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UN.GIFT

Global Initiative to Fight Human Trafficking

Responses to **HUMAN TRAFFICKING** in Bangladesh, India, Nepal and Sri Lanka



LEGAL AND POLICY REVIEW

Copyright: UNODC, 2011

Year of Publication: 2011

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A publication of

United Nations Office on Drugs and Crime
Regional Office for South Asia
EP 16 / 17, Chandragupta Marg
Chanakyapuri, New Delhi 110021

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This publication has not been formally edited.

Designed and printed by: **Impression Communication**

RESPONSES TO HUMAN TRAFFICKING IN BANGLADESH, INDIA, NEPAL AND SRI LANKA

A REVIEW COMMISSIONED BY UNODC
**Under the United Nations Global Initiative to
Fight Human Trafficking**

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List of Abbreviations

ILO	International Labor Organization
IOM	International Organization for Migration
ITPA	Immoral Traffic (Prevention Act), 1956
Protocol	Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, 2000
SAARC	South Asian Association for Regional Cooperation
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UN.GIFT	United Nations Global Initiative to Fight Human Trafficking
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention Against Transnational Organized Crime, 2000

Acknowledgments

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This review would not have been possible without the financial support of the Governments of Norway, Sweden and the United Arab Emirates (through the UN.GIFT).

About the Report

The United Nations Global Initiative to Fight Human Trafficking (UN.GIFT) was conceived to promote the global fight on human trafficking, on the basis of international agreements reached at the UN. UN.GIFT was launched in March 2007 by the UN Office on Drugs and Crime (UNODC) with a grant made on behalf of the United Arab Emirates. It is managed in cooperation with the International Labour Organization (ILO); the International Organization for Migration (IOM); the UN Children's Fund (UNICEF); the Office of the High Commissioner for Human Rights (OHCHR); and the Organization for Security and Co-operation in Europe (OSCE).

UN.GIFT works with all stakeholders - governments, business, academia, civil society and the media - to support each other's work, create new partnerships and develop effective tools to fight human trafficking.

The United Nations Office on Drugs and Crime, Regional Office for South Asia, (UNODC ROSA) and the UN Women, South Asia signed a Memorandum of Understanding, whereby they committed to strengthen the existing cooperation in dealing with the organized crime of human trafficking in the South Asian countries of Bangladesh, Bhutan, India, Nepal, Maldives and Sri Lanka.

With the entry into force of the UNTOC and its Protocols, the international community took a major step in the fight against organized crime. The Protocol in particular gives the first comprehensive definition of human trafficking. It obliges States to criminalize this practice, and many have adopted legislation translating the Protocols' obligations into national law.

International cooperation is a basic condition for successfully responding to trafficking in persons, and therefore bilateral, regional and global agreements are needed.

The Protocol seeks to prevent trafficking in persons, protect victims of trafficking and promote cooperation among State Parties in order to meet these objectives.

Within South Asia, the legal regime is diverse, and the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002, represents a need and political commitment from countries in the SAARC Region.

Bangladesh, India, Nepal and Sri Lanka have all taken steps in the right direction to combat human trafficking; however, there is a need to look closely at country specific laws to understand where the gaps lie. It is in the light of this, that a Legal and Policy Review of Responses to Human Trafficking has been taken up.

This Report looks at the law and policy, especially in the context of the Protocol, supplementing work already available in different studies.

Human Trafficking and the Law in South Asia



1. The Working of Domestic Laws in Cross Border Trafficking
2. A Comparison of the Working of Legal Frameworks with the UNTOC and the Protocol
3. A Comparison of Ratification Status of Key International Instruments

1. THE WORKING OF DOMESTIC LAWS IN CROSS BORDER TRAFFICKING

1.1 The Primary Role of Domestic Laws

While there are a number of international instruments dealing with human trafficking, the primary tool used by governments in the South Asian Region to combat cross border trafficking is their own domestic legislations. This is for two main reasons. One, the legislations are set in the criminal justice mode and have clearly identifiable crimes with their consequential punishments. Two, the criminal justice systems of these countries are geared towards enforcing domestic law.

This does not mean that international law or treaty obligations have no role to play. The domestic criminal justice system tends to rely heavily on domestic law, whether it be the police, judiciary or prosecution, and even when applicable international standards may not be examined or used much. This is for several reasons but primarily because of the perception that international law is a soft law and what really matters is domestic legislation. Countries are also not uniformly monist¹, and some instruments may be applied by courts only if they have been specifically passed by means of legislation.

Most cases on trafficking are dealt with by the local police, local public prosecutors and local judges. At the trial court stage, what the judge is concerned with is primarily the determination of guilt and the sentencing of the convicted person, if any. Leave alone international standards, constitutional standards on trafficking contained in the Constitution of a country are seldom looked at. Of course, constitutional standards on rights of an accused, procedures for a fair and free trial, etc., would be used. Discussions on constitutional standards of protection to be accorded to citizens and non citizens (aliens) in cases of domestic or cross border trafficking are generally dealt with only at the level of higher courts, either in its original jurisdiction or on appeal from a lower court.

Cases which are available in the public domain and reported in law reports generally fall into this category. A felt need of the majority of those who work within the criminal justice system is a strengthening of the understanding and working of domestic laws.

It is not denied that constitutional protections are important but they are not uniform across South Asia. While the Constitutions of India² and Nepal³ prohibit trafficking in any form, as well as forced labor, as a fundamental right or basic human right, Bangladesh while including forced labor, talks not of trafficking, but prostitution⁴. The Sri Lankan Constitution is silent on the point beyond invoking a general obligation on the State to protect children⁵.

The primacy accorded to domestic law makes it important to have a strong domestic legal framework to tackle cases of cross border trafficking. Also, specifically, a strong criminal justice framework becomes essential to be able to deal with cross border trafficking.

¹ Legal regimes where treaties upon ratification become part of domestic law automatically without further procedural formalities.

² Articles 23 prohibiting trafficking in human beings and forms of forced labor. India also has two non justiciable Directive Principles of State Policy protecting persons, especially children and youth from abuse and exploitation.

³ Nepal has an Interim Constitution and the Constitutional Assembly is in the process of drafting a Constitution for Nepal. Article 20 deals with the prohibition of trafficking in human beings, slavery, serfdom and forced labor.

⁴ Article 34 (1) prohibits forced labor while Article 18(2) places a duty upon the State to adopt effective measures to prevent prostitution.

⁵ Articles 27(13) and 12(4).

1.2 The Breadth of Trafficking Laws in South Asia

Trafficking has been viewed with increasing concern in South Asia as a region and by individual South Asian countries as well. Many of them have already had provisions in their laws, which could be used to combat trafficking, since colonial times as in the cases of Bangladesh, India and Sri Lanka, or since the codifications of customary law as in Nepal. Many, however, felt these provisions in general criminal codes to be insufficient and sought to check trafficking by the passing of specific trafficking legislations. Due to the serious nature and the wide prevalence of trafficking for sexual exploitation in the region, many of these laws deal with this form of trafficking⁶. Instead of a complete code dealing with different forms of trafficking, law is scattered across different legislations.

The questions to be addressed are: What breadth does trafficking laws cover? Also, how far is the cover an absolute one on all forms of trafficking? And, finally, how far does the cover comply with international standards?

While trafficking-specific laws focus mainly on trafficking for commercial sexual exploitation, it is also clear that many forms of trafficking are covered by some provision of each country's criminal code. These include a whole spectrum of offences, from kidnapping and rape to wrongful confinement and hurt.

However, there are also cases of trafficking which are thinly disguised and may not *prima facie* be identified as trafficking. These include, using the open border policy between Nepal and India to bring in Nepali girls and women to India and then selling them to brothels, or the recruitment and employment agency scams in Sri Lanka where persons find themselves in situations akin to forced labor or labor with little or no remuneration. These need to be pinpointed by individual nations and action taken speedily.

1.3 Definitions: The Lack of a Common Definition on Trafficking

Underlying all this is the difficulty that there is no common definition of trafficking. The definition currently applicable to the region under this study is the one adopted in the SAARC convention⁷ which is a limited one only covering trafficking for commercial sexual exploitation. Trafficking is defined as 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 trafficking⁸.

Domestic laws even now lack a shared understanding of trafficking. Not all domestic laws define trafficking⁹. Although India has a specific law on trafficking, it does not define trafficking, but defines 'prostitution' to have the usual attributes of trafficking for sexual exploitation¹⁰. The law of Bangladesh also defines 'trafficking of women and children' and not trafficking in a holistic manner¹¹. The recent law in Nepal covers more forms of trafficking such as for the removal of organs, but it also covers actions it considers immoral and punishable though it is not, strictly

⁶ India's Immoral Traffic Prevention Act, 1956, is a classic example.

⁷ South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002.

⁸ Article 1 *Ibid*.

⁹ The Immoral Traffic (Prevention Act), 1956.

¹⁰ It is hoped that the amendment that is on the cards will take this into consideration. The Goa Children's Act, 2003 has a definition on trafficking, but that is limited a) to the State of Goa in India, and b) to child trafficking only.

¹¹ Women and Children Repression Prevention Act, 2000, Sections 5 and 6.

speaking, trafficking¹². Sri Lanka, as mentioned earlier, has made major reforms in law in this area through modifications in the Penal Code in 2006 covering different forms of trafficking along with a definition of trafficking.

How far is the SAARC definition used? Except for international conferences and manuals prepared for different stakeholders, the definition has little practical significance where the punitive law continues to follow a different definition. However, it is useful in cooperation efforts and in making future policy for the South Asian Region which would help to combat trafficking. It would make it far more relevant if it were mirrored in domestic laws.

2. A COMPARISON OF THE WORKING OF LEGAL FRAMEWORKS WITH THE UNTOC AND THE PROTOCOL

2.1 Organized Crime

A comparison of the working of domestic legal frameworks with the larger UN Convention Against Transnational Organized Crime, 2000, presupposes a common understanding of what organized crime is. In the case of the Protocol, it presupposes a common understanding of what trafficking is. In the case of the latter, we have already seen that there is no common understanding of what trafficking is due to a lack of a clear definition on trafficking which is compliant with the UNTOC standards. There is no definition of organized crime in any of the domestic laws although there are standards having a bearing on organized crime¹³. Unlike trafficking, there is no SAARC definition on organized crime in either the SAARC Convention on Mutual Assistance in Criminal Matters, 2008, or the South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002.

While Bangladesh, India and Sri Lanka have a number of anti-corruption provisions in their penal codes, India and Nepal also have separate Prevention of Corruption Acts which can be made use of in organized crime and cross border trafficking, as there is involvement at times of public officials at different levels. Other provisions in criminal law, including common intention to commit an offence, criminal conspiracy and abetment, already exist in laws and can be used to deal with organized crime. Loosely, they do comply with the definition of organized crime, as it may identify a group acting in concert to attain a benefit of some kind. Prima facie the definition of organized crime seems to be covered in domestic laws.

2.2 South Asia and the Protocol

In order to determine the efficacy of criminal justice systems in South Asia and their effectiveness in handling trafficking, it is essential to compare the standards in South Asia to the UNTOC standards as embodied in the Trafficking Protocol. The Protocol is fairly comprehensive in terms of looking at a variety of strategies to combat cross border trafficking.

The problems of definition persist and impact many aspects of the Trafficking Protocol because a country's reading of the Protocol would depend on its definition of trafficking.

¹² Engaging a person in prostitution with or without consideration and having sexual intercourse with a prostitute are examples. Adapted from http://www.unodc.org/pdf/insia/Nat_Rep2006-07.pdf accessed on 10 July 2010 and Shruti Pandey, "Legal Framework on Trafficking in Persons in SAARC Region: Draft Study Report" (unpublished) UNIFEM (2007).

¹³ The exception to this is India which though lacking a Central law on organized crime does have some laws at the State level dealing with Organized Crime. This is not a uniform phenomenon across States and is restricted to some States. Moreover, many of these laws have been critiqued by groups as violative of human rights.

The Trafficking Protocol covers all three dimensions of anti-trafficking standards - prevention, protection and prosecution.

Prevention

Prevention strategies under the UNTOC and Protocol largely involve cooperation between States Parties in order to combat cross border trafficking. States are also required to undertake measures to protect victims of trafficking and to prevent them from being re-victimized¹⁴. Research, information and mass media campaigns, and social and economic initiatives to prevent and combat all forms of trafficking, are advocated¹⁵. A broad spectrum of initiatives tackling push factors; such as poverty alleviation measures, are also suggested¹⁶. Many initiatives and strategies are currently being used in the countries studied.

Protection

Protection standards deal with measures to be taken to protect victims of trafficking. Under Article 6 of the Protocol, assistance is to be given to the victims of trafficking and they are to be protected. The protections may vary in the case of women, children and others. All the States, except for Sri Lanka, do have certain protections falling within the ambit of this provision. In India, a child in need of care and protection includes one who is vulnerable and likely to be trafficked. Bangladesh has held that it is a fundamental right to be returned to Bangladesh if a person has been trafficked to a different country - this is applicable to citizens of Bangladesh. Nepal perhaps has more protections under this Article than the other States. A number of provisions such as a right to legal representation, translation, protection of whistle blowers, police protection, etc., provide both protection to the victim and assist the victim in accessing justice.

Prosecution

What is prohibited and criminalized is the basis of all prosecution¹⁷. Criminalization of trafficking is largely focused on trafficking for commercial sexual exploitation in its various forms or trafficking for employment. Cross border trafficking may carry a higher penalty and so may trafficking of children. Criminal justice procedures need to also be strengthened to avoid secondary victimization of victims during the trial process¹⁸.

While individual States have taken up a fair number of measures covering all three, a detailed analysis of the area does throw up certain gaps within the region as far as adherence to the Protocol is concerned.

This is further accentuated by the fact that a number of key treaties have limited application in the region.

¹⁴ Article 9 UNTOC Protocol

¹⁵ Ibid Clause 2

¹⁶ Ibid. Clause 4

¹⁷ Article 5 Trafficking Protocol hereinafter referred to as, Protocol

¹⁸ This may happen in many ways including lengthy procedures where their presence may be demanded time and again in courts, harassment by powerful interests, forcible stay in protection homes, etc.

3. A COMPARISON OF RATIFICATION STATUS OF KEY INTERNATIONAL INSTRUMENTS

Instrument	India	Nepal	Bangladesh	Sri Lanka
Convention on the Rights of the Child	Y	Y	Y	Y
Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography	Y	Y	Y	Y
Convention on the Suppression of Immoral Traffic and of the Prostitution of Others	Y	Y	Y	Y
ILO Convention 138 on Minimum Age	N	Y	N	Y
ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor	N	Y	Y	Y
Convention on the Elimination of All Forms of Discrimination Against Women	Y	Y	Y	Y
SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution and the SAARC Convention on Regional Arrangements for the promotion of child welfare in South Asia ¹⁹	Y	Y	Y	Y

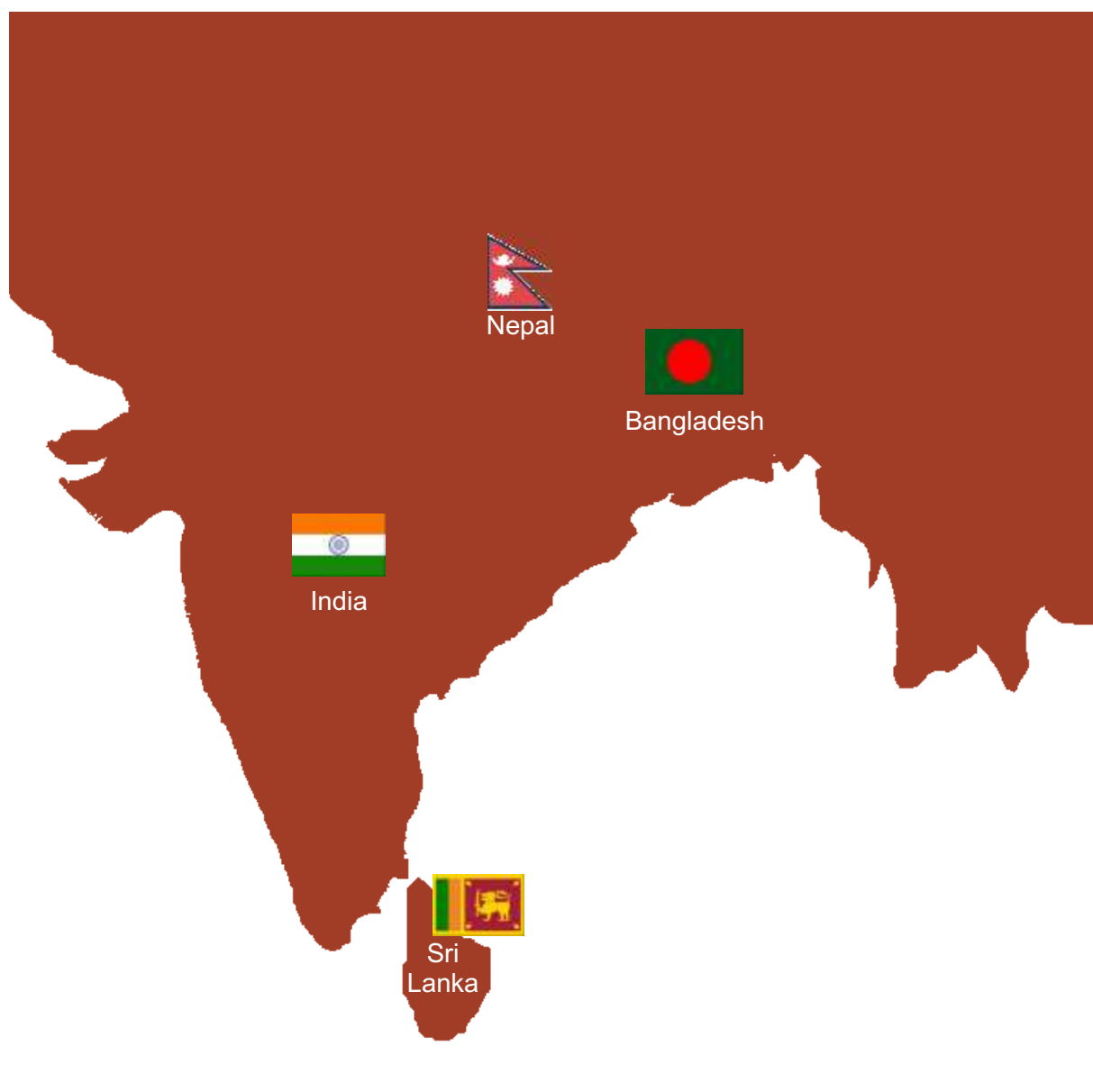
Subsequent Chapters highlight the position of the legal framework relating to human trafficking by discussing the relevant legislations in each country under study.

A shared understanding of trafficking and shared cooperation strategies to tackle trafficking will go a long way in strengthening the legal framework on trafficking in South Asia.

¹⁹ Signatories

2

Country Analysis



COUNTRY ANALYSIS

BANGLADESH



BANGLADESH

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10. Key Recommendations for Bangladesh

BANGLADESH



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1. CONCERNS ON TRAFFICKING IN BANGLADESH

Bangladesh is a major country of origin and transit for men, women and children subjected to trafficking in persons, especially forced labor and forced prostitution²⁰. There is internal trafficking within the country, but a large proportion of trafficking is cross border. Such illegal transactions are on the rise between persons in India and Bangladesh. Often, such transactions are carried out with ease. After India's partition in 1947, there were many 'enclaves'²¹ between the borders of India and Bangladesh. There are 111 Indian enclaves in Bangladesh and 51 enclaves of Bangladesh in India. Research carried out by the Bangladesh National Women Lawyers Association (BNWLA) has shown that these enclaves have been used as recruitment and collection sites by traffickers.²² Many border areas²³ are frequently used as land routes for trafficking.

