



STRENGTHENING RESPONSES ON MISSING CHILDREN - LEGAL REVIEW

**Victim Protection for Child Survivors of
Cross Border Trafficking
Bangladesh, India and Nepal**

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I. BACKGROUND

Trafficking of persons, particularly women and children, for forced and exploitative labour, including for exploitation, is one of the most egregious violations of human rights that the United Nations now confronts. It is widespread and growing. It is rooted in social and economic conditions in the countries from which the victims come, facilitated by practices that discriminate against women and driven by cruel indifference to human suffering on the part of those who exploit the services that the victims are forced to provide. (Kofi Annan)

This report was commissioned as part of the Missing Child Alert (MCA) program, led by Plan International and currently being implemented in Bangladesh, India and Nepal. The MCA program aims to enhance and strengthen the collective regional response to the issue of missing children generally, examine potential linkages with cross border trafficking and develop a regional cross border prevention of child trafficking alert system in Bangladesh, India and Nepal.

The Broad aims of the MCA program are to:

- Improve response mechanisms that address the needs of children/youth who are vulnerable to or are victims of neglect, abuse and cross border trafficking by strengthening coordination and management of services provided to them.
- Institutionalize the available regional technological mechanisms and systems that can be used to prevent, rescue and repatriate children who are vulnerable to being trafficked or those who have already been trafficked; and
- Introduce technology as a catalyst to strengthen and accelerate multiple processes.

The current report has been conceptualized in partnership with the South Asia Initiative to End Violence against Children (SAIEVAC) and aims at addressing legal reforms and supporting regional actions for protecting the rights of missing children. In this regard, the first phase of the project consisted of a mapping process that reviewed and documented the international and domestic legal framework in South Asia in relation to missing and trafficked children. The mapping aimed at comprehensively reviewing existing legislation and policy in the region with a view to identifying gaps, inconsistencies and potential avenues for reform. All eight South Asian countries were covered and legislation reviewed included laws related to trafficking in persons, sexual abuse and exploitation, child labour and child marriage as well as constitutional protections afforded to children in each country.

The main report is constituted of research carried out during phase two of the project. In this phase, discussions held and specific points of consensus reached by the MCA stakeholders were taken into account to guide the selection of the subject area.¹

¹ These points arose at the Trilateral Convention of Stakeholders jointly organised by Plan and SAIEVAC. The Convention was held in February 2013 and was attended by a wide range of stakeholders such as senior representatives of the Ministry of Home Affairs, the Ministry of Foreign Affairs, the Ministry of Women and Child Development, the Ministry of Telecommunications, the National Informatics Centre of Govt. of India, SAARCLAW, SAIEVAC, UNICEF, IOM, INGOS, Civil Society organizations and organizations of survivors from Bangladesh, India and Nepal.

During this meeting, stakeholders had agreed that despite MOU's and operating protocols being in place, problems such as lengthy delays in repatriation and compromised protection and safety of survivors during reintegration are still serious concerns. The group also agreed on the need for regional cooperation in prosecution and sharing of real time information on missing and trafficked children for early interception and rescue. During the discussion the stakeholders also acknowledged that all agreements or legal instruments must act in the child survivor's best interest. This review aimed to address these discussions using a lens of victim protection and standards of care giving and repatriation for child survivors of cross border trafficking in the three MCA program countries, namely Bangladesh, India and Nepal. In this regard data collection focused on the existing legal provisions and policies relating to missing and trafficked children in Bangladesh, India and Nepal with a focus on provisions related to standards of care and protection through the rescue, repatriation and rehabilitation process.

METHODOLOGY

A combination of desk review of available reports and documents and primary research was used. Documents included reports available online as well as those provided by partners and key stakeholders. A questionnaire was used for key informant interviews in Bangladesh, India and Nepal. Those interviewed included lawyers and judges as well as representatives from law enforcement agencies, Home Ministries in the three countries, academics and experts from NGOs dealing with survivors of child trafficking.

II. FUNDAMENTAL ISSUES

CONTEXT SETTING: MISSING CHILDREN AND TRAFFICKING

An internationally accepted definition of a missing child is a child below the age of 18 whose whereabouts are unknown to their parents or legal guardians. The Supreme Court of India has defined a missing child as "a person below 18 years of age whose whereabouts are not known to the parents, legal guardians or any other person who may be legally entrusted with the custody of knowing the whereabouts/wellbeing of the child whatever may be the circumstances/ causes of disappearance. The child will be considered missing and in need of care and protection, until located and/or his/her safety/well-being is established."²

The term 'missing children' is in fact very broad and encapsulates diverse groups of children including those that are abducted, those that run away from home and those that are lost, or those that become victims of a crime. It also includes children who are trafficked either persuaded to leave home or abducted and subsequently sold into forced labour.³ According to the Indian *Penal code* for example, a missing child may be a victim of kidnapping/abduction for purposes including ransom, begging, wrongful confinement, marriage/illicit intercourse, murder, grievous hurt, or slavery. In addition a missing child could be one that is kidnapped or sold into labour,

² <http://www.bba.org.in/?q=content/supreme-court-india-delivers-landmark-judgement-missing-children>

³ John Lannon and Edward F. Halpin, 'Responding to Cross-Border Child Trafficking In South Asia: An Analysis of the Feasibility of a Technologically Enabled Missing Child Alert System', *Plan International*, 2013.

sexual exploitation, entertainment, or for adoption. It even includes child soldiers in areas of armed conflict. Clarity with regard to categories of missing children is a critical component in correctly responding to the problem of a child that has gone missing. The International Centre for Missing and Exploited Children (ICMEC) has pointed out that, "A common definition of a 'missing child' with clear categories facilitates coordination and communication across jurisdictions and ensures that policies and programs comprehensively address all aspects of missing children's issues. Although all missing child cases should receive immediate attention, investigative procedures following the initial report may vary based on the case circumstances."⁴

There are a variety of intersecting factors that make children vulnerable to going missing in South Asia. These include poverty; lack of education and awareness about what trafficking is; violence and abuse within the home and armed conflict causing displacement of families. In addition, gender discrimination in the region involving traditional practices such as dowry may cause girls to be perceived as a burden to the household and make them more vulnerable to being trafficked.

Children are at risk of harm in various ways when they go missing and the longer they are missing the more severe the harm is likely to be. This is one of the critical reasons why prompt intervention is so important when children go missing. The most immediate risk is to their physical safety—they may face violence, abuse, exploitation and even death. In addition they face harms such as hunger, thirst, health issues, sleeping rough, lack of economic well-being and loss of potential because they are unable to attend school. Many of these are causes as well as consequences of becoming a missing child. For instance, poverty and inability to attend school are often linked to children being trafficked and ending up as missing children.

Anecdotal evidence from India has, for decades revealed a persistent link between missing children and trafficked children in the region. However specific systemic gaps have meant that these links have not been effectively realised and there has been no way to link children going missing in one state and perhaps turning up rescued in another. These gaps include a lack of clarity on the definition of a missing child as well as legal provisions dealing with the issue, the lack of a comprehensive protocol for dealing with missing children between states and at the national level as well as systemic failure in terms of gathering and organising data related to missing children and keeping records of missing traced and untraced children around the country. In fact, these are common issues for all three countries. Reports suggest that very little data is available on missing children in Bangladesh and police and media reports are the main source of information. According to Save the Children, "The only reliable statistics [on missing children] are those that refer to the number of children 'rescued' each year, and the number of cases opened against traffickers or traffickers convicted each year. Each of these figures is very small."⁵

⁴ From International Centre for Missing & Exploited Children (ICMEC). Missing Children in Central America Research of Practices and Legislation on Prevention and Recovery: United Nations Children's Fund (UNICEF), International Centre for Missing & Exploited Children (ICMEC), 2011.

⁵ Integrated Regional Information Networks (IRIN), *Bangladesh: More data needed on abandoned children, trafficking*, 6 September 2012, available at: <http://www.refworld.org/docid/5049c5332.html>

None of the three countries has legislation, which specifically deals with missing children and comprehensively links children going missing with the crimes that they may be subjected to. However, laws dealing with trafficking, child labour and sexual exploitation of children are highly relevant in this regard. Efforts at recognising the links and directly addressing these within the legal system have been seen in India and perhaps this approach can act as a model within the region.

The serious lacunae in how missing children were being dealt with was initially highlighted as part of a National Human Rights Commission (NHRC) Action research study in 2004 which revealed that hundreds of women and children were going missing daily and that these cases, while occasionally being recorded in the local police station's diary were not being officially reported or investigated.⁶ The report also revealed the reluctance of parents and guardians to approach the authorities in cases where children had gone missing after parents consented to their departure. Parents fearing being prosecuted under trafficking laws were not reporting cases. Similarly, in Dhaka, a child protection specialist from UNICEF pointed out that a lack of awareness among the masses and an absence of a nationally integrated reporting system means that a large number of missing children cases are unreported and untraced. An NHRC committee convened in the wake of the Nithari case⁷ in 2006 subsequently came out with a series of recommendations on missing children including the need to sensitise all stakeholders on the issue and to ensure the filing of an FIR within a certain period of time in cases of missing children.⁸

More concrete progress has finally been made on this issue during the last five years through a series of court decisions sparked off by research conducted by Bachpan Bachao Andolan (BBA) a child rights NGO. Their report, based upon research conducted in 392 districts of the country, revealed that 1,17,480 children were reported missing and 41,546 remained untraced in two years between 2008 and 2010. The report also revealed a vast disparity with National Crime Records Bureau data according to which 17,279 children were missing in the same period. This disparity highlighted the serious dearth of any sort of comprehensive or centralized database on missing children wherein information relating to them would be gathered and shared at national, state and district levels.

The organization subsequently petitioned the court to take cognizance of this issue presenting research showing that, in 2011 alone 90,654 children went missing but only 15,284 FIRs were registered.⁹ BBA's research showed that even within Delhi, dozens of cases had not been registered or investigated by the police or any statutory body. In May 2013, the Supreme Court of India passed a landmark judgment¹⁰ on missing children ordering mandatory registration of a First Information report (FIR) in all cases where children go missing with an initial assumption of abduction or trafficking to be made. In addition the court issued directions ordering:

⁶ NHRC, UNIFEM and ISS. A Report on Trafficking in Women and Children in India 2002-2003, 2004. Available at <http://nhrc.nic.in/Documents/ReportonTrafficking.pdf>

⁷ More than 30 children found to have been abducted and murdered by a serial killer on the outskirts of Delhi. Some of these children were from neighbouring states.

⁸ 'NHRC Committee on Missing Children comes out with recommendations' at <http://nhrc.nic.in/dispatch.asp?fno=1482>

⁹ Bachpan Bachao Andolan vs. Union of India and Others [WP (CrI) 75 of 2012]

¹⁰ <http://www.bba.org.in/?q=content/supreme-court-india-delivers-landmark-judgement-missing-children>

- Compulsory registration of cases by police of all those children who are still untraced (in 2011 34,406 children are still untraced).
- Preparation by police of standard operating procedures relating to missing children in all states
- Appointment and training of special child welfare officers in every police station to deal with the cases of missing children.
- Maintenance of records of recovered children along with photographs by police with the assistance of the Ministry of Home Affairs.

The case has remained before a social justice bench of the Supreme Court and in January 2015 further directions were passed including¹¹:

- The Secretary, Ministry of Women and Child Development will be the nodal officer to coordinate the efforts in preventing children from going missing, tracing such children and for planning resettlement and rehabilitation of such children in child care institutions
- The Secretary, Ministry of Women and Child Development will be responsible for obtaining information from all States and Union Territories instead of them filing separate affidavits
- Technical assistance should be sought to improve the operation of the website www.trackthemissingchild.gov.
- A model Standard Operating Procedure to trace missing children (based upon the SOPs prepared by the different States) should be prepared.
- Preparation of a standard curriculum to be utilised to train police officers and sensitizing them about the issue of missing children with specific regard to the links with trafficking and child labour

In November 2015, the SC has noted that the standard operating procedure is almost finalised and that pending final comments, “It will be issued and published on the website of the Ministry of Women and Child Development.”¹²

Child Trafficking

Child trafficking is a global phenomenon, and is recognized as a violation of the fundamental human rights and freedoms of children. It poses a threat to the child’s life as well as to their physical and mental integrity. Most of the South Asian countries serve as origin, destination and transit countries within the context of trafficking. Children are trafficked within their own countries, across borders into other countries within the region and also outside of the region.¹³ Extensive research has revealed that in South Asia, children are trafficked for purposes including sexual exploitation, labour exploitation, begging, exploitation in armed conflict, arranged marriage,

¹¹ Writ Petition(s)(Civil) No(s).75/2012

¹² Writ Petition(s)(Civil) No(s).75/2012

¹³ UNICEF, IRC. P.9.

domestic servitude, criminal activity and other exploitative situations.¹⁴ However, collecting accurate data on the scale of the problem including identifying how many children are trafficked each year and for what purpose has proven to be very challenging. Studies have pointed out that differentiating between a child that has experienced forms of exploitation and abuse in the context of migration and a child that has been trafficked according to international definitions (which specify certain types of experiences) may be very difficult. Children identified as trafficked may not have had experiences that fall under the international definition of child trafficking. Alternatively those that have been trafficked may be misidentified as migrant children, victims of sexual exploitation or children living on the street. These issues are compounded by the fact that children themselves may be reluctant to be identified as trafficked fearing threats from traffickers towards themselves or family members, restrictions on their future mobility and earning ability as well as social stigma.¹⁵

Compounding this is a lack of reliable data collection systems with research showing that cross country comparisons are hindered by “the lack of standardized indicators for identification, the lack of guidelines for data collection and the varying quality of national statistics.”¹⁶ Accurate data on the purposes for which children are trafficked is also lacking. One problem in this regard is that countries in the region have tended to focus their data collection on cases of cross-border trafficking of women and girls for commercial sexual exploitation (CSE), paying less attention to the other reasons for which trafficking occurs. This narrow emphasis can be seen in the regional legal and policy planning, for instance with the *SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2002)*, which focuses specifically on prevention of trafficking for purposes of sexual exploitation and only on women and girls. Men trafficked for any purpose is not covered. Therefore, it is not surprising that research shows that although ‘children’ ostensibly includes both sexes, boys being trafficked for CSE tend to be sidelined in policy responses and planning interventions within the region. Studies reveal “although research shows that boys face nearly the same degree of sexual abuse and exploitation as girls, programming throughout the region is overwhelmingly directed at girls and women.”¹⁷ In addition there is “an absence of legal commentary on legislation regarding boys’ issues and an absence of advocacy efforts to take action and amend laws to provide equal protection to boys.”¹⁸ This should be highlighted as another gap in data collection.

Trafficking and Migration

Research suggests that anti-trafficking initiatives should “address the broader context of migration within which trafficking often occurs.”¹⁹ Whilst trafficking should be distinguished from migration, the interrelated nature of these two means by which people move or are moved needs to be

¹⁴ UNICEF, IRC, 2009

¹⁵ UNICEF, IRC.

¹⁶ Ibid. p. 8

¹⁷ John Frederick. Sexual Abuse and Exploitation of Boys in South Asia; A Review of Research Findings, Legislation, Policy and Programme Responses. 2010. Innocenti Research Centre, Working Paper. Available at http://www.unicef-irc.org/publications/pdf/iwp_2010_02.pdf

¹⁸ Ibid.

¹⁹ Ibid.

considered. For instance, people who want to migrate within their own country or across borders may be vulnerable to being recruited by traffickers. At the same time, evidence shows that restrictive measures put in place to manage migration have not deterred would be migrants but rather have sometimes resulted in higher levels of vulnerability for them.²⁰ For instance, following reports that female migrants from Myanmar were being forced into sex work, the government prohibited females under the age of 25 from travelling without a legal guardian. This led to girls and women's migration shifting underground with increased payments to intermediaries to procure the passports, visas or other travel documents. In addition, the actual travel was facilitated through more difficult, less used and remote terrains, thus further heightening susceptibility to harm or abuse along the way.²¹

Similar trends have been reported from other countries such as Nepal and Bangladesh, where the portrayal of all children on the move as victims of trafficking has caused them to be seen only as victims of crime rather than within a broader context of economic strategies, social mobility and cultural, religious and ethnic relations. This may mean that government interventions focus on the criminal aspect to the detriment of programming that addresses root causes and the needs of children prior to and after migration.²²

III. THE LEGAL ENVIRONMENT

In this section of the report, we examine the prevailing legal environment related to missing and trafficked children in South Asia. Several International Conventions are relevant in this context. Whilst previous reports have analysed these in detail, we will briefly cover the salient points in terms of regional and international obligations of Bangladesh, India and Nepal focusing especially on developments in recent years. The report also examines the domestic legal environments in areas relevant to trafficking and missing children with a focus on specific legislation related to trafficking as well as forced labour commercial sexual exploitation. Several pieces of legislation have been enacted in the region within the last five years and the report will attempt to analyse the extent to which provisions within these laws are in consonance with current international law and norms and where the critical gaps remain.

It is important to note that within dualist legal frameworks like those in most South Asian countries, ratification of international conventions does not confer automatic rights domestically. This means that appropriate domestic legislation relating to the treaty needs to be enacted in each country with the exception of Nepal, which follows a monist system. Section 9 of the Nepal Treaties Act prescribes a monist approach, meaning that once an international treaty has been ratified through Nepal's parliament, it applies automatically in domestic law and takes precedence over the latter should there be a conflict.²³

²⁰ 'Children's Migration: Toward a Multidimensional Child Protection Perspective', Susu Thatun and Karin Heissler, in International Organization for Migration (IOM) (ed.), *Children on the Move* (Geneva: International Organization for Migration, 2013).

²¹ Ibid. Pg 102

²² 'Challenges Faced when Protecting Children on the Move: An NGO Perspective', Mirela Shuteriqi, in International Organization for Migration (IOM) (ed.), *Children on the Move* (Geneva: International Organization for Migration) 2013

²³ Bhardwaj, K. and V. Divan (2011). *Sexual health and human rights - A legal and jurisprudential review of select countries in the SEARO region: Bangladesh, India, Indonesia, Nepal, Sri Lanka, and Thailand*. International Council on Human Rights Policy.

