Gaurav Jain v. Union of India* stated the government's duty to rescue, rehabilitate and enable women to lead lives of dignity.<sup>266</sup> *Buddhadev Karmaskar vs State of West Bengal* constituted a panel to examine the issue of rehabilitation of sex workers and trafficked victims, which has continued to hold meetings and consultations with various state governments to suggest solutions for strengthening of the rehabilitation mechanism.<sup>267</sup> Despite these legal protections, though, assistance is often limited, delayed, and lacks proper oversight and monitoring.

The US TIP Report includes a whole litany of abuses taking place within the victim assistance system, from failure to provide legally mandated relief funds to allowing sexual abuse and re-trafficking to occur within the government-run shelters themselves.<sup>268</sup> These government-run shelters are permitted under Section 21 of the ITPA and Sections 37 and 34 of the Juvenile Justice (Care and Protection of Children) Act.<sup>269</sup> Conditions within the shelters remains suboptimal, one NGO worker describing them to be “like hell,” though she admitted they have improved significantly in recent years.<sup>270</sup> The shelters are available to victims both while their case is pending and during their rehabilitation or repatriation process, but equal care and assistance is not granted to all trafficking victims like.<sup>271</sup> In its skewed understanding of trafficking mostly being sex trafficking and child labor, India purposes all of its shelters for women and children, and does not provide care for adult male victims. In terms of provision of protective services, a lack of awareness among the police and judiciary often blocks implementation of the laws, just as it does in the prosecution of trafficking crimes. For example, while police are required to take sexual abuse victims for medical examinations immediately following the reporting of a crime, this often does not happen due to a lack of knowledge on the part of the officer.<sup>272</sup>

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<sup>266</sup> UNODC 2011 Report, *supra* note 229, 32-33.

<sup>267</sup> UNODC 2013 Report, *supra* note 202, 16.

<sup>268</sup> 2013 TIP Report, *supra* note 2, India Country Narrative.

<sup>269</sup> UNODC 2011 Report, *supra* note 229, 37.

<sup>270</sup> Personal Interview, notes in author's possession.

<sup>271</sup> UNODC 2011 Report, *supra* note 229, 34.

<sup>272</sup> Surendranath, *supra* note 213.

Much legislation has been devoted to providing assistance to children, yet even here the protection services are sub-par. Under the Juvenile Justice (Care and Protection of Children) Act, where children are defined as persons up to 18 years of age, any trafficked or prostituted child, those “in need of care and protection,” who is brought before the Magistrate is under the protection of the Child Welfare Committee. These children should not be charged with crimes under the Juvenile Welfare Board.<sup>273</sup> Nevertheless, trafficked children are occasionally charged with crimes, and girls are prosecuted on prostitution charges based upon falsified statements about their age.<sup>274</sup> The government, to its credit, is taking strides to improve legal protection for children under the old 1986 Child Labour (Prohibition and Regulation) Act. Currently, there is a motion to amend the law to bring it into conformity with the Right to Education as mandated in Article 21-A of the Indian Constitution.<sup>275</sup> The amendment would prohibit children under the age of 14 from being allowed to work, and would forbid child employment in hazardous work between the ages of 14-18.<sup>276</sup>

Another gap in victim protection in India has been in its lack of a witness protection program. This relates to the previously discussed issue of the government’s inability to prosecute and break up organized crime groups involved in the trafficking of persons. These organized trafficking rings frequently threaten victim witnesses, destroying any evidence which might be used against them. Without a witness protection program to create a safe atmosphere in which witnesses may testify, witnesses frequently turn hostile.<sup>277</sup>

Unlike in China, NGOs in India have been able to step up to play a much stronger role in victim protection, assisting governments not just in the investigation and prosecution of cases as seen earlier, but also in the provision of protection services to victims. Indian cities and states with a higher presence of strong NGOs perform better in combating trafficking and protecting victims.<sup>278</sup> Many of these NGOs try to pick up where they see government gaps, such as in the provision of the Palermo Protocol measures of housing, medical care and educational or

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<sup>273</sup> *Bachpan Bachao Andolan vs. Union of India & Ors*, Supreme Court of India, INSC 403, paragraph 42 (18 April 2011), Available at <http://www.liiofindia.org/in/cases/cen/INSC/2011/403.html>.

<sup>274</sup> Personal Interview, notes in author’s possession.

<sup>275</sup> UNODC 2013 Report, *supra* note 202, 16.

<sup>276</sup> Personal Interview with Mohammad Salam Khan (3 January 2014), notes in author’s possession.

<sup>277</sup> UNODC 2011 Report, *supra* note 229, 37.

<sup>278</sup> US 2013 TIP Report, *supra* note 2, India Country Narrative.

vocational training. By law, children who are picked up as trafficking victims are to be immediately taken to a government-run victim home, where their case is processed and they undergo medical tests and treatment.<sup>279</sup> At this stage, NGOs often step forward to assist with the care of these children. Any children's home needs a license and must be approved by the government. These homes see it as their mission to provide love and affection to the children, providing them not only with the basic essentials of housing and food, but also empowering them through education and skills training to make a better life for themselves. In a children's home in Rajasthan, the *Bal Ashram*, children originally rescued from begging or bonded labor in mines or textile factories, return to their local communities with skills in carpentry, cooking, tailoring and information technology.<sup>280</sup> STOP operates a shelter for girls under the age of 18 coming out of sex trafficking, and expressed a desire to aid these girls in gaining decision-making skills and in learning to exercise their own individual judgment. Roughly 20% of rescued girls are re-trafficked into prostitution, so STOP believes it is critical to give these girls both a sense of self-worth and critical thinking skills so as to make them less vulnerable in the future.<sup>281</sup>

Other NGOs seek to provide assistance to trafficked women in the midst of their exploitation. One such example, Apne Aap, provides legal assistance, welfare assistance and skills training (tailoring, cooking, computer literacy, financial literacy) to women working in the sex industry. Many of these women lack any tangible job skills, so the goal is to empower the women where they already are, demonstrating to them that they can take the initiative on their own to seek a better life. Apne Aap thought that the government policy of raid and rescue was more traumatizing to women than helpful: dragging them out of a brothel and throwing them into a deplorable government shelter from which they either escape or are released on bail by their trafficker/pimp/madam, and eventually end up voluntarily returning to the life or being re-trafficked because of their state of vulnerability. Many of the women do not even realize they are being "exploited," so they must be shown the difference between exploitation and personal autonomy. Only then will the women themselves be able to demand fair treatment and choose to take the control back over their own lives.<sup>282</sup>

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<sup>279</sup> Juvenile Justice (Care and Protection of Children) Act, Articles 29-39, Available at [http://www.law.yale.edu/rcw/rcw/jurisdictions/assc/india/India\\_Juv\\_Just.pdf](http://www.law.yale.edu/rcw/rcw/jurisdictions/assc/india/India_Juv_Just.pdf).

<sup>280</sup> Personal Interview with Nirpendar Singh (7 January 2014), notes in author's possession.

<sup>281</sup> Personal Interview with Roma Debabrata (31 December 2014), notes in author's possession.

<sup>282</sup> Personal Interview with Abhilasha Kumari (3 January 2014), notes in author's possession.

While NGOs are stepping up to fill the void in victim protection in India, the government is still often lax in providing legal protection to victims. Trafficking victims commonly find themselves penalized by the very laws which ought to be protecting them. The Immoral Trafficking (Prevention) Act (ITPA), for example, criminalizes prostitution. The ITPA is used to arrest, detain and prosecute sex trafficking victims for crimes of using any premises as a brothel, of living on the earnings of prostitution, or of carrying out prostitution in or in the vicinity of a public place.<sup>283</sup> Human rights activists complain that the sex workers are often the first target of brothel raids instead of the traffickers or pimps.<sup>284</sup> It is estimated that 85% of all prosecutions under the ITPA are used against the women in prostitution rather than the traffickers.<sup>285</sup> The International Human Rights Law Group has pointed out that the purpose of international law criminalizing trafficking in persons is meant to punish the traffickers only and not the victims. Domestic legislation must clearly state that trafficked persons are never punishable in crimes connected with their own trafficking.<sup>286</sup>

#### **D. Articles 7 and 8 Compliance: maintaining a legal status for foreign victims and providing for their repatriation**

*Emphasizing expedient repatriation of foreign national victims, while ducking responsibility for their protection*

##### **1. China**

Article 7 requests States to “consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases,” while giving “appropriate consideration to humanitarian and compassionate factors.” Again, the non-binding language appears to be recommending noble goals to which countries may aspire rather than establishing obligatory norms with which States must comply. Article 8(2) expects States who repatriate trafficking victims to their country of origin to do so “with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.” An NGO that does work along the China-Myanmar border stated that China’s lack of

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<sup>283</sup> Immoral Trafficking (Prevention) Act, Articles 2, 4 and 7, Available at [http://www.protectionproject.org/wp-content/uploads/2010/09/India\\_Acts\\_1986.pdf](http://www.protectionproject.org/wp-content/uploads/2010/09/India_Acts_1986.pdf).