Bangladesh has had laws specifically on trafficking right from 1933.²⁴ There are action plans to protect children, including plans to specifically protect children against sexual abuse and exploitation.²⁵ In order to strengthen protection and prosecution, a number of steps were taken including a new legislation in 2000²⁶ and the setting up of the Police Monitoring Cell for Combating Trafficking in Women and Children in the Bangladesh Police Headquarters. The latter is a 15 member strong team of police officers. There is also a 12 member police anti-trafficking investigative unit to support this cell and an inter-Ministerial committee on human trafficking chaired by the Home Minister.

Protection of victims of trafficking has seen a number of legal, medical, psychosocial and economic support services by the State as well as by NGOs. Four NGOs especially have been pinpointed by the Global Report on Trafficking in Persons, 2010 as playing a crucial role in sheltering victims of trafficking, viz., the Association for Community Development (ACD), The Thengamar Mohila Sabuj Sangha (TMSS), the Dhaka Ahsania Mission (DAM) and the Bangladesh National Women Lawyers Association (BNWLA). The Ministry of Expatriate Welfare and Overseas Employments operates shelters for female Bangladeshi victims of trafficking and exploitation in some places overseas, though Indian cities are not among them.²⁷

A large proportion of cross border trafficking in Bangladesh is due to migration in search of employment. Many Bangladeshi men and women migrate willingly to countries other than India, such as Saudi Arabia, Bahrain, Kuwait, the United Arab Emirates (UAE), Qatar, Iraq, Lebanon and Malaysia for work under formal contracts. Recruiting agencies acting as middlemen in such cases often charge exorbitantly, and there have been a number of cases of recruitment fraud where such migrants are misled about the terms of employment including payment. They find themselves being forced to work without wages and sometimes face physical or sexual abuse. Women work as domestic servants and often find themselves helpless if there is violence against them. The

²⁰ Trafficking in Persons Report 2010, United States Department of State, 14 June 2010 available at <http://www.unhcr.org/refworld/docid/4c18840ac.html> accessed on 08 July, 2010.

²¹ Enclaves are pockets of land belonging to a nation other than that which surrounds them.

²² Ruksana Gazi et al., Trafficking of Women and Children in Bangladesh, ICDDR, Centre for Health and Population Research, Dhaka, Bangladesh (2001).

²³ Khulna, Jessore, Satkhira, Rajshahi, Dinajpur, Rangpur, Mymensingh, Comilla, Brahmanbaria and Sylhet.

²⁴ The earlier Suppression of Immoral Traffic Act, 1933.

²⁵ National Plan of Action for Children 2004-2009 and the National Plan of Action against Sexual Abuse and Exploitation of Children.

²⁶ Women and Children Repression Prevention Act, 2000.

²⁷ Riyadh, Jeddah, Abu Dhabi and Dubai.

Bureau of Manpower Employment and Training (BMET) shut down some recruiting agencies which had exploitative practices; however, no recruitment agency has been prosecuted for trafficking related crimes.²⁸

On prosecution, there is a large backlog of cases due to procedural delays. Existing penal laws of Bangladesh are predominantly based on the philosophy of crime control method rather than human rights based approach. The concept of restorative justice is fully ignored in the counter trafficking penal legal framework of Bangladesh. The role of victims is restricted to that of informant and witness for the prosecution, even though s/he has suffered physical, emotional, psychological injury as well as financial and property losses. This approach seriously discourages the victims of trafficking to actively participate in the investigation and trial proceedings which ultimately results in very low conviction rate in trafficking cases. There are special courts for the prosecution of crimes of violence against women and children. The bulk of trafficking cases is in the realm of trafficking for commercial sexual exploitation, and trafficking for labor has not received the same attention.

Bangladesh's concerns lie in preventing trafficking, especially that which is labor related, clearing the backlog in cases and improving conditions to make the employment situation more attractive at home.

2. CONSTITUTIONAL PROTECTIONS AND TRAFFICKING

Bangladesh has addressed issues of trafficking in specific terms in its Constitution. There are two main provisions on trafficking - one dealing with forced labor and the other with prostitution.

Article 34(1)	Prohibits all forms of forced labor
Article 18(2)	Places a duty upon the State to adopt effective measures to prevent prostitution

The Constitution of Bangladesh deals specifically with two forms of trafficking - labor and commercial sexual exploitation. In Article 34(1), all forms of forced labor are prohibited, and Article 18(2) places a duty upon the State to prevent prostitution. Trafficking for purposes of labor or sexual exploitation, thus, are dealt with in the Constitution.

Article 31 of the Constitution guarantees every citizen the right to enjoy the protection of law wherever they may be. The implication of this provision is that to enjoy the protection of law it is not essential for a citizen to be on the territory of Bangladesh. In other words, the state is obliged to ensure the protection of law internally and extraterritorially. Therefore, the obligation of Bangladesh state for repatriation of trafficked victims is very much implied in this fundamental right provision of the Constitution of Bangladesh.

²⁸ Trafficking in Persons Report 2010, United States Department of State, 14 June 2010 available at <http://www.unhcr.org/refworld/docid/4c18840ac.html> accessed on 08 July, 2010.

3. WOMEN AND CHILDREN REPRESSION PREVENTION ACT, 2000

Bangladesh has framed a special legislation dealing with trafficking. Two distinguishing features of this legislation are one, that its focus is on trafficking for commercial sexual exploitation, and two, that sometimes the law blurs the distinction between commercial sex / prostitution and commercial sexual exploitation / trafficking.

Bangladesh's *Women and Children Repression Prevention Act, 2000*²⁹, is a fairly recent law which was enacted for the sole purpose of dealing with violence against women and children, including for commercial sexual exploitation. It criminalizes trafficking for prostitution or other unlawful or immoral purposes³⁰. It thus has a wide meaning, though what these immoral purposes could be is not defined. The punishment provided is severe - trafficking is punishable by death or by life imprisonment between ten to twenty years³¹. This is the harshest punishment for trafficking among the States in this Study. There is also a section penalizing 'sexual oppression,' but since the phrase has not been defined, it is not possible at this stage to speculate on its scope and application.

Child trafficking for similar purposes carries with it the punishment of death or life imprisonment³². For the purposes of the statute, a child is defined as a person below sixteen years of age³³. However, there is a draft National Child Policy, 2010, on the anvil which is not yet in force but which defines a child as below the age of eighteen³⁴. Other provisions which specifically deal with children include the penalty for damaging the organs of a child for beggary or sale³⁵.

In addition to substantive provisions, procedure also plays an important role in the Act. There are provisions to expedite prosecution by imposing time limits and setting up special tribunals³⁶. This is much needed in a situation where prosecutions may not succeed and traffickers go scot free if there are delays in prosecution. Evidence may be mislaid, and victims of the crime of trafficking may not be traceable.

Victim rescue and rehabilitation provisions are also there, including measures for non disclosure of the victim's identity. This is important, as the victim needs to be rehabilitated, and that will not easily happen in current Bangladeshi society if it becomes known that the person was a victim of trafficking for commercial sexual exploitation. In camera proceedings are also mandated by the statute. Although it was available even prior to this law at the discretion of the courts, it was not made applicable in all cases.

²⁹ *Nari o Shishu Nirjatan Domon* is what the name originally reads in the vernacular (Bangla/ Bengali). See generally Shruti Pandey, *Legal Framework on Trafficking in Persons in SAARC Region*, Draft Study Report, UNIFEM (2007)

³⁰ Section 5

³¹ *Ibid*

³² Section 6

³³ Section 2(k)

³⁴ <http://www.mowca.gov.bd/newsdetails.php?lang=en&id=4> accessed on 10 August 2010.

³⁵ Section 12

³⁶ Sections 18 and 20. The Government of Bangladesh has appointed 42 Special Tribunals in 33 Districts under this Act and a Special Judge has been appointed in each Tribunal for trial of cases relating to violence against women and children including trafficking in women and children. There have been 42 Special Public Prosecutors designated in each of these Tribunals for conducting these cases (Source- Regional Study for the Harmonization of Anti Trafficking Legal Framework in India, Bangladesh and Nepal with International Standards, op. cit. May 2007 at 282).

The Chart appended below gives an overview of the Women and Children Repression Prevention Act, 2000:

Legislation	Section	Provisions relating to trafficking
Women and Children Repression Prevention Act, 2000	5	Criminalizes the trafficking of women for prostitution or other unlawful or immoral purposes and makes it a capital offence punishable by a death sentence or life imprisonment or a prison term not less than ten and not more than twenty years. Also makes the offender liable to pay a fine.
	6	Child trafficking for prostitution or immoral or unlawful purposes is prohibited. A child is defined as a person below 16 years of age. This is a capital offence punishable by a death sentence or life imprisonment along with a fine.
	7	Kidnapping punished.
	10	Penalizes sexual oppression of women or children.
	12	Penalizes damaging of organs of a child for beggary or sale.
	20	Victim-assistance provisions, including measures for non-disclosure of victim's identity and in-camera testimony.
	9A, 31A	Measures to expedite prosecutions, imposing time limits and setting up special tribunals.

4. MISCELLANEOUS LEGISLATIONS RELEVANT TO TRAFFICKING

Bangladesh has also made provisions in other penal laws to deal with trafficking. Some of these provisions in penal laws have existed prior to its Independence; others have been added post Independence. In addition, there are other laws which have a close bearing on addressing trafficking as viewed in the UNTOC read with the Trafficking Protocol.

Broadly speaking these legislations deal with a number of themes such as children/ juvenile justice and protection, foreign employment/ regulating of foreign job placement agencies, child labor, bonded labor/ indentured labor/ pledging of persons for labor and extradition.

These legislations also deal with the criminalizing of a number of offences including procuring, buying and selling of human beings, importing or exporting human beings, buying and selling minors, kidnapping, abducting and using force for the purpose of trafficking, slavery and slavery like conditions, servitude, bondage and unacceptable forms of labor and others.

³⁷ Section 2(k)

³⁸ Regional Study for the Harmonization of Anti Trafficking Legal Framework in India, Bangladesh and Nepal with International Standards, TDH 2007 at 245.

³⁹ Ibid.

A chart detailing miscellaneous legislations relevant to trafficking is given below.

Miscellaneous Legislations Relevant To Trafficking

SELECT MISCELLANEOUS LEGISLATIONS RELEVANT TO TRAFFICKING	Section	DETAILS OF THE PROVISION
Penal Code, 1860	366	Kidnapping or abducting or inducing a woman to compel marriage.
	366A	Procuring a minor girl.
	366B	Importing a girl from a foreign country.
	367	Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.
	370	Buying or disposing of any person as a slave.
	371	Habitual dealing in slaves.
	372	Selling minor for purposes of prostitution, etc.
	373	Buying minor for purposes of prostitution, etc.
	374	Unlawful compulsory labor.
Children Act, 1974	41	Keeping children above four in brothels.
	35	Using children for begging.
	42	Encouraging seduction of a girl child below 16 years of age.
	43	Court can direct parents to take care of a girl child below 16 who is vulnerable to seduction.
	44	Sexual exploitation or exposure of a child employee to an immoral atmosphere.
Extradition Act, 1974	Para 4 Schedule to the Act ⁴⁰	Procuring or trafficking in women or young persons is an extraditable offence.
	Schedule to the Act ⁴¹	Kidnapping, abduction and dealing in slaves are extraditable offences.
Bangladesh Labor Code, 2006	34	No child will be required to work in any profession or establishment. ⁴²
	35	No parent or guardian can enter into a contract of employment of a child.
Emigration Ordinance, 1982 ⁴³	20	Binding person to emigrate, withholding travel documents, etc., is unlawful.
	21	Fraudulently inducing someone to emigrate is prohibited.
	23	Receiving money for providing foreign employment.
Employment of Women, Young Persons and Children Act, 1956	20A	Children (below 18) cannot be employed in hazardous occupations. ⁴⁴
Prevention of Money Laundering Act, 2009	2	Money laundering as a consequence of trafficking is prosecutable. ⁴⁵

⁴⁰ <http://www.oecd.org/dataoecd/48/62/39355312.pdf> accessed on 12 June, 2010

⁴¹ Id.

⁴² Md Abdul Halim & Masum Saifur Rahman, The Bangladesh Labor Code, 2006, CCB Foundation, 2007 as cited in Regional Study for the Harmonization of Anti Trafficking Legal Framework in India, Bangladesh and Nepal with International Standards, TDH (2007) at page 246

⁴³ http://bdlaws.gov.bd/pdf_part.php?id=628 accessed on 12 June, 2010

⁴⁴ As cited in Shruti Pandey, Legal Framework on Trafficking in Persons in SAARC Region, Draft Study Report, UNIFEM (2007)

⁴⁵ Ibid

5. TRAFFICKING AND ORGANIZED CRIME AS DEFINED BY THE LAW OF BANGLADESH

For the purpose of understanding cross border trafficking, especially in the context of organized crime, there are two definitions that need to be analyzed, viz., 'trafficking' and 'organized crime.' How Bangladesh defines and engages with these two terms provides an understanding of the rubric of legal protection to combat trafficking as an organized crime in Bangladesh.

In order to weigh the definitions that Bangladesh has, since all the countries which are part of this study are part of the South Asian Association for Regional Cooperation, the definitions under SAARC will also be studied.

Trafficking Definitions

UN Convention Against Transnational Organized Crime and the Trafficking Protocol

The definition of trafficking under Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000⁴⁶, covers 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 labor or services, slavery or practices similar to slavery, servitude, or the removal of organs.

It further clarifies that the consent of a victim of trafficking in persons, to the intended exploitation, is irrelevant where the means specified above have been used⁴⁷. Also, where a child⁴⁸ is concerned, the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered trafficking, even if it does not involve any of the means laid down in the definition of trafficking.⁴⁹

The South Asian Association for Regional Cooperation

The SAARC Convention⁵⁰ adopted unanimously by Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka, which is relevant for cross border trafficking in South Asia also, has defined trafficking. However, it is a limited definition which only covers trafficking for commercial sexual exploitation. Trafficking is defined 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.⁵¹

⁴⁶ Hereinafter referred to as Protocol

⁴⁷ Article 3(b) Ibid.

⁴⁸ A 'child' is any person under eighteen years of age (Article 3(d) Protocol)

⁴⁹ Article 3 (c) Protocol

⁵⁰ South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002.

⁵¹ Article I

Domestic Law of Bangladesh

The Women and Children Repression Prevention Act, 2000⁵² defines trafficking of women as covering these acts if they were done with the intention of engaging in prostitution or illegal or immoral acts⁵³ -

- Bringing in women or children from abroad or sending them out of the country.
- Dealing in the purchase and sale of women and children or hiring them out or handing them over for torture or for similar purposes.
- Keeping women and children in possession or custody for such purpose.

Organized Crime Definitions

UN Convention Against Transnational Organized Crime and the Protocol

Under the United Nations Convention Against Transnational Organized Crime, 2000⁵⁴, “Organized criminal group”⁵⁵ has been defined as a structured group⁵⁶ of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.⁵⁷

The South Asian Association for Regional Cooperation

There is no definition of organized crime in either the SAARC Convention on Mutual Assistance in Criminal Matters, 2008, or the South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2000.

Domestic Law of Bangladesh

Bangladesh does not have legislations dealing with organized crime particularly, but the Penal Code, 1860,⁵⁸ does list provisions having a crucial bearing on organized crime. These include provisions on common intention to commit an offence,⁵⁹ criminal conspiracy⁶⁰ and abetment.⁶¹ The Penal Code also has a number of provisions dealing with anti-corruption and punishing public servants for taking gratification other than the legal remuneration they are entitled to.⁶² This last

⁵² Translated from the original Nari o Shishu Nirajaton Domon Ain, 2000, as cited in Shruti Pandey, Legal Framework on Trafficking in Persons in SAARC Region, Draft Report, UNIFEM 2007.

⁵³ Sections 5 and 6. Separate acts of trafficking have been dealt with in the sub section on Laws on Trafficking.

⁵⁴ Hereinafter referred to as UNTOC.

⁵⁵ Article 2(a) of the United Nations Convention Against Transnational Organized Crime, 2000.

⁵⁶ Further defined in Article 2 (c) UNTOC to mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

⁵⁷ Article 2(a) UNTOC.

⁵⁸ http://bdlaws.gov.bd/pdf_part.php?id=11

⁵⁹ Section 34 Penal Code, 1860.

⁶⁰ Sections 120A and 120B Penal Code, 1860.

⁶¹ Sections 107-120 Penal Code, 1860.

⁶² Anti Corruption provisions in the Bangladesh Penal Code, 1860.

Section 161- Public servant taking gratification other than legal remuneration in respect of an official act

Section 162- Taking gratification, in order by corrupt or illegal means, to influence public servant

Section 163- Taking gratification, for exercise of personal influence with public servant

Section 164- Punishment for abetment by public servant of offences defined in Section 162 or 163

Section 165- Public servant obtaining valuable thing, without consideration, from person concerned in proceeding or business transacted by such public servant

provision could be useful in dealing with cases of official complicity which have often been alleged in cases of trafficking.⁶³

6. CASE LAW ON TRAFFICKING: LANDMARK JUDICIAL PRONOUNCEMENTS HAVING A BEARING ON HUMAN TRAFFICKING

Other than looking at provisions in constitutions and legislations, case law built up by courts are also part of the domestic law. Case law provides an important insight into the direction that the law is taking and the interpretation courts may have on any given provision of law. Trafficking offences are highly dependent on the subordinate/ lower judiciary to determine convictions, and the lower judiciary is bound by judicial pronouncements of the higher courts which lay down policy, guidelines and interpretations.

Decisions by higher courts in Bangladesh have been few, but they have been significant in the context of cross border trafficking and the rights of victims of trafficking. Courts in Bangladesh have had cases both on protection as well as prosecution.

*Bangladesh Society for the Enforcement of Human Rights (BSEHR) vs Government of Bangladesh and Others*⁶⁴ saw certain specific rights of sex workers being recognized. The case was in response to a 'raid and rescue' operation carried out by the police. Specifically, it was a brothel raid in the night when police barged into rooms and dragged residents away. Adult women and children were physically assaulted, loaded into vehicles and kept against their will at government homes. They claimed that they were subjected to indignities and despite their objections were kept there. A Public Interest Litigation was filed on behalf of the women and children by a group of organizations working with sex workers. While there was no allegation of trafficking in this case, it is an important case from the point of view of women who are victims of trafficking and continue in prostitution, as it recognizes first and foremost that they have the same right to life and personal liberty as does any other citizen of Bangladesh. The court pointed out that 'prostitution' by itself was not illegal, and though there was a Constitutional mandate to take effective measures to prevent prostitution, it was not to be done by violating rights. The court also upheld the right to privacy and dignity of all people.

While this was a decision which was from the point of view of the marginalized in the case, it was by no means the only one to look at facts through that lens. In *Abdul Gafur vs. Secretary, Ministry of Foreign Affairs, Govt of Bangladesh*,⁶⁵ a fifteen year old Bangladeshi girl had disappeared from her village. After four years, the family found out that she had been abducted by child traffickers and had been sold in India, she was subsequently rescued and was now residing at a state run women's home in West Bengal. Her father wrote to the government of Bangladesh asking authorities to take steps for her repatriation, but the government remained unmoved. Finally, he filed a writ petition in court requesting the court to direct the concerned government department to act.

This is an important test case as in most cases of cross border trafficking, it is very difficult for victims or their kin in Bangladesh to access the criminal justice system in India, or even to approach the Indian government to make a request for repatriation, etc. The appropriate mechanism should be the domestic one, which will then get in touch with the Indian counterpart.