I. International Law

a. United Nations Convention on the Rights of the Child (CRC), 1989

All of the SAARC countries have ratified the United Nations Convention on the Rights of the Child (CRC), the first legally binding international instrument to lay out a comprehensive set of rights for children in the civil, political, economic, social and cultural spheres. It defines all children persons under the age of 18, unless under the law applicable to the child, majority is obtained earlier.²⁴ The CRC entered into force in September 1990 and has been ratified by every state in the SAARC region. It establishes the principle that the best interests of the child should guide all actions concerning children.²⁵ It also iterates the rights of children to life, survival and development²⁶ and to non-discrimination on any grounds including their “*race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*”²⁷ The Convention also guarantees the right to privacy, the right of children to express opinions freely in matters affecting them, and to have their views given due consideration.²⁸

States are obliged under the CRC to take action to protect children from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual exploitation.”²⁹ States must take all necessary legislative, educational, social and administrative measures towards this end and this includes protecting children from economic exploitation, exploitation for drug trafficking, sexual exploitation, human trafficking and any other forms of exploitation that are prejudicial to the child’s welfare.³⁰ The CRC stipulates that children are entitled to protection from all forms of sexual exploitation and sexual abuse, including child prostitution,³¹ and the right to recovery and reintegration for child victims.³²

b. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC)³³

All the SAARC countries have ratified this optional protocol, with the exception of Afghanistan who has acceded to it but not yet ratified it.³⁴ The protocol stipulates important obligations of states with regards to sexual exploitation calling on states to criminalise the sale of children, child prostitution and child pornography. Article 2 of the OPSC specifically defines the sale of children

²⁴ *Convention on the Rights of the Child*, United Nations General Assembly, 20 November 1989.

²⁵ CRC, Article 3

²⁶ CRC, Article 6

²⁷ CRC, Article 2

²⁸ CRC, Article 12.

²⁹ CRC, Article 19 (1).

³⁰ CRC, Articles 32-26

³¹ CRC, Article 34

³² CRC, Article 39.

³³ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC) entered into force in 2002. Full text available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>

³⁴ For status of ratifications as of April, 2015, please see https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-11-c&chapter=4&lang=en

as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.” The protocol prohibits sale of children for sexual exploitation but goes beyond this prohibiting their sale for forced labour, transfer of organs or adoption as well. The protocol also defines child prostitution as “the use of a child in sexual activities for remuneration or any other form of consideration.”³⁵

The OPSC also requires states parties to adopt civil and administrative proceedings for seizure of instrumentalities used to commit or facilitate the offences described by the Protocol and deals with the issues of jurisdiction and extradition. Researchers have suggested that one of the critical aspects of the protocol is the requirement for states parties to adopt appropriate measures to protect the rights of child victims of the offences described “*at all stages of the criminal justice process*.”³⁶ This particular provision stipulates rights such as child-friendly legal proceedings which includes the need for information as to rights, role, scope, timing, and progress of the proceedings as well as dispositions; due consideration to children’s views, needs, and concerns; privacy and confidentiality concerning their identity and safety and protection against intimidation and retaliation.³⁷ The Protocol also assigns to States Parties the duty to consider the best interests of the child victim as a primary consideration and to provide appropriate training to all those who work with child victims, among others.³⁸ In this context states must avoid the “double victimization” of child victims and ensure that they are not treated as offenders under national law.

c. United Nations Convention against Transnational Organized Crime and Protocols

The Convention is the first comprehensive and global legally binding instrument to fight transnational organized crime. This could be significant in terms of countries being bound by a common definition of organised crime as well as enhancing regional cooperation around the issues. Shortly after India ratified the convention in 2011, the (then) Union Home Secretary of India explained that “The Government of India believes that signing and progressive ratification of the UNTOC and its related protocols will enhance the level of international co-operation among the various State parties to the Convention in the fight against various forms of organized crime with transnational character.”³⁹ Indeed states parties to UNTOC commit themselves to taking several measures to address organized crime including criminalizing those who are participants in an organized criminal group and adopting frameworks for extradition, mutual legal assistance and international cooperation.⁴⁰ Some progress has been made in recent years with all countries in South Asia, other than Bhutan, ratifying or acceding to UNTOC. However, in order to enhance cooperation related to trafficking more effectively UNTOC needs to be implemented in consonance with its three Protocols, which target specific forms of organized crime of which the

³⁵ OPSC, Article 2 (b).

³⁶ OPSC, Article 8.

³⁷ Ibid

³⁸ Ibid

³⁹ UNODC, ‘India: Significance of the United Nations Convention against Transnational Organized Crime (UNTOC) to address human trafficking’, at <http://www.unodc.org/southasia/en/frontpage/2011/june/significance-of-the-untoc-to-address-human-trafficking-interview-with-mr-g-k-pillai.html>

⁴⁰ UNODC, ‘India: Government ratifies two UN Conventions related to transnational organized crime and corruption’, at <http://www.unodc.org/southasia/en/frontpage/2011/may/indian-govt-ratifies-two-un-conventions.html>

most relevant for the purposes of this report is the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime

This protocol, popularly known as the 'Palermo Protocol', provides the first internationally agreed definition of trafficking in human beings and child trafficking.⁴¹ See text box.

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

A critical feature of the protocol is the stipulation that none of the means set forth in the definition above (coercion, abduction, fraud etc.) are necessary to consider that a child has been a victim of trafficking. Article 3 (c) of the Protocol states that "[t]he recruitment, transportation, transfer, harbouring or receipt of a

child for the purpose of exploitation shall be considered "trafficking in persons." This implies that unlike with trafficking of adult persons, consent of a child is irrelevant in determining whether trafficking has occurred. The protocol also extends the scope to recognize trafficking for various purposes including forced labour, slavery and "or practices similar" which can cover a broad range of exploitation. This is particularly useful in the South Asian context because the current SAARC convention on trafficking of women and children only deals with trafficking for the purpose of commercial sexual exploitation.

The protocol emphasizes cross border cooperation and states in its preamble that it intends to provide "a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims."⁴² However, analysis of the Palermo protocol reveals that whilst it contains strong provisions on issues such as border control, security of documents and criminal law (in line with its purpose to supplement UNTOC), it is less specific on protection and assistance of child victims of trafficking.⁴³ In this regard it has been suggested that ratification of both this protocol and the OPSC are needed to comprehensively protect children who have been trafficked or sold into exploitation.

⁴¹ *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Article 3 (a)* Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>

⁴² Ibid. Preamble

⁴³ IRC, 2009.

As of now, only India has ratified the 'Palermo Protocol' and Sri Lanka has signed it. Widespread ratification of this protocol in South Asia would be desirable providing states with a common minimum platform, in terms of a comprehensive definition of trafficking for different purposes and obliging them to take implementing measures suggested therein.

d. United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

CEDAW is an important convention, that has been ratified by all the SAARC countries and that specifically deals with state obligations to eliminate discrimination on the basis of gender. As mentioned above, gender discrimination has been identified as a serious root cause of child trafficking. CEDAW specifically outlines a series of measures that states are obliged to take to ensure equality within different spheres including the family, workplace, healthcare settings, education etc. Article 6 also specifically addresses trafficking requiring all States Parties to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."⁴⁴ CEDAW has generally been interpreted to be applicable to both girls and adult women and to complement rights outlined in the CRC.⁴⁵

e. ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour⁴⁶, 1999

This ILO convention otherwise known as the 'Worst Forms of Child Labour Convention' defines children in line with the CRC as anyone under the age of 18. It is relevant to this issue since it reinforces the abolishment of harmful child labour established by ILO convention 138 and requires states parties to take urgent and immediate action to eliminate the 'worst forms of child labour'. Article 3 of the convention stipulates that these include: "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...; the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs." It also includes more generally "work which...is likely to harm the health, safety or morals of children."⁴⁷

As mentioned above, research reveals that children who have been trafficked or gone missing for other reasons are particularly vulnerable to being exploited within these forms of child labour. Bangladesh and Nepal have ratified ILO 182 but India has not.

II. Regional Mechanisms

The SAARC countries have entered into several regional agreements to prevent trafficking of

⁴⁴ Convention on the Elimination of all Forms of Discrimination against Women, Article 6. Full text available at <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>

⁴⁵ IRC, 2009. P.15.

⁴⁶ International Labour Organization (ILO), *Worst Forms of Child Labour Convention, C182*, 17 June 1999, C182, available at: <http://www.refworld.org/docid/3ddb6eoc4.html>

⁴⁷ Ibid, article 3.

people across borders and two of these are particularly relevant for the purposes of this review.

a. SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2002)

This convention is the first regional treaty dealing specifically with the issue of trafficking which it defines as “the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking.”⁴⁸ Whilst this definition deals with trafficking both within and across borders, it is limited because it only covers trafficking for the purposes of commercial sexual exploitation. People trafficked for other reasons are not covered and nor are men for any purpose.

As UNICEF has pointed out, “the Convention covers both prevention and protection mechanisms that, although limited in their scope, have the capacity to safeguard or restore the rights of trafficked persons and those vulnerable to trafficking.”⁴⁹ For instance Article 8 outlines preventive measures which include raising awareness through the media of the problems of trafficking, focusing “preventive and development efforts on areas which are known to be source areas for trafficking”⁵⁰ and sensitizing “law enforcement agencies and the judiciary in respect of the offences under this Convention and other related factors that encourage trafficking in women and children.”⁵¹ These are useful provisions if properly implemented by the countries of the region. In addition, Article 9 deals with care, rehabilitation and repatriation of trafficked persons stipulating that legal services, counselling, shelter homes and employment and health services must be provided.

However, a gap here is that the article does not stipulate that repatriation should ensure the safety of trafficked people and their families or that it should be voluntary. In addition, “the article does not elaborate on the provision of legal assistance; nor does it mention issues such as closed courts for hearing cases, or providing evidence in camera.”⁵² In the context of children who have been victims of trafficking and may be facing criminal proceedings as victims or witnesses, lack of child friendly procedures is a serious gap in terms of their ability or willingness to access justice mechanisms. In addition, in the absence of protective procedures women and children are at risk of being victimized again by the court system that they encounter. As discussed above, the OPSC does contain these provisions to protect children within criminal justice processes. States parties to the SAARC convention, all of whom have also ratified (or acceded to) the OPSC, could therefore strengthen their approach to protection and treatment of child victims of trafficking by drawing on this protocol.

Legal activists have also pointed out that “as a legal framework the convention is ineffective as it lacks a treaty body and enforcement mechanisms through which violations of the convention can

⁴⁸ SAARC Convention On Preventing And Combating Trafficking In Women And Children For Prostitution, Article 1 (3). Available at <http://www.saarc-sec.org/userfiles/conv-traffiking.pdf>

⁴⁹ IRC, 2009. p. 17.

⁵⁰ Ibid. Article 8 (7) and (8)

⁵¹ Ibid. Article 8 (2)

⁵² IRC, 2009. p.17.

be brought to book.”⁵³

b. SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia

All the SAARC countries have ratified this convention, which reiterates states parties commitment to the CRC and the principles upon which it is based including non-discrimination, best interests of the child and the right to participation. Article 3 specifically obliges states parties to put legal and administrative measures and social safety nets in place to ensure that “their national laws protect the child from any form of discrimination, abuse, neglect, exploitation, torture or degrading treatment, trafficking and violence.”⁵⁴ It also mentions that special preventive measures should be taken to “discourage entry of children into hazardous and harmful labour.”⁵⁵

Significantly, the convention does not limit trafficking to only trafficking for sexual exploitation but rather stipulates that regional arrangements must be strengthened and strategies and measures implemented, “for prevention of inter-country abuse and exploitation of the child, including the trafficking of **children for sexual, economic and other purposes.**”⁵⁶

⁵³ Bhardwaj, K. and V. Divan, 2011. p.127.

⁵⁴ SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia, Article IV. 3 (a).

⁵⁵ Ibid. Article IV.3 (b)

⁵⁶ Ibid. Article 5 (d).

II. Domestic Legislation

a. Sexual Abuse and Commercial Sexual Exploitation of Children (CSEC)

“...sexual violence is arguably the worst form of violence against children....(it) is harmful at all levels of the personality and leaves life-long physical, emotional and psychological damage. Commercial sexual abuse and exploitation of children should be regarded as the ultimate level of violation, because it not only offends the innermost dimension of a human being at a vulnerable age, but also turns a young person into a tradable commodity.”⁵⁷

Despite broad ranging efforts by countries in the region, child sexual abuse (CSA) and the commercial sexual exploitation of children (CSEC) continue to be the most pervasive and under-reported forms of human rights violations for children in South Asia and are estimated to affect significant numbers of children across the region. CSA usually happens within the home or community and is often perpetrated by someone familiar with the child.⁵⁸ The key element distinguishing CSEC from CSA is the remuneration factor. In other words, “there is an exchange in which one or more parties gain a benefit – cash, goods or kind – from the exploitation for sexual purposes of someone aged below 18.”⁵⁹

Whilst commercial gain is absent in CSA, research has shown “a clear link between non-commercial sexual abuse of a child and the increased vulnerability of an abused child to commercial sexual exploitation.”⁶⁰ For instance, sexual abuse in the home may force children to leave their families leaving them on the street and vulnerable to be exploited. One study among child victims of CSEC in Bangladesh showed that six percent of the children interviewed stated that they had initially left home to avoid sexual abuse.⁶¹ A research study based in Sri Lanka also found that there were “clear linkages between ‘domestic’ sexual abuse and children’s entry into commercial sexual exploitation.” In addition, a US study showed that “earlier childhood sexual abuse greatly increases vulnerability to commercial sexual exploitation during teen years” and cited national statistics showing that “children who are sexually abused earlier in childhood are four times more likely than their peers to be targeted and victimized by commercial sexual exploitation.”⁶²

In addition to serious physical trauma and a high risk of being infected with STDs including HIV, children who have been victims of sexual abuse and exploitation suffer long-term deleterious effects upon their psychological health. These include feelings of guilt, fear, shame and helplessness and may be accompanied by anxiety, depression and eating and sleeping

⁵⁷ ECPAT. *The Commercial Sexual Exploitation of Children in South Asia: Developments, Progress, Challenges and Recommended Strategies for Civil Society*, 2014. p.5.

⁵⁸ Save the Children. *Stepping up Child Protection: An assessment of Child protection Systems from All Countries in South Asia, including Reflections from Central Asia*. 2010.

⁵⁹ ECPAT. *CSEC Terminology*. Available at http://resources.ecpat.net/EI/Csec_definition.asp

⁶⁰ Ibid.

⁶¹ Save the Children, 2010.

⁶² Office of the Superintendent of Public Instruction, OSPI. *Commercial Sexual Exploitation, Abuse and Trafficking of Children and Youth: A Prevention and Intervention Resource Guide for Educators, Parents and Community Members*, 2013.

disorders. In addition drug and alcohol abuse are also common. Sexual abuse and exploitation affect children from all groups of society but research shows that some children are more vulnerable than others. These include children:

- from marginalised communities such as those belonging to lower castes or those from ethnic minorities
- living on the street or in slums or red light districts
- working in the worst forms of child labour such as within households as domestic help or begging
- from areas affected by conflict or natural disasters

As with trafficking data generally, understanding the exact scope of the problem is hindered by a severe lack of good reporting and data collection mechanisms as well as by the clandestine nature of the sex trade and chronic under-reporting of the problem. According to ECPAT, “when information is available, data is seldom disaggregated by age, gender, geographical origin, form of sexual exploitation or social background of survivors.”⁶³ This information is critical in order to analyse data and utilise it in effective interventions.

Policy, programming and legislation must be reoriented to account for the dynamic and evolving nature of CSEC in the region. Emerging trends raise new questions and bring new problems to the fore but may also present new opportunities to address this crime. For instance, the rapidly expanding use of the internet and mobile phones means that children are vulnerable to being accessed by sexual offenders through diverse means. However, modern communication technologies such as GPS can also be used to track children and the internet can be used to “connect vulnerable children, network alert systems and deliver preventive and rehabilitative services.”⁶⁴

a. Sexual Abuse and Commercial Sexual Exploitation of Children (CSEC) Related Legislation

BANGLADESH: the primary piece of legislation for the protection against such sexual offences is provided in the *Bangladesh Penal Code*. The Penal Code defines rape of a child as intercourse with anyone under the age of 14. The offence of rape is punishable by imprisonment for life or with imprisonment for a term which may extend to ten years, and shall also be liable to a fine. The *Women and Children Repression Prevention Act, 2000* (amended in 2003) also establishes penalties for rape of a child (punishable by rigorous imprisonment for life and a fine) and deals more broadly with other forms of sexual abuse as well. For instance, punishment for “sexual oppression against any person who tries to satisfy his sexual urge by touching an organ of a child with his body or any substance” is punishable by ten years imprisonment and a fine.⁶⁵

Section 366A of the code states that whoever induces any minor girl i.e. under the age of 18 years to go from one place to another with the intent that such girl will be used for prostitution will

⁶³ Ibid. p. 17.

⁶⁴ Ibid. p.

⁶⁵ *Women and Children Repression Prevention Act 2000*, Sections 9 and 10.

be punishable with imprisonment for ten years and also liable to fine. Under section 372 and 373 buying and selling of minors (girls or boys) for “any unlawful or immoral purpose” including prostitution is also punishable by up to ten years imprisonment and a fine.

Section 292 of the Penal Code prohibits the sale, hire, distribution, public exhibition or circulation of obscene books, pamphlets, papers, drawings, paintings, representations or figures and the import and export of obscene objects. Section 293 of the Penal Code states that whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object shall be punished with imprisonment of up to six months, with a fine, or both.