<sup>284</sup> Global Network of Sex Work Projects, *supra* note 181.

<sup>285</sup> 2013 TIP Report, *supra* note 2, India Country Narrative.

<sup>286</sup> Annotated Guide to Trafficking Protocol, *supra* note 75.

victim support is true of both domestic and foreign victims. In “raid and rescue” missions that uncover foreign trafficking victims, the standard policy is to send the victims immediately back to their home country and “dump them.” The government officials responsible want to “get rid of” the victims as quickly as possible.<sup>287</sup> In the alleged shelter for trafficked women in Kunming, the MFA official mentioned that victims would come through for a few days, no longer than a week, while waiting for their paperwork to be processed. No plan, though, according to the official’s knowledge, was ever made for looking into the situation of their home country to ensure that the victim would not re-fall into the same cycle of exploitation.<sup>288</sup> Therefore, in addition to not having implemented any domestic legislature to enable foreign victims to remain under a temporary resident permit, the Chinese government also does not investigate or take into account whether the victim will face further hardship or abuse back in their home countries. It is hard to definitively prove noncompliance with the Protocol, though, as the NPC might very well have “considered” a more comprehensive and humanitarian repatriation system, and then decided against it. However, it is clear that this is a matter of non-cooperation, as China is violating the object and purpose of the treaty to protect trafficking victims in whatever manner possible, whether by providing safe haven in China through temporary or permanent residence, by acting with due “consideration to humanitarian and compassionate factors,” and by prioritizing “the safety of that person.”

It is widely known that China regularly violates both its Palermo obligation to protect foreign victims and its UNHCR commitment to non-refoulement of refugees by its regular insistence on forcibly repatriating North Koreans back to the Democratic People’s Republic of Korea. China insists that North Koreans moving across the border into northeast China are nothing more than illegal aliens being smuggled across the Yalu River. Beijing has steadfastly refused to recognize these individuals as either refugees or trafficking victims, and consistently denied UNHCR access to these people.<sup>289</sup> The Palermo Protocol specifically states that, “Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law... in particular... the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.”<sup>290</sup>

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<sup>287</sup> Personal Interview, notes in author’s possession.

<sup>288</sup> Personal Interview, notes in author’s possession.

<sup>289</sup> 2013 TIP Report, *supra* note 2, 131.

<sup>290</sup> Palermo Protocol, *supra* note 33, Article 14(1).

Aside from its breach in international law with UNHCR, China is also violating Article 7 of the Palermo Protocol to “permit victims of trafficking in persons to remain in its territory...in appropriate cases... [with] appropriate consideration to humanitarian and compassionate factors.”<sup>291</sup> In cases where returned North Koreans face severe punishment, detention in forced labor camps, and even death, it is also clear that China is not complying with its legal promise in Article 8 to return each individual “with due regard for the safety of that person.”<sup>292</sup> Despite international disapproval, China staunchly retains its position that North Korean escapees are not refugees but illegal migrants, not victims in need of assistance and protection but individuals violating its sovereign borders.<sup>293</sup>

## 2. India

The Palermo Protocol obliges member states to repatriate victims “without undue or unreasonable delay,” “with due regard for the safety of that person and for the status of any legal proceedings,” and “shall preferably be voluntary.”<sup>294</sup> Although the majority of trafficking in India is internal, India does see a fair amount of trafficking across its borders, particularly in women from Nepal and Bangladesh,<sup>295296</sup> necessitating good laws on repatriation. India struggles with compliance to uphold the Protocol’s victim protection measures for speedy,<sup>297</sup> safe and

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<sup>291</sup> *Id.*, Article 7.

<sup>292</sup> *Id.*, Article 8(3).

<sup>293</sup> Sonya Sceats and Shaun Breslin, “China and the International Human Rights System,” London: Chatham House, October 2012, 35.

<sup>294</sup> Trafficking Protocol, *supra* note 33, Article 8(1, 2).

<sup>295</sup> There are also reported instances of women trafficked from former Soviet republics and, in recent years, from Myanmar. See UNODC 2013 Report, *supra* note 202, 45.

<sup>296</sup> India has an open border policy with Nepal, making human trafficking difficult to detect. The Bangladesh border is 4,156 kms long with some twenty official check posts, but corruption of border guards is a known and common problem. Every year, between 5000-7000 Nepali girls are trafficked into red light districts in India, many of whom are around the age of 9 or 10 years old. Estimates for the number of Nepali women and girls working within Indian brothels range from 20,000-25,000 nationwide to 50,000 in Mumbai alone. It is also estimated that 200,000 Bangladeshi children have been trafficked for sexual exploitation across the border, usually to work in brothels and nightclubs in Kolkata and Mumbai or trafficked into forced marriages in Uttar Pradesh. See UNODC 2011 Report; UNODC 2013 Report; ECPAT International, *Global Monitoring Report on the Status of Action against Commercial Sexual Exploitation of Children in India* (2006); and “Human Trafficking,” *The Rescue Foundation*, Available at <http://www.rescuefoundation.net/human-traffic.html>.

<sup>297</sup> There are reported instances of repatriation processes taking months to several years. In some child labor cases, foreign-born children have contracted illnesses and died while held in government or NGO-run shelters. Their parents, meanwhile, had traveled to India and spent indefinite lengths of time waiting for the official paperwork to be processed so that their child might be released to them. See Kathleen Kerr, “Returning Home: the

voluntary repatriation. India does not provide for either permanent or temporary resident status for trafficking victims, and considers all victims to be illegal immigrants if they do not possess appropriate travel documents.<sup>298</sup>

In India, the process for repatriation of trafficking victims varies depending on the local state policy. Local AHTUs develop independent strategies to implement nation-wide Ministry of Home Affairs (MHA) advisories for combatting trafficking.<sup>299</sup> In West Bengal, for example, the police are the sole actors in the handover of trafficking victims across the border. Government bureaucracy can clog up the process to where it takes multiple years to process a case, all the while in which the victim will be languishing in a detention center. In Delhi, the government partners with NGOs to complete the handover. When the NGOs get involved, they are able to speed the process along, pressuring the various ministries and police stations to action.<sup>300</sup> Here the NGOs are helping India to fulfill its treaty obligation to repatriate victims in a more expedient manner.

Another area in which NGOs have been lobbying is to sensitize the government to the idea that foreign trafficked women are not illegal immigrants. Pointing to the Palermo Protocol's provisions that repatriation must respect the victim's personal safety, these NGOs have successfully pushed for policy in Delhi that requires investigation into the victim's home country. No victim can be sent back without a verifiable address. If precautionary measures are not taken to determine from where the victim was initially trafficked, what his/her home situation is like, why he/she was trafficked in the first place, and that he/she has a safe place to which to return, he/she will be vulnerable to re-trafficking.<sup>301</sup> This policy is especially important for Bangladeshi victims. Nepali victims are allowed to remain in India as long as they like due to a 1950 bilateral agreement between the two countries.<sup>302</sup> No such agreement exists with

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Challenge of Repatriating Foreign Born Child Victims of Forced Labor from India," *Buffalo Human Rights Law Review* (2010).

<sup>298</sup> UNODC 2011 Report, *supra* note 229, 34.

<sup>299</sup> *Id.*

<sup>300</sup> Personal Interview with local NGO staff worker, notes in author's possession.

<sup>301</sup> A high number of girls rescued from commercial sexual exploitation are re-trafficked, often due to non-acceptance by families and communities and a lack of alternative sources of income or livelihood options for the girls upon return. See ECPAT International Report, *supra* note 296.

<sup>302</sup> The Treaty of Peace and Friendship between India and Nepal. See K. V. Rajan, "Should the 1950 treaty be scrapped?" *The Hindu* (3 May 2008), <http://www.thehindu.com/todays-paper/tp-opinion/should-the-1950-treaty-be-scrapped/article1250815.ece>.