⁶³ See further the sub-chapters on Gaps and Recommendations

⁶⁴ *Bangladesh Society for the Enforcement of Human Rights (BSEHR) vs Government of Bangladesh and Others* 53 DLR (2001).

⁶⁵ *Abdul Gafur v Secretary, Ministry of Foreign Affairs, Govt of Bangladesh* 17 (1997) BLD (HCD) 560.

The father of Hasina, the girl in this case, had done exactly that but received no response. He claimed that Hasina, as a Bangladeshi citizen, was entitled to all protection as a citizen despite the fact that she was in a different country, as she had not left of her own volition, but had been forcibly taken. It was stated in the petition that the girl was entitled to the protection of Articles 27, 31 and 32 of the Constitution. It is suggested that even if a person had left of her own will, being allured by promises of work or seduced by marriage, the duty of the government of Bangladesh would in no way diminish. The court here directed the government department to follow up the matter and work towards the repatriation of Hasina.

In the above case, the Supreme Court of Bangladesh clearly recognizes repatriation as a fundamental right and lays emphasis on the State's responsibility in ensuring repatriation of trafficked victims.

Another question which arose in this case was whether trafficking in this case was child trafficking or trafficking of an adult woman. Since the incident happened when she was a child, the court held that it should be considered a case of child trafficking. However, the court also held that if she continued to be trafficked several times during the course of her stay in India, there would be separate offences of child/ adult trafficking as the facts indicated.

7. MEASURING DOMESTIC TRAFFICKING PROVISIONS AGAINST INTERNATIONAL YARDSTICKS: THE PROTOCOL

In order to identify gaps, it is essential to compare domestic laws with international standards. In this study, this is done in two steps. In the first step which is contained in this chapter, the Protocol has been used as a yardstick to see how far domestic laws comply with the provisions of the Protocol. Specific Articles of the Protocol are used as the basis for this comparison, as seen in the following charts. In the second step which is contained in the next chapter, the international instruments that have been signed/ ratified too are listed. This is done to ensure that for certain crucial points such as gender, human rights and the rights of the child, these instruments will serve as referral points in identifying gaps and making recommendations.

Bangladeshi Law and the Protocol

Protocol	Bangladeshi Law/ Government Action
Article 5 Criminalization of offences	A number of trafficking related offences have been penalized - Trafficking for compelling marriage Trafficking for prostitution Unlawful compulsory labor Slavery in any form Forcing children to beg Organ trafficking of children (damaging organs) Pledging of children's labor Binding a person to emigrate Receiving money for procuring foreign employment
Article 6 Assistance to and protection of victims of trafficking	Courts have held that it is a fundamental right to be returned to Bangladesh if a person has been trafficked to a different country. Homes and crisis centers for victims of trafficking are run by government and NGOs. Victims are encouraged to assist in prosecutions.
Article 7 Status of victims of trafficking in persons in receiving States	Not very relevant, as Bangladesh is a source State.
Article 8 Repatriation of victims of trafficking in persons	For Bangladeshi victims of trafficking in India, the Courts have held that they have a fundamental right to be repatriated. However, in many cases, the State has not confirmed the identity of those who have been trafficked and so repatriation has not happened.

Protocol	Bangladeshi Law/ Government Action
Article 9 Prevention of trafficking in persons	Anti-trafficking messages have been addressed. Trainings of personnel at different levels have been conducted. Licensing of placement agencies is now being done.
Article 10 Information exchange and training	Sometimes there is cooperation, but no formal mechanism exists. Border Guards in Bangladesh and Border Security Force in India sometimes cooperate in repatriations.
Article 11 Border measures	Due to the very long border with India and the presence of enclaves in both States, it is difficult to prevent cross border movement into India.
Article 12 Security and control of documents	There is no travel document in most cases of trafficking.
Article 13 Legitimacy and validity of documents	Lack of documents is the key issue, and thus it is difficult to prove that a victim of trafficking in India is indeed from Bangladesh.

The study has therefore thrown up a number of points at which there is a match between the Protocol and domestic laws of Bangladesh.

8. AN OVERVIEW OF THE RATIFICATION STATUS TO IMPORTANT INTERNATIONAL INSTRUMENTS

In addition to the Protocol, there are other international instruments which are important if one is to identify gaps in the study, because even though they don't have any specific provisions on trafficking, they are crucial in understanding how the interests of vulnerable groups are met. They also serve to provide an understanding of the approaches to trafficking Bangladesh has taken.

Status of Conventions Signed/ Ratified by Bangladesh

Name of Convention	Status	Comments
UN Convention on the Rights of the Child (UNCRC)	Signed on 26 th Jan, 1990, and ratified on 3 rd August, 1990	
Optional Protocol to UNCRC on Sale of Children, Child Prostitution, Child Pornography	Signed and Ratified on 16 September, 2000	
Convention on the Suppression of Immoral Traffic and of the Prostitution of Others	Date of Accession: 11 th Jan, 1985	
ILO Convention 138 Minimum Age Convention	Not Ratified	
ILO Convention 182 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor	Ratified on 12 th March, 2001	
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	Date of Accession: 6 th November, 1984	Upon accession, the Government of Bangladesh made the following reservation: "The Government of the People's Republic of Bangladesh does not consider as binding upon itself the provisions of Articles 2, 13 (a) and 16 (1) (c) and (f) as they conflict with <i>Sharia</i> law based on Holy Quran and Sunna." On 23 July 1997, the Government of Bangladesh notified the Secretary-General that it had decided to withdraw the reservation relating to articles 13 (a) and 16 (1) (f) made upon accession.

⁶⁶ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#5

Name of Convention	Status	Comments
SAARC Convention of Preventing and Combating Trafficking in Women and Children for Prostitution 2002 and SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia	Signed on 5 th January 2002	
UN Convention against Transnational Organized Crime	Not Signed	
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children	Not Signed	
Protocol against the Smuggling of Migrants by Land, Sea and Air	Not Signed	

9. GAPS IN THE LEGAL FRAMEWORK ON TRAFFICKING IN BANGLADESH

There are two classifications under which gaps have been studied - first under the Prosecution-Protection-Prevention matrix and second under the Protocol, testing gaps with specific Articles.

Gaps Examined within the Prosecution-Protection-Prevention Matrix

Key gaps in the legal framework of the region including Bangladesh have an impact on all three areas of prosecution, protection and prevention. These include:-

- Non ratification of UNTOC and Protocols which is a major stumbling block as many enabling provisions of these instruments cannot be availed of.
- Lack of a comprehensive definition of trafficking, either as a common minimum platform for the States to work on with each other, or even for punishing all forms of trafficking within the countries. The Women and Children Repression Prevention Act, 2000, does not give a comprehensive definition and is restricted to a few forms of trafficking.
- Gender sensitivity is missing even though there are laws for women. This does not translate into a sensitive law, at least in its working, as commercial sex workers also get booked under trafficking law. Victims may be re-victimized during the procedure, and some who are prosecution witnesses may turn hostile.

Key Gaps in Prosecution

- There is no uniform definition of who is a child/ minor in terms of age. It varies in different statutes. The Employment of Women and Young Persons and Children Act, 1956, places a child as a person below eighteen⁶⁷, while the Women and Children Repression Prevention Act, 2000, defines a child as a person below sixteen years of age.⁶⁸
- Trafficking is not often seen as an organized crime, and provisions relevant to organized crime are not made use of in trafficking cases although the Bangladesh Penal Code, 1860, does have provisions relating to common intention to commit an offence,⁶⁹ criminal conspiracy⁷⁰ and abetment.⁷¹

⁶⁷ Section 20A

⁶⁸ Section 6

⁶⁹ Section 34

⁷⁰ Sections 120A and 120B

⁷¹ Sections 107-120

- Cooperation mechanisms are ad hoc or non-existent as far as cross border trafficking is concerned. This is so especially concerning:
 - a. Legal assistance
 - b. Providing information
 - c. Transfer of sentenced persons
 - d. Joint investigations
- Prosecutions overall are not satisfactory⁷². There are no separate courts dealing with issues of this nature.
- Absence of a comprehensive definition of trafficking leaves space for dishonest police personnel to convert a trafficking case into illegal migration, illegal border crossing, human smuggling, etc.

Key Gaps in Protection

- There is sometimes no adequate distinction drawn between the trafficker and the victims; e.g., in the case of prostitution or in the case of unsafe migration without documents. Although there have been cases where courts have ordered rescue, some of those who migrate may not be treated as Bangladeshis by the country if they don't have documents to prove so.
- There is no positive duty cast upon States to provide sufficient shelters or for rehabilitation or rescue victims of trafficking.⁷³
- Civil remedies in tort law are not used against employers who violate labor standards or force employment.⁷⁴
- Financial support for existing programs is often insufficient.
- A conducive atmosphere to make it safe for victims to testify is not created. There is no witness protection program, either.
- The focus is on women and children, with inadequate protection for men.⁷⁵
- The focus is also on trafficking for sexual exploitation and punishments for trafficking for labor do not carry the same weight.

Key Gaps in Prevention

- Trainings of personnel at different levels are done sporadically, and materials are not revised systematically.
- There are insufficient awareness campaigns and community initiatives, leading to trafficking or unsafe migration which increases vulnerability to trafficking.

⁷² The TIP Report gives some details on the gaps in prosecution including low convictions, backlog and delays due to procedural loopholes. Corruption in the form of official involvement in trafficking has affected prosecution. See generally, Trafficking in Persons Report 2010, United States Department of State, 14 June 2010, available at <http://www.unhcr.org/refworld/docid/4c18840ac.html> accessed on 08 July 2010.

⁷³ However the government continues to run shelters, a one-stop crisis center for women and children at the Dhaka hospital and other such homes. While victims are encouraged to testify in their cases, it is not clear how many have been able to. Ibid.

⁷⁴ While workers ostensibly have several options to address complaints of labor and violations and to get compensation, the most popular process of arbitration by the Bangladesh Association of International Recruiting Agencies (BAIRA) provided little compensation and could not address issues of illegality. It is quick and the worker gets paid cash quickly, hence its popularity. Trafficking in Persons Report 2010, United States Department of State, 14 June 2010 available at <http://www.unhcr.org/refworld/docid/4c18840ac.html> accessed on 08 July 2010.

⁷⁵ There is a lack of effort to protect adult male victims of forced labor especially. See *ibid*

- Licensing of recruitment agencies and their monitoring is not satisfactory. Illegal immigration is often resorted to.
- Systems like referrals and identification of support staff and service providers or authorities at different levels is absent.
- Absence of skilled police officers having motivation and adequate training in both pro-active and reactive investigation to combat organized crime like trafficking.

Gaps Compared With the Protocol

Bangladesh has not yet signed the Protocol, so comparison at this stage would be more meaningful once this is done. The Protocol lays down a universally acceptable common definition on trafficking and thus must be accepted.

Bangladesh has undertaken a number of measures which do comply with all three Statements of Purpose⁷⁶ of the Trafficking Protocol. However, the focus of the legal framework has been on the first, i.e., to prevent and combat trafficking in persons, especially women and children.⁷⁷ To a lesser extent, laws comply with the second objective, i.e., to protect and assist the victims of such trafficking with full respect for their human rights. While there are laws penalizing trafficking, 'prostitution' is often targeted which confuses the issue. The last objective to promote cooperation among States Parties is not really dealt with in domestic law, though there have been some initiatives including through government, border authorities and courts.

While Bangladesh has a separate law dealing with violence against women, it does not have a comprehensive legislation on trafficking. There is a long-standing demand for enactment of a separate and comprehensive law dealing with trafficking alone. The current law deals only with trafficking for forced prostitution or sexual exploitation. There are other laws, primarily the Penal Code, which deal with some other aspects of trafficking. There is no comprehensive definition of trafficking which complies with the definition under the Protocol.

A definition of organized crime is also lacking. However, this is a limited drawback as the Penal Code of Bangladesh covers common intention, abetment, criminal conspiracy and other forms of criminal activity done as an organized crime. However, these have domestic application or apply to cases where the domestic courts can exercise jurisdiction. Not all cross border trafficking may be covered by these provisions.

Bangladesh has also not ratified the Minimum Age Convention of the ILO and the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor. This has a direct bearing on the protection of children under the Protocol.

The existing legal framework of Bangladesh does not address the aspects of repatriation and rehabilitation of trafficked persons. Where victim protection is concerned,⁷⁸ the courts have, however, held that repatriation is a fundamental right of every Bangladeshi citizen. The State is obliged to ensure the return of victims of trafficking. However, due to lack of proper travel and identity documents for citizens mandated by Article 12 of the Protocol, it is difficult to identify who Bangladeshi citizens are. This, and the fact that Bangladesh is surrounded by Indian territory on three sides makes it difficult to exercise border measures contemplated in Article 10. Cooperation measures detailed in Article 9 similarly become difficult to implement.

⁷⁶ Article 2

⁷⁷ Article 2(a)

⁷⁸ See Article 6 generally

10. KEY RECOMMENDATIONS FOR BANGLADESH

Some recommendations are common to prosecution, protection and prevention. These include:

- Ratification of the UNTOC and the Protocols is essential so that there will be a common blueprint and a common as well as comprehensive legal framework.
- In order to have a common understanding of trafficking and also to ensure that all forms of trafficking are penalized, the definition under the Protocol must be adhered to. Even if this is not done under one comprehensive law on trafficking, it must be woven into existing legislations.
- There must be a greater sensitivity to the violations of rights of women who have been trafficked.

Key Recommendations in Prosecution

- By amendment to specific provisions of statutes wherever a child or minor is mentioned, the definition of a child must comply with the definition under the UNCRC. Every person below the age of eighteen years must be considered to be a child. The Women and Children Repression Prevention Act, 2000, must be amended accordingly.⁷⁹
- Trafficking must be seen as an organized crime in criminal procedure and substantive criminal law. Existing principles of criminal law, such as common intention, conspiracy, etc., must be used in cases of trafficking.
- Cooperation mechanisms must be set up with mutual contacts at different levels to cut through the red tape and make rapid action possible. This must be also done at the regional level through SAARC or some other mechanism.
- Prosecutions should be increased.
- Corruption among police and border officials must be investigated in order to ensure that cases of trafficking don't figure as illegal migration.
- Cases of trafficking should be taken up by designated courts dealing with violence against women, and judges in such courts should be both trained in the law and sensitized towards issues of gender.
- There is a need for overall systematic and focused trainings of all the wings of the criminal justice system; namely, the police, the public prosecutors and the judicial officers. There must be more stringent punishments for violations of labor standards.

Key Recommendations in Protection

- There must be a clear line drawn between the trafficker and the victim. Victims must not be further penalized, and a distinction must be made between trafficking on the one hand, and prostitution or unsafe migration on the other.
- States must accept back their nationals who have been trafficked, even if laws relating to border controls may have been breached by such persons.
- Rescue should go along with effective rehabilitation and must be done in a gender sensitive

⁷⁹ See Section 6

way. The survivors of trafficking should have the right to exercise independent agency, rather than being compelled to do whatever the State thinks is best for them.

- Civil remedies like torts, claims and compensation must be created and enforced against traffickers or employers.
- States must commit finances for more and better schemes to rehabilitate victims.
- Witness protection must be explored to create an atmosphere free from fear within which a victim can testify.
- Focus should also be on men who are trafficked for labor.

Key Recommendations in Prevention

- Anti-trafficking trainings must continue with renewed vigour for different implementing agencies. Trainings must be done continuously and at three levels:
 - Basic/ Qualification Training
 - Trainings to in-service personnel
 - Trainings to those deputed to anti-trafficking squads/ police/ border controls.
- Employment and recruitment agencies must be closely monitored.
- There must be greater awareness at all stages of source, demand and transit, and whistleblowers must be protected.
- Awareness building and community initiatives should be strengthened to prevent trafficking and to ensure that unsafe migration will not take place.

In Conclusion

While a good beginning has been made with the Women and Children Repression Prevention Act, 2000, a comprehensive legislation on trafficking is required. Bangladesh needs to ratify the UNTOC and its Protocols for a more uniform system of anti-trafficking frameworks for tackling both, internal and cross border trafficking. A clear definition of trafficking in keeping with Protocol would be the next step. While there is a Draft Child Policy, the protection of all children must be stressed, and ILO Conventions - especially with regard to the elimination of worst forms of labor - must be given effect to. Cooperation, especially with India, to control trafficking must be done by creating domestic and bilateral mechanisms and processes. While there have been steps taken, they must be reviewed to strengthen anti-trafficking measures in Bangladesh.

In early 2011, the Government of Bangladesh with assistance from IOM is in the process of drafting the “Human trafficking (Deterrence and Protection) Act 2011”. This Act aims to consolidate and amend existing laws and standards and to enact new provisions in order to prevent and suppress all forms of human trafficking and protect the victims of human trafficking.

COUNTRY ANALYSIS

INDIA



INDIA

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INDIA



1. Concerns on Trafficking in India
2. Constitutional Protections and Trafficking
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6. Case Law on Trafficking: Landmark Judicial Pronouncements having a bearing on Human Trafficking
7. Measuring Domestic Trafficking Provisions Against International Yardsticks: the Protocol
8. An Overview of the Ratification Status to Important International Instruments
9. Gaps in the Legal Framework of Trafficking in India
10. Key Recommendations for India

1. CONCERNS ON TRAFFICKING IN INDIA⁸⁰

Trafficking is prohibited by the Constitution of India.⁸¹ Yet India is a source, destination and transit country for human trafficking primarily for commercial sexual exploitation and forced labor, and with the falling sex ratio, trafficking for marriage is becoming another pull factor for trafficking of women and girls. The pernicious system of bonded labor continues despite legislation to combat it.⁸²

Movement of persons is from Nepal and Bangladesh into India and sometimes beyond, through the borders that these countries have with India which are porous and very long. There are about twenty check posts across the length of the Bangladeshi border which is 4,156 kms long. Crossing the border is not a cumbersome process, and money may change hands. With Nepal, there are fourteen legal entry points, but illegal cross border movements take place easily. Since India has an open border policy with Nepal, trafficking may be difficult to identify.⁸³ Bangladeshis don't have similar access, but trafficking from both these countries takes place.

Within the country, a number of factors operate as factors influencing trafficking of Indian men, women and children. Women and girls in India may be trafficked due to cultural practices such as the devadasi system⁸⁴ though banned or due to poverty. There are again many women who willingly migrate to the Middle East, Europe and the United States to work as domestic labor who are defrauded by placement agencies and sometimes trafficked. Men, women and children are trafficked within India and abroad and kept in conditions of involuntary servitude with characteristics such as withholding payment of wages, confiscation of travel documents, non-adherence to conditions of work, inordinate profits to middlemen with bonded labor to pay off the profits/ charges, etc. Bonded labor within the country is also a serious problem.⁸⁵

India is also a destination country for persons from Bangladesh and Nepal, and a bulk of those trafficked from these countries are women and children. In both cases, the initial migration, legal or illegal, may be voluntary, and subsequently migrants may be trafficked. The numbers are very large, though precise figures are lacking and need to be tackled urgently.

The 2010 Trafficking in Persons Report⁸⁶ also points out that ninety percent of those trafficked belong to the most disadvantaged groups. It also carried evidence of NGO reports on duping of girls from North East India with promises of jobs and then forcing them into prostitution as well as forced marriages. Brides are in high demand in the State of Haryana and other States due to the low sex ratio caused by sex selective abortions.

There, thus, seems to be more push and pull factors for trafficking that need to be urgently addressed.

⁸⁰ Trafficking In Persons Report, 2010, United States Department of State, 14 June 2010 sourced from <http://www.unhcr.org/refworld/docid/4c1883c52d.html> accessed on 08 July 2010.