INDIA: The primary piece of legislation in this context is the relatively recent *Protection of children from Sexual Offences Act, 2012*⁶⁶, **India**, which was enacted in order to deal with sexual abuse and sexual exploitation of children in a comprehensive way, in line with obligations under the CRC. This Act defines different forms of sexual abuse under chapter 2, including penetrative and non-penetrative sexual assault⁶⁷, sexual harassment⁶⁸ and pornography.⁶⁹ The penalty for penetrative sexual assault is a minimum prison sentence of seven years, which can be extended up to life imprisonment. Aggravated assault is defined according to the identity of the perpetrator and the gravity of the assault and includes those categories of people who might be in positions of power or authority over children.⁷⁰ The qualitative nature of the crime is also looked at so that assault including use of a weapon, upon a child with a physical or mental disability or that results in making a girl pregnant are also included in the category of aggravated assault. The penalty is a minimum sentence of 10 years extendable up to life imprisonment.⁷¹ These penalties are welcome provisions in protecting children against sexual assault. Penalties for using a child in pornography are also prescribed and range from three years for keeping pornographic material involving a child to five years for “using a child for pornographic purposes.”⁷² These penalties are extended if the person is involved in “directly participating in pornographic acts” and thereby liable for prosecution under sexual assault provisions.

Another significant feature of the Act is that it includes provisions relating to abetment of sexual crimes against children. In the context of this report this means that abetment provisions apply to people that are involved with trafficking children for the purpose of CSE, who are punishable with the same penalties as prescribed for the perpetrator.⁷³ It also puts the onus of protection squarely on adults including family, teachers, doctors, community members and law enforcement through its provision on mandatory reporting. This casts a legal duty upon people to report known cases of child sexual abuse and failing to do this attracts a penalty of up to six months imprisonment and a fine.⁷⁴

⁶⁶ THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 (32 OF 2012)

⁶⁷ Ibid, Sections 3, 7 and 9.

⁶⁸ Ibid, Section 11

⁶⁹ Ibid, Section 13

⁷⁰ Ibid. Chapter 2. Section 3. This includes law enforcement, security forces, armed forces, heads of educational institutions, custodians of shelter etc.

⁷¹ Ibid. Chapter 2, Section 6.

⁷² Ibid. Section 13, 14 (1), (2), (3).

⁷³ Ibid. Section 16.

⁷⁴ Ibid. Section 21 (1)

NEPAL: The Penal Code of **Nepal** or the *Muluki Ain*, 1964 defines child as anyone aged under 16. However, with regard to penalties related to rape the code refers to five age brackets; under 10; 10 –under 14; 14 but under 16; 16 but under 20 and finally women above 20. The penalty for this ranges from 15 years imprisonment for children under 10 to 5 years for rape of an adult woman. Activists have pointed out that the rape laws need serious reform because they retain out-dated provisions such as the requirement that rape cases must be filed within 35 days to have legal standing. Another shocking provision states that rape of a sex worker is punishable only by a 500-rupee fine and perhaps up to one year in prison.⁷⁵

The Children’s Act of Nepal⁷⁶ prohibits the involvement of children in immoral professions and deals with child pornography stating that “no photograph of a child shall be taken or allowed to be taken, nor such photograph shall be distributed or exhibited for the purpose of engaging a child in an immoral profession.”⁷⁷ Unfortunately the penalty attached to contravention of this article, “punishment with a fine up to ten thousand rupees or with imprisonment for a term which may extend to one year or with both”, lacks severity.⁷⁸ This Act also prohibits torture or cruel treatment of a child although this is left undefined and does not mention sexual abuse per se.

b. Child Labour Related Legislation in Review Countries

BANGLADESH: The *Bangladesh Labour Act*, 2006, was enacted to consolidate and amend the laws relating to employment of labour. Chapter III of the Act specifically deals with the employment of children and adolescents. It states that no child shall be employed or permitted to work in any occupation or establishment.⁷⁹ A child is defined as a person below fourteen years of age and an adolescent is defined as someone aged between fourteen and eighteen years. It allows adolescents to be employed provided a medical practitioner grants a certificate of fitness in the prescribed form.⁸⁰ It prohibits parents or guardians of the child from entering into an agreement or allowing the service of the child to be utilized in any employment.⁸¹

The Act regulates working conditions to be observed for employment of adolescents, restricting hours of work and shift timings and stipulating that no adolescent can work in any establishment between 7pm and 7 am.⁸² Article 374 of the *Penal Code* also addresses forced labour stating that whoever compels any person to labour against the will of that person shall be punished with imprisonment for a term which may extend to one year, or with a fine, or both.

The Penal Code also seeks to deter slavery and bonded labour by laying down stringent penalties in Article 370 which states that whoever imports, exports, removes, buys, sells or disposes of any

⁷⁵ Mallika Aryal, Statute of Denial, 2014. Available at <http://nepalitimes.com/regular-columns/Interesting-Times/nepal-archaic-law-puts-deadline-on-reporting-sexual-crimes,368>

⁷⁶ Children's Act, 2048 (1992)

⁷⁷ Section 16. The Children’s Act, 1992

⁷⁸ Ibid. Section 53 (4)

⁷⁹ The Bangladesh Labour Act, 2006, Section 34(1).

⁸⁰ Ibid. Section 34(2)

⁸¹ Section 35, The Bangladesh Labour Act of 2006

⁸² Section 41, The Bangladesh Labour Act of 2006

person as a slave, or accepts, receives or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. A person who habitually deals in slaves shall be punished with imprisonment for life, or with punishment of a term not exceeding 10 years and also liable to a fine.

INDIA: In addition to the Constitutional prohibition aimed at preventing the employment of children below the age of 14 years in any hazardous employment, domestic laws have been enacted to comprehensively deal with child labour. The main Act in this regard is the *Child Labour (Prohibition and Regulation) Act, 1986*, the preamble of which states that it is intended to prohibit the engagement of children in certain areas and to regulate conditions of work of children in others.

It defines a child as any person up to 14 years old⁸³ and an adolescent as a person aged between 14-18 years.⁸⁴ The Act prohibits the employment of children in certain occupations including catering at railway establishments, construction work on the railway or anywhere near the tracks, plastics factories, automobile garages, etc. The act also prohibits children from working in places where certain processes are being undertaken, such as beedi making, tanning, soap manufacture, brick kilns and roof tile units.⁸⁵ This list was amended in 2006 when working as domestic workers as well as working in hotels, roadside eateries, dhabas, resorts and spas were added to the prohibited list.

Part III regulates the conditions of work in establishments wherein children are allowed to work and stipulates hours of work⁸⁶ and weekly holidays.⁸⁷ If an employer employs children in his establishment he is obliged to maintain a register which states the name and age of the child, hours worked and the nature of such work.⁸⁸ If someone permits any child to work in contravention of the provisions of section 3 he shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to one year or with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees or with both.⁸⁹ Any person, police officer or Inspector may file a complaint of the commission of an offence under this Act in a court of competent jurisdiction.⁹⁰

⁸³ The Child Labour (Prohibition and Regulation) Act, 1986 (Act 61 of 1986) Section 2(ii).

⁸⁴ Ibid. Section 23(i) (a).

⁸⁵ Ibid, Section 3.

⁸⁶ Ibid, Section 7.

⁸⁷ Ibid, Section 8.

⁸⁸ Ibid, Section 11

⁸⁹ Ibid, Section 14

⁹⁰ Ibid, Section 16(1)

Other relevant legislation includes *the Factories Act, 1948*⁹¹, *The Plantation Labour Act*⁹², *Merchant Shipping Act, 1951*⁹³, *Mines Act, 1952*⁹⁴, *The Motor Transport Workers Act, 1961*⁹⁵ and *Beedi and Cigar Workers (Conditions of Employment Act, 1966*⁹⁶ all aim to respectively prohibit employment of children in their industries.

The *Bonded Labour System (Abolition) Act, 1976* aims to abolish the system of bonded labour wherein generations work under bondage for the repayment of a small sum, which has been taken by some remote ancestor. It extinguishes the obligation of a bonded labourer to repay any bonded debt on the commencement of this Act.⁹⁷

NEPAL: Whilst Nepal does not have the most child labourers in South Asia in actual numbers, the ILO estimates that “in relative terms children in Nepal face the highest risk of being in child labour than elsewhere in South Asia, with over one quarter (26 per cent) of all 5-17 year olds engaged in child labour.” Children in Nepal continue to be engaged in labour in the agricultural sector as well as within the worst forms of child labour such as commercial sexual exploitation and hazardous brick kiln factories.⁹⁸

The Government of Nepal has made serious efforts to deal with the issue of child labour more effectively in recent years by strengthening the legal framework and employing more labour inspectors.

The primary act with regard to this issue is the *Child Labour (Prohibition and Regularization) Act, 2000* which states that it is necessary to prohibit engagement of children in factories, mining and other similar hazardous industries as well as to make provisions for health and safety for their engagement in other work.⁹⁹ The Act defines a child as a person under 16.¹⁰⁰ Engaging a child under 14 in labour is prohibited by section 3 of the Act and section 4 further states that no one will engage a child by pleasing, gratifying or misrepresenting him or due to under greed, fear, threat or coercion or by using any means against his will.

As with other countries of the region, the Act establishes a list of occupations prohibited for children, such as working in the tourism industry, workshops, laboratories, slaughterhouses, cold storage facilities, public transportation, construction, manufacturing, and energy production.¹⁰¹ If

⁹¹ Section 67: Prohibition of employment of young children-No child who has not completed his fourteenth year shall be required or allowed to work in any factory.

⁹² Section 24: No child who has not completed his twelfth year shall be required or allowed to work in any plantation.

⁹³ Section 109: No person under fourteen years of age shall be engaged or carried to sea to work in any capacity in any ship, except

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(a) in a school ship, or training ship, in accordance with the prescribed conditions; or

(b) in a ship in which all persons employed are members of one family; or

(c) in a home-trade ship of less than two hundred tons gross; or

(d) where such person is to be employed on nominal wages and will be in the charge of his father or other adult near male relative.

⁹⁴ Section 45: No child shall be employed in any mine, nor shall any child be allowed to be present in any part of a mine which is below ground or in any (open cast working) in which any mining operation is being carried on.

⁹⁵ Section 21: No child shall be required or allowed to work in any capacity in any motor transport undertaking.

⁹⁶ Section 24: Prohibition of employment of children-No child shall be required or allowed to work in any industrial premises.

⁹⁷ Bonded Labor System (Abolition) Act, 1976, Section 6.

⁹⁸ Bibek Bhandari, No life for a child: The grim reality of Nepal's child labourers. available at <http://edition.cnn.com/2013/08/14/world/asia/nepal-child-labor/>

⁹⁹ Preamble, Child Labour (Prohibition and Regularization) Act, 2000

¹⁰⁰ Child Labour (Prohibition and Regularization) Act, 2000, Sec 2(a).

¹⁰¹ United States Department of Labor, *2013 Findings on the Worst Forms of Child Labor - Nepal*, 7 October 2014, available at: <http://www.refworld.org/docid/5448a6490.html>

an establishment seeks to engage a child for work approval must be taken from the father/mother or guardian of the child.¹⁰² A certificate of fitness must be issued before a child is employed as a labourer.¹⁰³ The Act also regulates the hours and period of work for children¹⁰⁴ and the remuneration and facilities that have to be made available.¹⁰⁵

Penalties for violation are quite specific and fairly stringent. Section 19 lays out the different applicable penalties depending on which section of the act has been contravened. These include imprisonment up to three months or with a fine up to rupees ten thousand or with both if in contravention of Section 3(1) of the Act;¹⁰⁶ imprisonment up to one year or a fine up to rupees fifty thousand or with both if in contravention with Section 3 and Section 4 of the Act; Imprisonment up to one month or fine up to rupees three thousand or with both for a manager who commits acts in contravention to the ones mentioned in the Act. Section 19(6) provides that if someone repeats an offence under the Act he shall be punished every time with twice the punishment mentioned in the same sections.

c. Trafficking Related Legislation In Review Countries

BANGLADESH : The Human Trafficking Deterrence and Suppression Act (HTDSA), 2012, which repeals the previous '*Prevention of Repression against Women and Children Act*' has been described as a "spectacular achievement" by the Bangladeshi Government and implementing partners and is touted as a rights based piece of legislation placing "concerns for trafficking victims at the core of its functional fold."¹⁰⁷ The Act, in line with international obligations, provides a comprehensive definition of trafficking, which is inclusive, and gender-neutral covering men, women and children. Notably, the definition also acknowledges the various purposes for which people may be trafficked by stating that it covers "sexual-exploitation, labour-exploitation or any other form of exploitation."

Section 2 (15) of the Act provides a list of actions that would be considered 'exploitation' including fraudulent marriages, forcing a person to beg, forcing a person to engagement in the amusement trade or

"The selling, buying, recruitment, receipt, transportation, transfer, or harbouring of any person for the purpose of sexual-exploitation, labour-exploitation or any other form of exploitation whether in or outside of Bangladesh by means of (a) threat or use of force or other forms of coercion, or (b) abduction, fraud or deception, or of the abuse of any person's socio-economic, environmental or other types of vulnerability, or (c) of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person."

¹⁰² Child Labour (Prohibition and Regularization) Act, 2000, Section 6.

¹⁰³ Ibid, Section 7.

¹⁰⁴ Ibid, Section 9.

¹⁰⁵ Ibid, Section 10.

¹⁰⁶ Sec 3(1): Nobody shall engage in work a child who has not completed fourteen years of age as a laborer.

¹⁰⁷ Bangladesh National Woman lawyer's Association (BNWLA), 'Human Trafficking in Bangladesh: Analysis, Challenges and Recommendations', 2013.

removing a person's organ for the purpose of trade. The definition also deals with previous lacunae by covering both internal and international trafficking.

The HTDSA provides stringent penalties for the offence of trafficking stipulating the death penalty when it has taken place as an organized crime and life imprisonment otherwise.¹⁰⁸

Also notable are the aspects of the act that might work to enhance coordination and cooperation on sharing information and prosecutorial evidence on missing and trafficked children across borders. In this regard, trafficking offences are listed as extraditable.¹⁰⁹ Mutual legal assistance between the recipient and sending country is provided for and foreign documents may be admitted as evidence.

The Act also contains a strong protective regime to safeguard and rehabilitate victims of trafficking stipulating that all processes related to the identification, rescue, rehabilitation and repatriation of victims of trafficking will be conducted in a 'victim friendly' way and with special regard to the needs of women and children. Provisions include the establishment of more protective homes with services to be offered including medical care and psychological counselling and other rehabilitation services.¹¹⁰ Notably in the context of this report, the Act also stipulates several measures related to protection of victims during criminal trials and these are discussed in detail in section IV of this report.

One limitation within the current HTDSA is that while section 46 delegates power to the Government to enact Rules to fulfil the purposes of the Act, there is no specific time limit within which the Rules have to be created. This has meant that practitioners dealing with cases have faced problems handling cases and making decisions on specific issues. Legal activists have suggested that the most important areas for which rules need to be defined in order to ensure implementation and proper functioning of the HTDSA include a legal education mechanism for law enforcers, judicial officers, and public prosecutors and sustainable procedures of repatriation and return.¹¹¹

INDIA

Until recently, the primary legislation dealing with trafficking in India was the *Immoral Traffic Prevention Act*, (ITPA), 1956 supplemented by Provisions in the Indian Penal Code. According to this Act trafficking was defined in very narrow terms, focusing on those who procure persons for the purposes of prostitution.¹¹²

¹⁰⁸ Human Trafficking Deterrence and Suppression Act (HTDSA), 2012. Sections 6 and 7.

¹⁰⁹ Human Trafficking Deterrence and Suppression Act (HTDSA), 2012. Section 5.

¹¹⁰ Ibid. Sections 32-37.

¹¹¹ Bangladesh National Woman lawyer's Association (BNWLA), 'Human Trafficking in Bangladesh: Analysis, Challenges and Recommendations', 2013

¹¹² Section 5A of the Act defines trafficking as when a person recruits, transports, transfers, harbours or receives a person for the purpose of prostitution by means of: a) threat or use of force or coercion, abduction, fraud, deception or b) by abuse of power or a position of vulnerability or c) by giving or receiving of payment or benefits to achieve the consent of such person.

In 2013, the Criminal law (Amendment) Act introduced a new section to the Indian penal Code, namely Section 370 which defines the offence of trafficking thus replacing the prior Section 370, which dealt with the buying or disposing of any person as a slave. In line with international obligations, Section 370 criminalises anyone who recruits, transports, harbours, transfers or receives a person using certain means (including threats, force, coercion, fraud, deception, abduction, abuse of power, or inducement) for purposes of exploitation. Bridging the lacuna in ITPA, exploitation is said to include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs. Punishment for trafficking of a child is rigorous imprisonment for not less than ten years, which may be extended to life imprisonment and a fine. Penalties are further enhanced for trafficking more than one child and for repeat offences. Section 370 is a welcome addition to the IPC expanding the definition of trafficking so that it can be “used to prosecute traffickers in a range of labour sectors, including India’s brick kilns, rice mills, farms, embroidery factories, mines, stone quarries, homes and carpet factories and not only sex work”¹¹³ and imposing strict penalties on traffickers for a broad range of purposes.

In addition, “recognising that targeting the demand for trafficked labour is often crucial in the fight against trafficking, Section 370A criminalises anyone who engages a trafficked minor or adult for sexual exploitation.”¹¹⁴ The penalty for sexually exploiting a trafficked minor is rigorous imprisonment for not less than 5 years but which may extend to 7 years and a fine.¹¹⁵ However, the employers of trafficked labour in other sectors are not criminalised under this section.