Bangladesh, meaning that victims are ordinarily repatriated immediately regardless of any other circumstances. The verifiable address requirement adds a layer of protection for the victims, as the government of India has recognized that it cannot take a trafficking victim from one exploitative situation only to send them unknowingly into another. NGOs in India work with partner organizations in Nepal and Bangladesh to verify addresses and to ensure that the transfer of the victim back across borders is done with the utmost concern for the victim's safety and well-being.<sup>303</sup>

### **E. Article 9 Compliance: preventing trafficking in persons**

*Refocusing national policy to address the contributing societal factors which make individuals vulnerable to trafficking*

#### **1. China**

The Palermo Protocol requires states to “establish comprehensive policies, programmes and other measures: (a) to prevent and combat trafficking in persons; and (b) to protect victims of trafficking in persons, especially women and children, from revictimization.”<sup>304</sup> In China's case, over the past year, the government has set in motion efforts to change or eliminate policies which have previously served to enhance and facilitate a demand for trafficking. By stopping and preventing further state compliance in human trafficking, China has chosen to mitigate these contributing factors for trafficking demand, thus preventing further trafficking in the future and moving itself into closer compliance with the Protocol.

Last fall at the Third Plenary meeting of its Central Committee, the Chinese Communist Party (CCP) announced two major social changes with implications for combating human trafficking. One was to phase out the 1979 One-Child family planning policy, and the other was to outlaw the infamous 1957 Reeducation through Labor camps (RTL).<sup>305</sup> China's decades old family planning policy stipulated urban families could only have one child, but permitted ethnic minority couples and couples in rural areas up to two children. Researchers blame this family planning policy for creating a gender imbalance that clashes with cultural expectations of

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<sup>303</sup> Personal Interview with Roma Debabrata (31 December 2014), notes in author's possession.

<sup>304</sup> Palermo Protocol, *supra* note 33, Article 9(1).

<sup>305</sup> Sophie Song, “Six Dramatic Reforms from China's Third Plenum,” *International Business Times* (15 November 2013), Available at <http://www.ibtimes.com/six-dramatic-reforms-chinas-third-plenum-1472754>.

universal marriage and producing a male heir.<sup>306</sup> Allowed only one child, families, particularly those in rural areas, often choose to abort girls in favor of baby boys, creating a skewed gender ratio of around 118 boys to 100 girls.<sup>307</sup> This in turn has driven up the demand side for trafficked women for forced prostitution and as brides for men in rural areas unable to find wives.<sup>308</sup> For the past decade in the annual *Trafficking in Persons Report*, the U.S. has consistently named the One-Child Policy as an enabling factor to the high levels of sex trafficking in China.<sup>309</sup> The spokesperson for the Myanmar Department of Transnational Crime also blames this policy for high levels of human trafficking in Myanmar, saying, “Myanmar women are in great demand because China practices its one-child policy. About 80 percent of human trafficking in Myanmar are due to forced illegal marriage issue in China.”<sup>310</sup> Under the new change to the policy, those eligible to have two children will be increased to include most of the population,<sup>311</sup> hopefully

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<sup>306</sup> See June JH Lee, “Human Trafficking in East Asia: Current Trends, Data Collection and Knowledge Gaps,” *Data and Research on Human Trafficking: A Global Survey*, Ed by Frank Laczo and Elzbieta Gozdzia, International Organization for Migration (Special Issue of *International Migration*) Vol. 43, 177-178.

<sup>307</sup> Alanth Krishnan, “Alarm in China over high gender imbalance,” *The Hindu*, 23 January 2013, Available at <http://www.thehindu.com/todays-paper/tp-international/alarm-in-china-over-high-gender-imbalance/article4334174.ece>.

<sup>308</sup> In rural areas of China, traditional values surrounding gender norms and marital norms remain entrenched. In this context, men are expected to marry in order to produce a male heir to continue the family lineage. Women are devalued, partially because after marriage, they are seen as becoming the property of the groom’s family, no longer belonging to or able to provide for their natal family (for this reason, parents prefer to give birth to a son who will be able to provide for them in their old age, rather than a girl who will be sold off to another family). Parents of the bride, therefore, demand a high bride price as compensation. Today with the shortage of females in rural areas (the few who do grow up in these areas are often moving away to distant cities to seek job opportunities), young men face large bride prices which they are unable to afford. These men have found it cheaper to purchase women from outside, whether women trafficked from other parts of rural China, or more commonly, from countries in Southeast Asia. Local officials tend to turn a blind eye to this practice, recognizing its necessity for the survival of their village. See Susan Tiefenbrun and Christie Edwards, “Gendercide and the cultural Context of Sex Trafficking in China,” *Fordham International Law Journal*, Vol. 32(3) (2008); Tiantian Zheng, “China: Sex Work and Human Trafficking,” *Fair Observer* (19 August 2013), Available at <http://www.fairobserver.com/article/china-sex-work-human-trafficking-part-1>; Opening Statement of Hon. Chuck Hagel, Chairman, Cong-Exec. Commission on China, *Combating Human Trafficking in China: Domestic and International Efforts: Hearing Before the Congressional-Executive Commission on China*, 109<sup>th</sup> Cong. 1 (2006); and Tsung-Mei Cheng, “China must solve its daughter deficit,” *South China Morning Post* (6 April 2013), Available at <http://www.scmp.com/comment/insight-opinion/article/1207870/china-must-solve-its-daughter-deficit>.

<sup>309</sup> U.S. TIP Report.

<sup>310</sup> Soe Sandar Oo, “Myanmar’s brides to China top human trafficking list,” *Myanmar Times* (7 January 2013), Available at <http://www.mmmtimes.com/index.php/national-news/3705-brides-to-china-top-govt-human-trafficking-list.html>.

<sup>311</sup> Song, *supra* note 305.

having a long-term impact “to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.”<sup>312</sup>

The Third Plenum’s second major social reform last month to abolish the labor camp system has been met with limited optimism by critics.<sup>313</sup> Other than the One-Child Policy, the RTL camps have been the other perpetual grievance in the TIP Report’s annual China Country Narrative. The PRC has insisted over the years that these camps serve to reeducate criminals through manual labor; yet in practice, the system has permitted police brutality and arbitrary detention of individuals for up to four years without due process or a fair trial. The U.S. State Department has called the RTL system “state-sponsored forced labor,”<sup>314</sup> and Amnesty International estimates that China is currently maintaining a network of well over 300 RTL camps to detain hundreds of thousands of dissidents, from petitioners to human rights activists to Falun Gong members.<sup>315</sup> Most human rights advocates claim that the RTL camps will simply be replaced with an expansion in another type of detention camp, whether the “reform through labor” camps (inmates, believed to be in the millions, must be convicted of a crime), “black jails” (ten years ago replaced the “custody and repatriation centers” which locked up rural migrants in cities), or “brain washing centers.”<sup>316</sup> State media as early as this past summer was already announcing the transition of some RTL camps into “drug rehabilitation centers,” a system which also utilizes forced labor of inmates.<sup>317</sup> A recent story that broke in *The Guardian* last December interviewed Chinese sex workers held in “custody and education” detention camps for months without any type of criminal charge or trial. This system is overseen by public security officials instead of judges, and unlike RTL, requires detainees to pay for their own incarceration (living fees many times higher than outside the camps) while subjected to daily

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<sup>312</sup> Palermo Protocol, *supra* note 33, Article 9(5).

<sup>313</sup> “China: End reeducation through labor without loopholes,” *Human Rights Watch* (15 November 2013), Available at <http://www.hrw.org/news/2013/11/15/china-end-re-education-through-labor-without-loopholes>.

<sup>314</sup> 2013 TIP Report, *supra* note 2, China Country Report.

<sup>315</sup> “China: Abolition of labour camps must lead to wider detention reform,” *Amnesty International*, 15 November 2013, Available at <http://www.amnesty.org/en/news/china-re-education-through-labour-camps-2013-11-15>.

<sup>316</sup> Hugo Restall, “China’s Potemkin Reforms: the one child policy will continue for most of the country,” *The Wall Street Journal*, 17 November 2013, Available at <http://online.wsj.com/news/articles/SB10001424052702303789604579201950156826002>.

<sup>317</sup> “媒体称多地已停止劳教审批 部分变身强制戒毒所” (“Chendi County has already approved the closure of reeducation through labor camps, some will be changed into compulsory drug rehabilitation camps”), *Wangyi Xinwen* (24 July 2013), Available at <http://news.163.com/13/0724/13/94I7KIQB0001124J.html>.

manual labor and verbal and psychological abuse.<sup>318</sup> That the Chinese government has responded to international and domestic criticism by abolishing the high-profile RTL system is a positive sign, but does not mean that China is actually outlawing the nation-wide practice of arbitrary detention and state-sponsored forced labor.