⁸¹ Article 23

⁸² The Bonded Labor System (Abolition) Act, 1976.

⁸³ Adapted from Trafficking in Women and Children in India, Orient Longman, New Delhi (2005) pp 10-12.

⁸⁴ Dedicating a girl to prostitution, though ostensibly dedicated to serve a goddess.

⁸⁵ Trafficking in Persons Report, 2010 op. cit..

⁸⁶ Trafficking In Persons Report, 2010, United States Department of State, 14 June 2010 sourced from <http://www.unhcr.org/refworld/docid/4c1883c52d.html> accessed on 08 July 2010.

2. CONSTITUTIONAL PROTECTIONS AND TRAFFICKING

India has addressed trafficking both directly and indirectly in its Constitution. There are three Articles spread over Fundamental Rights in Part III and Directive Principles of State Policy in Part IV which address trafficking related issues. The chart below summarizes the provisions.

Provisions on Trafficking in the Constitution of India

Article 23	Fundamental Right prohibiting trafficking in human beings and forms of forced labor.
Article 39(e)	Directive Principle of State Policy directed at ensuring that health and strength of individuals are not abused and that no one is forced by economic necessity to do work unsuited to their age or strength..
Article 39(f)	Directive Principle of State Policy stating that childhood and youth should be protected against exploitation.

India has a written Constitution, and though the above provisions make India's mandate on trafficking clear, penalizing and tackling trafficking is dealt with by legislation. The Constitution specifically mentions trafficking in human beings as well as forced labor and also indicates the special protection to be provided to vulnerable groups in society.

The Constitution of India discusses provisions on trafficking at two levels - one, at the level of Fundamental Rights which are basic rights available to all, irrespective of caste, creed, sex, place of birth, etc., and two, at the level of Directive Principles of State Policy. Fundamental Rights are justiciable and can be directly enforced in a court of law, whereas Directive Principles of State Policy are non-justiciable and cannot be directly enforced in a Court of Law. However, Directive Principles play a major role in shaping the policy of the State and may sometimes be the basis that legislation is built on. As a Fundamental Right in Article 23, trafficking in human beings is prohibited as are all forms of forced labor. According to Directive Principles of State Policy in Articles 39(e) and (f), the health and strength of workers should not be abused. It prohibits exploitation of persons to perform work which is unsuitable for them. It also specifically protects children and youth against exploitation of any kind. While the provisions in the Directive Principles of State Policy do not mention trafficking, it mentions exploitation which is a key element in trafficking.

3. IMMORAL TRAFFIC PREVENTION ACT, 1956

India's Immoral Traffic Prevention Act, 1956 is the only legislation specifically addressing trafficking. However, it does mix up issues of trafficking and prostitution⁸⁷ and is currently pending amendment. It penalizes trafficking of women and children for commercial sexual exploitation. Keeping a brothel is a punishable offence,⁸⁸ as is living on the earnings of the prostitution of others.⁸⁹ The latter would inadvertently also cover family members or dependents of the woman, which was not the intention of the legislation. There have been cases at times where the trafficked woman has herself been charged under this provision.

Some of the major elements of trafficking are covered by the enactment. These include procuring, inducing or taking a person for prostitution,⁹⁰ detaining a person in premises where prostitution is

⁸⁷ Which is why as far as possible, the term commercial sexual exploitation is used in this document.

⁸⁸ Section 3

⁸⁹ Section 4

⁹⁰ Section 5

carried on⁹¹ and soliciting.⁹² Soliciting has also been used against women themselves and is sought to be addressed by the proposed amendment which seeks to drop the provision. If a person is found with a child in a brothel, there is a presumption that the child has been detained in that place for sexual exploitation.⁹³ It is a presumption which can be rebutted by the defense on production of appropriate evidence.

On rescue and rehabilitation, the Act also provides for rescue on the directions of a Magistrate.⁹⁴ In order to ensure that the women rescued are not harassed, it requires that two women police officers be present during the search procedures and also that the interrogation be done by a woman police officer.⁹⁵ There is a provision for placing the woman or child in intermediate custody in a safe place and to refrain from placing her with those who might have a harmful influence on her.⁹⁶ If trafficking has been by the members of the family, or there is suspicion that they may be involved, the trafficked persons may not be released to their families.

As mentioned earlier, the Act is under amendment, and it is hoped that the concerns often raised in its implementation will be adequately addressed.

The chart below gives an overview of the Immoral Traffic Prevention Act, 1956.

Legislation	Section	Provisions relating to trafficking
Immoral Traffic Prevention Act, 1956	3	Brothel keeping
	4	Living on the earnings of prostitution of others.
	5	Procuring, inducing or taking person for prostitution.
	6(1)	Detaining person in premises where prostitution is carried on.
	6(2)	Presumption of offence if a person is found with a child in a brothel.
	7	Prostitution in the vicinity of public places.
	8	Seducing or soliciting.
	9	Seduction of a person in custody.
	15	Two women police officers to be present during search, and interrogation is to be done by a woman police officer.
	16	Rescue on Magistrate's directions.
	17	Intermediate custody in a safe place, not with those with a harmful influence over her.

4. MISCELLANEOUS LEGISLATIONS RELEVANT TO TRAFFICKING

India also has other penal laws dealing with trafficking. Some of these provisions have existed prior to its independence.

Broadly speaking these legislations deal with a number of themes such as children/ juvenile justice and protection, child labor, bonded labor/ indentured labor/ pledging of persons for labor and marginalized groups such as Scheduled Tribes and Scheduled Castes in India.

⁹¹ Section 6(1)

⁹² Section 8

⁹³ Section 6(2A)

⁹⁴ Section 16

⁹⁵ Section 15(6A)

⁹⁶ Section 17

These legislations, especially in the form of the Indian Penal Code, 1860, also deal with criminalizing of a number of offences not specifically dealt with in the ITPA. These include penalizing acts such as procuring, buying and selling of human beings, importing or exporting human beings, buying and selling minors, coercing or forcing marriage of minors, kidnapping/abducting and using force for the purpose of trafficking, Slavery and slavery like conditions, servitude, bondage and unacceptable forms of labor, and others.

A chart detailing miscellaneous legislations relevant to trafficking⁹⁷ is given below.

LEGISLATIONS	Section	DETAILS OF THE PROVISION
Indian Penal Code, 1860	366	Kidnapping, abducting or inducing a woman to compel marriage.
	366A	Procuring a minor girl.
	366B	Importation of a girl below 21 for sexual exploitation.
	367	Kidnapping/ abducting to subject person to grievous hurt, slavery.
	370	Buying or disposing of person as slave.
	371	Habitual dealing in slaves.
	372	Selling minor for prostitution.
	373	Buying minor for prostitution.
	374	Compelling a person to labor.
Prohibition of Child Marriage Act, 2006	12	Child marriage void, if after that the minor is sold or trafficked or used for immoral purposes.
Children (Pledging of Labour) Act, 1933	4-6	Penalties for pledging labor of children (under 15 years).
Bonded Labour System (Abolition) Act, 1976	16	Compelling a person to render bonded labor or forced labor.
Child Labour (Prohibition and Regulation) Act, 1986	3	Child work in certain employments.
Juvenile Justice Act, 2000	2(vii)	A child in need of care and protection includes one who is vulnerable and likely to be trafficked.
	24	Employment of child for begging.
	26	Procuring juveniles for hazardous employment or bonded labor is punishable.
Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989	3(vi)	Compelling or enticing a member of a Scheduled Caste or Scheduled Tribe.
	3(xii)	Using a position of dominance to sexually exploit a Scheduled Caste or Scheduled Tribe woman.

5. TRAFFICKING AND ORGANIZED CRIME AS DEFINED BY THE LAW OF INDIA

For the purpose of understanding cross border trafficking, especially in the context of organized crime, there are two definitions that need to be analyzed, viz., 'trafficking' and 'organized crime.' How India defines and engages with these two terms is an indicator of the legal protection given to combat trafficking as an organized crime.

⁹⁷ Only Central legislations are dealt with unless examples are taken, e.g., of the Goa Children's Act or Maharashtra Control of Organized Crimes Act. There are also some legislations which deal with devdasis at the State level which prohibit the dedication of girls ostensibly to a deity but which results in their sexual exploitation.

In order to weigh the definitions that India uses, the definitions under SAARC will also be studied, since all the countries under study are part of the South Asian Association for Regional Cooperation.

5.1 Trafficking Definitions

5.1.1 UN Convention on Transnational Organized Crime and the Protocol

The definition of trafficking under Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000,⁹⁸ covers the recruitment, transportation, transfer, harboring 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 labor or services, slavery or practices similar to slavery, servitude, or the removal of organs.

It further clarifies that the consent of a victim of trafficking in persons, to the intended exploitation, is irrelevant, where the means specified above have been used.⁹⁹ Also, where a child¹⁰⁰ is concerned, the recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered trafficking, even if it does not involve any of the means laid down in the definition of trafficking.¹⁰¹

5.1.2 South Asian Association for Regional Cooperation (SAARC)

The SAARC Convention¹⁰² adopted unanimously by Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka, which is relevant for cross border trafficking in South Asia, also has defined trafficking. However, it is a limited definition which only covers trafficking for commercial sexual exploitation. Trafficking is defined 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.¹⁰³

5.1.3 Domestic Law of India

Domestic law in India lacks a comprehensive definition of trafficking at the Central level. The ITPA, does not define trafficking, but it defines 'prostitution' to mean sexual exploitation or abuse of persons for commercial purposes, which has elements of trafficking. It has a number of provisions which punish forms of trafficking without actually defining trafficking.¹⁰⁴ The Act is in the process of being amended,¹⁰⁵ and these amendments also include a proposed definition of trafficking as follows.¹⁰⁶

⁹⁸ Hereinafter referred to as the Protocol.

⁹⁹ Article 3(b) Ibid.

¹⁰⁰ A 'child' is any person under eighteen years of age (Article 3(d) Protocol).

¹⁰¹ Article 3 (c) Protocol.

¹⁰² South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002.

¹⁰³ Article I

¹⁰⁴ Dealt with in the section on Laws relating to Trafficking. Broadly these pertain to: Punishment for keeping a brothel or allowing premises to be used as a brothel in Section 3; Procuring, inducing or taking person for the sake of prostitution in Section 5; Detaining a person in premises where prostitution is carried on in Section 6; and Seduction of a person in custody in Section 9.

¹⁰⁵ The Immoral Traffic (Prevention) Amendment Bill, 2006.

¹⁰⁶ Vide the proposed amendment Section 5A to the Immoral Traffic Amendment Act, 1956.

Whoever 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.
- (b) Abuse of power or a position of vulnerability.
- (c) Giving or receiving of payments or benefits to achieve the consent of such person having control over another person, commits the offence of trafficking in persons.

Explanation: Where any person recruits, transports, transfers, harbours or receives a person for the purposes of prostitution, such person shall, until the contrary is proved, be presumed to have recruited, transported, transferred, harboured or received the person with the intent that the person shall be used for the purpose of prostitution.

As of now, though there is no Central legislation defining trafficking comprehensively, one of the States, i.e., Goa, has a legislation which, though limited to child trafficking, gives a detailed definition of trafficking. The Goa Children's Act, 2003, defines 'child trafficking' to mean the procurement, recruitment, transportation, transfer, harboring 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.¹⁰⁷ While the definition complies with the standards laid down in the Protocol, it applies only to children and, that too, only within the State of Goa.

5.2 Organized Crime Definitions

5.2.1 UNTOC and the Protocol

Under the United Nations Convention Against Transnational Organized Crime, 2000,¹⁰⁸ "Organized criminal group"¹⁰⁹ has been defined as a structured group¹¹⁰ of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.¹¹¹

5.2.2 SAARC

There is no definition of organized crime in either the SAARC Convention on Mutual Assistance in Criminal Matters, 2008, or the South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002.

5.2.3 Domestic Law of India

There is no current central legislation in India with regard to organized crime. Some States however have legislated on the same. Maharashtra, which was the first State to have an Act,¹¹² defines organized crime as any continuing unlawful activity by an individual, singly or jointly, either as a member of an organized crime syndicate or on behalf of such syndicate, by use of violence or

¹⁰⁷ Section 2(z) Goa Children's Act, 2003, goagovt.nic.in/documents/goachildact2003.pdf

¹⁰⁸ Hereinafter UNTOC

¹⁰⁹ Article 2(a) of UNTOC

¹¹⁰ Further defined in Article 2 (c) UNTOC to mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership, or a developed structure

¹¹¹ Article 2(a) UNTOC

¹¹² Maharashtra Control of Organized Crime Act, 1999.

threat of violence or intimidation or coercion or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person, or promoting insurgency.¹¹³

In the absence of a specific law on organized crime, reliance is placed on general provisions in criminal law dealing with common intention to commit an offence,¹¹⁴ criminal conspiracy¹¹⁵ and abetment.¹¹⁶ Anti-corruption laws may also be used.¹¹⁷

6. CASE LAW ON TRAFFICKING: LANDMARK JUDICIAL PRONOUNCEMENTS HAVING A BEARING ON HUMAN TRAFFICKING

Other than looking at provisions in constitutions and legislations, case laws built up by courts are also part of the domestic law. Case law provides an important insight into the direction that the law is taking and the interpretation the courts may have on any given provision of the law. Trafficking is highly dependent on the subordinate/ lower judiciary to determine convictions, and the lower judiciary is bound by judicial pronouncements of the higher courts which lay down policy, guidelines and interpretations.

Court decisions deal with issues ranging from treatment of victims to the constitutional protection of victims as well as prosecution of traffickers. Also, domestic trafficking has been the focus rather than cross border trafficking.

In most references to judicial decisions or to 'landmark cases' on trafficking, reference is usually made to decisions of the Supreme Court of India, or to one of the High Courts. However, the bulk of cases on trafficking are dealt with by lower courts.¹¹⁸ These cases are not reported unlike those of the High Courts and the Supreme Court. However, studies have shown that convictions have been abysmally low and that very often victims have been re-victimized in the process.¹¹⁹

There have been some principles laid down by the High Courts and the Supreme Court which have had a positive impact on the approach of the judiciary to cases of trafficking. Broadly speaking, these decisions deal with three main concerns - victim's rights, giving appropriate directions to government, and special protection to the child.

- a) **Victim's Rights :** Many judicial decisions in India have been focussed on the protection of victims of trafficking. In *Prajwala v Union of India*,¹²⁰ the implementation of a victim protocol was demanded. There have been cases where compensation has been ordered to be paid by a perpetrator of crimes to victims of the crime as in *Bodhisattwa Gautam v Subhra*

¹¹³ Section 2(e) Maharashtra Control of Organized Crime Act, 1999. Similar laws now exist in some of the other States as well, including Andhra Pradesh and Karnataka.

¹¹⁴ Section 34 Indian Penal Code, 1860

¹¹⁵ Sections 120A and 120B Indian Penal Code, 1860

¹¹⁶ Sections 107-120 Indian Penal Code, 1860

¹¹⁷ Prevention of Corruption Act, 1988. Main provisions include:-Section 7- Public servant taking gratification other than legal remuneration in respect of an official act; Section 8- Taking gratification in order, by corrupt or illegal means, to influence public servant; Section 9- Taking gratification, for exercise of personal influence with public servant; Section 11- Public servant obtaining valuable thing, without consideration, from person concerned in proceeding or business transacted by such public servant.

¹¹⁸ Judicial Magistrate First Class in many cases and also by Sessions Courts when there are cases of rape.

¹¹⁹ Judicial Handbook on Combating Trafficking of Women and Children for Commercial Sexual Exploitation, UNICEF (2004) available at <http://wcd.nic.in/Judicial%20Manual.pdf> as on 10 April 2010

¹²⁰ 2006 (9) SCALE 531

Chakraborty,¹²¹ where a person had promised marriage to a woman and even went through with a wedding ceremony which turned out to be false. This has been applied to foreign nationals as well.¹²² In cases of trafficking too, this principle has been used, as seen in *PUCL v Union of India*,¹²³ where compensation was ordered to be paid where children were trafficked/ bonded for labour.

- b) Directions to State functionaries to tackle the problem of trafficking :** *Vishal Jeet v Union of India and Others*¹²⁴ was a landmark decision where the Supreme Court took it upon itself to give directions for the protection and rehabilitation of those who had been dedicated as *devdasis* by their families or communities for cultural reasons and were currently in prostitution. While *devdasis* and *jogins* are from different states in India, this also could apply to Nepali women who are also dedicated, albeit in Nepal, and find themselves in brothels in India. In *Gaurav Jain v Union of India*¹²⁵ the court affirmed that the State had a duty to rescue, rehabilitate and enable women to lead a life of dignity.

The Court has also at times taken serious note of what it referred to as the indifferent and callous attitude of the State Administration in identifying, releasing and rehabilitating bonded laborers in the country. It observed that whenever it is shown that a laborer is made to provide forced labor, the court would raise a presumption that he is required to do so in consideration of an advance received by him and is, therefore, a bonded laborer. The burden of rebutting this presumption is upon the employer. The Court made this observation in *Neerja Chaudhary v State of Madhya Pradesh*.¹²⁶

- c) Special protection to children :** There have been two categories of children that courts have looked at - children who have been trafficked themselves and children who are in need of care and protection (those vulnerable to being trafficked). *Prerana v State of Maharashtra*¹²⁷ clearly held that children who have been trafficked themselves should also be considered as children in need of care and protection,¹²⁸ and not as children in conflict with the law. *Gaurav Jain*¹²⁹ among other things also dealt with children of sex workers who were vulnerable. The Court held that they should not be allowed to live in their homes as their surroundings were undesirable. Yet another case was *Lakshmikant Pandey v Union of India*¹³⁰ which examined the vulnerability of children being trafficked in adoption rackets due to the lack of an effective protection mechanism. The court went on to create an appropriate mechanism to fill the gap, especially in the context of inter country adoptions.

¹²¹ (1996) 1 SCC 490

¹²² *The Chairman, Railway Board v Chandrima Das* AIR 2000 SC988

¹²³ 1998(8) SCC 485

¹²⁴ (1990) 3 SCC 318

¹²⁵ AIR 1997 SC 3021

¹²⁶ AIR 1984 SC 1099

¹²⁷ (2003) MLJ 105

¹²⁸ Juvenile Justice (Care and Protection) Act, 2000, Section 2(d) 'child in need of care and protection' means a child : (vi) who is being or is likely to be grossly abused, tortured, or exploited for the purpose of sexual abuse or illegal acts ; (vii) who is found vulnerable and is likely to be inducted into drug abuse or (viii) who is being or is likely to be abused for unconscionable gains

¹²⁹ AIR 1997 SC 3021

¹³⁰ AIR 1984 SC 469

7. MEASURING DOMESTIC TRAFFICKING PROVISIONS AGAINST INTERNATIONAL YARDSTICKS: THE PROTOCOL

In order to identify gaps, it is essential to compare Indian law with international provisions. In this study, this is done in two steps. In the first step which is this chapter, the Trafficking Protocol has been used as a yardstick to see how far domestic laws comply with the provisions of the Protocol. Specific Articles of the Protocol are used as the basis for comparison as seen further. In the second step which is contained in the next chapter, the international instruments that India has signed/ ratified or is party to are listed. This is done to ensure that for certain crucial points such as gender, human rights and the rights of the child, these instruments will also serve as referral points in identifying gaps and making recommendations.