The Committee on the Rights of the Child has expressed concern about these provisions with regard to them still not being fully compliant with requirements under the OPSC, which India has ratified. Specifically the Committee has recommended that the Penal Code should be amended with a view to removing the *requirement* of an element of force or other forms of coercion, abduction, fraud and deception when recruiting, harbouring, transferring, or receiving a child for the purpose of exploitation. In addition it also suggests that there should be an express stipulation that child victims of the offences under the Optional Protocol are not considered as offenders.¹¹⁶

Other IPC provisions which are relevant to missing and trafficked children include section 361 which stipulates that a kidnapping is said to have occurred when any person takes or entices a minor less than 16 years of age (if a male) and under 18 years of age if female without the consent of their guardian.¹¹⁷ The crime of kidnapping is punishable by imprisonment of a term, which may extend to seven years and shall also be liable for a fine.¹¹⁸ Additional provisions which are more relevant to sexual abuse and exploitation can be found in Section 366A which

¹¹³ Kotiswaran,P. A Battle Half-Won: India’s New Anti-Trafficking Law. Available at <http://traffickingroundtable.org/2013/04/a-battle-half-won-indias-new-anti-trafficking-law/>

¹¹⁴ Kotiswaran,P. A Battle Half-Won: India’s New Anti-Trafficking Law. Available at <http://traffickingroundtable.org/2013/04/a-battle-half-won-indias-new-anti-trafficking-law/>

¹¹⁵ Section 370 and 370 (a), The Criminal Law Amendment Act, 2013. Available at <http://indiacode.nic.in/acts-in-pdf/132013.pdf>

¹¹⁶ UN Committee on the Rights of the Child (CRC), *Concluding observations on the report submitted by India under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography : India*, 13 June 2014, available at: <http://www.refworld.org/docid/541coc184.html>

¹¹⁷ Section 361, Indian Penal Code, 1860, Act 45 of 1860

¹¹⁸ Section 363, Ibid.

addresses the situation of anyone who induces a girl under the age of 18 to go from any place or to do any act with the intention that such girl will be forced or seduced to have intercourse with another person. The person committing such an offence shall be imprisoned for up to ten years and may also have to pay a fine. Section 366B deals with importation of a girl from a foreign country and is punishable with imprisonment which may extend to 10 years as well as a fine. Section 372 and 373 are also relevant in this context specifically addressing the selling of a minor for the purpose of prostitution. Usefully, these provisions are gender neutral.

Immoral Trafficking Prevention Act: ITPA defines prostitution as the sexual exploitation or abuse of persons for commercial purposes or for consideration in money or in any other kind.¹¹⁹ A child is defined as anyone under 18, in line with the CRC.¹²⁰ However, it also creates a category of ‘major’ children aged between 16-18 years. As mentioned above trafficking is defined very narrowly under this act. Prostitution is defined as the sexual exploitation or abuse of persons for commercial purposes or for consideration in money or in any other kind.¹²¹ Any person who commits the offence of trafficking shall be punishable on first conviction with rigorous imprisonment for a term, which shall not be less than seven years and in the event of a second or subsequent conviction with imprisonment for life.¹²² If a person attempts to commit or abets in trafficking, he shall also have been deemed to have committed the offence and be liable for the same punishment.¹²³

Certain concerns have been raised with regard to implementation of this Act over the last few decades. The overwhelming focus on ‘immoral’ purposes has meant that the act has been ineffective in terms of criminalizing the abuse and harms suffered during the trafficking process. Rather it has been used “to criminalize and punish any third party, including brothel owners, keepers, managers and their assistants, who benefit from the exploitation of prostitution.”¹²⁴ Whilst ITPA does not criminalise the commercial exchange of sex, it does penalize acts like keeping a brothel¹²⁵, soliciting in a public place¹²⁶, living off the earnings of prostitution and living with or habitually being in the company of a prostitute.¹²⁷ Section 8 criminalises ‘solicitation’ which refers to “*drawing attention of potential customers from a visible, conspicuous site, whether in a street or private dwelling.*”¹²⁸ This directly targets sex workers who usually confess rather than facing detention and trial, which would lead to loss of earnings. Research shows that over 90% of those arrested under ITPA are female sex workers.¹²⁹ As sex workers unions have explained, pleading guilty involves them in a “*vicious cycle of criminalisation*”¹³⁰ with police using Section 8 to repeatedly harass and detain known sex workers even if they do not intend to charge them.

¹¹⁹ Immoral Traffic Prevention Act, 1956, Section 2(f).

¹²⁰ Section 2 (aa), Immoral Traffic Prevention Act, 1956

¹²¹ Immoral Traffic Prevention Act, 1956, Section 2(f).

¹²² Ibid. Section 5B(1).

¹²³ Ibid. Section 5B(2)

¹²⁴ IRC, 2009. P 24.

¹²⁵ See Section 3 ITPA

¹²⁶ See Section 8, ITPA

¹²⁷ See Section 4, ITPA

¹²⁸ National Network of Sex Workers and Lawyers Collective, ‘Sex Workers meet Law Makers’, Report of meeting, March 2011

¹²⁹ Asia-Pacific Regional Dialogue of the Global Commission on HIV and the Law, ‘Issues Brief: Laws and Practices Relating To Criminalization Of People Living With HIV and Populations Vulnerable To HIV’, 2011 (Pg 12)

¹³⁰ Ibid. Pg 4

Particularly relevant to this report is the fact that ITPA has not clearly defined *who* may be prosecuted and legal analysts have suggested that a literal reading of the law “renders a trafficked and prostituted child liable for prosecution” under the solicitation provisions.¹³¹ This ambiguity in the law has led to spurious distinctions being made wherein children rescued from brothels are recognised as victims of trafficking whereas those found soliciting on the streets are treated as child offenders.¹³² Indeed since ITPA was implemented, there have been cases of children being arrested and presented before the Juvenile Justice Board rather than the Child Welfare committee despite provisions in the *Juvenile Justice (Care and Protection of Children) Act, 2000*, stating that a rescued child must be treated as a child in need of care and protection and placed in safe custody.

Ambiguities notwithstanding, there are presumptions within ITPA that also protect child victims of trafficking into CSE. Firstly, the use of the word ‘persons’ means that the Act is gender neutral and therefore applies to both girls and boys.¹³³ In addition, ITPA confers statutory powers upon law enforcement officials, which commonly result in operations involving raid and rescue. If a child is found in a brothel and on medical examination it is proven that the child has been sexually abused, ITPA stipulates that it shall be presumed that the child has been detained for purposes of prostitution and has been sexually exploited for commercial purposes.¹³⁴ Section 5 stipulates that if a person is taken or engaged in prostitution against the will of that person, the punishment-imprisonment for a term of seven years shall extend to a term of 14 years and to a life term if the offence is committed with respect to a child.¹³⁵ Under Section 16 of the Act, a magistrate may pass directions to rescue a person engaged in the trade of prostitution upon receipt of information.¹³⁶ The Magistrate also has the discretion to decide whether a rescued child should be returned to parents or guardian or put into a child protection home and the Act states that “the magistrate should satisfy himself about the capacity or genuineness of these persons to keep the children” by investigating this through a recognised welfare institution.¹³⁷ This is an important provision as research has shown that fictitious parents who are actually pimps and brothel owners have often made applications for custody of rescued children.¹³⁸ The Act also incorporates the establishment of protection homes by the state governments.¹³⁹ These provisions should ostensibly protect children during the process of rescue and rehabilitation.

Various amendments to ITPA have been proposed including formulating a new definition of trafficking in line with the Palermo Protocol and deleting the section on soliciting, so that women

¹³¹ Kathmandu School of Law, ‘Regional Study for the Harmonization of Anti-Trafficking Legal Framework in India, Bangladesh and Nepal with International Standards’, 2007. Pg 151.

¹³² Perna vs. State of Maharashtra

¹³³ Kathmandu School of Law, ‘Regional Study for the Harmonization of Anti-Trafficking Legal Framework in India, Bangladesh and Nepal with International Standards’, 2007.

¹³⁴ Section 6(2-A), Immoral Traffic Prevention Act, 1956

¹³⁵ *Ibid*

¹³⁶ Section 16, Immoral Traffic Prevention Act, 1956

¹³⁷ Section 17 (a), Immoral Traffic Prevention Act, 1956

¹³⁸ Kathmandu School of Law, ‘Regional Study for the Harmonization of Anti-Trafficking Legal Framework in India, Bangladesh and Nepal with International Standards’, 2007.

¹³⁹ Section 21, Immoral Traffic Prevention Act, 1956

and children who are victims of trafficking are not re-victimized through a criminal justice process. However, the proposed amendment bill was also critiqued by civil society groups on legal, human rights and public health grounds and finally lapsed in 2009.¹⁴⁰ It is worth noting that the Ministry for Women and Child Development has issued an advisory to state governments, which included mention of implementation of ITPA and specifically addressed the criminalisation of victims under section 8. The advisory states, “it is generally noticed that sections 8 and 20 of ITPA, which focuses on the victims, are more often invoked as a result of which the victim is re-victimized and the exploiters are not punished. It is, therefore, advised that sections 3, 6 and 7 which pertains to pimps, brothel owners, clients who are actual perpetrators of the crimes need to be invoked rather than sections 8 and 20.” The advisory also suggested that law enforcement agencies need to take a victim centric approach during investigations.¹⁴¹

ITPA and the Debate around Consent

Another issue with ITPA is the question of consent. All the provisions in ITPA exist “with or without consent” of the women involved thus infantilising adult women. The assumption that adult women could not possibly have given their consent to be sex workers is inconsistent with laws on other issues, such as abduction or illegal confinement, where consent or the lack thereof is considered critical to determining whether a crime has taken place. Powers given to police for rescuing people from brothels make no distinction between minor or adult and voluntary vs coerced sex workers meaning that anyone found in the brothel at the time of a raid can be forcibly removed and forcibly rehabilitated in a women’s shelter.¹⁴²

This conflation of trafficking and prostitution has resulted in strategies, that are meant to combat trafficking, being at odds with programmatic interventions and policy that would be required to ensure rights and services for sex workers.

The Juvenile Justice (Care and Protection of Children) Act, 2000:

“An Act to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection, by providing for proper care, protection and treatment by catering to their development needs, and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institutions established under this enactment.”¹⁴³

This Act is highly relevant in the context of protecting and promoting the rights of children in India and covers children in conflict with the law as well as children in need of care and protection.

¹⁴⁰ For a detailed critique of the proposed amendments see

<http://www.lawyerscollective.org/files/LCHAU%20submission%20on%20ITPA%20Bill%20for%20website%28ITPA%29.pdf>

¹⁴¹ The advisory was issued in response to a Supreme Court order (Vishal jeet vs. Union of India) stipulating that every state government should set up “a state advisory committee for preventing and combating trafficking of women and children for commercial sexual exploitation.” For the text of this advisory see UNODC. Current Status of Victim Service Providers and Criminal Justice Actors in India on Anti-Human Trafficking, Country Assessment. 2013. Annexures.

¹⁴² Section 14, 15, 16, ITPA

¹⁴³ The Juvenile Justice (Care And Protection Of Children) Act, 2000 (Act No. 56 of 2000) available at <http://khoyapaya.gov.in/mpp/resources/Juvenile%20Justice%20Act%202000.pdf>

Section 2 of the Act explicitly defines children in need of care and protection as including those:

- who are being or are likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts
- who are found vulnerable and are likely to be inducted into drug abuse or trafficking,
- who are being or are likely to be abused for unconscionable gains¹⁴⁴

Therefore, children in situations of enhanced vulnerability to trafficking are covered as are children rescued from exploitation of any sort. Although the Act does not define terms such as trafficking, abuse or sexual abuse, it does make punishable certain crimes related to trafficking stating, “whoever ostensibly procures a juvenile or the child for the purpose of any hazardous employment keeps him in bondage and withholds his earnings or uses such earning for his own purposes shall be punishable with imprisonment for a term which may extend to three years and shall be liable to fine.”¹⁴⁵

The Goa Children’s Act, 2003: Certain state Acts are also worth noting in this context. Until CLA, 2013, The *Goa Children’s Act, 2003*, although not nationally applicable, was the only law in India containing a comprehensive definition of trafficking, defining it as “the procurement, recruitment, transportation, transfer, harbouring or receipt of persons, legally or illegally, within or across borders, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving payments or benefits to achieve the consent of a person having control over another person, for monetary gain or otherwise.”¹⁴⁶

This law explicitly prohibits the trafficking of children for employment although the penalties may not be stringent enough to act as a deterrent (imprisonment for three months and a fine of 50,000 rupees). With specific regard to trafficking for commercial sexual exploitation the law “prohibits child prostitution, provides for the removal of child prostitutes and provides for a punishment of imprisonment for one year and fine up to 100,000 rupees for any person who exploits a child for commercial sexual exploitation. It also prohibits the system of ‘devadasi’ or the dedication of a minor girl to a temple/god.”¹⁴⁷ The Goa Act also prohibits the sale of children and involves various stakeholders such as airport authorities, traffic police, railway police and border police, to report suspected cases of trafficking in children.¹⁴⁸

A New Law on the Cards: As noted, many existing laws deal with trafficking albeit in ways that are limited in scope (for instance only in terms of CSE or only applicable to certain states Like Goa). The Government of India is now planning to introduce a comprehensive anti-trafficking law that will cover forced labour, slavery and sexual exploitation and an inter-ministerial committee under the Cabinet secretary, will pilot the draft bill.¹⁴⁹ Anti-trafficking activists have welcomed the

¹⁴⁴ Ibid. Section 2 (d)

¹⁴⁵ Ibid. Section 26.

¹⁴⁶ Section 2, Goa Children’s Act, 2003.

¹⁴⁷ Bharwaj and Diwan, 2011. p.127.

¹⁴⁸ Section 8 (15), Goa Children’s Act, 2003.

¹⁴⁹ <http://nlrd.org/a-law-for-all-laws/>

proposal for an omnibus legislation on trafficking feeling that it will address the lacunae in the current law as well as broaden protective provisions and help in prosecution of trafficking offences since police currently have to deal with too many laws each time a minor is rescued. As explained by Shakti Vahini, “in most cases, girls are brought from one state to another with the promise of domestic work and then forced into prostitution. As such, several acts such as the Child Labour Act, Juvenile Justice Act, Interstate Migration Act and Protection of Children from Sexual Offences Act come into play. One single act will help law enforcement agencies in filing strong charges and in giving justice to the victims.”¹⁵⁰

Nepal

In Nepal, The *Trafficking In Persons and Transportation Control Act (2007)* prohibits human trafficking and transportation and seeks to protect and rehabilitate victims of trafficking through its various provisions.

Trafficking Definition according to the Act

Section 4 (2) of the Act defines trafficking as: Taking a person out of the country for the purpose of buying and selling. And also taking anyone from his/her home, place of residence or from a person by any means such as enticement, inducement, misinformation, forgery, tricks, coercion, abduction, hostage, allurements, influence, threat, abuse of power and by means of inducement, fear, threat or coercion to the guardian or custodian and keep him/her into ones custody or take to any place within Nepal or abroad or hand over him/her to somebody else for the purpose of prostitution and exploitation.

A victim is defined as a person who is sold, transported or put into transportation.¹⁵¹ A child is defined as a person under the age of 18.¹⁵² Section 4 of the Act defines specific acts that constitute human trafficking. These include; selling or purchasing a person for any purpose; utilizing someone for the purpose of prostitution, with or without any benefit; extracting human organs except when otherwise determined by law and indulging in prostitution. Human transportation includes taking a person out of the country or taking anyone away from their home and internal trafficking is also covered.

Concerns have been raised about continuing lack of clarity on the definition of trafficking. Whilst the Act defines forcing someone into prostitution or organ extraction as trafficking, forcing someone into other forms of exploitation is regarded as human transportation.¹⁵³ Thus prostitution remains the primary focus of anti-trafficking initiatives. As rights activists in Nepal point out, this conflation “stigmatizes survivors of trafficking, criminalises sex workers, and fails to provide justice to individuals who have been trafficked for purposes other than sex work.”¹⁵⁴ This conflation has also led to confusion related to where cases should be registered. Instances of

¹⁵⁰ Ibid.

¹⁵¹ Section 2(c), Human Trafficking and Transportation (Control) Act 2007

¹⁵² Section 2(d), *ibid.*

¹⁵³ Section 4 (2) (b), Human Trafficking and Transportation (Control) Act 2007

¹⁵⁴ Forum for Women, Law and Development (FWLD), “Human Trafficking and Transportation (Control) Act, 2007: Its Implementation.” P.36. 2014.

trafficking involving men as victims have not been reported as human trafficking and are instead reported under the Foreign Employment Act, which has implications in terms of penalties as well as compensation. These sorts of cases also hinder progress in terms of understanding new forms of trafficking and using the law effectively to prosecute these.

However, the Act does contain positive changes designed to facilitate prosecution of cases. These include the provision in section 9 that the burden of proof is shifted to the accused, which makes the prosecutor's task easier. In addition section 6 states that the testimony of a trafficked person that has been authenticated in court can be used as evidence even if she/he does not appear again during the trial.

Section 13 of the Act, stipulates important measures relating to establishing rehabilitation centres for physical and emotional treatment as well as for social rehabilitation and to facilitate family reconciliation with the victim. Stigma and rejection by the community and family are often faced by repatriated victims of trafficking, especially girls, so planning of these measures is critical.

In terms of punishment, Section 15 prescribes penalties ranging from *20 years imprisonment* with a fine of 2,00,000 rupees for buying or selling a human being to *10-15 years imprisonment and a fine of 50-100,000 rupees* for forcing someone into prostitution. Interestingly, the Act places an additional penalty on parents or those known to the victim stating that they will be liable for additional punishment because of their relationship. Clearly this clause recognizes that parents and relatives are often complicit in trafficking, especially of children.¹⁵⁵

The Children's Act 1992, providing for the protection of the rights and interests of children in Nepal, specifies in section 14 that children shall not be offered to a god for any financial compensation and in section 16 that children shall not be involved in an immoral profession. In addition, the Act imposes an obligation on the parents to make arrangements to bring up their children and provide for their education, health care, sports and recreation facilities as per the financial status of the family.¹⁵⁶ The Act mandates that no child shall be subjected to torture or cruel treatment.¹⁵⁷ In order to enforce the rights set out in Section 4 and Section 7, the Act allows *every person* to file a petition on behalf of the child before a District Court and upon enquiry into the matter the Court may enforce the right by issuing the appropriate order, direction or writ. Although this ostensibly means that a child could seek remedy directly from the court, obstacles related to children's access to justice (lack of awareness, literacy, finances, transport) would be almost insurmountable for children, especially those living in rural areas. However, this is still a useful provision, which presumably allows friends, relatives, teachers, community leaders or law enforcement officials to take cognisance of the situation of a child in a vulnerable situation who might be particularly at risk of going missing or being trafficked.