The NPC's announcement to abolish the RTL system will only be true compliance with the Protocol if *all* arbitrary detention centers using forced labor are closed. If the RTL camps are instead renamed something else or if all of the inmates are shipped to a differently-named-but-same-in-practice labor camp, nothing will have changed.

The Palermo Protocol also calls upon member states to “cooperat[e] with non-governmental organizations, other relevant organizations and other elements of civil society,” in preventing and combating human trafficking.<sup>319</sup> As discussed earlier, the Chinese government's relationship with local NGOs and civil society organizations has not generally been one of mutual cooperation. In contrast, China has built up more congenial partnerships with IGOs, particularly among the various UN bodies. Even before ratifying the Protocol, China has been engaging in anti-trafficking programs with multilateral bodies such as the International Labour Organization (ILO), the International Organization for Migration (IOM) and the United Nations Inter-Agency Project on Human Trafficking in the Greater Mekong Sub-region (UNIAP). China has had a long and complicated relationship with the ILO,<sup>320</sup> but in the past decade, has collaborated with the ILO on several anti-trafficking projects targeting prevention. The Project to Prevent Trafficking in Girls and Young Women for Labour Exploitation within China (CP-TING, 2004-2008), the Mekong Sub-region Project to Combat Trafficking in Children and Women (TICW, 2000-2008) and the Preventing Trafficking for Labour Exploitation in China (CP-TING Phase II, 2010-2012) each were seen as successful at the time.<sup>321</sup> Most people with whom the author spoke noted good collaboration between the ILO and the All-China Women's Federation (ACWF – quasi-governmental NGO), though lasting impacts of the projects appeared to be lacking. Additionally, since ratifying the Palermo Protocol, no new joint-projects directly targeting human trafficking have been initiated. The IOM in China has facilitated cooperation

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<sup>318</sup> Tania Branigan, “China's sex workers face paying for their incarceration,” *The Guardian*, 19 December 2013, Available at <http://www.theguardian.com/world/2013/dec/19/china-sex-workers-pay-incarceration>.

<sup>319</sup> Palermo Protocol, *supra* note 33, Article 9(3).

<sup>320</sup> Ann Kent, *China, The United Nations and Human Rights: The Limits of Compliance* (1999), 117-145.

<sup>321</sup> Personal Interview, notes in author's possession.

between EU partners and the ILO with the Chinese ministries of Foreign Affairs, Public Security and Civil Affairs in its Capacity Building for Migration Management in China project (CBMM China). The two phases of CBMM China have focused primarily on technical assistance and capacity building for combatting human trafficking, mostly through workshops and training programs, exchange of personnel and information campaigns.<sup>322</sup> Like the ILO and the IOM, UNIAP has also enjoyed state support for capacity building, periodically running training programs for border police and law enforcement, sharing best practices for NGOs focused on combating human trafficking, and training branch offices of ACWF on new counter-trafficking techniques.<sup>323</sup>

## 2. India

In the last several years even before the ratification of the Palermo Protocol, the Indian government has been working to establish policies and programs targeting trafficking prevention. In 2006, the Ministry of Home Affairs (MHA) set up a Nodal Cell for Prevention of Trafficking. MHA tasked the cell with coordinating and networking between state governments and other concerned agencies. Its purpose has been two-fold: to determine best practices amongst Indian states in combating trafficking in persons and to share data and intelligence between all of the stakeholders. Through various surveys and action research studies, MHA has developed training and capacity building programs for law enforcement officials, such as the Anti-Human Trafficking Units (AHTUs).<sup>324</sup> The ongoing process has created resource materials and standard operating procedures for countering and preventing trafficking. The AHTUs as standard policy work closely in partnership with civil society organizations.<sup>325</sup>

As with the punishment and protection elements of the Palermo Protocol, India relies heavily on NGOs for assistance in prevention of human trafficking. The most recent UNODC report on human trafficking in India points out that “the support of community organizations...is a must for ensuring prevention of trafficking.”<sup>326</sup> In 2007, India launched *Ujjawala*, a

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<sup>322</sup> Personal Interview, notes in author’s possession.

<sup>323</sup> Personal Interview, notes in author’s possession.

<sup>324</sup> UNODC 2011 Report, *supra* note 229, 29.

<sup>325</sup> *Id.*, 32.

<sup>326</sup> UNODC 2013 Report, *supra* note 202, 20.

“comprehensive scheme” to prevent and rescue women and children from trafficking for sexual exploitation.<sup>327</sup> The program leverages the mobilization and involvement of local communities for awareness building and public discourse in workshops and events in order to minimize the pre-conditions for trafficking and to facilitate the rescue of victims from exploitation.<sup>328</sup>

*Ujjawala* seeks to empower trafficking victims by enabling them to become financially independent and improve their standard of living, health and social status. The Ministry of Women and Child Development recognizes that due to the “complex nature of this issue, it is imperative that civil society...play a proactive role.”<sup>329</sup> In 2013, *Ujjawala* was sponsoring 207 prevention projects around the country.<sup>330</sup>

The MHA has launched various other training programs, workshops and media campaigns to raise awareness on the prevention of human trafficking.<sup>331</sup> To truly get to the root of trafficking prevention, though, India needs to address underlying cultural and societal norms which increase the vulnerability of certain populations and serve as enabling factors for trafficking in persons. The Trafficking Protocol lists three common enabling factors which member states should target, which are poverty, underdevelopment and lack of equal opportunity.<sup>332</sup> The fight to alleviate each of these preconditions for trafficking is a huge challenge for the Indian government, due to the scale of the situation. Since 1994, the World Bank calculates that India has halved the number of its population living below the national poverty line from 45.3% to 21.9%.<sup>333</sup> However, 32.7% of the population still live below the international extreme poverty line of \$1.25 per day. Compared against this standard, India has only managed to lift 35 million people out of extreme poverty since the 1980s. In the same amount of time, China has lifted 678 million of its citizens out of poverty.<sup>334</sup>

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<sup>327</sup> *Id.*, 35.

<sup>328</sup> National Mission for Empowerment of Women, “Ujjawala: a Scheme for Prevention of Trafficking and Rescue, Rehabilitation and Reintegration” (10 November 2011), Available at <http://nmew.gov.in/index1.php?lang=1&level=1&sublinkid=125&lid=145&ltypeid=1&domid=10>.

<sup>329</sup> Government of India, “Ujjawala Scheme,” Available at [http://www.archive.india.gov.in/spotlight/spotlight\\_archive.php?id=42](http://www.archive.india.gov.in/spotlight/spotlight_archive.php?id=42).

<sup>330</sup> UNODC 2013 Report, *supra* note 202, 45.

<sup>331</sup> See UNODC 2013 Report, UNODC 2011 Report.

<sup>332</sup> Palermo Protocol, *supra* note 33, Article 9(4).

<sup>333</sup> World Bank, “India – World Development Indicators,” Available at <http://data.worldbank.org/country/india>.

<sup>334</sup> Ram Mashru, “India’s Growing Urban Poverty Crisis,” *The Diplomat* (4 March 2014), Available at [http://thediplomat.com/2014/03/indias-growing-urban-p overty-crisis/](http://thediplomat.com/2014/03/indias-growing-urban-p-overty-crisis/).

In India, lack of equal opportunity has many forms, whether brought on by gender discrimination, high illiteracy rates, or discrimination against Dalits and those at the bottom of India's hierarchical caste system.<sup>335</sup> In recent years, India has been making efforts to address these rifts in society. For example, following the Delhi gang rape in December 2012, public outrage sparked national dialogue on how to eradicate violence against women which had become pervasive throughout the society.<sup>336</sup> Child labor is another systemic problem in India, affecting the lives of 13 million children under the age of 14.<sup>337</sup> In many places, child labor is so prevalent that people have grown insensitive to it. This is evidenced by incidences such as the New Delhi police force flippantly placing a newspaper ad that appears to promote child labor,<sup>338</sup> or in the occasional scandals of India's middle and upper classes employing 12 and 13-year-old girls as domestic servants.<sup>339</sup> Before India can hope to eradicate child trafficking and ensure that every child has the right to education and to a childhood, it needs to focus on prevention strategies of changing cultural mindsets about what behavior is acceptable.

## **F. Articles 10-14 Compliance: strengthening cooperation amongst states parties on information exchange, training, border measures and verifiable documentation**

### **1. China**

Articles 10-13 of the Palermo Protocol address cooperation procedures among member states to direct them in jointly combating human trafficking. This cooperation entails information

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<sup>335</sup> Ravi S. Srivastava, *Bonded Labour in India: Its Incidence and Pattern*, International Labour Organization Working Paper (June 2005), Available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_081967.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_081967.pdf).