Implementation of the Protocol in the Indian context:

Protocol	Indian Law/ Government Action
Article 5 Criminalization of offences	Many offences are criminalized either in trafficking laws, or other laws having a bearing on trafficking. These include: Trafficking for prostitution Trafficking for marriage Trafficking for slavery Forced labor Voiding child marriages, if for trafficking Pledging labor or bonded labor Child work in certain circumstances Employment of a child for begging
Article 6 Assistance to and protection of victims of trafficking	A child in need of care and protection includes one who is vulnerable and likely to be trafficked as well as children who are victims of trafficking. They are entitled to protection under the Juvenile Justice (Care and Protection of Children) Act, 2000: In camera proceedings are possible. Victims are entitled to legal aid. Cooperation with NGOs to assist prosecution. State run homes for sheltering victims while the case is pending and during rehabilitation/ repatriation. Compensation may be provided under various schemes of the government/ criminal law and vide decisions of the Supreme Court.
Article 7 Status of victims of trafficking in persons in receiving States	There is no provision for permanent or temporary resident status. Victims are also considered illegal immigrants if they have no travel documents, and they may be kept in State-run homes.
Article 8 Repatriation of victims of trafficking in persons	Repatriation is done where the other country acknowledges citizenship but cannot be officially done otherwise. Lack of identifying papers/ travel documents makes this difficult.
Article 9 Prevention of trafficking in persons	Several programs are in place. The official website of the Ministry of Women and Child Development ¹³¹ contains a number of details on: Research done Involvement of NGOs Strengthening stakeholders Running homes for women and children who are victims of trafficking

¹³¹ <http://wcd.nic.in/> as accessed on 20 September 2010

Protocol	Indian Law/ Government Action
Article 10 Information exchange and training	Training of the following have been done: ¹³² Judiciary Police Public prosecutors NGOs Superintendents of homes and other personnel There have been cases, though not well documented on cooperation.
Article 11 Border measures	Border check posts are there both for Nepal and Bangladesh, but because of the length of the border with Bangladesh and also the open border policy with Nepal, it is difficult to seal borders effectively.
Article 12 Security and control of documents	There have been cases of forged passports and also because of ethnic similarities, it is difficult to say if the person is from India or not.
Article 13 Legitimacy and validity of documents	Not usually the case, as cases of trafficking may also be of illegal immigrants

8. AN OVERVIEW OF THE RATIFICATION STATUS TO IMPORTANT INTERNATIONAL INSTRUMENTS

In addition to the Protocol, there are other international instruments which are relevant to identify gaps in the study, because even though they don't have any specific provisions on trafficking, they are crucial in understanding how the interests of vulnerable groups are protected. They also serve to provide an understanding of the approaches to trafficking that India has taken.

Status of Conventions Signed/ Ratified by India¹³³

Name of Convention/ Protocol	Status	Comments
UN Convention on the Rights of the Child	Date of Accession: 11 December, 1992	The Juvenile Justice Act, 2000, came about as a commitment to this Convention. The Act protects a trafficked child, or a child vulnerable to trafficking, as a child in need of care and protection.
Optional Protocol to CRC on Sale of Children, Child Prostitution, Child Pornography	Signed on 15 November, 2004	
Convention on the Suppression of Immoral Traffic and of the Prostitution of Others	9 May, 1950	This was the basis of the ITPA, which is the core statute on trafficking for commercial sexual exploitation in India.
ILO Convention 138 Minimum Age Convention	Not yet ratified by India ¹³⁴	Establishment of minimum age as 14 years to be introduced in legislation. It would also cover domestic labor. Difficulties of enforcement in informal sector. Ratification will be postponed until enforcement of new age legislation Core Conventions ratified. ¹³⁵

¹³² See Ibid generally and under Ministry of Home Affairs, Government of India and UNODC Project on "Strengthening the Law Enforcement Response in India against Trafficking in Persons through Training and Capacity Building".

¹³³ Adapted from India Country Report, Ministry of Women and Child Development, 2005, and <http://www.law-lib.utoronto.ca/resources/orgs/intorg3.htm#5> accessed on 15 July 2010

¹³⁴ As per the official website <http://labour.nic.in/ilas/indiaandilo.htm> as on 10 April 2010

¹³⁵ Comments of the Government of India in its official capacity in the MWCD Country Report 2005

Name of Convention/ Protocol	Status	Comments
ILO Convention 182 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor	Not yet ratified by India	
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	Ratified on 9 July, 1993, with a declaration/reservation	
SAARC Convention of Preventing and Combating Trafficking in Women and Children for Prostitution 2002 and SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia	Signed on 5 January, 2002, at the Eleventh SAARC Summit in Kathmandu on 4-6 January, 2002	
UN Convention against Transnational Organized Crime	Signed on December 12, 2002	
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children	Signed on December 12, 2002	
Protocol against the Smuggling of Migrants by Land, Sea and Air	Signed on December 12, 2002	

9. GAPS IN THE LEGAL FRAMEWORK OF TRAFFICKING IN INDIA

There are two classifications under which gaps have been studied first, under the Prosecution-Protection-Prevention matrix and second, under the Protocol, testing gaps with specific Articles.

Gaps Examined within the Prosecution-Protection-Prevention Matrix

Key gaps in the legal framework have an impact on all three areas of prosecution, protection and prevention. These include:

- Non-ratification of UNTOC and Protocols, which is a major stumbling block as many enabling provisions of the treaties cannot be availed of.
- Lack of a comprehensive definition of trafficking either as a common minimum platform for the States to work on with each other, or even for punishing all forms of trafficking within the countries. While the SAARC definition is there, it is limited to trafficking for sexual exploitation and only covers women and children. While there is a definition in the Goa Children's Act, 2003 this only covers children and is not applicable beyond the boundaries of the State.
- Gender sensitivity is missing; even though there are laws for women, this does not translate into a sensitive law. There are provisions in the ITPA, which penalize the victim, for instance.

Key Gaps in Prosecution

- There is no uniform definition of who is a child/ minor in terms of age. It varies in different statutes; both civil, e.g., marriage or labor, and criminal, e.g., trafficking. Even within fields of law like labor law, the definitions of a child/ minor vary according to the legislation.
- Trafficking is not often seen as an organized crime, and provisions relevant to organized crime are not made use of in trafficking cases.¹³⁶

- Cooperation mechanisms are ad hoc or non-existent, as far as cross border trafficking is concerned. Especially concerning:
 - a. Legal assistance
 - b. Providing information¹³⁷
 - c. Transfer of sentenced persons
 - d. Joint investigations
- Prosecutions overall are not satisfactory.¹³⁸

Key Gaps in Protection

- There is sometimes no adequate distinction drawn between the trafficker and the victims; e.g., in the case of prostitution or in the case of unsafe migration without documents. Sections 4 and 8 of the ITPA, have been used against the victim herself in some cases.¹³⁹
- There is no positive duty cast upon States to provide sufficient shelters or for rehabilitation or rescue although enabling provisions exist in a number of legislations such as the ITPA¹⁴⁰ and the Juvenile Justice (Care and Protection of Children) Act, 2000.¹⁴¹ The conditions in the homes that do exist need improvement.¹⁴²
- Civil remedies in tort law are not used against employers who violate labor standards or force employment, though remedies are available in the Criminal Procedure Code and as established by case law, and though there are a number of initiatives now being taken on bonded labor.¹⁴³
- Financial support for existing programs is often insufficient.¹⁴⁴
- A conducive atmosphere to make it safe for victims to testify is not created. There is no witness protection program too. Many witnesses turn hostile as a result. The lengthy proceedings and delays add to this.
- The proceedings are not often gender sensitive and a woman victim is often unaware of proceedings in her own case. She is not involved, nor does she have the services of legal counsel to advise her. Women victims may also be put into protective homes against their will and separated from their children.

¹³⁶ However, they have been used in crimes like rape.

¹³⁷ There seems to be some informal communication especially in trafficking cases from Nepal.

¹³⁸ Convictions are low and there is also the involvement of some public officials in human trafficking, which has remained an issue not addressed yet. Trafficking In Persons Report, 2010, United States Department of State, 14 June, 2010, sourced from <http://www.unhcr.org/refworld/docid/4c1883c52d.html> accessed on 08 July, 2010

¹³⁹ Section 4 - Living on the earnings of prostitution of others and Section 8 - Seducing or soliciting.

¹⁴⁰ Section 21 Protective homes.

¹⁴¹ Shelter homes (Section 37) and Children's Homes (Section 34)

¹⁴² The conditions of government-run shelter homes under the Ministry for Women and Child Development vary from State to State. They usually are forced to function beyond their capacity, leading to cramped and unhygienic conditions. Trafficking In Persons Report, 2010, United States Department of State, 14 June 2010 sourced from <http://www.unhcr.org/refworld/docid/4c1883c52d.html> accessed on 08 July 2010

¹⁴³ For instance courts have been fairly active in issuing orders to rescue and rehabilitate bonded labor. Ibid.

¹⁴⁴ A case in point is the state of shelter homes mentioned earlier.

Key Gaps in Prevention

- Trainings of government personnel as well as community awareness are done sporadically and materials are not revised systematically.¹⁴⁵
- Awareness programs among the general public have to be strengthened along with widely publicized helpline numbers. Community initiatives especially in vulnerable areas must be stepped up with the cooperation of NGOs.
- Licensing of recruitment agencies is currently not done, though there is a need to do so.
- Law reform, policy and prevention measures are slow to respond to newer forms of trafficking. There have been several critiques even on the proposed amendments to the ITPA, currently under consideration.
- There are often no set guidelines for safe migration; pushback is sometimes resorted to in cases of women and others from Bangladesh

Systems like referrals and identification of support staff and service providers or authorities at different levels is absent, although there are a number of NGOs who do support these activities.

Gaps under the Protocol

India has not ratified the UNTOC or the Protocol. The Protocol is meant to establish global standards, and a lack of ratification leads to a lack of a common understanding of trafficking that can be legally enforced.

The Statement of Purpose detailed in Article 2 of the Protocol requires India to prevent and combat trafficking in persons, particularly women and children.¹⁴⁶ It is also to protect and assist the victims of such trafficking with full respect for their human rights.¹⁴⁷ Laws dealing with legal aid and juvenile justice for instance reflect this, though the laws on trafficking continue to be criminalizing statutes which also have some strong provisions on rescue and other remedies.

Promoting cooperation to tackle trafficking is not reflected in domestic laws, but has been a part of political statements in SAARC and other forums. Trafficking within the country sees transferring the person to her home State; however, inter-country trafficking often sees women and children languishing in State run homes.

A comprehensive definition of trafficking is lacking in India. The major law on trafficking only has a definition on prostitution, which only partially covers trafficking. Though there is a State law,¹⁴⁸ there is no comprehensive central legislation defining trafficking.

Organized crime also lacks a national law defining it, though there have been State laws defining organized crime. However, aspects of organized crime are covered in the Penal Code, such as abetment, common intention, etc., and there are separate laws on corruption as well. These are used for domestic as well as for cross border trafficking.

¹⁴⁵ Some efforts have been made, e.g., the Central Bureau of Investigation (CBI), the Bureau of Police Research and Development and other government agencies conducted training programs and developed training manuals.

¹⁴⁶ Article 2(a)

¹⁴⁷ Article 2(b)

¹⁴⁸ In Goa, detailed earlier

The Protocol in Article 3(d) defines a child as any person below the age of 18 years. Labor laws in India show different standards of a child and the use of terms like 'minor' and 'child' simultaneously have compounded the confusion. A uniform definition of a child is a must. India has also not ratified the Minimum Age Convention of the ILO or the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, and this must be done.

In compliance with Article 4 of the Protocol, there are some laws dealing with cross border trafficking, but there is nothing comprehensive.

On victim protection, many of the parameters of Article 6 have not been complied with in its breadth, though there is legal representation provided, legal aid given, and compensation may be available. There is also cooperation with governmental and non governmental organizations in repatriating victims, at least with Nepal and to a limited extent with others. Repatriation is usually done.¹⁴⁹ There is, however, no law detailing a temporary residence permit.

On cooperation, one area where India has been trying to work is border measures, detailed in Article 11. However, because of the porous borders, implementation is proving difficult. Similarly, since the borders are porous, provisions on travel documents and identity documents become difficult to enforce.¹⁵⁰

10. KEY RECOMMENDATIONS FOR INDIA

Some recommendations are common to prosecution, protection and prevention. These include the following:

- There must be ratification of the UNTOC and the Protocols, so that there will be a common blueprint and a common as well as comprehensive legal framework.
- In order to have a common understanding of trafficking and also to ensure that all forms of trafficking are penalized, the definition under the Protocol must be adhered to. Even if this is not done under one comprehensive law on trafficking, it must be woven into existing legal frameworks.
- There must be a greater sensitivity to the violations of rights by women who have been trafficked. The woman must have a say in legal proceedings pertaining to her matter. Women should not be forced into homes or separated from their children and families. Cases are not always taken up in designated courts dealing with violence against women.

Key Recommendations in Prosecution

- By amendment to specific provisions of statutes wherever a child or minor is mentioned, the definition of a child must comply with the definition under the UNCRC. Every person below the age of eighteen years must be considered to be a child. This should cut across all laws whether labor, criminal law or family law.
- Trafficking must be seen as an organized crime in criminal procedure and substantive criminal law. Existing principles, such as common intention, conspiracy, etc., must be used in cases of trafficking.¹⁵¹

¹⁴⁹ Article 8

¹⁵⁰ Article 12

¹⁵¹ Already there, in the Indian Penal Code Sections 34, 120A, 120B, 107-120

- Cases must be taken up in designated courts, e.g., courts dealing with violence against women, and judges must be trained and sensitized to handle matters on trafficking. Cooperation mechanisms must be set up with mutual contacts at different levels to make rapid action possible.
- There must be greater focus on trafficking for labor.¹⁵²

Key Recommendations in Protection

- There must be a clear line drawn between the trafficker and the victim. Victims must not be further penalized, and a distinction must be made between trafficking on the one hand, and prostitution or unsafe migration on the other, even if laws relating to border controls have been breached by such persons.
- Rescue of trafficked victims should go along with effective rehabilitation and must be done in a gender sensitive way. The survivors of trafficking should have the right to exercise independent agency, rather than being compelled to do whatever the State thinks is best for them.
- Civil remedies like torts claims and compensation must be created and enforced against traffickers or employers.
- States must commit finances for more and better schemes to rehabilitate victims.
- Witness protection must be explored to create an atmosphere free from fear within which a victim can testify.

Key Recommendations in Prevention

- Anti-trafficking trainings must continue with renewed vigor for different implementing agencies. Trainings must be done continuously and at three levels-
 - Basic/ Qualification Training
 - Trainings to in-service personnel, and
 - Trainings for those deputed to anti-trafficking squads/ police/ border controls
- Employment and recruitment agencies must be closely monitored.¹⁵³
- There must be greater awareness at all stages of source, demand and transit, and whistleblowers must be protected.
- Corruption among the police, border officials and other government personnel must be addressed more firmly.
- Community initiatives must be strengthened in order to ensure greater awareness on trafficking. Generating of labor opportunities locally and enforcement of labor standards nationwide will reduce the vulnerability of labor to trafficking.

¹⁵² The focus now is largely on trafficking for sexual exploitation.

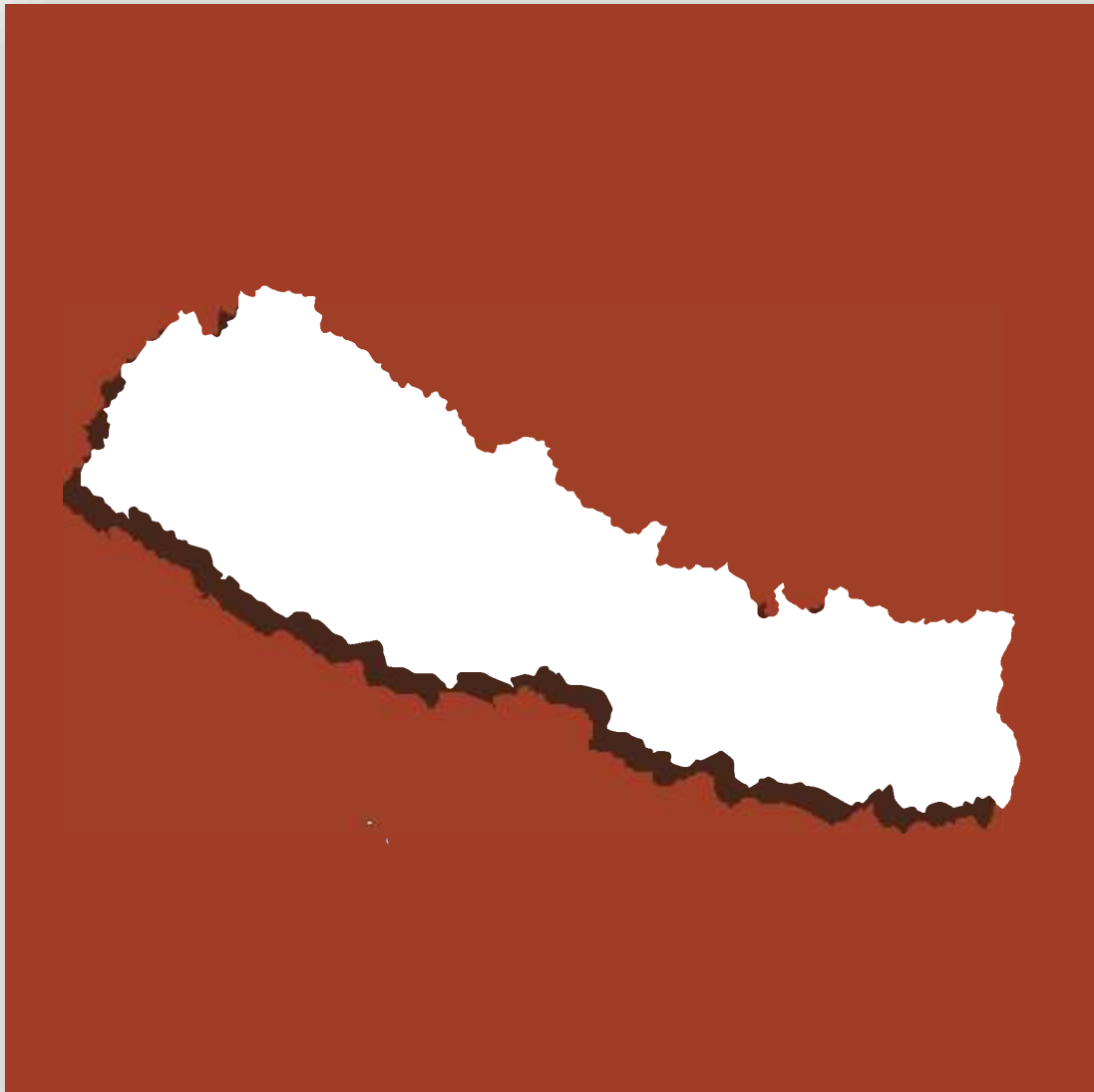
¹⁵³ The Migrant Resource Center in Kerala counsels potential migrants and the Andhra Pradesh government has a similar initiative supported by IOM. This must be strengthened and greater awareness generated about the potential dangers of unsafe migration.

In Conclusion

India needs to ensure that major Conventions especially UNTOC and Protocols are ratified for a more uniform system of anti-trafficking frameworks for tackling cross border trafficking. While in Goa there is a definition of trafficking, this is not true for the rest of the country, and clear definitions on trafficking and organized crime must be formulated. The internationally accepted norm of a child being a person below the age of eighteen must be incorporated in all statutes, including those on labor. India needs to cooperate with its neighbours, especially with Nepal and Bangladesh, to tackle cross border trafficking. Although some measures exist, these need to be formalized in law and policy and operationalised through training programmes for different stakeholders. Cross border trafficking in the region cannot be tackled without India's commitment matched by law, policy and action.