¹⁵⁵ Section 15(4), *ibid*.

¹⁵⁶ *The Children's Act, 2048 (1992)*, Section 4.

¹⁵⁷ *Ibid*. Section 7

IV. PROTECTION, REPATRIATION AND REHABILITATION OF VICTIMS OF TRAFFICKING

This section of the report examines some of the main provisions that exist to protect survivors of trafficking, in the three countries with regard to criminal justice procedures, compensation, repatriation and rehabilitation.

A. Child Friendly Procedures within the Criminal Justice System

International obligations prescribe a range of measures that should be taken by countries to protect and assist victims of trafficking. The OPSC is particularly pertinent in this regard laying out a range of measures, which are specifically aimed at protecting child victims at all stages of the criminal justice process. These are worth noting because all three countries have ratified this protocol and these standards can act as a yardstick by which to assess progress towards a system that substantively protects children in this situation. These measures include:

- Informing child victims of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases;
- Allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law;
- Providing appropriate support services to child victims throughout the legal process;
- Protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims;
- Providing, in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
- Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims.
- States Parties shall ensure that uncertainty as to the actual age of the victim shall not prevent the initiation of criminal investigations, including investigations aimed at establishing the age of the victim.
- States Parties shall ensure that, in the treatment by the criminal justice system of children who are victims of the offences described in the present Protocol, the best interest of the child shall be a primary consideration.
- States Parties shall take measures to ensure appropriate training, in particular legal and psychological training, for the persons who work with victims of the offences prohibited under the present Protocol.¹⁵⁸

In each of the reviewed countries, provisions to protect children who are victims or witnesses to crime, within the justice system do exist. Procedural law, substantive law, case law and government directives all contain provisions that have a bearing on this issue. It is important to note that case law in each country is also part of domestic law and “provides an important insight into the direction that the law is taking and the interpretation that courts may have on any given

¹⁵⁸ Ibid. Article 8.

provision of law.”¹⁵⁹ Case law has helped countries to define parameters related to missing children and trafficking and to affirm victim’s rights to protection, rehabilitation and compensation. In addition, the courts have been highly instrumental in pushing forward progressive measures related to child friendly procedures that protect the rights of child survivors of trafficking and exploitation. In this section we examine some of the most relevant laws or judgments in this context in each country.

As noted by the National Rapporteur on Trafficking in Women and Children in Nepal, there are many factors that influence survivor’s decisions on reporting the crime and attempting to get redress from the courts. These include, “lack of legal awareness; undue influence by the perpetrators; trauma and psychological suffering; fear of humiliation, stigma, and discrimination; police bias, incompetence with regard to women’s and children’s issues; lengthy and cumbersome court proceedings; high cost of access to justice; distrust toward justice institutions; and lack of financial support and very low likelihood of receiving compensation.”¹⁶⁰ Ensuring access to justice for survivors of trafficking and especially children, involves addressing these deterrents by creating protective mechanisms that can uphold the rights of the survivor throughout the investigation and prosecution process.

In **India** some of the most detailed provisions in this context can be found in the above-mentioned Protection of Children from Sexual Offences Act (POCSO). This is a notable piece of legislation that deals with the critical area of access to justice for children making specific provisions to avoid re-victimisation of the child at the hands of the justice system. Child friendly measures are prescribed including: establishing special courts that conduct the trial in-camera and without revealing the identity of the child; ensuring that the child is not called upon repeatedly to testify in court; involvement of interpreters, counsellors, or other professionals to assist the child; ensuring that the child has a parent or other trusted person accompanying them; the right of a child victim to free legal assistance and allowing regular recesses.¹⁶¹ The Act also stipulates that a case of child sexual abuse must be disposed of within one year from the date the offence is reported.¹⁶²

These measures are in line with international protocols on ensuring child friendly justice for children and are an important feature of the law. Significantly, the MWCD has, in accordance with Section 39 of the law also come up with detailed guidelines for use by professionals and experts on implementing the law.¹⁶³ These provide assistance and instruction on different aspects of POCSO including laying down guidance on how to interview children (see text box) how to implement legal processes and procedures and advice to medical and mental health professionals. The guidelines also address the specific vulnerabilities of children with special needs.

¹⁵⁹ UNODC, Responses to Human Trafficking in Bangladesh, India, Nepal and Sri Lanka: Legal and Policy Review. 2011. UNODC Regional Office for South Asia.

¹⁶⁰ Nepal National Human Rights Commission (2012), Trafficking in Persons, Especially of Women and Children in Nepal. National Report 2011. Office of the Special Rapporteur on Trafficking in Women and Children.

¹⁶¹ The Protection Of Children From Sexual Offences Act, 2012 (32 Of 2012). Chapter VIII and Chapter IX.

¹⁶² Ibid. Section 35

¹⁶³ Ministry of Women and Child Development. Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act, 2012. 2013. Available at <http://wcd.nic.in/act/POCSO%20-%20Model%20Guidelines.pdf>

MWCD Guidelines on interviewing a child

Reasons for interviewing the child:

- To get a picture of the child's physical and emotional state;
- To establish whether the child needs urgent medical attention;
- To hear the child's version of the circumstances leading to the concern;
- To get a picture of the child's relationship with their parents or family;
- To support the child to participate in decisions affecting them according to their age and maturity;
- To inform the child of further steps to be taken in the enquiry.

Interview setting

- The more comfortable a child is, the more information he is likely to share. The interview as far as possible should be conducted in a safe, neutral and child friendly environment.

Things to be kept in mind while interviewing a child:

- Children should be approached with extreme sensitivity and their vulnerability recognized and understood
- Try to establish a neutral environment and rapport with the child before beginning the interview.
- Always identify yourself as a helping person and try to build a rapport with the child.
- Ask the child if he/she knows why they have come to see you. Children are often confused about the purpose of the interview or worried that they are in trouble.
- Avoid touching the child and respect the child's personal space. Do not stare at the child or sit uncomfortably close.
- Do not make false promises. For example, do not say, "Everything will be okay" or "You will never have to talk about this again."
- Ask the child to describe what happened, or is happening, to them in their own words. The interviewer should, as far as possible, follow the child's lead; however, he may have to delicately introduce the topics of the abuse
- Avoid the use of leading questions that imply an answer or assume facts that might be in dispute and use direct questioning only when open-ended questioning/free narrative has been exhausted.
- Try to establish the child's developmental level in order to understand any limitations as well as appropriate interactions. It is important to realize that young children have little or no concept of numbers or time, and that they have limited vocabulary and may use terminology differently to adults, making interpretation of questions and answers a sensitive matter.

The Goa Children's Act, 2003 contains a number of provisions with regard to the protection of rights of child victims including providing for the establishment of a Children's Court which is to try all offences against children. Section 27 (2) of the Act specifically states that, the children's court shall be guided at all times by the best interests of the child in all its procedures and this includes consideration of the space and the clothing worn by members of the legal profession, which should be consciously and deliberately child-friendly. Section 32 contains a number of provisions

for the protection of child victims including provisions with regard to confidentiality; care during cross - examination of child witnesses; care of special needs of child victims and witnesses; presence of counsellors/ social workers while recording testimony; provisions of in camera trials etc.¹⁶⁴

The Ministry of Women and Child Development (MWCD) has also issued a *Protocol for pre-rescue, rescue and post-rescue operations of child victims of trafficking for commercial sexual exploitation*. This contains useful protective provisions but is limited in that it only relates to child victims of trafficking for the purpose of CSE. Usefully this protocol has been translated into regional languages and is supposed to be widely distributed amongst stakeholders in different states.¹⁶⁵

In **Bangladesh** the Human Trafficking Deterrence and Suppression Act (HTDSA), 2012 specifically addresses the provision of child-friendly procedures during criminal trial in chapter 5. Notably the Act directly deals with children stating that for any child victim or witness, the “principles of welfare and the best interest of the child...as well as the provisions in different international instruments” shall be followed. Stigmatising or victimizing the child or putting the child into a remand home are expressly prohibited and all children must be dealt with through “the intervention of a child friendly officer and processes.”¹⁶⁶ This article with its reference to international obligations and the best interests of the child would seem to indicate that children must be dealt with according to internationally agreed upon child friendly procedures such as those stipulated in the UN guidelines. A recent country assessment acknowledged that the Act provides for victim protection during judicial proceeding but stated “it is unclear how frequently officials employed such protections.”¹⁶⁷

In **Nepal**, the Children’s Act contains several provisions, which aim to protect children who come into contact with the justice system. Whilst the Juvenile Justice Procedure Rules¹⁶⁸ rules apply only to children in conflict with the law, provisions under the Children’s Act apply to all children. Section 49 of this Act stipulates that court proceedings should remain closed to the public in cases involving children. The privacy of the child is protected and court approval is required before any information and pictures relating to these cases is released. In addition, lawyers and parents or guardians are permitted to attend, as are child protection professionals with the permission of the judge.¹⁶⁹ The General Code also contains relevant provisions stipulating for instance that courts must give priority to cases involving children. It also states that children under

¹⁶⁴ Kathmandu Law School and Terres des Hommes, Regional Study for the harmonization of the Anti-Trafficking legal Framework in India, Bangladesh and Nepal with International Standards’. Pg 185. 2004

¹⁶⁵ United Nations Office on Drugs and Crime (UNODC). Current Status of Victim Service Providers and Criminal Justice Actors in India on Anti Human Trafficking. 2013.

¹⁶⁶ Human Trafficking Deterrence and Suppression Act (HTDSA), 2012. Section 38.

¹⁶⁷ United States Department of State, 2015 Trafficking in Persons Report - Bangladesh, 27 July 2015, available at: <http://www.refworld.org/docid/55b73c1531.html>

¹⁶⁸ Juvenile Justice Procedural Rules (2063), 2006.

<http://www.ccwb.gov.np/uploads/userfiles/resources/English/Rules/Juvenile%20Justice%20procedural%20Rules,2063%282006%29.pdf>

¹⁶⁹ Children's Act, 2048 (1992).

the age of 16 without parental or guardian care must be prioritised¹⁷⁰ and juvenile justice cases must be disposed of within 120 days.¹⁷¹

Although child victims of trafficking should never be subject to prosecution, a recent assessment suggested that “during some raids of cabin restaurants, dance bars, and massage parlours, police reportedly arrested and imprisoned victims, including girls.”¹⁷² Protection for children in conflict with the law is detailed in the JJ Rules¹⁷³ and provisions include:

- police should be in civil dress when dealing with children
- children cannot be interrogated for more than 1 hour
- They can be accompanied by parent or a guardian
- A special juvenile bench must hear cases and should be constituted of trained judges as well as a social activist, child specialist or child psychologist
- A child friendly environment should be provided for interrogation and proceedings of the case

Similarly, the Child Rights Act has provisions on protection of child rights during investigation and prosecution. For instance, an investigation can be carried out without keeping the child in police custody and they may stay with parents or a guardian on condition that they are present as and when required for the purposes of Investigation. The Human Trafficking and Transportation Control Act (HTTCA), 2007, also contains victim protection provisions although a recent assessment suggests that these are being inconsistently applied.¹⁷⁴ Indeed, the Committee on the Rights of the Child has observed that while the HTTCA is a welcome move forward in terms of fighting trafficking of children it is concerned with “the lack of privacy, legal representation and protection that victims of trafficking face during the criminal justice process, and a lack of rehabilitation and reintegration shelters thereafter.”¹⁷⁵

i. Victim and Witness Protection

“The absence of a victim/witness protection protocol exposes [victims of trafficking] to pressure, exploitation and threats from traffickers forcing them to turn hostile or worse pushing them back into the trade due to lapses in background verification of applicants seeking release of victims.”¹⁷⁶

In trafficking cases, the victim is very often the primary witness as well. It is difficult to overstate the importance of ensuring a protective regime for victims and witnesses as well as for informants who may have information that is critical to the prosecution. As one representative of an NGO

¹⁷⁰ General Code, Part 2. Chapter 1. Number 11.

¹⁷¹ Juvenile Justice Procedural Regulations, section 16.

¹⁷² United States Department of State, *2015 Trafficking in Persons Report - Nepal*, 27 July 2015, available at: <http://www.refworld.org/docid/55b73bbec.html>

¹⁷³ For detailed guidelines relating to Juvenile Justice please see: Juvenile Justice Procedural Rules (2063), 2006. Available at <http://www.ccwb.gov.np/uploads/userfiles/resources/English/Rules/Juvenile%20Justice%20procedural%20Rules,2063%282006%29.pdf>

¹⁷⁴ Forum for Women, Law and Development (FWLD), “Human Trafficking and Transportation (Control) Act, 2007: Its Implementation.” 2014

¹⁷⁵ Ibid.

¹⁷⁶ <http://nlrd.org/national-legal-services-authority-submits-recommendations-to-supreme-court-for-combating-human-trafficking-in-india/>

explained, “While NGOs and the State want justice and prosecutors behind bars, prosecutions are not always in the best interests of the survivor. There are no guarantees that the survivor will get protection, win the case and eventually be provided with redress and compensation.” Interviews with key stakeholders in Bangladesh reiterated this point with the founder of a legal aid NGO stating, “Most victims do not want to file cases. They are often being given money from the perpetrators. There is not much advantage seen to be got from filing cases.”¹⁷⁷

Providing security is often key to ensuring that witnesses (survivors or informants) do not

Victims face intimidation as well as societal stigma

In a recent case a girl was rescued from Delhi and sent back home. The traffickers tried to bribe her to ensure that she did not testify. After this they threatened her family. She refused to come to court and asked the NGO that had rescued her to provide protection. They attempted to facilitate by contacting the state police but there was no response. During this process court summons kept arriving at the village which caused more problems for the survivor since she had to face speculation, stigma and gossip from the community. The NGO filed a petition for protection with the court on her behalf and the girl also asked to speak to the judge directly. In this case a highly sensitised judge ordered the police to bring her to the court and protect her. She arrived in Delhi within a day of this communication and testified in the case. The trafficker was jailed for ten years. Source: Key Informant Interview with rescue and rehabilitation NGO, Delhi, November 2015.

withdraw the case, change their statements or indeed refuse to file a case at all. As a representative from a highly experienced rescue and rehabilitation NGO in Delhi explained, “the criminal prosecution of traffickers is a critical aspect of addressing trafficking, deterring potential traffickers and of course of receiving justice for the victim. However, the case collapses without testimony of the victim and traffickers will do a lot to ensure that the victim does not testify. For us the rescue is the first step but the ultimate goal is to get a conviction. For this we need to properly support and protect the victim with all the services they require and we also need to gather evidence efficiently.”¹⁷⁸

Unfortunately comprehensive witness and victim protection laws are conspicuous by their absence in the three countries. As legal experts point out, “currently in this sub-continent, neither...India, Bangladesh [or] Nepal...have a distinct law, policy, guidelines or programs to protect victim witnesses before, during or after the trial. Though some existing laws (penal codes, criminal procedure codes and constitutions) refer to witness protection, provisions appear to be insufficient to adequately protect women and children victim witnesses who have been trafficked for sexual exploitation.”¹⁷⁹

The Forum for Women, Law and Development (FWLD) has filed a writ petition before the Supreme Court of Nepal with regard to witness protection. In response, the Supreme Court issued a directive order to the government to take necessary steps to prepare a separate law in order to create a victim-witness protection and assistance program.¹⁸⁰ Whilst Indian laws have

¹⁷⁷ Key Informant Interview. BNWLA. Dhaka. October 2015

¹⁷⁸ Key Informant Interview. Shakti Vahini. Rescue and Rehabilitation NGO Delhi. November 2015.

¹⁷⁹ Barrister M. Aftab Uddin. Protection of Victim of Crime and Witness, State Responsibility. Law Journal Bangladesh. January, 2015. Available at <http://www.lawjournalbd.com/2015/01/protection-of-victim-of-crime-and-witness-state-responsibility/>

¹⁸⁰ <http://www.spotlightnepal.com/News/Article/-Need-Of-Victim-Witness-Protection->

some provisions for witness protection there is no comprehensive legislation that provides standard operating procedures to ensure the safety of witnesses. The Supreme Court has, in several judgments emphasised the importance of 'Witness Anonymity' and 'Witness Protection Programs'.¹⁸¹ It has also stated that Parliament must draft a law on this subject as soon as possible. The one state that has made progress in this regard is Delhi. In July 2015, the Delhi government notified its witness protection programme, the *Delhi Witness Protection Scheme 2015*, it lays down steps to protect the identity of witnesses. Among the steps suggested are "prohibiting the publication or revealing, in any manner, directly or indirectly, the name, address and other particulars which may lead to the identification of a witness; changing the identity of a witness; relocating the person, facility for in-camera proceedings and 'live link', in which a witness can depose without coming to court."¹⁸²

In 2011, the *Law Commission of Bangladesh* prepared a report on a proposed law on the issue specifically relating to "protection of victims and witnesses of crimes involving grave offences."¹⁸³ This report also contained a Draft Bill on the issue. However, no progress has been made on this.

ii. Security and Confidentiality Provisions Under Anti-Trafficking Legislation

The Human Trafficking Deterrence and Suppression Act (HTDSA), 2012, in Bangladesh contains strong provisions to protect victims and witnesses to trafficking crimes by making specific actions related to the victim's security punishable offences. For instance, the Act establishes rights such as the right to special police protection and security should this be required and it backs this right up by stipulating that threats or intimidation toward victims, families of victims or witnesses will be punishable by a minimum term of three years imprisonment.¹⁸⁴

Similarly, providing security is an obligation under the **Nepal** HTTCA. According to section 26, the nearest police station is obliged to provide protection, should the victim or an informant provide reasonable grounds. However, according to a recent study, which assessed the implementation of various provisions of the Act, survivors commonly report that while their request is registered at the police station no action is taken to stop harassment and threats that they face. Many survivors also had no idea that requesting security was an option.¹⁸⁵

Indeed a recent assessment revealed that victims frequently retracted their statements to law enforcement under alleged threat by traffickers or those acting on the trafficker's behalf. Contrary to victim-witness protection norms courts also fined victims who failed to appear in court or who provided testimony contradicting their previous statements.¹⁸⁶

¹⁸¹ NHRC v. State of Gujarat 2003(9) SCALE 329, PUCL v. Union of India 2003(10) SCALE 967, Zahira Habibulla H. Sheik and Another v. State of Gujarat 2004 (4) SCALE 375 and Sakshi v. Union of India 2004 (6)

¹⁸² See more at: <http://indianexpress.com/article/cities/delhi/delhi-government-notifies-witness-protection-programme>

¹⁸³ Available at <http://www.lc.gov.bd/reports/74.pdf>

¹⁸⁴ The Human Trafficking Deterrence and Suppression Act (HTDSA), 2012. Section 14 and 37 (3)

¹⁸⁵ Forum for Women, Law and Development (FWLD), "Human Trafficking and Transportation (Control) Act, 2007: Its Implementation." 2014.