<sup>336</sup> Cultural discrimination against women runs deep in India, where similar to China, illegal sex-selective abortions have created an imbalance of 914 girls to every 1000 boys. Girls receive less medical care and less education, and women are regularly subjected to sexual harassment and violence both in the home and in the workforce. Nirmala George, "Delhi Rape Case Affects Societal Changes Though Sexism Persists One Year Later," *The Huffington Post* (13 December 2013), Available at [http://www.huffingtonpost.com/2013/12/13/delhi-rape-changes\\_n\\_4438926.html?](http://www.huffingtonpost.com/2013/12/13/delhi-rape-changes_n_4438926.html?)

<sup>337</sup> Save the Children uses this number from a 2001 government census (See Save the Children, "Child Labour Statistics," Available at <https://www.savethechildren.in/what-we-do/child-labour.html>), whereas other estimates place the number as high as 20 or 60 million (See "Over 60 million child laborers in India!" *Indian Tribune*, Available at [http://www.indiatribune.com/index.php?option=com\\_content&id=2884:over-60-million-child-laborers-in-india&Itemid=400](http://www.indiatribune.com/index.php?option=com_content&id=2884:over-60-million-child-laborers-in-india&Itemid=400)).

<sup>338</sup> Eleanor Goldberg, "Controversial Delhi Police Ad Appears to Promote Child Labor," *The Huffington Post* (31 July 2013), Available at [http://www.huffingtonpost.com/2013/07/31/delhi-police-child-labor-ad\\_n\\_3684585.html](http://www.huffingtonpost.com/2013/07/31/delhi-police-child-labor-ad_n_3684585.html).

<sup>339</sup> Gethin Chamberlain, "The Delhi child servant scandal that has outraged India," *The Guardian* (7 April 2012), <http://www.theguardian.com/world/2012/apr/07/india-child-labour-delhi-outrage>.



exchange, training of relevant officials, border controls to prevent and detect trafficking, and the secure issuance of travel or identity documents. Whereas the previous four articles of the Protocol emphasized ways in which to protect and preserve the human rights of trafficking victims and of those who may be susceptible to being trafficked, these next four articles detail the international cooperation which must take place between national authorities, including their law enforcement and immigration border control. When the international community first took up the issue of human trafficking in the late 1990s, countries were most concerned about the finding ways to preserve their sovereignty and security over national borders. Realizing that the traffickers and migrant smugglers interfered with orderly legal migration and circumvented national immigration law, the international community saw the need for strong international cooperation.<sup>340</sup> The transnational nature of the well-organized criminal groups meant that no single state would be able to stop trafficking through unilateral action.<sup>341</sup> It would require a “comprehensive international approach in the countries of origin, transit and destination.”<sup>342</sup> The sharing of intelligence, sharing of best practices through joint trainings, and collaboration between border agents and law enforcement was essential to the effectiveness of the Protocol as an international legal instrument.<sup>343</sup> Both China and India recognized the need for this cooperation early in the treaty negotiations and vocalized the importance of “technical and economic cooperation internationally” at the tenth session of the Ad Hoc Committee for the development of CTOC in July 2000.<sup>344</sup>

Considering the number of international agreements to which it is party, China appears to be taking seriously its responsibility for joint intelligence sharing and training. China has become an active participant in multilateral and bilateral agreements targeting human trafficking. As of 2008, China's Ministry of Public Security (MPS) had signed 72 treaties and MOUs with 41 countries to strengthen collaboration on anti-trafficking.<sup>345</sup> By 2011, the Chinese police had

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<sup>340</sup> Gallagher, *supra* note 9, 976.

<sup>341</sup> LeRoy G. Potts, “Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons,” *George Washington International Law Review*, Vol 35 (2003), 248.

<sup>342</sup> Trafficking Protocol, Preamble.

<sup>343</sup> Gallagher, *supra* note 9, 977.

<sup>344</sup> Statement by the Group of 77 and China, Report of the Ad Hoc Committee, A/55/383, paragraph 86 (2 November 2000), Available at [http://www.unodc.org/pdf/crime/final\\_instruments/383e.pdf](http://www.unodc.org/pdf/crime/final_instruments/383e.pdf)

<sup>345</sup> UNIAP, *SIREN Human Trafficking Data Sheet: China*, Strategic Information Response Network (September 2008), 3, Available from [http://www.no-trafficking.org/content/SIREN/SIREN\\_pdf/china%20siren%20data%20sheet%20sept%202008.pdf](http://www.no-trafficking.org/content/SIREN/SIREN_pdf/china%20siren%20data%20sheet%20sept%202008.pdf).



cooperation agreements with over 50 countries containing anti-trafficking terms.<sup>346</sup> Over the past few months, China has cooperated with Taiwan,<sup>347</sup> Vietnam<sup>348</sup> and Myanmar<sup>349</sup> police forces in several high-profile successful raids, has conducted joint law enforcement anti-trafficking trainings with Laos<sup>350</sup> and Myanmar,<sup>351</sup> and has renewed its commitment to intelligence sharing and cooperation in joint police training with the EU.<sup>352</sup>

China's core strategic counter-trafficking agreements have been with its neighboring countries, particularly in Southeast Asia. China shares borders with three of the other five countries in the Greater Mekong Subregion (GMS),<sup>353</sup> an area known for its porous borders, vulnerable impoverished and minority populations, and thriving sex trafficking trade.<sup>354</sup> Estimates are that around 200,000 women are trafficked annually in Southeast Asia.<sup>355</sup> In recognition of the vulnerability of its southern border, China has committed itself to partnering with its southern neighbors to counter transnational criminal activity. In 2004, China signed the Cooperation against Trafficking in Persons in the GMS Memorandum of Understanding (MOU) along with Cambodia, Laos, Myanmar, Thailand, and Vietnam.<sup>356</sup> This agreement was the basis for the Coordinated Mekong Ministerial Initiative against Trafficking (COMMIT), and instituted annual meetings with senior officials from the six countries, committed UNIAP as the COMMIT

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<sup>346</sup> "China, Angola cracks trans-national human trafficking," *China Daily* (16 November 2011), Available at [http://www.chinadaily.com.cn/china/2011-11/16/content\\_14102848.htm](http://www.chinadaily.com.cn/china/2011-11/16/content_14102848.htm).

<sup>347</sup> "21 caught in forced prostitution raid," *CCTV* (18 September 2013), Available at <http://english.cntv.cn/20130918/102329.shtml>.

<sup>348</sup> Zhu, *supra* note 187.

<sup>349</sup> "Bride trafficking to China on the rise," *Eleven Myanmar* (18 September 2013), Available at <http://elevenmyanmar.com/national/crime/3431-bride-trafficking-to-china-on-the-rise>.

<sup>350</sup> "Laos, China map out measures to tackle human trafficking," *Vientiane Times* (10 May 2013), Available at [http://www.vientianetimes.org.la/FreeContent/FreeContent\\_Laos%20china.htm](http://www.vientianetimes.org.la/FreeContent/FreeContent_Laos%20china.htm).

<sup>351</sup> "China-Myanmar Border Liaison Offices Anti-Trafficking Training Yunnan," UNIAP China Office (October 2013), Available at <http://www.notip.org.cn/article/Details.asp?LanFlag=2&NewsId=7901&classid=30&BID=>.

<sup>352</sup> Bi Mingxin, "China-EU 2020 Strategic Agenda for Cooperation," *Xinhua* (23 November 2013), Available at [http://news.xinhuanet.com/english/china/2013-11/23/c\\_132912113\\_2.htm](http://news.xinhuanet.com/english/china/2013-11/23/c_132912113_2.htm).

<sup>353</sup> The Chinese provinces of Yunnan and Guangxi border Myanmar, Laos and Vietnam. Thailand is 200 kilometers south of China along the Mekong River, and shares a border with the sixth GMS country Cambodia.

<sup>354</sup> Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery*, New York: Columbia University Press (2009), 161.

<sup>355</sup> Ralf Emmers, *Globalization and Non-Traditional Security Issues: a Study of Human and Drug Trafficking in East Asia*, No 62, Singapore: Institute of Defense and Strategic Studies (March 2004), 18.