COUNTRY ANALYSIS

NEPAL



NEPAL

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1. CONCERNS ON TRAFFICKING IN NEPAL¹⁵⁴

Nepal is primarily considered a country of origin - a source for the trafficking of men, women and children. The girls end up in brothels in India or Pakistan or in Middle Eastern or South Asian countries.¹⁵⁵ Nepal's concerns are largely that persons go to India without proper papers quite legitimately, and it is difficult to differentiate between a legitimate and non-legitimate reason. It has no way of keeping tabs on its citizens wherever they may be. Victims of trafficking from Nepal move to India or the Middle East or even to Europe. Women and girls are also trafficked to other Asian destinations.¹⁵⁶

There is voluntary migration as well to countries other than India.¹⁵⁷ Victims subsequently may be trafficked or exploited by not being paid wages, or being paid at a lower rate than agreed. Their passports may be withheld and they may suffer physical and sexual abuse. Recruitment agencies may charge unconscionably high sums as commissions for placing them in a job. Some traffickers may give the family an advance to pay off a loan, and then the victim is forced to perform labor to repay it, often with little or no pay.¹⁵⁸

Within Nepal, there has been some attention on the foreign child sex tourism trade within the country. Nepal also has a system of bonded labor where entire families may be bonded and forced to work in a range of occupations. This is especially so among lower castes and socially marginalized groups, who are particularly vulnerable to dominance and exploitation.¹⁵⁹

Movement of persons is from Nepal to India, which is quite easy considering the long border it has with India. There are fourteen legal entry points, but illegal cross border movement without documents takes place quite easily. Since India has an open border policy with Nepal, Nepalis have free access to enter India, and therefore trafficking becomes difficult to identify.¹⁶⁰

Nepal's concerns also include making it less economically lucrative to go to India by providing alternatives within Nepal. Considering the poverty, the lack of educational opportunities and work opportunities available in Nepal, these concerns need to be addressed in order to tackle push factors which make vulnerable men, women and children victims of trafficking.

2. CONSTITUTIONAL PROTECTIONS AND TRAFFICKING

Nepal is going through a transitional phase currently, with the system of monarchy now abolished. There is an Interim Constitution in place, but a final Constitution is still in the process of being drafted. Since trafficking is a priority issue in the country, the Interim Constitution deals with it as summarized below.

Provision on Trafficking in the Interim Constitution of Nepal

Article 29	Prohibition of trafficking in human beings, slavery, and bonded labor
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¹⁵⁴ Adapted from Global Report on Trafficking in Persons as well as the Trafficking in Persons Report, 2010, United States Department of State, 14 June 2010 sourced from <http://www.unhcr.org/refworld/docid/4c1883c52d.html> accessed on 08 July 2010.

¹⁵⁵ "When Victims Become Accused," Times of India, 13 October 2003.

¹⁵⁶ Including Malaysia, Hong Kong and South Korea

¹⁵⁷ Malaysia, Israel, South Korea, the United States, and also Gulf States - Saudi Arabia, the UAE, Qatar, etc.

¹⁵⁸ Trafficking in Persons Report, 2010, United States Department of State, 14 June 2010 sourced from <http://www.unhcr.org/refworld/docid/4c1883c52d.html> accessed on 08 July 2010.

¹⁵⁹ Ibid.

¹⁶⁰ Adapted from Trafficking in Women and Children in India, Orient Longman, New Delhi (2005) pp 10-12.

The Interim Constitution of Nepal, 2007,¹⁶¹ addresses all forms of trafficking against human beings by its broad prohibition of trafficking in Article 29. It deals with all forms of forced labor, again broadly. In an attempt to break existing patterns of indebtedness, it abolishes serfdom. Slavery is a gross violation of human rights, and that too is specifically covered under this provision. The provisions of Nepal's Constitution are still being discussed, but considering the attention given to the problem of trafficking in its recent past, there is every indication that the Constitution, when its draft is finalized, will seek to effectively deal with trafficking in human beings.¹⁶²

3. TRAFFICKING IN PERSONS AND TRANSPORTATION (CONTROL) ACT, 2007

Nepal's Trafficking in Persons and Transportation (Control) Act, 2007, aims at preventing trafficking in persons in Nepal and also cross border trafficking from Nepal. The outstanding feature of the legislation is the procedure laid down for prosecution as well as protection. Unique features have been built into the enactment to make discharging the burden of proof easier which theoretically should lead to more convictions. While usually raids are conducted using information given to the police, very often people who are aware of trafficking may be reluctant to come forward to identify themselves for fear of retribution. Keeping in mind that traffickers may be from among the powerful elements in society, this caution is understandable. Informers may also be reluctant to come forward with their testimony for the same reason. The Act protects whistle blowers and protects their identity.¹⁶³ This may go a long way in encouraging people to come forward if they know of any incidents of trafficking. Similarly, informant's identity, even from within the rings of trafficking, is kept confidential,¹⁶⁴ as is the identity of the trafficked person.¹⁶⁵ Publicity is usually shunned by those who have been trafficked, especially those who have been trafficked for commercial sexual exploitation, as they would ideally like to be reunited with families and communities who may not accept them back if the truth is known. It also makes rehabilitation under the Act much easier.

In order to make it easier to prove the offence, the burden of proof is shifted from the prosecution to the accused, presumably when a *prima facie* case is made out. Since getting witnesses to testify is difficult in prosecution of trafficking cases and also because gathering proof in cross border cases is a daunting task, a shifting of the burden of proof makes the prosecutor's job easier.¹⁶⁶ Also, the testimony of a trafficked person which is authenticated in court is sufficient evidence even if she does not appear before the court further in the case.¹⁶⁷ Such evidence is admissible and will go a long way in preventing witnesses turning hostile and will also shorten trials.

Usually in criminal cases, only the defense has a right to counsel who will represent him/ her. However, the statute provides that the victim of trafficking would also be represented by a counsel.¹⁶⁸ This would go a long way in ensuring that the trafficked person's other rights under this

¹⁶¹ www.unmin.org.np/.../Interim.Constitution.Bilingual.UNDP.pdf accessed on 20 September 2010. However, the website of Nepal's Supreme Court gives a different translation of the provisions. See www.supremecourt.gov.np accessed on 20 September 2010

¹⁶² The Constitution also makes specific provision of women's rights in Article 20 and the rights of children in Article 22.

¹⁶³ Section 5

¹⁶⁴ Section 20

¹⁶⁵ Section 25

¹⁶⁶ Section 9

¹⁶⁷ Section 6

¹⁶⁸ Section 10

statute would be well protected. Having a representative who is competent in legal matters may do a lot to bolster the confidence of a trafficked person. A similar empowering provision is the right to have a translator.¹⁶⁹ Usually victims find themselves at a double disadvantage; firstly, they may not be aware of legal procedures and, secondly, they may not understand the language the proceedings are in and would not be able to judge whether what they say is being accurately presented. With a counsel and translator, they will be in a position to know what is happening and how best to ensure that their interests would be protected. In camera trials are specifically provided in the Act,¹⁷⁰ and while it was earlier discretionary, it was not followed in many cases. With its specific inclusion in the Act, in camera trials will help maintain confidentiality and protect the identity of those involved. It will also prevent to some extent the intimidation of prosecution witnesses.

Rescue and rehabilitation provisions abound in the Act. A positive duty has been cast upon the State to rescue victims of cross border trafficking¹⁷¹ and also to rehabilitate them. Police protection and also accommodation at a rehabilitation centre must be provided if required.¹⁷² Compensation is to be provided to victims of trafficking,¹⁷³ regardless of the conviction of offenders, and a rehabilitation fund is required to be established by the government to take care of this.¹⁷⁴

The chart appended below gives an overview of the Trafficking in Persons and Transportation (Control) Act, 2007.

Legislation	Section	Provisions relating to trafficking
Trafficking in Persons and Transportation (Control) Act, 2007	5	Protection of identity of whistle blowers.
	6	Once the trafficked person has authenticated her statement in court, it may be admitted by the court as evidence even if she does not appear before the court again.
	9	Shifting of burden of proof from the prosecution to the accused.
	10	Right of legal representation to the trafficked person.
	11	Right to appoint an interpreter/ translator if the trafficked person requires.
	12	Duty of the government to rescue victims of cross border trafficking.
	13	Duty of the government to rehabilitate victims of trafficking.
	14	A rehabilitation fund to be established by the government.
	16	Right to self defense of trafficked persons.
	17	Compensation to the trafficked person to be compulsorily paid by the offender.
	20	Protecting informants identity.
	25	Protection of identity of trafficked person.
	26	Police protection/ stay at a rehabilitation centre for a trafficked person while attending court.
	27	<i>In camera</i> trials.

¹⁶⁹ Section 11

¹⁷⁰ Section 27

¹⁷¹ Section 13

¹⁷² Section 26

¹⁷³ Section 17

¹⁷⁴ Section 14

4. MISCELLANEOUS LEGISLATIONS RELEVANT TO TRAFFICKING

In addition to the specific legislation on trafficking, Nepal has a number of legislations and codes enacted at different points of time and dealing with a number of issues.

Broadly speaking, these legislations deal with a number of themes, such as Children, Foreign employment/ regulating of foreign job placement agencies, Bonded labor/ indentured labor/ pledging of persons for labor, and Registration of births, deaths or migration.

These legislations also deal with criminalizing a number of offences not specifically dealt with in the Trafficking in Persons and Transportation (Control) Act, 2007. These include penalizing procuring, buying and selling of human beings, importing or exporting human beings, buying and selling minors, servitude, bondage and unacceptable forms of labor, and others.

A chart detailing miscellaneous legislations relevant to trafficking is detailed below.

Miscellaneous Legislations Relevant To Trafficking

Legislation	Section	DETAILS OF THE PROVISION
Children's Act, 1991	16	Prohibits and punishes involving a child in an immoral profession.
	18	Prohibits employing a child in work which may have an adverse impact on the life/ health of a child.
Foreign Employment Act, 1998		Has provisions which in general prescribe a number of safeguards and requirements to be met before leaving the country on overseas work. ¹⁷⁵
Child Labor (Prohibition and Regulation) Act, 2000	3(1)	Prohibits and penalizes employment of children below 14 years.
	3(2)	Prohibits and penalizes employment of any child in hazardous work.
	4	Prohibits child labor that is forced or has an adverse impact on the child's life and health.
Birth, Death and Other Vital Events (Registration) Act, 1976	2(b)	Requires migration for six months or more to be registered by the senior member of a family. No punishments are prescribed for non-compliance.
<i>Muluki Ain</i> ¹⁷⁶	Chaper 11(1)	Taking any person out of the country for sale is prohibited.
	11(2)	Prohibits separation of minor/ person with mental disorder without the guardian's consent..
	11(3)	Making someone a servant/ slave/ bonded labor is prohibited and punishable. Also, compensation is to be paid to such person.

5. TRAFFICKING AND ORGANIZED CRIME AS DEFINED BY THE LAW

For the purpose of understanding cross border trafficking, especially in the context of organized crime, there are two definitions that need to be analyzed, viz., 'trafficking' and 'organized crime.' How Nepal would define and engage with these two terms gives us an understanding of the rubric of legal protection given to combat trafficking as an organized crime.

In order to weigh the definitions that Nepal has, the definitions under SAARC will also be studied, since all the countries under this study are part of the South Asian Association for Regional Cooperation (SAARC).

¹⁷⁵ Regional Study for the Harmonization of Anti Trafficking Legal Framework in India, Bangladesh and Nepal with International Standards, TDH (2007) pp 59-60

¹⁷⁶ Source: Unofficial Copy, Kathmandu School of Law available at <http://www.asianlii.org/np/legis/laws/marhtc11385/>. Accessed on 15 August 2010 See also Regional Study for the Harmonization of Anti Trafficking Legal Framework in India, Bangladesh and Nepal with International Standards, TDH (2007).

5.1 Trafficking Definitions

5.1.1 UN Convention Against Transnational Organized Crime (UNTOC) and the Protocol

The definition of trafficking under Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000,¹⁷⁷ covers the recruitment, transportation, transfer, harboring or receipt of persons, 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 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 labor or services, slavery or practices similar to slavery, servitude, or the removal of organs.

It further clarifies that the consent of a victim of trafficking in persons to the intended exploitation is irrelevant where the means specified above have been used.¹⁷⁸ Also, where a child¹⁷⁹ is concerned, the recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered trafficking even if it does not involve any of the means laid down in the definition of trafficking.¹⁸⁰

5.1.2 South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002

The SAARC Convention¹⁸¹ has defined trafficking. However, it is a limited definition which only covers trafficking for commercial sexual exploitation. Trafficking is defined 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.¹⁸²

5.1.3 Domestic Law of Nepal

The Trafficking in Persons and Transportation (Control) Act, 2007,¹⁸³ defines trafficking as including the following actions:¹⁸⁴

- Selling or buying a person for any purpose
- Engaging a person in prostitution with or without consideration
- Removing, except as permitted by law, organs of any person
- Having sexual intercourse with a prostitute.

¹⁷⁷ Hereinafter referred to as Protocol

¹⁷⁸ Article 3(b) Ibid.

¹⁷⁹ A 'child' is any person under eighteen years of age (Article 3(d) Protocol)

¹⁸⁰ Article 3 (c) Protocol

¹⁸¹ South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002.

¹⁸² Article I

¹⁸³ Also referred to in some literature as the Human Trafficking (Control) Act, 2064 (2007)

¹⁸⁴ Adapted from http://www.unodc.org/pdf/india/Nat_Rep2006-07.pdf accessed on 12 July 2010 and Shruti Pandey, "Legal Framework on Trafficking in Persons in SAARC Region: Draft Study Report" (unpublished) UNIFEM 2007.

¹⁸⁵ Ibid.

The Act also deals with 'transportation' which also covers some elements of trafficking. Transportation is committed by:¹⁸⁵

- Taking a person to a foreign country with a view to selling or buying the person
- Taking a person away from a home or person having control over such person, to another place within Nepal or to a foreign country, or handing over a person by enticing, alluring, or abducting or by misrepresentation, fraud, deception, force or coercion, or by taking hostage or taking advantage of the vulnerability of a person, or by making a person unconscious, abusing post or power, or alluring, causing fear, giving threat or coercing the parent or guardian, in order to cause such person to be engaged in prostitution or exploitation.¹⁸⁶

The Act was an improvement on the earlier Muluki Ain which, while identifying different forms of trafficking which were punishable by law, did not define trafficking.¹⁸⁷

5.2 Organized Crime Definitions

5.2.1 UNTOC and the Protocol

Under the United National Convention Against Transnational Organized Crime, 2000,¹⁸⁸ "Organized criminal group"¹⁸⁹ has been defined as a structured group¹⁹⁰ of three or more persons, existing for a period of time and acting in concert, with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.¹⁹¹

5.2.2 SAARC

There is no definition of organized crime in either the SAARC Convention on Mutual Assistance in Criminal Matters, 2008, or the South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002.

5.2.3 Domestic Law of Nepal

Nepal has recently drafted laws dealing with corruption. The Prevention of Corruption Act, 2002,¹⁹² has a number of provisions relating to offences of corruption and provides punishments for the same. Sections 3 to 8 specifically cover different situations of bribe and graft taken by public servants.¹⁹³ Both the giver and the taker of graft are punishable by law.¹⁹⁴

¹⁸⁶ Ibid

¹⁸⁷ For a list of offences covered in the Muluki Ain, i.e., the Country Code, 1963, refer to the sub-section on Miscellaneous Trafficking Legislations.

¹⁸⁸ Hereinafter UNTOC

¹⁸⁹ Article 2(a) of the UNTOC

¹⁹⁰ Further defined in Article 2 (c) UNTOC to mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

¹⁹¹ Article 2(a) UNTOC

¹⁹² http://www.ciaa.gov.np/nepali/jhola/Anti_Corruption_2002.doc accessed on 10 July 2010 where an unofficial translation is found.

¹⁹³ Section 3- Punishment to giver and taker of graft. Where the taking is for himself to perform or forbear to perform an act. It also covers situations where a person not a public servant takes, in order to convince a public servant to act in a particular way. Abetment is also punished in the same manner.

Section 4- Accepting goods or services free of cost or at reduced prices.

Section 5- Accepting a gift, present, award or donation without the prior approval of the appropriate authority in the government.

Section 6- Accepting a commission, remuneration, brokerage fee, etc.

¹⁹⁴ Section 3

6. CASE LAW ON TRAFFICKING: LANDMARK JUDICIAL PRONOUNCEMENTS HAVING A BEARING ON HUMAN TRAFFICKING

Other than looking at provisions in constitutions and legislations, case law built up by courts are also part of the domestic law. Case law also provides an important insight into the direction that the law is taking and the interpretation the courts may have on any given provision of the law. Trafficking is highly dependent on the subordinate/ lower judiciary to determine convictions, and the lower judiciary is bound by judicial pronouncements of the higher courts which lay down policy, guidelines and interpretations.

Nepal has had one important case which strengthened prosecution. The prosecution depended on proving whether trafficking had taken place or not as in this particular case, the girl was rescued before she was taken away. In *Permanent Resident v HMG on the FIR of Tara Devi Dahal*,¹⁹⁵ Tara Devi was allured by a man who promised to marry her with the help of his partner. She was taken across the Nepal border into India where she stayed for some time in a hotel with him. He had sexual intercourse with her on the pretext of marrying her and then took her to Patna where she was sold to a brothel owner for Sixteen Thousand Indian rupees. The girl shouted and screamed, and the police was alerted, and she was rescued. The question was whether a crime had been committed under the Human Trafficking Activities (Control) Act for the sale of the woman abroad since the sale did not actually go through. Nevertheless, the act amounted to trafficking. In *obiter*, the court also said,¹⁹⁶ “In a case like human trafficking, the statement of the victim-complainant needs to be considered trustworthy until otherwise proved by the defendant.” The court then upheld the sentencing which had been pronounced by the lower court.¹⁹⁷

In *Urmila Thapa Magar*,¹⁹⁸ a woman, who claimed to be trafficked, had agreed to go with an acquaintance to another part of Nepal. However, the intention was to cross the border. A timely police check prevented cross border trafficking. When the case came before the courts in Nepal which had jurisdiction over the matter, the question was whether there was cross border trafficking or not. This was an important issue, as the woman continued to remain within the territory of Nepal and had not crossed into India. The court held that the crime of cross border trafficking which had a higher penalty in the laws in Nepal would be considered proved if - one, trafficking is proved and, two, if it can be shown that trafficking was for the purposes of taking the person to another country. This was sufficient, and there was no need for the person to actually be taken across the borders of Nepal.

Cases of timely intervention by police or border patrols, and apprehension of traffickers thereto, would provide for cases of thwarted attempts of cross border trafficking within Nepal to be tried by Nepali courts as cross border trafficking. Criminal syndicates involved on both sides of the border, if apprehended, could also be tried in Nepal, assuming of course that they are apprehended in Nepal.

¹⁹⁵ Criminal Case No. 1042 of 2051 BS

¹⁹⁶ Para 28

¹⁹⁷ Adapted from Landmark Decisions on Violence Against Women and Children in South Asia, SARI/EQUITY available at http://www.childtrafficking.com/Docs/judge_woman_childvio_0607.pdf

¹⁹⁸ *Urmila Thapa Magar v Krishna Prasad Pudasaini* Criminal Appeal no 1610 of the Year 2051 BS

7. MEASURING DOMESTIC TRAFFICKING PROVISIONS AGAINST INTERNATIONAL YARDSTICKS: THE PROTOCOL

In order to identify gaps, it is essential to compare domestic laws with international provisions. In this study, this is done in two steps. In the first step which is this chapter, the Protocol has been used as a yardstick to see how far domestic laws comply with the provisions of the Protocol. Specific Articles of the Protocol are used as the basis for comparison, as seen in the country specific charts. In the second step which is contained in the next chapter, the international instruments, that Nepal has signed/ ratified or is party to, are listed. This is done to ensure that for certain crucial points such as gender, human rights and the rights of the child, these instruments will also serve as referral points in identifying gaps and making recommendations.