¹⁸⁶ United States Department of State, *2015 Trafficking in Persons Report - Nepal*, 27 July 2015, available at: <http://www.refworld.org/docid/55b73bbec.html>

Confidentiality and protecting the privacy of the accused is also an important protection for children. International instruments, including the OPSC and the SAARC Convention, require that the identity of trafficking victims be kept confidential. In Bangladesh, the HTDSA punishes breaches of privacy and confidentiality, wherein the name of a victim is released, by 6 months imprisonment and a fine.¹⁸⁷

In India, ITPA does not address confidentiality of victims. However, confidentiality provisions for child victims can be found in POCSO, wherein the court is directed to protect the identity of the child during the course of investigation and trial.¹⁸⁸ In addition, release of the child's name by the media is made punishable by up to one-year imprisonment. As noted previously these provisions would only protect a child whose case had been filed under this Act. The Goa Children's Act also addresses confidentiality stating that "the child's right to privacy and confidentiality shall be protected by all means and through all stages of the proceedings."¹⁸⁹ The above-mentioned MWCD protocol clearly specifies the measures to be taken to protect the identity of victims, which include keeping their identity confidential and refraining from publishing information relating to survivors in a newspaper, magazine, news or visual media. However, this protocol is limited in that it deals only with victims of trafficking into CSE.

In **Nepal**, the Supreme Court established the right to privacy in specific types of cases in 2007.¹⁹⁰ The procedural guidelines issued refer to cases involving rape, abortion, sexual abuse, human trafficking, selling and buying of human beings, incest rape, violence against women, criminal cases with children or women as victims and cases involving PLHIV. The guidelines stipulate "personal information is protected from the time of filing of the complaint, and throughout all procedures and even during the period following the implementation of the verdict."¹⁹¹

The Human Trafficking Act in **Nepal** also penalises breaches of confidentiality. The Act provides that the personal information of the informant is to be kept confidential, including their real name and address during the registration of the complaint with the police, and during court proceedings.¹⁹² The complainant must also be provided with a pseudonym.¹⁹³ Breaches of the confidentiality provisions, which include a prohibition on public dissemination of the name of the victim or of any other information that might be detrimental to them is punishable by a fine of up to 10,000 NPR.¹⁹⁴

iii. Testimonial Aids

The issue of video-conferencing is a critical one in terms of the way it could potentially contribute to the protection of victims of trafficking. It directly addresses the issue of facing the perpetrator as

¹⁸⁷ The Human Trafficking Deterrence and Suppression Act (HTDSA), 2012. Section 37 (2)

¹⁸⁸ POCSO, Ch.8.

¹⁸⁹ Goa Children's Act, Section 32. Kathmandu Law School and Terres des Hommes, Regional Study for the harmonization of the Anti-Trafficking legal Framework in India, Bangladesh and Nepal with International Standards'. Pg 185. 2004.

¹⁹⁰ Procedural Guidelines for Protecting the Privacy of the Parties in the Proceedings of Special Types of Cases, 2064 (2007).

¹⁹¹ Ibid.

¹⁹² Section 5(2) and Section 20, Human Trafficking and Transportation (Control) Act. 2007.

¹⁹³ Human Trafficking and Transportation (Control) Regulations 2008, r. 9

¹⁹⁴ Section 25, Human Trafficking and Transportation (Control) Act. 2007.

well as the logistical and emotional problems involved in bringing children back to testify after they have already been repatriated to another state or another country.

Legal provisions in the different countries do allow for the use of in-camera trials or video conferencing in certain cases where children are victims. In **India**, POCSO stipulates that the child shall not be exposed to the accused in any way and can testify using video-conferencing, single visibility mirrors or curtains.¹⁹⁵ In **Bangladesh**, the HDTSA has recognised the admissibility of electronically recorded evidence. Article 25 directly links this to the protection of children stating that “for the interest of justice and to protect the child and woman victim, the tribunal may.....direct that the trial of an offence under this Act be conducted in-camera with the presence of only the parties to the case and their advocate.”¹⁹⁶

In Nepal, Section 27 of the HTTCA provides for in camera proceedings, illustrating that some attention has been paid to the need for sensitive criminal justice processes in trafficking cases. This is particularly relevant for children but also for women within social contexts wherein the victim may be stigmatized by society and may be unable to speak out in a public hearing.

In cases of cross-border trafficking the use of these techniques can be particularly relevant to protecting children from further trauma. Ideally a comprehensive statement taken from the child victim of trafficking should be taken prior to repatriation. However, as legal activists have pointed out, if this is not possible, then it should be done in such a way that it causes the least harm possible to the child.¹⁹⁷ Recognising this, the Supreme Court of India has held that the recording of evidence through video conferencing could be done in cases where the attendance of the witness cannot be ensured without delay, expense and inconvenience.¹⁹⁸ In addition the Court has declared that recording of evidence by video conferencing was a ‘procedure established by law’ under Article 21 of the Constitution and does not violate the rights of the accused. The court has pointed out “although the rights of the accused must be safeguarded, they should not be overemphasised to the extent of forgetting that the victim also has rights.”¹⁹⁹ In the case of child victims of trafficking the best interests of the child should determine where and when the video recording of the statement takes place.

Shortly following this judgment by the apex court, the Delhi High Court came out with a historical judgment ordering the use of inter-state video conferencing in a trafficking trial involving many girls from Andhra Pradesh. In this case the girls had been rescued and then sent back to their home state after a lengthy delay and re-settled into their homes. The High Court took cognizance of the reluctance of the survivors to return to Delhi and re-live the trauma they had faced. They ordered the State Government to make recording facilities available within the State to record the victim’s testimony and to ensure adequate safeguards for the victims. The state of Andhra

¹⁹⁵ POCSO, Section 36.

¹⁹⁶ Article 25, HDTSA, 2012.

¹⁹⁷ Key Informant Interview. Shakti Vahini. NGO. Delhi. November 2015.

¹⁹⁸ State of Maharashtra vs Praful Desai (2003 4 SCC 601)

¹⁹⁹ Ravi Kant, ‘Witness Examination through video conferencing’ available at <https://lawreports.wordpress.com/2011/10/31/witness-examination-through-video-conferencing/>

Pradesh provided these facilities at their district headquarters. As legal activists explain, “once implemented, this judgment can go a long way in protecting the rights of trafficked victims.”²⁰⁰

This is relevant both in cases of internal and cross border trafficking. As an official from the MoWCSW in Nepal explained to us, “trafficking victims have to return to India to testify for trials. This is logistically, financially and emotionally an enormous burden. However, if the victim does not go then the Indian police can’t really prosecute. Therefore we are trying to implement a system of video conferencing and in camera hearings so that the victim does not need to travel. However, this should not be ad-hoc, it should happen in each and every case.”²⁰¹

iv. Translators/Interpreters

For child victims of trafficking it is critical that they receive information and are able to communicate in a language that they are comfortable in. In **Nepal**, section 10 of the Trafficking Act states that a translator or interpreter must be provided if needed. It stipulates that “if the working language used by the concerned court and office in dealing with an offence under this Act is not understandable by the victim, he/she may [arrange] for the translator or interpreter with the permission of the court.”

However, a recent study shows that survivors and even NGOs working with survivors are unaware of this provision. In addition the study found that no criteria for selection of interpreters exist and no list of interpreters is available to the courts.²⁰² In **Bangladesh**, the HDTSA stipulates that a victim or any witness may request an interpreter at any stage of the trial, including a sign language interpreter and the court will issue an order to this effect.²⁰³

In **India**, as mentioned above, the use of translators is specifically provided for in cases under POCSO and is also mentioned in guidelines issued by the Government. The importance of using translators has recently been recognized as an important feature of rescue operations. As one legal activist involved in these operations explained, children are often very afraid of being rescued as they may have had negative experiences with law enforcement either on the street or in brothels as customers. Therefore rescue NGOs attempt to have background information on the children before they attempt a rescue, in order to be able to communicate with and reassure them.²⁰⁴ These are useful measures only if rescuers can communicate in a language that the children are familiar with. Towards this end, the Ministry of Home Affairs in India recently issued a letter to the police chiefs of various states stipulating that the availability of professional translators must be ensured “well before the rescue operation.” As the founder of an NGO that rescues trafficked children explained, “Not just police, but NGO activists too face a lot of problems

²⁰⁰ Ibid.

²⁰¹ Key informant Interview. Ministry of Women, Children and Social Welfare. Nepal. October 201

²⁰² Ibid.

²⁰³ Article 26. HDTSA

²⁰⁴ Key Informant Interview. Shakti Vahini. Rescue and Rehabilitation NGO Delhi. November 2015

in rescue operations, as the children speak in their regional language or dialect. With translators present, it will make communication a lot easier."²⁰⁵

v. Taking the Trauma out of Testimony: Guidance from the Courts

It is worth noting that the Delhi High court issued an extremely progressive set of guidelines related to recording evidence of vulnerable witnesses in criminal matters in 2013.²⁰⁶ These are applicable to every criminal court in Delhi and therefore should apply to all children who are victims of a crime regardless of which law their case is filed under. These Guidelines, aiming to be compliant with international standards on this issue, have relied heavily on the principles and provisions set out in the *UN Model Law on Justice in Matters involving Child Victims*.²⁰⁷

The primary objective is to elicit reliable evidence from vulnerable witnesses, defined as a child under the age of 18, and minimize harm or secondary victimization as a result of participation in the criminal justice system. The Guidelines give directions to criminal court judges to give high priority to vulnerable witnesses and ensure that the testimonies in such cases are handled expeditiously without unnecessary delays. They also stipulate general conditions to ensure that the vulnerable witness is able to freely depose with respect to the case that is being tried. (See text box)

²⁰⁵ <http://timesofindia.indiatimes.com/city/gurgaon/Translators-to-help-cops-beat-language-hurdle-in-rescue-of-trafficking-victims/articleshow/50432984.cms>

²⁰⁶ Guidelines for recording evidence of vulnerable witnesses in criminal matters, Available at http://delhihighcourt.nic.in/writereaddata/upload/notification/notificationfile_lcwcd2x4.pdf

²⁰⁷ UN Office on Drugs and Crime (UNODC), *Justice in Matters involving Child Victims and Witnesses of Crime. Model Law and Related Commentary*, April 2009, available at: <http://www.refworld.org/docid/4a096ce42.html>

Progressive Guidelines issued by Delhi High Court

- The vulnerable witness shall be allowed a pre-trial court visit along with the support person to enable such witnesses to familiarize themselves with the layout of the court.
- The judge may meet a vulnerable witness in the presence of the prosecution and defence lawyer or in their absence in order to explain the court process.
- A vulnerable witness may be provided with legal assistance by the court, if the Court considers that this may be in the best interests of the child.
- The Court shall ensure that proceedings relevant to the testimony of a child victim or witness are conducted in language that is simple and comprehensible to a child.
- The court shall ensure a comfortable environment for the vulnerable witness by issuing directions and also by supervising, the location, movement and deportment of all persons in the courtroom including the parties, their counsel, child witnesses, support persons, guardian ad litem, facilitator, and court personnel.
- The child may be allowed to testify from a place other than the witness chair. The witness chair or other place from which the child testifies may be turned to facilitate his testimony but the opposing party and his counsel must have a frontal or profile view of the child even by a video link, during the testimony of the child.

The Supreme Court has also been active in Nepal on issues that are directly relevant to prosecuting cases of trafficking and ensuring victims' rights therein. On July 31st, 2013 the Supreme Court decided in favour of a PIL on the implementation of *continuous hearings*.²⁰⁸

The demands of the PIL included:

- An order to the Home Ministry, Police Headquarters and Office of the Attorney General to ensure whenever possible that all accused are present in court during the investigation process of such serious cases.
- An order to the district court that when the charge sheet is being filed against the accused that have already been taken into custody, all witness statements are to be taken at the same time.
- An order to district courts to establish a case hearing calendar to ensure the implementation of continuous hearings in cases such as human trafficking, rape, abduction and domestic violence.
- An order to Supreme Court for the adoption of a guideline on the implementation of continuous hearings to be drafted and implemented.
- An order to the Appellate Court to ensure the effective monitoring of whether continuous

²⁰⁸ Maiti Nepal/Shakti Samuha/FWLD vs Office of Prime Minister and Council of Ministers et. al./Writ No. 069-WO-0258

hearings are being implemented in all courts as required by the regulations issued by the Supreme Court, and subsequently to ensure this implementation.

This order is very relevant because human trafficking cases have often taken a very long time to resolve, leaving the survivors with months of court procedures to live through with the concomitant logistical problems as well as societal stigma and fear relating to threats and intimidation from traffickers. Continuous hearings, which mandate speedy resolution of a case without gaps of months between court dates ensure that cases of human trafficking are prosecuted swiftly “so that perpetrators do not abscond, so that victims are not threatened by the accused throughout the duration of the court procedures, and so that victims are provided justice” as early as possible.²⁰⁹

Whilst, implementation of the order is still an issue in many courts around the country, efforts are being made to ensure compliance. The Apex court has made it clear that continuous hearings in specific types of cases are mandatory for all district courts around the country and training programs as well as monitoring and evaluation efforts to determine the effectiveness of the order are being carried out. Data provided by the Supreme Court in 2015 showed that of 914 such cases received by the Kathmandu District Courts, 453 cases had been resolved through continuous hearings within six months.²¹⁰

vi. Compensation

“Trafficked persons, as with all victims of human rights violations have a right to a remedy. This means they have a right to access criminal, civil and/or administrative procedures for seeking financial redress – compensation for material and non-material damages resulting from the crime committed to them, unpaid wages, restitution from the offender and other forms.”²¹¹

In India, Section 357 (A) of the Criminal Procedure Amendment Act, 2008, specifies that all victims of crime have a right to compensation, stipulating that “every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.”

In Bangladesh, the HTDSA addressed reimbursement of costs incurred by victims or witnesses as well as legal and court ordered compensation. Article 28 states that “the tribunal may pass an order to the accused to pay the victim of the offence...a reasonable amount of compensation in addition to the fine and ...any such compensation shall be recovered by the tribunal directly, or ...in accordance with the public demands Recovery Act.”

²⁰⁹ Forum for Women, Law and Development (FWLD), “Human Trafficking and Transportation (Control) Act, 2007: Its Implementation.” P.30. 2014

²¹⁰ Continuous hearing leads to speedy justice at district courts - See more at: http://myrepublica.com/portal/index.php?action=news_details&news_id=79074#sthash.FZ4VfDsH.dpuf

²¹¹ Ravi Kant, blog

In Nepal, the trafficking Act states “a court shall issue order to provide compensation to the victim which shall not be less than half of the fine levied as punishment to the offender.”²¹² However, whilst establishing a right to compensation and receiving a judicial order is a critical aspect of redress for the victim, it is important to note that in most cases there have been serious implementation issues in terms of actually receiving the compensation. As explained by an official from the Ministry of women, children and social welfare, “the law says that compensation must be given by taking money from the perpetrator but this is almost impossible and there have been no cases where money has actually been received from the perpetrator.”²¹³ As one study points out “in many cases the accused do not have money, property or any other means to pay that fine. Therefore, survivors end up without compensation.”²¹⁴

In response to a writ petition filed by FWLD highlighting the problem, The Supreme Court passed a judgement stating ordering the creation of a “separate compensation fund as early as possible managing necessary allocation of amount in the budget of fiscal year 2070/071 for payment of compensation to the victims of such crime, after a judgment by the court, pursuant to Section 17 of the Human Trafficking and Transportation Act 2064 and also to take and cause to take necessary measures by the concerned police office to pay compensation to such victim(s).”²¹⁵ As explained by a representative from the MoWCSW, the Government of Nepal is now amending the rehabilitation fund which provides income generation seed money and rehabilitation services for victims of trafficking in order to encompass the requirements for compensation. This means that the money will come from that fund from now and the onus for recovering the money from the perpetrator will be on the Government and not on the victim.

Several stakeholders said that if compensation could be guaranteed, it would act as an incentive to survivors and their families to report cases and not to withdraw from them. Since many cases fall apart due to witnesses turning hostile, prosecution and punishment could be positively impacted. As a superintendent with the CBI in Nepal explained, “cases are often not filed because there is no guarantee of justice and compensation from the state. To seek legal redress, to get into the legal process in Nepal means making a public announcement of being trafficked and the victim is accused of bringing dishonour to the family. Regardless of whatever purpose of trafficking, for example be it trafficking for labour or organ transplants- the moment you file the complaint and village people come to know you have been trafficked, they conflate it with sex trafficking/prostitution. There is also no assurance of social security. There is no help or support from the State.”²¹⁶

This point, that a major deterrent to reporting cases is social stigma related to the conflation of trafficking with sex work came up repeatedly in interviews as well as in existing documentation.