<sup>356</sup> *Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-Region*, 29 October 2004, Available at [http://www.no-trafficking.org/content/pdf/final\\_commit\\_mou.pdf](http://www.no-trafficking.org/content/pdf/final_commit_mou.pdf).

secretariat, and established eight border offices in China with neighboring countries.<sup>357</sup> In 2007, the COMMIT countries again came together to sign a Joint Declaration, recognizing the complexity of human trafficking and the need for increased regional cooperation in criminal justice and law enforcement responses. At the Sixth Senior Official's Meeting (SOM6), the countries discussed the need for understanding and harmonization of the respective criminal laws of each state, for strengthening cooperation in law enforcement and criminal justice projects, and for carrying out joint training on law enforcement.<sup>358</sup> At the 2012 SOM8, the GMS countries signed the second Joint Declaration of COMMIT on the theme of sustained unity and cooperation. During its Third Sub-regional Plan of Action, running from 2011 to 2013, COMMIT targeted improving cross-border collaboration of in the criminal justice sector, effectiveness of reintegration assistance to trafficked persons, and good practice in community level trafficking prevention programs.<sup>359</sup> SOM9, held in Bangkok in February 2013, discussed lessons learned over the past few years and achievements in attaining deeper coordination among border police. Looking forward, the six countries announced their resolve to strengthen trafficking victim shelter standards and to increase the focus on victim reintegration and aftercare.<sup>360</sup> In October 2011, China entered into an agreement for a four party mechanism framework to jointly patrol the Mekong River with Myanmar, Laos and Thailand. In light of the importance of the waterway for transporting goods and people, this joint patrolling mechanism is intended to increase safety and security of river traffic, and to also assist in combating transnational crime on the river such as human trafficking and illegal immigration.<sup>361</sup> Coordination of law enforcement has been at the heart of all of these agreements, showing China's emphasis on prosecuting trafficking in persons crimes and its compliance with Palermo

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<sup>357</sup> Zhang Yan, "Cross-border human trafficking cases rising," *China Daily* (12 August 2011), Available at [http://www.chinadaily.com.cn/cndy/2011-08/12/content\\_13097171.htm](http://www.chinadaily.com.cn/cndy/2011-08/12/content_13097171.htm).

<sup>358</sup> "Improving law enforcement cooperation and severely combating transnational crimes of trafficking in persons," Speech by China's delegation at the Sixth Senior Officials' Meeting, SOM6 (5 November 2008), Available at [http://www.no-trafficking.org/reports\\_docs/china/som6\\_speech.pdf](http://www.no-trafficking.org/reports_docs/china/som6_speech.pdf).

<sup>359</sup> *Press Release for the Second Joint Declaration signed by Mekong Governments to combat human trafficking*, COMMIT: Hanoi (14-16 February 2011), Available at [http://www.no-trafficking.org/Press\\_Release%20COMMIT%20SOM8%20Press%20Release%2017-1-2012.pdf](http://www.no-trafficking.org/Press_Release%20COMMIT%20SOM8%20Press%20Release%2017-1-2012.pdf).

<sup>360</sup> *9<sup>th</sup> COMMIT Senior Officials Meeting (SOM9) Press Release*, Republic of the Union of Myanmar, Ministry of Home Affairs, Body for Suppression of Trafficking in Persons, Available at <http://myanmarhumantrafficking.gov.mm/content/9th-commit-senior-officials-meeting-som-9-press-release>.

<sup>361</sup> "Exclusive: Thai PM hopes to boost Thai-China ties," *China Daily* (16 April 2012), Available at [http://www.chinadaily.com.cn/china/2012-04/16/content\\_15061547.htm](http://www.chinadaily.com.cn/china/2012-04/16/content_15061547.htm).

to do so within a transnational cooperative framework. The long-run effectiveness and durability of these regional coordination efforts remains to be seen.

## 2. India

Like China with COMMIT, India has joined regional partnerships aimed at strengthening member state cooperation in combating trafficking, particularly in the areas of information exchange, training and border measures, yet the actual impact of these formal agreements has been ambiguous. India is a member of the South Asian Association for Regional Convention (SAARC) on Preventing and Combating Trafficking in Women and Children for Prostitution, signed in 2002 and later entering force in 2005. The SAARC Convention has the stated purpose of promoting regional cooperation amongst member states India, Pakistan, Bangladesh, Sri Lanka, Nepal, the Maldives, Bhutan and Afghanistan in order to effectively combat human trafficking.<sup>362</sup> This inter-state cooperation is to be aimed at the exchange of information for investigations and trials, including the exchange of fingerprints, photographs and police records.<sup>363</sup> Furthermore, states parties must provide resources, training and assistance to law enforcement authorities for the investigation and prosecution of trafficking offences.<sup>364</sup> Despite the Convention's noble aspiration for state cooperation in areas which would uphold the UN Trafficking Protocol, review of the Convention's effectiveness over the past decade has not been positive. Anne Gallagher argues that there is little evidence of the Convention exerting any influence on either regional or national anti-trafficking law. The SAARC Convention calls for the establishment of two bodies: a regional taskforce overseeing implementation and a regional voluntary fund for the rehabilitation and reintegration of trafficking victims. Both of these bodies have yet to be organized.<sup>365</sup> Gallagher believes there has been a collective disregard of the SAARC Convention by member states and that it will soon fall into desuetude.<sup>366</sup> Other scholars have argued that SAARC as a regional group on the whole has failed to inspire regional

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<sup>362</sup> SAARC Convention, at Article II.

<sup>363</sup> *Ibid.*, Article VI.

<sup>364</sup> *Ibid.*, Article VIII.

<sup>365</sup> Gallagher, *supra* note 9, 131.

<sup>366</sup> *Ibid.*, 132.

cooperation on social and humanitarian issues, allowing an exaggerated emphasis on state security and a neglect of social and human security.<sup>367</sup>

Outside of broad regional agreements, in recent years India also has signed bilateral treaties and MoUs with neighboring countries, relating to extradition, the exchange of information and border controls. Regarding trafficking in persons, India's two most important borders are with Bangladesh and Nepal, both of which are long and porous. This creates difficulties despite the many official border check posts in place.<sup>368</sup> The 4,156 km long Bangladeshi border has around twenty check posts, but corruption of border guards is frequently noted.<sup>369</sup> In 2012, India and Bangladeshi officials formed a task force to develop a blueprint for the repatriation of trafficking victims back to their country of origin, including SOPs for joint cooperation on prevention, rescue and rehabilitation of victims.<sup>370</sup> The India-Nepal border has 14 legal entry points, but due to India's open border policy with Nepal, trafficking is hard to detect and illegal border crossings occur regularly.<sup>371</sup> Examples of other agreements for bilateral cooperation in combating trafficking have been signed by India with Thailand,<sup>372</sup> Myanmar<sup>373</sup> and the United Arab Emirates.<sup>374</sup> These range from detailing intelligence sharing and border control to proper repatriation procedures of victims.

#### IV. Why Compliance or Non-compliance?

As the two previous case studies demonstrate, both China and India have moved in the general direction of greater compliance since their respective ratification of the treaty. While

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<sup>367</sup> Ishtiaq Ahmed, "SAARC: Social Charter and Human Security," in *The Emerging Dimensions of SAARC*, ed. S. D. Muni, 132-151 (Delhi: Foundation Books, 2010), 150.

<sup>368</sup> UNODC 2011 Report, *supra* note 229, 34-35.

<sup>369</sup> *Ibid.*, 26.

<sup>370</sup> UNODC 2013 Report, *supra* note 202, 34.

<sup>371</sup> UNODC 2011 Report, *supra* note 229, 26.

<sup>372</sup> "India and Thailand sign extradition treaty," *NDTV*, 30 May 2013, Available at <http://www.ndtv.com/article/india/india-and-thailand-sign-extradition-treaty-373382>.

<sup>373</sup> Nay Pyi Taw, "India-Myanmar ink agreement to curb human trafficking and insurgency," *Firstpost*, 10 May 2014, Available at <http://www.firstpost.com/world/india-myanmar-ink-agreement-to-curb-human-trafficking-and-insurgency-1516781.html>.

<sup>374</sup> "Bilateral Agreements and International Cooperation," *United Arab Emirates National Committee to Combat Human Trafficking*, Available at <http://www.firstpost.com/world/india-myanmar-ink-agreement-to-curb-human-trafficking-and-insurgency-1516781.html>.