Nepali Law and the Protocol

Protocol	Bangladeshi Law/ Government Action
Article 5 Criminalization of offences	Criminalization includes the following acts : Trafficking for prostitution in its various forms Cross Border Trafficking Making someone a servant/ slave/ bonded labor Certain kinds of employment of children
Article 6 Assistance to and protection of victims of trafficking	Shifting of burden of proof Admission of statement even if victim does not return to court Right to legal representation to the victim Right to interpreter Duty of state to rehabilitate and rescue Right of self defense of trafficked persons Protection of whistle blowers Protecting identity of person Police protection/ stay at government home while attending court <i>In-camera</i> trials
Article 7 Status of victims of trafficking in persons in receiving States	Since Nepal is a source State, this is not very relevant here and the law has no provision for this.
Article 8 Repatriation of victims of trafficking in persons	Cooperation for repatriation from India is easier because of the open border policy. ¹⁹⁹
Article 9 Prevention of trafficking in persons	Awareness and training programs especially in high-risk districts Mobilizing communities against trafficking Work by NGOs and government in sensitization and training programs for anti-trafficking personnel, border guards, etc.
Article 10 Information exchange and training	It is there with India, and joint rescues have happened. ²⁰⁰
Article 11 Border measures	Requiring migration to be registered by members of the family Seeking travel documents
Article 12 Security and control of documents	Since there is an open border - and a long one - this is difficult.
Article 13 Legitimacy and validity of documents	Whether documents are there, or not, repatriations have happened. Very often, in illegal immigration, documents may not be there. Also, Nepal and India have an open border policy.

¹⁹⁹ There is anecdotal evidence for the same and newspaper reports of rescue and repatriation of Nepali women and girls

²⁰⁰ Ibid

8. AN OVERVIEW OF THE RATIFICATION STATUS TO IMPORTANT INTERNATIONAL INSTRUMENTS

In addition to the Protocol, there are other international instruments which are important if one is to identify gaps in the study. Because, even though they may not have any specific provisions on trafficking, they are crucial in understanding how the interests of vulnerable groups are met. They also serve to provide an understanding of the approaches to trafficking taken by Nepal.

Status of Conventions Signed/ Ratified by Nepal

Name of Convention	Status	Comments
UNCRC	Signed on 26 th Jan, 1990 and Ratified on 14 th September, 1990	
Optional Protocol to CRC on Sale of Children, Child Prostitution, Child Pornography	Signed on 8 th September, 2000 and Ratified on 20 th Jan, 2006	
Convention on the Suppression of Immoral Traffic and of the Prostitution of Others	Date of Accession: 10 th December, 2002	
ILO Convention 138 Minimum Age Convention	Ratified on 30 th May, 1997	Minimum Age Specified: 14 years
ILO Convention 182 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor	Ratified on 3 rd January, 2002	Nepal has been involved in the outlawing of the <i>Kamaiya</i> system of bonded labor which involved children as well as adults. ²⁰¹
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	Signed on 5 th February, 1991 Ratified on 22 nd April, 1991	
SAARC Convention of Preventing and Combating Trafficking in Women and Children for Prostitution 2002 and SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia	Signed on 5 th January, 2002	
UN Convention against Transnational Organized Crime	Signed on 12 th December, 2002	
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children	Not Signed	
Protocol against the Smuggling of Migrants by Land, Sea and Air	Not Signed	

9. GAPS IN THE LEGAL FRAMEWORK ON TRAFFICKING IN NEPAL

There are two classifications under which gaps have been studied; first, under the Prosecution-Protection-Prevention matrix and, second, under the Protocol, testing gaps with specific Articles.

Key gaps in the legal framework have an impact on all three areas of prosecution, protection and prevention. These include:

- Non-ratification of UNTOC and Protocols, which is a major stumbling block as many enabling provisions of the treaties cannot be availed of.
- Lack of a comprehensive definition of trafficking, either as a common minimum platform for the

²⁰¹ http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang-en/WCMS_007917/index.htm accessed on 18 July 2010

States to work on with each other, or even for punishing all forms of trafficking within the countries. While the SAARC definition is there, it is limited to trafficking for sexual exploitation and only covers women and children.

- Gender sensitivity is missing; even though there are laws for women, this does not always translate into a sensitive law.

Key Gaps in Prosecution

- There is no uniform definition of who a child/ minor is in terms of age. It varies in different statutes.
- Trafficking is not often seen as an organized crime, and provisions relevant to organized crime are not made use of in trafficking cases.
- Cooperation mechanisms are ad hoc or non-existent as far as cross border trafficking is concerned.²⁰² Especially concerning the following points:
 - a. Legal assistance
 - b. Providing information
 - c. Transfer of sentenced persons
 - d. Joint investigations
- Prosecutions overall are not satisfactory²⁰³ and judges dealing with the issue have not always been provided with training or sensitization to the issue of trafficking.
- Penalties at different stages and for different forms of trafficking are unclear.²⁰⁴

Key Gaps in Protection

- Civil remedies in tort law are not used against employers who violate labor standards or force employment.
- Financial support for existing programs is often insufficient.²⁰⁵
- A conducive atmosphere to make it safe for victims to testify is not created. There is no witness protection program, either.
- Often, there is complicity of government officials.²⁰⁶

Key Gaps in Prevention

- Trainings are done sporadically.²⁰⁷
- While there are some community initiatives, especially by NGOs, they are not enough to prevent trafficking. Awareness is also low, especially on the effects of unsafe migration.

²⁰² Except with India, but this too does not cover points a. to d. completely

²⁰³ Although the Trafficking in Persons and Transportation (Control) Act, 2007 makes it easier, there are no statistics to show better prosecutions. However, it may also be too early to determine whether the new system is working.

²⁰⁴ For example, on non-registration of migration

²⁰⁵ However, the TIP Report 2010 has credited the government with significant efforts despite limited resources.

²⁰⁶ This includes active involvement in trafficking, ownership of cabin restaurants, massage parlors and dance bars, and so on. Also, no Maoist official has been charged with recruitment of child soldiers. See generally TIP Report 2010 for more examples.

²⁰⁷ Partly again, due to lack of resources mentioned earlier; however, some trainings have been done for military troops, police, peacekeeping forces and others, and funds sought and received from other governments and NGOs to sponsor such trainings. See also Ibid.

- Licensing of recruitment agencies and their monitoring is not satisfactory.²⁰⁸
- Law reform, policy and prevention measures are slow to respond to newer forms of trafficking.²⁰⁹
- Systems, like referrals and identification of support staff and service providers or authorities at different levels, are absent.

Gaps under the Protocol

Nepal has not yet signed the Protocol. That is the first and most important starting point without which this analysis remains academic. There has also not been a ratification of the UNTOC. Nepal has, otherwise, had a good track record of signing and ratifying international standard setting documents.

Nepal's domestic laws have been recently amended to cover some of the objectives laid down in the Statement of Purpose of the Protocol.²¹⁰ These are:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children,²¹¹ has been addressed in recent legislation discussed earlier. However, this is limited to commercial sexual exploitation alone and not other forms of trafficking.
- (b) To protect and assist victims of such trafficking with full respect for their human rights,²¹² recent legislation tries to comply with this as well. A number of provisions have been incorporated which take protection seriously.

Cooperation among States such as India is being done, but this is not incorporated into domestic legislation; it is being done bilaterally through individual initiatives of governmental or non governmental organizations.

Nepal has perhaps rightly been concerned with the trafficking of women and children, particularly to India, for commercial sexual exploitation. Laws in Nepal do not comprehensively cover all forms of trafficking and perfunctorily cover forms not directly linked with commercial sexual exploitation, although they provide for extra territorial jurisdiction. There is not, therefore, complete compliance with the definition of trafficking. All forms of trafficking may not be criminalized as trafficking. The same holds true for organized crime. Although the Minimum Age Convention of the ILO has been ratified, as has the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, ratification has not necessarily led to concrete changes at the ground level, as is evident from official websites and the concern of Nepal with poverty alleviation programs and the monitoring of migration.

Article 6 lays down a number of standards for victim protection. Victims of trafficking for commercial sexual exploitation are covered by a number of legal provisions, including making it easier for them to testify, giving them legal representation, etc. There is cooperation to rescue and assist victims, but a lot still needs to be done. Compensation can also be given. However, unlike what Article 7 suggests, victims of trafficking have no special legal status. This may not be relevant

²⁰⁸ See generally TIP Reports 2009 & 2010.

²⁰⁹ Although trafficking for labor is a huge concern, it has not received the same attention as commercial sexual exploitation. See generally TIP Report 2009 & 2010.

²¹⁰ Article 2 of the Protocol

²¹¹ Ibid.

²¹² Article 2(b) of the Protocol

in Nepal, which is primarily a source country and the victims it has to deal with are largely its own nationals. Similarly, Article 8 dealing with repatriation may not be very relevant. Usually, victims of trafficking are accepted back because of the open border policy Nepal shares with India.

Article 9 deals with a number of cooperation strategies; some of them detailed elsewhere in this document have been used, but as the TIP Report 2010 shows, much work still remains to be done. Border measures detailed in Article 11, for example, need to be strengthened, even if it is an open border.

10. KEY RECOMMENDATIONS FOR NEPAL

Some recommendations are common to prosecution, protection and prevention. These include:

- Ratification of the UNTOC and the Protocols, so that there will be a common blueprint and a common, as well as comprehensive, legal framework
- In order to have a common understanding of trafficking and also to ensure that all forms of trafficking are penalized, the definition under the Protocol must be adhered to. Even if this is not done under one comprehensive law on trafficking, it must be woven into existing legal frameworks.
- There must be a greater sensitivity to the violations of rights of women who have been trafficked.

Key Recommendations in Prosecution

- Amendments to be made to specific provisions of statutes, wherever a child or minor is mentioned; the definition of a child must comply with the definition under the UNCRC. Every person below the age of eighteen years must be considered to be a child.
- Trafficking must be seen as an organized crime in criminal procedure and substantive criminal law. Existing principles, such as common intention, conspiracy, etc., must be used in cases of trafficking.
- Cases must be taken up in designated courts, e.g., courts dealing with violence against women; and judges must be trained and sensitized to handle matters on trafficking. Cooperation mechanisms must be set up, with mutual contacts at different levels to cut through the red tape and make rapid action possible.

Key Recommendations in Protection

- States must accept back their nationals who have been trafficked, even if laws relating to border controls may have been breached by such persons, and the focus must be on protecting the victim of trafficking.
- Rescue should go along with effective rehabilitation and must be done in a gender sensitive way. The survivors of trafficking should have the right to exercise independent agency, rather than being compelled to do whatever the State thinks is best for them.
- Civil remedies like torts claims and compensation must be created and enforced against traffickers or employers.
- States must commit finances for more and better schemes to rehabilitate victims.

- Witness protection must be explored to create an atmosphere free from fear within which a victim can testify.

Key Recommendations in Prevention

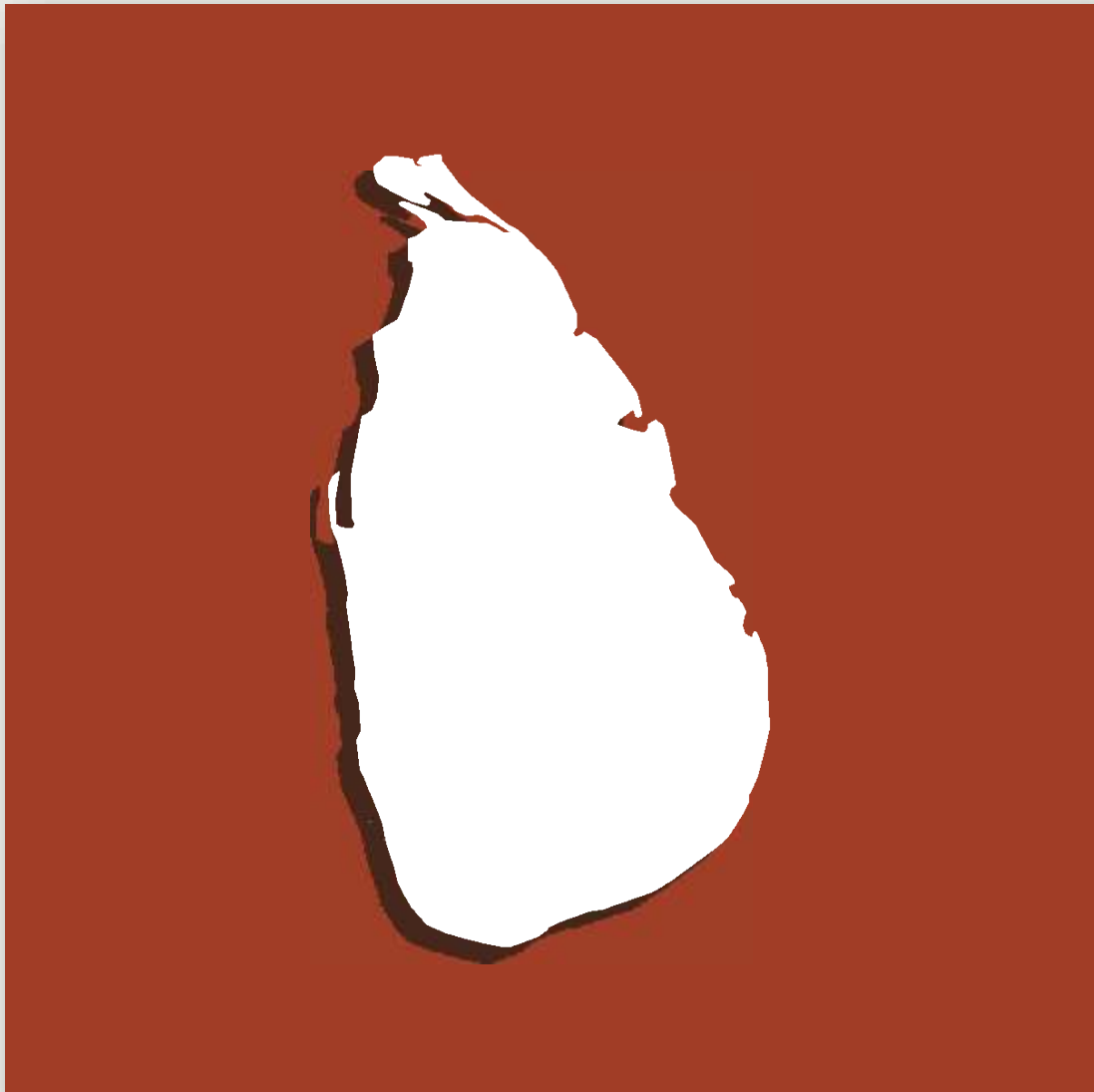
- Anti-trafficking trainings must continue with renewed vigor for different implementing agencies. Trainings must be done continuously and at three levels:
 - Basic/ Qualification Training
 - Trainings to in-service personnel
 - Trainings to those deputed to anti-trafficking squads/ police/ border controls
- Employment and recruitment agencies must be closely monitored.
- There must be greater awareness at all stages of source, demand and transit, and whistleblowers must be protected.

In Conclusion

Nepal has taken a number of steps including legislation to strengthen anti-trafficking measures. It must focus on strengthening implementation by ensuring prosecutions and other measures for different forms of trafficking including labor trafficking. Community based initiatives must be developed in order to combat the problem at the grassroots.

COUNTRY ANALYSIS

SRI LANKA



In this Section

1. Concerns on Trafficking in Sri Lanka
2. Constitutional Protections and Trafficking
3. The Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Act, 2005
4. Miscellaneous Legislations relevant to Trafficking
5. Trafficking and Organized Crime as Defined by the Law of Sri Lanka
6. Case Law on Trafficking: Landmark Judicial Pronouncements Having a bearing on Human Trafficking
7. Measuring Domestic Trafficking Provisions Against International Yardsticks: the Protocol
8. An Overview of the Ratification Status to Important International Instruments
9. Gaps in the Legal Framework of Trafficking
10. Key Recommendations for Sri Lanka

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1. CONCERNS ON TRAFFICKING²¹³

Sri Lanka is primarily a source country with men, women and children being trafficked primarily for labor and also for commercial sexual exploitation, including domestic child sex tourism.²¹⁴ While the civil strife within the country has received a lot of attention and quite rightly so, the problem of trafficking has been relegated to a backseat. Trafficking is a real concern, and though there are some steps that have been taken, a lot more needs to be done in order to prevent the gross violations of rights of men, women and children.

Due to the internal conflict, children have been recruited, sometimes forcibly, as soldiers by the LTTE. There may also be a small but significant trafficking of women into Sri Lanka from countries such as Thailand, China and the members of the former USSR for commercial sexual exploitation.

There are also recent concerns about trafficking for employment to the Middle East²¹⁵ as well as Singapore among other countries. Men and women are offered jobs as domestic workers, construction labor or in other factories like garments. On arriving abroad, their passports or other travel documents are withheld from them, and some terms of employment may be breached. While they are offered lucrative jobs in order to get them to migrate for labor, they may not receive their just dues. Again, labor recruitment agencies may charge disproportionate fees for such employment. There have been raids on fraudulent recruiting agencies, and legal action has been taken in many cases which involved suspension of licenses. However, there were no large scale prosecutions on trafficking.

Despite arrests and initiation of prosecutions, there have been no significant convictions. A national policy was drafted on migration, and there were proposals to set up a national anti-trafficking task force. A National Task Force on Human Trafficking has been set up in partnership with the International Organization for Migration to support successful prosecutions and protect victims.²¹⁶ The National Child Protection Authority would also play a role in protecting children from abuse and exploitation.²¹⁷ The law itself has undergone changes on trafficking, since 1844 when slavery was abolished²¹⁸ to the landmark amendment in 2006, to its Penal Code which prohibited several forms of trafficking and prescribed stringent punishments for the same on par with the punishment for other grave offences like rape. The Parliament has also passed the Convention Preventing and Combating Trafficking in Women and Children for Prostitution Act, 2005, but it has not yet come into force.²¹⁹ When it does, it will create legal provisions to give effect to the SAARC Convention.

Protection has seen continuation of access to protective services made available by NGOs or international organizations. The government also has limited services for the same, including counseling for child trafficking victims. There have been rescued foreign victims as well. While

²¹³ Adapted from Global Report on Trafficking in Persons as well as the Trafficking In Persons Report, 2010, United States Department of State, 14 June 2010 sourced from <http://www.unhcr.org/refworld/docid/4c1883c52d.html> accessed on 08 July 2010.

²¹⁴ See generally Ibid

²¹⁵ Kuwait, Jordan, Saudi Arabia, Qatar, Lebanon, United Arab Emirates (UAE), Oman and Bahrain.

²¹⁶ <http://documents.gov.lk/Acts/2005/Women%20and%20Children%20Act%20No.%2030%20of%202005/...> accessed on 20 September 2010 Trafficking In Persons Report, 2010 Ibid.

²¹⁷ <http://www.iomsrilanka.org/iom/?p=1444> as on 27 November 2010.

²¹⁸ Created under the National Child Protection Authority Act, 1998.

²¹⁹ Abolition of Slavery Ordinance, 1844

²²⁰ [http://documents.gov.lk/Acts/2005/Women%20and%20Children%20Act%20No.%2030%20of%202005/PL%20000372%20Wamen%20and%20Children%20\(E\).pdf](http://documents.gov.lk/Acts/2005/Women%20and%20Children%20Act%20No.%2030%20of%202005/PL%20000372%20Wamen%20and%20Children%20(E).pdf). Accessed on 28 September 2010.

victims were encouraged to participate in proceedings against their traffickers, because of the slow pace of the justice delivery system, there has not been enough cooperation.