IMPLEMENTATION RELATING TO PROTECTION

²¹² Article 17, Nepal Trafficking Act

²¹³ Key Informant Interview, MoWCSW. Nepal.

²¹⁴ Forum for Women, Law and Development (FWLD), “Human Trafficking and Transportation (Control) Act, 2007: Its Implementation.” P.58. 2014

²¹⁵ Ibid.

²¹⁶ Key Informant Interview, CBI. Nepal. October 2015.

“Promising initiatives notwithstanding, South Asian countries continue to face common challenges relating to the protection of child survivors in the justice system. Child-sensitive investigative procedures in line with international standards are still absent in most countries and, where they exist, are not systematically utilised by law enforcement authorities.”²¹⁷

Despite a plethora of provisions that should ensure that all children who come into contact with the justice system are adequately protected, this is often not the case. There are several potential reasons for this. Proper implementation of procedures requires not only commitment to human rights principles and adequate training of all stakeholders but also strong commitments to improving physical and technological infrastructure. According to one anti-trafficking NGO, in **Nepal**, a majority of courts around the country simply lack the requisite physical infrastructure to implement child protection provisions as enshrined in the law. For example, police stations and courts do not have adequate space to fully ensure privacy and security of victims in terms of separate waiting rooms for children and do not have the resources to create separate space, which would be less formal or more child friendly within their premises. They also do not have technological capacity in terms of being able to provide video-links to court rooms or hear electronic evidence.²¹⁸ This point was reiterated during interviews in India as well. As a lawyer from one NGO explained, “if a tiny police station in a rural part of West Bengal is dealing with a case, how would they ensure a special child friendly room for the victim?”²¹⁹ Similarly, a legal rights NGO in Dhaka stated that although the laws are now very comprehensive, the budgetary allocation and support required for implementation of these laws is very inadequate.²²⁰

Another hindrance to ensuring protection is a lack of clarity about the law. In **India** for instance, due to the fact that provisions may be dispersed between several different laws they may be improperly understood and implemented. As noted above there are relevant articles in the Juvenile Justice law, POCSO the Penal Code and even State Acts such as the Goa Children’s Act. As one lawyer from an NGO explained, POCSO provides for special courts for children and a host of other protections discussed above. However, child victims of trafficking would go to a POCSO court only where this law is imposed which would only apply in cases of trafficking into CSE. For children trafficked into domestic labour for instance, the child would go to a normal court.²²¹ This operational anomaly wherein protective mechanisms could apply to one child and not another indicates an urgent need for a comprehensive piece of legislation on victim and witness protection, applicable in all cases where children come into contact with the justice system.

²¹⁷ ECPAT,

²¹⁸ Key Informant Interview. Anti-trafficking NGO. Nepal. October 2015. In this NGO’s experience, the courts at Kathmandu, Lalitpur and Sindhupalchowk do have resources which include child friendly spaces/rooms to interview children, a separate room for child to protect them from being intimidated, provision of a counsellor to accompany and be with the child in court and provision of in-camera hearings in court proceedings.

²¹⁹ Key informant Interview. Anti-trafficking NGO. India. November 2015.

²²⁰ Key informant Interview. Human Rights NGO. Bangladesh. October 2015

²²¹ Key Informant Interview. Anti-trafficking NGO. Delhi. October 2015.

Also relevant in this regard was the point that adequate protection of child victims is often left up to the sensitivity and discretion of individuals whether law enforcement, judges or prosecutors. This came up repeatedly during interviews. As one senior advisor to the Indian Government pointed out, “my experience is that on the ground the experience of the child is uneven, certain courts do insist on child friendly procedures and follow them in the best interests of the child but there are certain places or persons who are not aware or are insensitive themselves and then the child’s rights are violated.”²²²

Representatives from an anti-trafficking NGO in Nepal reiterated this and explained that implementation depends on individual judges. According to them, they have witnessed many cases where “judges have shown utter insensitivity by making trafficking victims and witnesses confront their traffickers despite requests from victims that they were unwilling to do this.”²²³ On the other hand as one representative from an international NGO pointed out, “precedents established by individual judges are actually moving the law forward, in fact making the law in Nepal. In Nepal a lot of law is interpretive, the common law system gives the liberty to interpret procedural rules according to human rights norms in line with Nepal’s international obligations.”²²⁴ One excellent example of this which is also regarded as an example of best practice regionally is the varied set of initiatives taken by one District Court Judge in Nepal to implement the anti-trafficking Act in Nepal while championing a child friendly justice process for children.²²⁵ Observing the success of his interventions the government has actually ordered replication of some of the measures across all 75 districts of the country. (See Text box)

²²² Key Informant Interview. Senior Government Advisor. Delhi. September 2015.

²²³ Key Informant Interview. Anti-trafficking NGO, AATWIN. Nepal. October 2015.

²²⁴ Key Informant Interview. International NGO. Kathmandu. October 2015.

²²⁵ Justice Tek Narayan Kunwar was named the Best Performing Judge of the year by the Judicial Council of Nepal and has also been presented a Trafficking in Person’s (TIP) hero award by the US State Department.

Moving the Law Forward!

Justice Kunwar's Interventions have included:

- Establishment of a help desk with provision of clear drinking water.
- Establishment of a witness protection room and introduced In-Camera Hearings so that children would not have to face or testify in front of the perpetrators
- Establishment of a very well-equipped juvenile justice court to be used for child victims and witnesses as well as children in conflict with the law.
- Introduction of measures such as taking statements from children in a child-friendly setting and in informal clothes so as not to intimidate them with the formality of the court.
- Creation of a separate lobby for children, women and elderly waiting for trial
- Introduction of continuous hearings for specific cases related to children in his court. This was prior to the Supreme Court mandamus order stating that all trial courts should ensure continuous hearing for specific cases.
- Introducing the use of a screen in court to prevent child victim from getting intimidated by perpetrator while giving statement, for child victim to avoid confronting perpetrator. The Chief Justice really appreciated the initiative and now it is mandatory to ensure that child victim does not have to face perpetrator while giving their statement.
- Judiciary Outreach Program - Under the program, instead of people coming to court, judges themselves go into the community in order to interact with people and inform them about legal/court proceedings. The main objective of this is to facilitate access to justice. The Supreme Court has issued an order that three such outreach programs be held in each district.
- In May 2013, handed down a progressive judgement regarding compensation by making the state accountable to provide the victim compensation from the state's fund and thereafter, reimburse the fund from a fine levied upon the perpetrator. This was contrary to the existing approach wherein the victim had to be involved in an , often fruitless, court battle to get compensation from the perpetrator.
- Established the practice within his own court that a copy of the judgment be delivered to the complainant. While the existing practice was as such that victim had to constantly follow up and fetch the copy of judgment from court.

REPATRIATION AND REHABILITATION

Children who are victims of trafficking need specific types of post-rescue assistance in terms of their emotional, physical and mental health and legal provisions in the three countries do recognise this. In Bangladesh, as mentioned above, the HDTSA emphasises 'victim friendly' processes with special regard to the needs of women and children. Provisions include the establishment of more protective homes with services to be offered including medical care and psychological counselling and other rehabilitation services.²²⁶ There is also a *National Policy for Providing Appropriate and Comprehensive Services for Victims of Human Trafficking*, which

²²⁶ Ibid. Sections 32-37.

includes detailed minimum standards of care and procedures and principles to be followed in delivering support services to victims of human trafficking.²²⁷

In India, ITPA and the JJ Act make provision for taking care of children who have been rescued in shelter homes and children's homes.²²⁸ According to the JJ Act, each state government may set up these homes, which should have comprehensive child care facilities to ensure their "all round development" and also to work with families to facilitate "their reintegration and rehabilitation into mainstream society."²²⁹ In Nepal, the HTTCA makes the Government responsible for providing rehabilitation centres and sets out operational standards including the provision of medical treatment, counselling, education and skill training. It also stipulates that victims of trafficking will not remain in these centres for more than six months before being reunited with their families.²³⁰

The HTDSA in Bangladesh addresses repatriation in Article 31 stating that Government will work to ensure repatriation of any Bangladeshi national found to be a victim of trafficking in a foreign country. Article 11 of the recent MOU signed between India and Bangladesh states that repatriation "shall be arranged and conducted expeditiously" and cases that continue for more than 6 months can appeal to court. It also suggests that repatriation shall follow the processes as laid out in the SOP that already exists between the states.²³¹ In terms of rehabilitation and reintegration into communities, the MOU states in article 12 that the parties "shall make all possible efforts towards the safe and effective reintegration of victims of trafficking into their families and communities in order to restore their dignity, freedom and self esteem in their respective countries." In Nepal, the Government in collaboration with several anti-trafficking NGOs, has created a repatriation protocol for Nepali victims of trafficking to India. This lays out practical guidelines to facilitate safe and voluntary repatriation.²³²

IMPLEMENTATION RELATED TO REPATRIATION AND REHABILITATION

As has been consistently seen, the gaps in care, services and protection for victims of trafficking may arise out of lack of implementation as opposed to a lack of adequate protective provisions in legislation or policy documents. In Bangladesh, a recent report suggests that a formal mechanism for authorities to refer identified victims to care was lacking and that those referrals that were happening depended on specific officials' awareness of the HTDSA.²³³ Similarly in India, MHA directives state that existing standard operating protocols must be used to proactively identify

²²⁷ BNWLA. 2013. pg 31.

²²⁸ ITPA Section 21 and JJ Act Section 34 and 37.

²²⁹ UNODC. Current Status of Victim Service Providers and Criminal Justice Actors in India on Anti-Human Trafficking, Country Assessment. 2013. This report also provides details of existing government schemes related to protection of women and children who have been victims of trafficking. For example The Ministry of Women and Child Development has funded shelter and rehabilitation services for women and children through two programs – the *Ujjawala* program, specifically for female sex trafficking victims, and the *Swadhar* program, for women in difficult circumstances.

²³⁰ Human Trafficking and Transportation (Control) Regulations 2008, r.11 and 16.

²³¹ http://www.hcidhaka.gov.in/bi_doc/MoU_between_India_and_Bangladesh_on_Bilateral_Cooperation_for_Prevention_of_Human_Trafficking.pdf

²³² Forum for Women, Law and Development (FWLD), "Human Trafficking and Transportation (Control) Act, 2007: Its Implementation." 2014.

²³³ United States Department of State, 2015 *Trafficking in Persons Report - Bangladesh*, 27 July 2015, available at: <http://www.refworld.org/docid/55b73c1531.html>

victims and refer them to protection services. However, it has been observed that “law enforcement officers at the district level were not appropriately trained to identify victims and there is no information such SOPs were used during the year.”²³⁴ In Nepal too, reports suggested that while the national minimum standards for victim care set forth procedures for referring identified victims to services, referral efforts remained *ad hoc* and inadequate.²³⁵

In India, reports suggest that financial support for shelter homes is often inadequate and that the conditions may be extremely bad.²³⁶ According to one report, “both government- and NGO-run shelters faced shortages of financial resources and trained personnel, particularly of counsellors and medical staff.” In addition, “due to the lack of government funds, shelter staff, or police escorts, victims were sometimes not transferred from temporary “transit homes” to shelters that

Case: Girls Stranded Due to Procedural delays

Three Nepali girls were rescued by the Rescue Foundation and kept in Allahabad, waiting to be repatriated. Maiti Nepal came in contact with these girls and initiated a process for their repatriation, but they were asked for a formal letter from the Government of Nepal, to authorize Maiti Nepal to carry out this repatriation. In June, 2012 they wrote a letter to the Police Headquarters of Nepal asking for this letter, but they got a reply saying that this was not their responsibility. They then approached the National Committee for Controlling Human Trafficking (NCCHT) for the same letter, and NCCHT wrote a letter to the Ministry of Foreign Affairs. Maiti Nepal has not yet received the letter from the Ministry. On the other hand, the Embassy of Nepal in India have not been able to verify these girls as being Nepali citizens as they do not have the required identification documents to prove their nationality. As the verification and the letter are lacking, these girls are still in India.

Source: Maiti Nepal

provide more long-term care for months after the victim was formally identified.”²³⁷ This means that children in urgent need of care and counselling may not be getting the services they critically need post rescue.

This situation is exacerbated by delays in repatriation of victims of trafficking, since they may have to rely on services within these homes for many years. Research shows that foreign victims of trafficking into CSE from both Nepal and Bangladesh have spent more than four years in some of these homes before being repatriated. This has been attributed to “long delays in processing paperwork, lack of coordination between concerned

agencies, and lack of clarity and cooperation concerning submission of critical papers.”²³⁸

The processes of rescue and repatriation of victims are also dependant on bilateral cooperation

²³⁴ United States Department of State, 2015 Trafficking in Persons Report - India, 27 July 2015, available at: <http://www.refworld.org/docid/55b73be315.html>

²³⁵ United States Department of State, 2015 Trafficking in Persons Report - Nepal, 27 July 2015, available at: <http://www.refworld.org/docid/55b73bbec.html>

²³⁶ Asian Centre for Human Rights. 'India's hell Holes: Child Sexual Assault in Juvenile Justice Homes', 2013. <http://www.hindustantimes.com/india/homes-of-horror-when-juvenile-shelters-become-exploitation-centres/story-eA26mAzoUErk85YaPJEtqO.html>

²³⁷ United States Department of State, 2015 Trafficking in Persons Report - India, 27 July 2015, available at: <http://www.refworld.org/docid/55b73be315.html>

²³⁸

with regards to identification of victims, repatriation procedures and extradition. In the absence of systematic agreed upon procedures and a clear understanding of the responsibilities of different stakeholders, the rescue and repatriation of survivors is complicated by legal obstacles (see text box). In the event that a survivor of trafficking is involved in a court case in another country as a witness in a criminal case against traffickers or exploiters – then the destination country may delay the individual's return unless extradition treaties, which include human trafficking, are in place.

Several stakeholders in Nepal explained that one logistical obstacle is that there is no specific systematic process for repatriation of Nepali children. According to representatives of a Nepalese NGO, which has been working in the area of anti-trafficking more for than two decades now, “there is no systematic process whereby survivors are systematically and voluntarily returned to their places of origin or homes or a proper procedure that governs all repatriations. Since there is no formal mechanism for official repatriation in place, different organizations follow different process of repatriation.”²³⁹ However, the organization was able to provide insight into how a typical repatriation process might take place given their own procedures (see text box).

Repatriation Procedure for Nepalese children

Once a child is rescued in India, the rescuing team/organization notifies the Child Welfare Committee. Then the child is placed in one of the Indian Juvenile Justice Homes until the rescuing organization provides some certification to show that the child is Nepali. At this point the receiving Nepali NGO is contacted and conduct an assessment at the child's purported place of origin. The report is sent to the Child Welfare Committee in India including details of the child's home and family background as well as authentic documents to prove the child's nationality. The report must also include the organization's care plan for the child and indicate spaces available for the child's accommodation. Unlike in cases of adult repatriation, the child must be given a choice as to whether they want to return to their home country. Once the court issues the release and repatriation order the Indian authorities escort the child to the Nepali Border. A Nepali NGO receives the child, and notifies the local administration and police that the child is back in Nepal within their shelter home. The CWC in India has strict protocols regarding follow up monitoring of the child's welfare for the next two years and the receiving NGO must submit reports on this.

Source: Key informant Interview. Shakti Samuha. Kathmandu, October 2015.

A representative of the Ministry of Women, Children and Social Welfare reiterated this explaining that whilst the Ministry supports the embassy in India in terms of funds and works on verification of identity and nationality, they rely entirely on NGOs on both sides of the border in terms of the actual operational process and this often takes place in an ad-hoc way. She further explained that one barrier to creating a bilateral agreement on repatriation between India and Nepal is the requirement of separate agreements with each state since law and order is a state subject in India.

²³⁹ Key Informant Interview. Anti-trafficking NGO. Kathmandu. October 2015.

One way to address these issues would be to focus on a regional mechanism, which could govern all countries and apply to any repatriation. Indeed the SAARC Convention obliges states to implement a common mechanism for repatriation and one recommendation is that the secretariat should work towards getting consensus on this.

Building Capacity of Actors: Advancing a Systematic Approach to Child Sensitive Protection and Justice

Inadequate Stakeholder Training

Training of all key stakeholders in child friendly procedures is critical if the rights of children are to be ensured throughout the process of rescue, investigation and prosecution of cases and reintegration into communities. In addition, efficient investigation and prosecution of cases under trafficking laws are hindered when stakeholders do not fully understand the nuances of the law. In recognition of this various laws in the three countries contain provisions stating that all stakeholders must be specially trained and training has been a major component of most anti-trafficking interventions. Training has been conducted through Ministries, multilateral organisations, NGOs and CBOs at international, national, district and community levels. Training manuals and tools to assist stakeholders in understanding concepts and procedures are prolific.²⁴⁰

During the course of our research several stakeholders spoke about concerns relating to training in terms of logistics and gaps. According to a senior law enforcement official in Bangladesh, each police station has child-friendly officers and a number of workshops have been conducted through the forensic training institute. These workshops use interactive training and role-playing to familiarize police with child protection issues and techniques to be used for interviewing children. However, as he pointed out, the sheer scale of training required is the biggest logistical barrier. He gave an example of the specific training manual on Investigation procedures for trafficking cases and explained that each person needs to be trained for at least 2 weeks on this. With 600 police stations across the country the time and resources required to train even one or two people from each station is considerable.