China and India already had policies and laws aimed at combating human trafficking before their ratification of the Palermo Protocol, at the time of ratification, both were in non-compliance with most elements of the treaty. Over the past few years, China and India's compliance with the Palermo Protocol has varied greatly relative to different articles of the treaty. Perhaps their greatest accomplishment related to the treaty has been their harmonization of domestic legislation with the international definition of human trafficking. In terms of criminalization and prosecution of human traffickers, China has shown itself diligent in implementing harsher criminal sentences, in training law enforcement taskforces, and in cooperating with border police in neighboring countries. India has created special AHTUs and is working to sensitize its police force and judicial system to handle trafficking cases, yet still is missing the mark in following through with prosecutions and ultimately holding the traffickers accountable. In terms of the provision of victim services and the care given to foreign victims, spotty to persistent non-compliance has plagued China's record. India has come further, largely due to deepening its relationships with local and international NGOs in order to provide a broad array of social and legal services to victims. More needs to be done to guarantee legal assistance and economic compensation, but the Indian government is proving itself to be increasingly responsive to public demands, gradually altering its policies and refocusing resources.

Seeing the change between pre-Palermo and post-Palermo behavior in China and India, is compliance the result of international pressures from signing the treaty, or could it be the result of simultaneous pressures being leveraged domestically? How much of the domestic changes taking place in China and India are related to their participation in the international legal regime, and what causes them to comply with certain treaty provisions and not with others? Is the international treaty having any real impact on China and India?

The first place to start is in considering the nature of the treaty regime and what its probable compliance pull is on member states based on the treaty's form and substance. As previously discussed, while the Palermo Protocol is a legal contract and therefore binding on member states, neither it nor the Convention contain any enforcement mechanisms. The role of the Conference of Parties is solely to review state behavior and offer assistance and guidance for improved implementation. Lack of an enforcement capability explains why states are not held accountable for non-compliance, but it does not explain their initial failure to comply. According

to Chayes and Chayes, lack of an enforcement mechanism should not necessarily be a reason for noncompliance if you recognize that the state voluntarily consented to the treaty, and therefore, must see some amount of self-interest attached to compliance.<sup>375</sup> Otherwise, the state would never have consented to the treaty in the first place. Neither China nor India rushed into the Palermo Protocol. Each took roughly a decade to reach an affirmative decision on the treaty. Especially in the case of India who was a signatory for almost nine years before ratifying the Protocol, such a delay resulting in eventual ratification would make it seem that the two states devoted considerable internal debate and thinking on the treaty before coming to a final conclusion.

Since both states remain in noncompliance, the managerialists would attribute this behavior to lack of capacity, ambiguity in the language or changes in the social and economic situation of the country. However, none of these explanations adequately explains failure to comply. The UNODC, as guardian to the Organized Crime Convention and its Protocols, has developed toolkits, model laws and training materials to assist member states with compliance.<sup>376</sup> States are encouraged to find the help they need to implement changes. The UNODC has even established legal tools and a Human Trafficking Case Law Database to demonstrate to states how national laws can be used to prosecute human trafficking crimes.<sup>377</sup> Since the treaty entered into force in 2002, there have been multiple attempts to clarify the language for member states. In one of the earliest, the UN Office of the High Commissioner for Human Rights issued “Principles and Guidelines on Human Rights and Human Trafficking,” specifying in greater detail what victims’ rights protections should look like.<sup>378</sup> The UN has also released the official interpretive notes, or *Travaux Préparatoires*, on the treaty, offering further meaning for some of the Protocol’s provisions. The main remaining ambiguity in the treaty text lays not in provisions on the positive obligations upon states but on matters that were purposefully left vague due to a lack of international consensus (such as the distinction between sex trafficking and sex work, as

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<sup>375</sup> Chayes and Chayes, *supra* note 8.

<sup>376</sup> United Nations Office on Drugs and Crime, *Toolkit to Combat Trafficking in Persons*, at 177, U.N. Sales No. E.08.V.14 (2008), available at <http://www.unodc.org/documents/human-trafficking/Toolkit-files/07-89375-Ebook%5B1%5D.pdf>.

<sup>377</sup> UNODC Legal Tools, Available at <http://www.unodc.org/cld/en/about/index.html>.

<sup>378</sup> U.N. High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Econ. & Soc. Council, U.N. Doc. E/2002/68/Add.1 (May 20, 2002) [*hereinafter* U.N. Principles and Guidelines].

previously discussed). The change in social or economic condition as a reason for noncompliance also does not make sense in this situation. The biggest change which has occurred is the leadership transition in China in the fall of 2012. Since the turnover of power in the NPC and Xi Jinping's centralizing of power, China has actually become *more* compliant, issuing the new eight-year National Plan of Action and taking steps at the 2013 Third Plenum to deconstruct several of the contributing factors to human trafficking.

Returning to the notion of the form and substance of the Trafficking Protocol, the monitoring mechanisms which do exist do not seem terribly effective. For example, when the UNODC released its 2012 Global Report on Trafficking in Persons based on reporting by member states, China was not among those who contributed. As a result, the report does not include any assessment or analysis on the state of trafficking within China, limiting itself to discussing Chinese trafficking victims found abroad in other countries.<sup>379</sup>

The connection between legal form and substance is also noteworthy. As discussed previously, the Protocol's law enforcement and international cooperation provisions have strong obligations attached to them. These border protection and joint coordination measures were what most member states had the highest interest in achieving. Comprehensive protections for victims' rights was not the status quo and not something most states saw themselves readily able to achieve. Therefore the treaty language for these provisions does not impose explicit obligations. States are free to interpret the protection and prevention articles with greater subjective license. While the victims' rights provisions go deep on substance, they stay light on legal obligation.<sup>380</sup> This is what permits countries like China to argue it is acting in compliance with the treaty, despite its abysmal record on protecting and assisting trafficking victims.

Although traditional theories of compliance are a useful starting point, they do not fully explain why these countries are following certain measures of the Protocol and not others. The theories of socialization and the influence of domestic affairs on state behavior are the most illustrative for understanding why these countries are behaving as they are and what role the international law plays in each of these states. I argue that China's interaction with the Palermo Protocol is best explained by the value Beijing attaches to its international reputation, its desire

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<sup>379</sup> *Global Report on Trafficking in Persons*, Vienna: UN Office on Drugs and Crime, 2012, 71.

<sup>380</sup> Raustiala and Slaughter, *supra* note 7.

to become more integrated into the international community, and its realist need to coordinate with neighbor states to combat transnational organized crime. The hybrid nature of the Protocol as both a law enforcement and human rights treaty facilitates China in partially realizing these goals. India, on the other hand, cares much less about its international reputation, so theories of socialization do not make as much sense. As a democracy, the Indian government derives its legitimacy directly from the popular vote of the people, not from the external benefits which it provides to the populace such as low crime rates or having a strong international reputation abroad. In India, domestic institutions and domestic politics have deeply affected how the government has dealt with the issue of human trafficking.

In considering how China may be in the process of being socialized into the international system, it is important to understand the value the Chinese leadership assigns to its international reputation. Since reengaging with the West over thirty years ago, China has gradually integrated into the international legal order, signing onto an increasing number of trade and security treaties, sparking much interest and debate into China's desired role within the international community.<sup>381</sup> Within the human rights realm, between 1980 and 1989, China signed or signed and ratified seven human rights conventions and one protocol.<sup>382</sup> Following the Tiananmen Square incident in 1989, China became more cautious in consenting to the human rights treaties, not wanting to tie itself to legal obligations it had no intention or capacity of fulfilling. To this day, it still has not ratified the International Covenant on Civil and Political Rights (ICCPR). On the flip side, China does ratify treaties it knows it can follow through with, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), and has fought to choke international criticism of its internal domestic behavior. Throughout its struggle with the UN Human Rights Commission in the 1990s, Beijing lobbied hard to prevent the international community from issuing a resolution condemning the country's internal human rights abuses.<sup>383</sup>

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<sup>381</sup> See Gerald Chan, *China's Compliance in Global Affairs* (2006); Randall Doyle and Zhang Boshu, *Modern China and the New World* (2011); Gerald Chan, Pak Lee and Lai-Ha Chan, *China Engages Global Governance* (2012); Pitman Potter, *China and the International Legal System: Challenges of Participation* (2008).

<sup>382</sup> Convention on the Elimination of All Forms of Discrimination against Women (1980); International Convention on the Elimination of All Forms of Racial Discrimination (1981); Protocol Relating to the Status of Refugees (1981); Convention Relating to the Status of Refugees (1982); Convention on the Prevention and Punishment of the Crime of Genocide (1983); International Convention on the Suppression and Punishment of the Crime of Apartheid (1983); International Convention against Apartheid in Sports (1987); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1988). See Kent, *supra* note 320.

<sup>383</sup> See Kent, *supra* note 320; and Sceats and Breslin, *supra* note 293.



In the twenty-first century, China's propaganda and public relations campaigns have gone active globally. Notwithstanding acts of aggression against Japan and in the South China Seas in recent years, Beijing continues to market itself with phrases about its "peaceful rise" and noble "China dream," seeking international respect, trust and cooperation.

If China truly does desire to sign onto treaties with which it knows it will already be in compliance and which will make it look good, the Trafficking Protocol is in some ways the ideal treaty. The Protocol's strongest provisions are in regards to interstate cooperation and fighting transnational organized crime. China has a strong interest in maintaining a stable and secure society, making these provisions and the notion of joint cooperation appealing. China also likes the idea of being a part of the international community and appearing to comply with international norms, even if it does not value those norms on their own. This is why a human rights treaty which is actually a law enforcement treaty with no firm and fast human rights obligations would be appealing. China's internal political institutions and varying levels of national, provincial and local authority have not been persuaded to the societal good and legal necessity of protecting and assisting trafficking victims. The protection of these human rights has not been internalized as a proper norm. China values far more its reputation and relationship with other member states. To use Johnston's language, the social benefit China sees to becoming party to the Protocol is not just the material benefits of joint crime fighting, but also the intangible benefit of building a closer relationship with the international community. China's desire to avoid international criticism, especially in the form of the annual scathing U.S. Trafficking in Persons Report, could be why for the last several years China has been gradually modifying its national policies concerning human trafficking.

Another factor which comes into play when analyzing China's compliance, particularly in looking at actions which are carried out by province and local level officials, is the extent of Beijing's ability to order policy changes throughout the country. Since coming to power, Xi Jinping has moved to consolidate power at the national level. As the varying success of the anti-corruption campaign demonstrates, though, Beijing still struggles to enforce its will over entrenched interests of local governments. The massive Chinese bureaucracy has left provinces a high degree of autonomy which they are now loathe to rescind. For example, "state-sponsored forced labor" camps like the Reform through Labor or the Custody and Education systems bring

in profits to local governments, making them lucrative side enterprises. Outside China analysts are often left guessing as to the power plays, internal politicking and negotiations happening within the “vertical democracy” of the Chinese Communist Party (CCP), but events like the NPC’s Third Plenum do show that the Chinese leadership is having these internal conversations and attempting to modify national policy. Regardless, it is important to recognize that even if Beijing is being “socialized” and is desirous of moving China into deeper cooperation with the international community, this is not a decision which can be made by one person or even a single group of leaders. If change is to happen in China’s offering of protection and assistance to trafficking victims, much more will need to happen than a simple vote in the Central Politburo Standing Committee.

Looking at the nature of China’s domestic political institutions, it seems unlikely that this change and real compliance with the Protocol’s human rights provisions will occur as a result of civil society pressures as theorized by Beth Simmons. It is true that following the NPC’s ratification of the Palermo Protocol, more domestic attention was diverted to the issue of human trafficking. China already had enacted its own National Plan of Action (NPA) to combat trafficking in 2008, but after signing the Protocol and receiving international criticism for its international definition, China modified the definition in its updated 2013 NPA. Becoming a state party to the Protocol gave greater focus and direction to anti-trafficking efforts as policy-makers contemplated how to make their existing laws more effective. Other than raising the issue on the national agenda, though, Simmons’s other two mechanisms by which human rights treaties impact domestic politics – litigation and political mobilization – are less applicable in China. Simmons recognizes that in order for treaties to help leverage litigation on human rights issues and thus bring about change, the system needs to have an independent judiciary and the political culture needs to possess a high respect for judicial decisions.<sup>384</sup> This does not exist in China. Judges are selected by the CCP, and rarely ever issue rulings outside of the Party line. Scholars, lawyers and government officials have been discussing the need to enhance the rule of law in China for a long time, and while the government has announced its plans for future legal reform, nothing has yet changed. Access to a fair trial or the ability to appeal unjust arbitrary decisions is not a possibility for most human trafficking victims.

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<sup>384</sup> Simmons, *supra* note 23, 150.

Political mobilization is also not an avenue open to most Chinese people. Political discussion only happens within the Party and any political mass movement against the Party's policies is not tolerated. That said, the CCP does tend to listen when there is enough groundswell of public opinion on a certain issue, as evidenced by changes enacted last fall at the Third Plenum to the family planning policy and to the system of forced labor detention camps. Both policies have faced significant popular disapproval in recent years. However, how much if any of this growing resistance to the policies was the result of the Palermo Protocol (or other international treaties) versus being an organic development of domestic mindsets is less definitive. Based on conversations with local and international NGOs in China, most anti-trafficking organizations, let alone the average person demanding their rights, do not seem aware of the treaty or what its relevant provisions would mean for them.

India, in many regards, represents the polar opposite of China in terms of political institutions and the role of civil society. India's democratic government and active civil society both have strong implications for the country's compliance with international treaty law. Compliance is often the result of factors exogenous to the international agreement, and in the case of the Trafficking Protocol, rooted in a domestic public ground-swell surrounding gender issues and violence against women. Furthermore, the political legitimacy of the government derives directly from the people, so leaders are focused more on placating the population and civil society groups and not the international community. Like the United States, India has a dualist legal system, meaning that international agreements must be incorporated into domestic legislation before holding the force of law. Indian courts have repeatedly allowed India to act domestically in violation of its international agreements in cases where the international law conflicted with the domestic statute.<sup>385</sup> India is less concerned with its international reputation, and is not as keen as China on becoming an honored member of the group.

The main driver for political and social change on human trafficking in India over the last few years has been public mobilization and judicial activism. Public discontent on the issue grew continuously over the past decade, reaching a peak with the Delhi rape incident and subsequent Justice Verma Committee process which resulted in the legal changes to the Indian Penal Code.

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<sup>385</sup> *Jolly George Varghese and Another v. The Bank of Cochin*, AIR 1980 SC 470 *Kesavananda Bharathi vs. State of Kerala*, (1973) Supp. SCR 1.

India's rapid ratification of the Trafficking Protocol, along with the two sister protocols and parent convention all simultaneously on 5 May 2011, after a nine year delay since first becoming a signatory to all of the agreements, denotes the strong political pressure behind the issue. According to legal activist Bhuwan Riuhu, there was no domestic demand for the Protocol to be signed before 2011.<sup>386</sup> The *Bachpan Bachao Andolan v. Union of India* case decided in April of that year, one month before ratification, was the first time the Courts publicly voiced a need for India to accept a standard trafficking definition.<sup>387</sup>

This is not to say, though, that the treaty has had no effect on India's state behavior over the past three years. Rather, India's use of the Trafficking Protocol is a textbook example of Simmons argument for how international human rights agreements can be utilized by domestic interest groups. As Dr. Abhilasha Kumari, the executive director for Aapne Aap, explained, "International conventions give NGOs a tremendous advantage and play a vital role in creating negotiating space. Civil society is able to point to these international obligations and bring pressure to bear on the government in order to establish laws and policies to guarantee people rights."<sup>388</sup> Ratification of the treaty certainly served to further raise the crime of trafficking in persons in the nation's consciousness, but just as importantly, it has become a tool for NGOs to regularly cite, whether lobbying for legal changes during the fact-finding committee process following the Delhi rape or whether while litigating in courts. Now that the international definition of human trafficking has been incorporated into Indian domestic law, civil society groups have an even greater ability to point to the law and claim specific rights and protections. The activism and vitality of the civil society groups in India – their ability to criticize the government, demand legal changes, and publicly investigate police corruption – is something that is not possible in China.

The Palermo Protocol as international law is affecting China and India's state behavior in very different ways. In some aspects, the impact of international law may appear negligible, and it may be difficult to determine whether it is the international law impacting state action or whether domestic politics is driving attitudes towards and ratification of the treaty. Even so, there is evidence that the treaty is slowing generating change within these countries and exerting some

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<sup>386</sup> Personal Interview with Bhuwan Ribhu (3 January 2014), notes in author's possession.

<sup>387</sup> Justice Verma Report, *supra* note 154, 165.

<sup>388</sup> Personal Interview with Abhilasha Kumari (3 January 2014), notes in author's possession.

form of compliance pull, however weak. China may have joined initially for matters of transnational coordination to fight crime or out of a desire to become a more integrated member of the international community, but it still now finds itself with obligations to better protect the human rights of trafficking victims. While decisions coming out of the Standing Committee have been moderated and cautious, there do seem to be positive signs that the country will gradually change policies to better combat conditions which may lead to trafficking. India, likewise, has seen positive developments in its anti-trafficking laws and policies in recent years. Here it will remain the responsibility of civil society groups to fight for rights protected under the treaty. The norms prescribed in the Protocol are already accepted as normal and good. The challenge remains for India to exert the focused attention and resources necessary to bring itself into full compliance in combating trafficking.

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