This view was also reflected during an interview with the Representative from UNODC in Delhi. She explained that a major part of UNODC's work in the area was related to training but they are still looking for the most effective approach. According to her, "one important tool is mandatory online training but it would be critical that it permeated through all levels." A common suggestion has been to embed the trainings into the law enforcement institutional curriculum so that every new trainee is exposed to it. However, as she explained, there are multiple forms of crime, which police deal with and multiple advocates for their own area of concern and institutions have to be realistic in terms of expectations of what can be squeezed into a curriculum.

A superintendent of the CID in Nepal explained that lack of conceptual clarity and understanding

²⁴⁰ Country reports for each country detailing initiatives taken by the government and trainings organized can be found at

of emerging trends of trafficking among judges was a key challenge from the perspective of prosecution of cases. She explained that despite new and emerging trends and purposes for which trafficking has been taking place, judges still view CSE as a predominant aspect of the crime. This has meant that cases of trafficking for organ transplants, fraudulent marriages and false promises of employment have been dismissed as non-trafficking cases and often prosecuted under laws with lower penalties, which do not necessarily allow for compensation for the victim. The failure of judges to see that key elements of trafficking exist in these cases (fraud, lure, enticement, entrapment and forcible restraint) need to be addressed by training on attitudes as well as nuances of the law. Similarly, with regard to the trafficking law in Bangladesh a recent study pointed out, “the effectiveness of the HTSDA depends on the skill and consciousness of the judicial officers.”²⁴¹ Judicial magistrates can pass orders to file cases under proper law and may also pass orders regarding safe custody while a case is pending. However, in many cases, these discretionary powers are not being utilized. (See text box)

Case : Lack of Judicial Consciousness

On 16 February 2012, 24 children aged between 7-18 years old were rescued by from a brick- field at Coxs’ Bazar where they were wrongfully restrained for three months and forced to work from morning to evening. The children were brought to this area fraudulently and sold as labour. Police arrested three individuals and filed a case under section 339 of Penal Code 1860 even though the case clearly fell within the ambit of Section 9 of the (then) HTSDO 2011. In addition, the survivors were handed over to their respective guardians which could expose them to being threatened or influenced by the perpetrators. The judge in this case had the power ensure that the case was filed under the correct ordinance and then to insist in safe custody for the children. However, neither of these things happened.

Other officers of the court such as the prosecutors and the investigating officers may also lack the necessary skills to effectively investigate and prosecute a trafficking case to its logical conclusion. The study suggests that “many cases end with negative results due to improper and unskilled services delivered by the tribunal judge, the magistrate, the special public prosecutor and or/the investigation officer.”²⁴² In addition, according to focus group discussions conducted

as part of the study, public prosecutors lack understanding of trafficking and are often unfriendly towards the victims in a case.

As one senior government advisor pointed out, “there is a gap in the training process itself.” It is apparent that training, when it comes to protecting children, cannot be simply on the content of laws. It must be on skills. In other words, “training beyond what the law says. What is needed is training on the art of listening. How do you ensure that the victims’ voice reaches you? How do you deal with the problem of the victims not getting enough time to speak? And how do you ensure that each part of the chain is strengthened? We need to train not just judges, but lawyers,

²⁴¹ Bangladesh National Woman lawyer’s Association (BNWLA), ‘Human Trafficking in Bangladesh: Analysis, Challenges and Recommendations’. Pg. 15. 2013

²⁴² Ibid. pg 28.

prosecutors and doctors including counsellors and forensic doctors who are involved in collecting evidence-basically training across the entire spectrum is needed.”²⁴³

Finally, even where extensive training sessions are being carried out, there is usually no monitoring and evaluation being carried out to determine their impact or outputs that may become apparent thereafter. This sort of impact evaluation would be very useful to determine how effective the training is in terms of various parameters related to all stages of the trafficking process.

Legal basis for supporting bilateral cooperation

As mentioned above, Bangladesh, India and Nepal have all ratified UNTOC. This convention squarely places human trafficking into the area of cross-border organized crime and recognizing that investigation and prosecution of crimes requires cooperation between government agencies across borders suggest that “states Parties shall consider concluding bilateral or multilateral treaties, agreements or arrangements to enhance the effectiveness of inter-national cooperation undertaken pursuant to this article.”²⁴⁴

There have been some welcome legislative changes in this context. In Nepal, the government has recently passed the Mutual Legal Assistance Act, (MLA) 2014. Mutual Legal Assistance in criminal matters is the formal way in which countries request and provide assistance in obtaining evidence located in one country to assist in criminal investigations or proceedings in another country.²⁴⁵ Now mutual legal assistance can be sought in criminal cases with at least one-year imprisonment or one hundred thousand fine. The MLA applies to criminal cases wherein the penalty is a minimum of one year in prison and to all countries including the countries Nepal does not have extradition treaty with. As explained by a senior judge In Nepal, “although other countries are not required to abide by this Act, it serves to open up avenues for seeking assistance from other countries through diplomatic channels.”²⁴⁶ Toward this end the Government of Nepal has designated the secretary of the *Ministry of Law and Justice* as a Focal Point for Nepal and s/he can be requested to assist with diplomatic enquiries by the investigation Officer or Prosecutor from the investigation stage of a trafficking or missing person’s case. The hope is that the passage of this act will allow greater coordination and communication at the government level on cases of trafficking.²⁴⁷

The HTDSA in Bangladesh is notable for its provision for extra-territorial application of the law if the victims or perpetrators are Bangladeshi Nationals. It also lists trafficking as an extraditable offence.²⁴⁸ This has laid the groundwork for bilateral extradition agreements in trafficking cases

²⁴³ Key Informant Interview. Senior Adviser to the Government on anti-trafficking. Delhi. October 2015.

²⁴⁴ *United Nations Convention against Transnational Organized Crime, Article 13 (9)*.

²⁴⁵ Mutual legal assistance might be built into the domestic legislation of a member country. The mechanism for execution, in such a case, would be in place through notifications and guidelines. The domestic provisions may not include every aspect for which MLA is desired between any two member countries. This can, however, be addressed by a treaty/agreement/MOU.

²⁴⁶ Key Informant Interview. Kathmandu. October 2015.

²⁴⁷ Ibid.

²⁴⁸ Human Trafficking Deterrence and Suppression Act (HTDSA), 2012. Section 5.

with relevant countries. Section 41 of the HTDSA also states that the government can sign MOUs with other states if any aspect of the case (victims, witnesses, money transfers or perpetrators) are in or have been in that state.²⁴⁹ One notable recent development in this regard is that India and Bangladesh signed an MOU in June, 2015, which applies to all forms of human trafficking with specific reference to the SOPs adopted by both countries.²⁵⁰

Salient points in the MOU

- Article 8 addresses the special needs of children and says that special measures included in the law to protect children will prevail. Children are defined as anyone under 18 years of age.
- Article 6 states that women and child victims will be treated with dignity and confidentiality and non-discrimination will be maintained throughout the process.
- Article 11 addresses repatriation stating that it “shall be arranged and conducted expeditiously” and cases that continue for more than 6 months can appeal to court. Repatriation shall follow the processes as laid out in the SOP that already exists between the states.
- In terms of rehabilitation and reintegration into communities, the MOU states in article 12 that the parties “shall make all possible efforts towards the safe and effective reintegration of victims of trafficking into their families and communities in order to restore their dignity, freedom and self-esteem in their respective countries.”
- Aiming to strengthen cooperation and information sharing to ensure speedier investigations and prosecutions of traffickers and organised crime syndicates in either country, Article 5 mentions that anti-trafficking cells and task forces will cooperate in various ways including creating and sharing databases on traffickers and victims, sharing of data and intelligence inputs and activating nodal points in the two countries.
- In Article 13 it also provides for the creation of a joint task force, which would assess the implementation of the MOU every two years.

These changes in the law supporting greater bilateral cooperation are very welcome and will have particular relevance if they lead to ground realities being impacted in practical ways. As explained by a senior law enforcement official in Dhaka, whilst legal instruments like the Extradition Act may exist, practical difficulties may hinder cross border cooperation. For instance, in many cases what is most needed is the sharing of information as quickly as possible including in cases when a known trafficker has crossed a border or a child has recently gone missing and a location needs to be confirmed. However, the protocol that must be followed in terms of the various channels that the request for information needs to go through is prohibitively time consuming. As he explained,

²⁴⁹ Bangladesh National Woman lawyer’s Association (BNWLA), ‘Human Trafficking in Bangladesh: Analysis, Challenges and Recommendations’, 2013

²⁵⁰http://www.hcidhaka.gov.in/bi_doc/MoU_between_India_and_Bangladesh_on_Bilateral_Cooperation_for_Prevention_of_Human_Trafficking.pdf

“a very good improvement would be if we could have direct links in each place where we could ask for information and if we could operationalize a continuous link for this.”²⁵¹ One strategy, which would also facilitate the exchange of information and the prompt investigation of cases and recovery of rescued victims would be to have liaison police officers within consulates in key countries. These officers would have trafficking and missing person offences under their purview and would be easily accessible to local police and vice versa.²⁵²

Experts in the other countries also reiterated that bilateral cooperation and information sharing was critical and suggested that a lack of technology integration is directly linked to this. As one senior advisor to the Indian Government explained, what is needed is technology that can connect established nodal contact points in key states and key police stations in each country. In this scenario someone from the Nepal border police would be able to communicate with or send an alert message straight to the relevant counterpart in Maharashtra in India and prompt action could be taken.²⁵³

Technology

In addition it was suggested that forensic technology should be integrated into anti-trafficking initiatives between the three countries. During the process of trafficking and exploitation, victims have often changed dramatically. They have usually experienced abuse, rape, assault and substance abuse and may be unrecognizable. In addition they may be many years older and traffickers will have changed their name, age and community on any ID that they may possess. Using technology that can account for factors like age and facial transformation could seriously improve efforts to trace missing and trafficked children within and between countries.²⁵⁴ The founder of an eminent legal aid Ngo reiterated this. According to her, “we may be organized but traffickers are much more organized. Traffickers are now using very sophisticated technology, different routes, land and sea, new techniques of money laundering, and mobile financial services.” Law enforcements representatives in Nepal and Bangladesh also confirmed that this was an issue. In terms of training police to properly investigate cases, it is necessary to understand the technology that is being used by the traffickers and to be equally trained in using it.

As one senior advisor to the Indian Government explained, “When it comes to missing children, the Supreme Court directive is excellent-telling police to register a case immediately and investigate. However, we also have to consider the how? How will effective investigation take place without the requisite technology? If you want to address the issue of missing children in this region the technological platform has to be institutionalized. We need a regional technical platform and a regional legal platform and then we can make progress.”

In this regard, the Missing Child Alert program could act as a regional technological platform, which could be up scaled and institutionalized if Governments agreed. Experts have envisaged that this platform would act as a gateway for sharing information, which could help to track

²⁵¹ Key Informant Interview. Dhaka. October 2015.

²⁵² Key Informant Interview. Dhaka. October 2015

²⁵³ Key Informant Interview, Dr. P.M. Nair. Delhi. September 2015.

²⁵⁴ Ibid.

missing children and link up the different countries. Access could be restricted to law enforcement and special investigative branches with the public only being given access to upload information and checks and balances would be created.

PRIMARY RECOMMENDATIONS FOR THE REVIEW COUNTRIES

I. LEGAL REFORM

- *Victim and Witness Protection Law:* Draft and enact a comprehensive victim and witness protection law as soon as possible. This should include special provisions on protecting child victims and witnesses in line with the UN Guidelines and should be applicable to all children regardless of which law their case is filed under.
- *Ratification of International Instruments:* All SAARC countries need to ratify the Palermo Protocol and harmonise their definitions of trafficking accordingly. This will also aid data collection.
- *SAARC Convention:* The SAARC Convention on Trafficking should be amended so that it is in line with international standards. This will enhance regional cooperation with regard to cross border initiatives being taken to address the issue.
- *Child Friendly Judicial Processes:* Adopt a human rights based approach to child protection, based on comprehensive application of the rights of the child. Ensure that existing laws provide for a range of child friendly judicial processes including formal witness protection procedures; ensuring the psychological well-being and privacy of children through in camera proceedings; providing adequate protection and compensation to victims; and expediting prolonged legal processes through fast-track, child-friendly courts and the use of video testimony. In addition, children should be informed about their rights and have access to legal support and other services (such as health, counselling and psychosocial support).
- Clarification and regional agreement on children's legal age of majority and other age limits defining a 'child' in relevant contexts. Clear age limits and agreements on the legal age of majority will allow for standardized approaches by stakeholders, particularly police and courts, to safeguard children's rights, address children's needs and respect children's ability to make informed decisions.

II. TRAINING

- *Strengthen Training:* Training initiatives must continue and be strengthened for different implementation agencies. All stakeholders should be trained on general information on trafficking including: how to recognize a human trafficking case; understanding victimization, trauma, stigma and vulnerable populations; using a victim oriented approach
 - ✓ **Judiciary:** strengthened training on how to evaluate a case
 - ✓ **Law enforcement training** should include specific modules on attitude change and stigma reduction as well as protocols and techniques for interviewing victims with a special focus on those who are children. In addition nuanced training on

how to use the existing trafficking provisions and which laws to file complaints under

- ✓ **Investigators and prosecutors** -Technical training could include training on the laws, use of “creative” prosecuting techniques, techniques for gathering evidence, and types of evidence to collect (e.g. phone records, clothing, etc.).
- *Monitoring and evaluation:* Training Initiatives should be monitored and evaluated. There is no follow up data and research generally on the impact of training and altered outputs following training. This is a major knowledge gap that should be addressed.

III. RESEARCH AND DATA CONTENT, COLLECTION AND ANALYSIS

- *Research and Data Collection:* Create and strengthen existing harmonized research methodology and systems of data collection and mechanisms for analysis to inform national and regional responses to prevent trafficking of children. Data needs to be disaggregated according to age, gender and form of exploitation and comprehensive analysis of this data needs to take place.
- *Dissemination:* data and information, which has been analyzed and can guide interventions needs to be disseminated among stakeholders in user-friendly formats and in different languages.
- *Research gaps:* More research is needed on:
 - ✓ The extent of implementation of protective measures for children who are victims and/or witnesses of crime, especially in cases of missing and trafficked children. Which measures are being implemented, in which courts and in how many cases? If existing measures are not being implemented why is this so? What are the training, resource and infrastructural gaps that need to be addressed to ensure widespread implementation of child protective provisions?
 - ✓ Links between missing children, child trafficking and other child protection issues, such as the protection of children’s rights during migration and other forms of mobility. The factors that make children vulnerable and the root causes of child trafficking need to be investigated in closer relation with other child protection concerns.
 - ✓ The evolving nature of the crime of human trafficking in terms of purposes for which trafficking takes place, modes of trafficking, different sites of exploitation, how are human trafficking operations structured hierarchically; networks in which human trafficking perpetrators and victims exist and operate.
 - ✓ Technological innovation and how different technology can assist in cross border efforts to trace missing children and prosecute traffickers

IV. BILATERAL COOPERATION

- Create MOU’s and standard operating procedure agreements with relevant countries. For

instance Nepal and India and Gulf states.

- Fully implement measures suggested in the current MOU between India and Bangladesh related to data sharing, intelligence sharing and having key points of contact between countries.
- Create liaison officers with law enforcement training who will be positioned at their country high commissions and act as focal points and intermediaries for the issue of trafficking and missing children.
- Establish agreement between the three countries as well as intergovernmental and multilateral organisations to operationalise a cross border technological system such as the Missing Child Alert system, to track and find missing children in Bangladesh, India and Nepal.
- Develop technical capacity to link various police stations so that law enforcement including border control police can take immediate action and get responses from counterparts in different countries when a child goes missing and is suspected to have been trafficked across the border.

VI. Repatriation and Post Repatriation Processes

- Create and implement bilateral agreements related to repatriation principles and procedures between all three countries. Currently only Bangladesh and India are covered.
- Implement an Integrated and comprehensive system of service provision post repatriation that ensures that children are kept safe and not re-trafficked.
- Reduce dependence on NGOs for post repatriation follow up or ensure that efforts are fully funded and supported with infrastructure so that institutions are capacitated to deal with follow up and monitoring of children regularly and systematically.

COUNTRY SPECIFIC RECOMMENDATIONS

BANGLADESH

- Create the implementing rules for the *Human Trafficking Deterrence and Suppression Act, 2012* to ensure implementation and proper functioning of the HTSDA. Include a specific focus on the areas of mutual legal assistance; legal education mechanisms for the law enforcers, judicial officers, and public prosecutors and sustainable procedures of repatriation and return.
- Fully implement all provisions in the HTDSA related to victim protection- for instance security, interpreters, confidentiality, in-camera hearings

NEPAL

- Ratify the Palermo protocol
- Expand the definition of trafficking in the *Human Trafficking and Transportation Control Act, 2007*, so that it is in line with the internationally accepted definition in the Palermo protocol and account for complex dynamics of human trafficking, emerging trends, new modus operandi of traffickers and varied purposes of trafficking.
- The Juvenile Justice Procedural Rules should be applicable to all children, and not only those who are in conflict with the law.
- The Government of Nepal should use the recently enacted *Mutual Legal Assistance Act (MLA)* to initiate bilateral talks with primary destination countries for trafficked Nepali women and children.
- Mainstream the use of technology such as in-camera hearings, videoconference for testimony in the court system. Ensure that adequate budgetary allocation is made for this.
- There should be a detailed and clear definition of roles of police in Repatriation Process
- Fully implement all provisions in the HTTCA related to victim protection- for instance security, interpreters, confidentiality, in-camera hearings.
- Institutionalise provisions for continuous hearing as laid down by the Supreme Court and make this binding for all cases prosecuted under HTTCA.

INDIA

- Draft and enact comprehensive anti-trafficking legislation in line with international obligations.
- Amend the Penal Code with a view to removing the requirement of an element of force or other forms of coercion, abduction, fraud and deception when recruiting, harbouring, transferring, or receiving a child for the purpose of exploitation
- Expressly stipulate in the Criminal Law (Amendment) Act, that child victims of the offences under the Optional Protocol are not considered as offenders but always as victims.