On prevention, several awareness programmes were conducted among different interest groups. A policy on migration has been drafted to protect workers moving abroad and an interagency task force is also being proposed.

For protecting women and children, the police also has a bureau in Colombo dealing with cases on women and children, including cases on trafficking.²²⁰ Sri Lanka's concerns have thus been towards tackling trafficking by amending laws and regulating migration.

2. CONSTITUTIONAL PROTECTIONS AND TRAFFICKING

The Sri Lankan Constitution is a written Constitution which contains two provisions specifically on trafficking. Both provisions are on trafficking of children. The chart below summarizes the provisions.

Provisions on Trafficking in Constitution of Sri Lanka

Article 27(13)	State has an obligation to protect children.
Article 12(4)	Action must be taken by the State to ensure such protection.

The Constitution of Sri Lanka places an obligation on the State to protect children and to take concrete action to ensure such protection. Details of punishing trafficking are dealt with by legislation and are covered subsequently.

Unlike other Constitutions in the study, the Sri Lankan Constitution does not mention trafficking for forced labor in any form.

The Sri Lankan Constitution contains provisions dealing with trafficking and has a language different from that of the other States in the study. It couches the protection in terms of the State's obligation to protect children. Its protection is thus limited only to one group which may be trafficked. Children under Article 27(13) of the Constitution of Sri Lanka must be protected against all harm, including by implication trafficking. Article 12(4) further implies that the State must take action in order to ensure such protection to children. The Constitution places emphasis on the duty of the State to actively protect children.

3. THE CONVENTION ON PREVENTING AND COMBATING TRAFFICKING IN WOMEN AND CHILDREN FOR PROSTITUTION ACT, 2005

Although there is an Act in Sri Lanka which is specifically on trafficking, though limited to women and children in prostitution, it has not yet been notified and cannot be used in cases of trafficking. Sri Lanka thus, at the moment, has no legislation in force specifically on trafficking.²²³ It has a number of miscellaneous legislations which are relevant to trafficking.

²²¹ Article 27(13) The State shall promote with special care the interests of children and youth, so as to ensure their full development, physical, mental, moral, religious and social, and to protect them from exploitation and discrimination. The National Child Protection Authority Act, 1998, also seeks to provide mechanisms to protect children from abuse and exploitation. No specific mention of trafficking has been made, although trafficking would fit within the meaning of abuse and exploitation.

²²² Article 12(4) Nothing in this Article shall prevent special provision being made by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons.

²²³ There is the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Act, No. 30 of 2005 available at [http://documents.gov.lk/Acts/2005/Women%20and%20Children%20Act%20No.%2030%20of%202005/PL%20000372%20Women%and%20Children%20\(E\).pdf](http://documents.gov.lk/Acts/2005/Women%20and%20Children%20Act%20No.%2030%20of%202005/PL%20000372%20Women%and%20Children%20(E).pdf)

4. MISCELLANEOUS LEGISLATIONS RELEVANT TO TRAFFICKING

In the case of Sri Lanka, because of the absence of a separate legislation on trafficking which is currently in force, and pending the notification of the Convention on Preventing and Combating Trafficking in Women and Children in Prostitution Act, 2005, miscellaneous legislations become even more relevant.

Broadly speaking these legislations deal with a number of themes such as children, foreign employment/ regulating of foreign job placement agencies, child labor, bonded labor/ indentured labor/ pledging of persons for labor and immigration/ emigration.

These legislations, especially in the form of the Penal Code, also deal with criminalizing of a number of offences not specifically dealt with in the specific laws on trafficking. These include penalizing acts, such as procuring, buying and selling of human beings, importing or exporting human beings, buying and selling minors, servitude, bondage and unacceptable forms of labor, adoption of children (unless done in the manner prescribed by law), breach of border control norms and procedures, and others.

A chart detailing miscellaneous legislations relevant to trafficking is detailed below.

LEGISLATIONS	Section	DETAILS OF THE PROVISION
Penal Code, 1883 ²²⁴	352	Kidnapping and taking out of the country is a separate offence. ²²⁵
	357	Kidnapping for forced marriage or sexual exploitation or forced sexual intercourse.
	358	Kidnapping for causing hurt, slavery or abuse to satisfy unnatural lust.
	358A ²²⁶	Debt bondage, serfdom, forced or compulsory labor, slavery and recruitment of children for use in armed conflict.
	360A	Inducing girls below 21 to leave Sri Lanka for the purposes of sexual exploitation is punishable. Similarly, bringing into Sri Lanka is also punishable.
	360C	Introduces the elements of trafficking including buying, bartering, selling or abetting the same. Recruitment, transfer, harboring, receipt of persons for certain purposes ²²⁷ of trafficking is also punishable.
	360D	Prohibits illegal adoption through procuring a child. ²²⁸
	360E	Soliciting a child below 18 is an offence.
	361	Buying, selling, detaining, disposing a person as a slave is punishable.
	362	Trafficking, and dealing in slaves.
	288 ²²⁹ 288B	Causing or procuring a child for begging, or trafficking in prohibited articles.

²²³ There is the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Act, No. 30 of 2005 available at [http://documents.gov.lk/Acts/2005/Women%20and%20Children%20Act%20No.%2030%20of%202005/PL%20000372%20Women%and%20Children%20\(E\).pdf](http://documents.gov.lk/Acts/2005/Women%20and%20Children%20Act%20No.%2030%20of%202005/PL%20000372%20Women%and%20Children%20(E).pdf)

²²⁴ http://www.commonlii.org/lk/legis/consol_act/pc25130.pdf accessed on 20 July 2010

²²⁵ Punished in Section 354 Ibid.

²²⁶ http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_isn=74477

²²⁷ For securing forced or compulsory labour or services, slavery, servitude, the removal of organs, prostitution or other forms of sexual exploitation or any other act which constitutes an offence under any law.

²²⁸ http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_isn=74477 accessed on 05 July 2010

²²⁹ By amendment in 199

[http://www.lawnet.lk/sec_process.php?chapterid=1998Y0V0C29A§ionno=3&title=Penal%20Code%20\(Amendment\)&path=2](http://www.lawnet.lk/sec_process.php?chapterid=1998Y0V0C29A§ionno=3&title=Penal%20Code%20(Amendment)&path=2) Accessed on 28 September 2010

LEGISLATIONS	Section	DETAILS OF THE PROVISION
	288A ²³⁰	Using a child for illicit sexual intercourse.
Immigrants and Emigrants Act, 1948 ²³¹	45C ²³²	Organizing for persons to leave the country on the promise of employment outside Sri Lanka in violation of the Act is punishable. ²³³
Employment of Women, Young Persons and Children Act, 1956	20A	Children (below 18) cannot be employed in hazardous occupations. ²³⁴
Sri Lanka Bureau of Foreign Employment Act, 1985	37A, 51A, 52 <i>inter alia</i>	Regulating advertisements, commissions for agencies offering employment abroad.
Prevention of Money Laundering Act, 2006	35	Trafficking is included as one of the unlawful activities which will attract the provisions of the Act. ²³⁵
Extradition Law, 1977 ²³⁶	24 and the Schedule	Includes money laundering as an extraditable offence, including <i>inter alia</i> where it is from trafficking of persons. ²³⁷

5. TRAFFICKING AND ORGANIZED CRIME AS DEFINED BY THE LAW

For the purpose of understanding cross border trafficking, especially in the context of organized crime, there are two definitions that need to be analyzed, viz., 'trafficking' and 'organized crime.' How different countries define and engage with these two terms gives us an understanding of the rubric of legal protection given to combat trafficking as an organized crime.

In order to weigh the definitions that each country has, the definitions under SAARC will also be studied, since all the countries under study are part of the South Asian Association for Regional Cooperation.

5.1 Trafficking Definitions

5.1.1. UN Convention Against Transnational Organized Crime and the Protocol

The definition of trafficking under Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000,²³⁹ covers the recruitment, transportation, transfer, harboring 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 labor or services, slavery or practices similar to slavery, servitude, or the removal of organs.

²³⁰ Ibid.

²³¹ A person below 18 is a child

²³² http://www.commonlii.org/lk/legis/consol_act/iae245290.pdf accessed on 26 September 2010

²³³ Amendment of 2006

²³⁴ [http://documents.gov.lk/Acts/2006/Immigrants%20and%20Emigrants%20\(Amend\)%20Act%20No.%2031/Act%2031%20E.pdf](http://documents.gov.lk/Acts/2006/Immigrants%20and%20Emigrants%20(Amend)%20Act%20No.%2031/Act%2031%20E.pdf)

²³⁵ As cited in Legal Framework on Trafficking in Persons in SAARC Region, Draft Study Report, UNIFEM (2007)

²³⁶ As cited in Legal Framework on Trafficking in Persons in SAARC Region, Draft Study Report, UNIFEM (2007)

²³⁷ <http://www.oecd.org/dataoecd/3/61/39370394.pdf> accessed on 15 July 2010

²³⁸ As cited in Legal Framework on Trafficking in Persons in SAARC Region, Draft Study Report, UNIFEM (2007)

²³⁹ Hereinafter referred to as Protocol

It further clarifies that the consent of a victim of trafficking in persons, to the intended exploitation, is irrelevant where the means specified above have been used.²⁴⁰ Also, where a child²⁴¹ is concerned, the recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered trafficking, even if it does not involve any of the means laid down in the definition of trafficking.²⁴²

5.1.2. South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002

The SAARC Convention²⁴³ adopted unanimously by Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka, which is relevant for cross border trafficking in South Asia also, has defined trafficking. However, it is a limited definition which only covers trafficking for commercial sexual exploitation. Trafficking is defined 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.²⁴⁴

5.1.3 Domestic Law of Sri Lanka²⁴⁵

The domestic law of Sri Lanka first does not have in force a separate legislation on Trafficking.²⁴⁶ A definition of trafficking is absent although many acts which amount to trafficking have been penalized, some by recent amendments in 2006.²⁴⁷ Section 360C of the Penal Code introduces the elements of trafficking including buying, bartering, selling or abetting the same. Recruitment, transfer, harboring, receipt of persons for certain purposes²⁴⁸ of trafficking is also punishable. Several other provisions in the Penal Code also deal with different aspects of trafficking including buying, selling, bartering, inducing someone else to do so for money or other consideration and using force, fraudulent means, etc., to do so. Purposes covered under the Penal Code, 1883, range from prostitution and sexual exploitation, to begging, to compulsory labor, slavery, servitude and serfdom among others.²⁴⁹

5.2 Organized Crime Definitions

5.2.1 UNTOC and the Protocol

Under the United National Convention Against Transnational Organized Crime, 2000,²⁵⁰ "Organized criminal group"²⁵¹ has been defined as a structured group²⁵² of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious

²⁴⁰ Article 3(b) Ibid.

²⁴¹ A 'child' is any person under eighteen years of age (Article 3(d) Protocol)

²⁴² Article 3 (c) Protocol

²⁴³ South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002

²⁴⁴ Article I

²⁴⁵ Adapted from Coomaraswamy, Radhika and Ambika Satkunathan: Anti-child Trafficking Legislation in Asia: A Six-country Review (Bangladesh, Nepal, Pakistan, Sri Lanka, Thailand and Indonesia). International Labor Organisation. 2006 p. 81-82.

²⁴⁶ Although as mentioned earlier, there is an Act, it is not yet in force.

²⁴⁷ Penal Code Amendment Act No. 16 of 2006

²⁴⁸ For securing forced or compulsory labour or services, slavery, servitude, the removal of organs, prostitution or other forms of sexual exploitation or any other act which constitutes an offence under any law.

²⁴⁹ See Table on Trafficking Legislations in Sri Lanka for details of available provisions.

²⁵⁰ Hereinafter UNTOC

²⁵¹ Article 2(a) of the UNTOC

²⁵² Further defined in Article 2 (c) UNTOC to mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.²⁵³

5.2.2 South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002

There is no definition of organized crime in either the SAARC Convention on Mutual Assistance in Criminal Matters, 2008, or the South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002.

5.2.3 Domestic Law of Sri Lanka

When a criminal act is done by several persons in furtherance of a common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.²⁵⁴ Whenever an act is criminal only by reason of its being done by criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.²⁵⁵

Abetment²⁵⁶ also deals with cases where different persons engaged in organized crime may work together doing different tasks. Conspiracy covered in Sections 113A and 113B covers preparations and attempt to traffic by organized groups which may even be apprehended before the event takes place.

Corruption, which is an important aspect of organized crime, is also punished under the Penal Code. Section 158 states: "Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Government of the Republic or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both".²⁵⁷

6. CASE LAW ON TRAFFICKING: LANDMARK JUDICIAL PRONOUNCEMENTS HAVING A BEARING ON HUMAN TRAFFICKING

No judgment on human trafficking was located in the current research; however, there have been some good decisions in the area of rape law and in offences relating to sexual assault which may be useful in cases of trafficking.

²⁵³ Article 2(a) UNTOC

²⁵⁴ Penal Code, 1883 Section 32 cited from http://www.commonlii.org/lk/legis/consol_act/pc25130.pdf accessed on 20 September 2010

²⁵⁵ Ibid.

²⁵⁶ Penal Code, 1883 Sections 100-113 cited from http://www.commonlii.org/lk/legis/consol_act/pc25130.pdf accessed on 21 September 2010

²⁵⁷ Other Sections on corruption in the Penal Code include:-

Section 159- Taking gratification in order, by corrupt or illegal means, to influence public servant

Section 160- Taking gratification for exercise of personal influence with public servant

Section 161- Abetment of the earlier two offences of corruption

Section 162- Whoever being a public servant knowingly disobeys any direction of the law as to the way in which he is to conduct himself intending to cause or knowing it to be likely that he will cause injury to any person or to the government.

Adapted from http://www.commonlii.org/lk/legis/consol_act/pc25130.pdf accessed on 20 August 2010

In *Piyasena and others vs the Attorney General*,²⁵⁸ it was held that in a series of attacks, it would be sufficient if one single charge could be proved by the prosecution to constitute the offence. In *Rajapakse v The State*,²⁵⁹ it was held that the absence of the accused from the proceedings in court during the trial would not be fatal to the final outcome of the case if the accused had remained absent deliberately from the court.

7. MEASURING DOMESTIC TRAFFICKING PROVISIONS AGAINST INTERNATIONAL YARDSTICKS: THE PROTOCOL

In order to identify gaps, it is essential to compare domestic laws with international provisions. In this study, this is done in two steps. In the first step which is this chapter, the Protocol has been used as a yardstick to see how far domestic laws comply with the provisions of the Protocol. Specific Articles of the Protocol are used as the basis for comparison, as seen in the country-specific charts. In the second step which is contained in the next chapter, the international instruments that States have signed/ ratified or are party to are listed. This is done to ensure that for certain crucial points such as gender, human rights and the rights of the child, these instruments will also serve as referral points in identifying gaps and making recommendations.

Sri Lankan Law and the Protocol

Protocol	Bangladeshi Law/ Government Action
Article 5 Criminalization of offences	Several offences of trafficking are currently criminalized: Trafficking for commercial sexual exploitation in various forms Trafficking outside the country and into it Debt bondage, serfdom, forced or compulsory labor, slavery Recruitment of children for use in armed conflict Organizing for employment outside the country in violation of law Special provisions regarding employment of children.
Article 6 Assistance to and protection of victims of trafficking	No separate provisions other than that available under general substantive and procedural law.
Article 7 Status of victims of trafficking in persons in receiving States	Very few persons are trafficked into the country; they are kept until deportation can be arranged. ²⁶⁰
Article 8 Repatriation of victims of trafficking in persons	Not really done unless the costs of repatriation are met and they are placed in detention in the meantime. ²⁶¹
Article 9 Prevention of trafficking in persons	Shelters as well as counseling and resource centers for victims of trafficking Rehabilitation centers for children in armed conflicts Awareness generation by the immigration and emigration department through campaigns, posters etc. ²⁶²
Article 10 Information exchange and training	Some trainings are provided sporadically to police officials. Officials of the Immigration and Emigration Department also receive training on issues relating to trafficking. ²⁶³
Article 11 Border measures	There is a visa on arrival system; illegal immigrants are few.
Article 12 Security and control of documents	Since there is a visa on arrival system, this may not be very relevant.
Article 13 Legitimacy and validity of documents	Since there is a visa on arrival system, there is no entry using forged travel documents.

²⁵⁸ (1986) 2 Sri. L. R 288, Landmark Judgments on Violence Against Women and Children, SARIQ at 105

²⁵⁹ (2001) 2 Sri. L. R. 161 Ibid

²⁶⁰ See generally TIP Reports 2009 and 2010

²⁶¹ Ibid.

²⁶² <http://www.immigration.gov.lk/>, <http://www.tops.lk/article4362-concerted-effort-against-human-trafficking.html> accessed on 27 November 2010

²⁶³ Ibid.

8. AN OVERVIEW OF THE RATIFICATION STATUS TO IMPORTANT INTERNATIONAL INSTRUMENTS

In addition to the Protocol, there are other international instruments which are important if one is to identify gaps in the study, because even though they don't have any specific provisions on trafficking, they are crucial in understanding how the interests of vulnerable groups are met. They also serve to provide an understanding of the approaches to trafficking each country has taken.

Status of Conventions Signed/ Ratified by Sri Lanka

Name of Convention	Status	Comments
UNCRC	Signed on 26 th Jan, 1990 and ratified on 12 th July, 1991	
Optional Protocol to CRC on Sale of Children, Child Prostitution, Child Pornography	Signed on 8 th May, 2002, Ratified on 22 nd September, 2006	
Convention on the Suppression of Immoral Traffic and of the Prostitution of Others	Date of Accession: 15 th April, 1958	
ILO Convention 138 Minimum Age Convention	Ratified on 11 th February, 2000	Minimum Age Specified: 14 years
ILO Convention 182 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor	Ratified on 1 st March, 2001	
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	Ratified on 5 th October, 1981	
SAARC Convention of Preventing and Combating Trafficking in Women and Children for Prostitution 2002 and SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia	Signed on 5 th January, 2002	
UN Convention against Transnational Organized Crime	Signed on 13 th Dec, 2000 and Ratified on 22 nd Sep, 2006	
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children	Signed on 13 th December, 2000	
Protocol against the Smuggling of Migrants by Land, Sea and Air	Signed on 13 th December, 2000	

9. GAPS IN LEGAL FRAMEWORK ON TRAFFICKING IN SRI LANKA

There are two classifications under which gaps have been studied: first, under the Prosecution-Protection-Prevention matrix and, second, under the Protocol, testing gaps with specific Articles.

Gaps Examined within the Prosecution-Protection-Prevention Matrix

Key gaps in the legal framework have an impact on all three areas of prosecution, protection and prevention. These include the following:

- Non ratification of the Protocols is a difficulty as many enabling provisions of the treaties cannot be availed of.
- Lack of a comprehensive definition of trafficking either as a common minimum platform for the States to work on with each other, or even for punishing all forms of trafficking within the countries. While the SAARC definition is there, it is limited to trafficking for sexual exploitation and only covers women and children.

- Gender sensitivity is missing; even though there are laws for women, this does not translate into a sensitive law. Thus, for example, foreign victims of trafficking often languish, as they don't have the resources to go back to their countries of origin. Also, a large number of boys are forced into prostitution,²⁶⁴ but this problem has not received sufficient attention.

Key Gaps in Prosecution

- Trafficking is not often seen as an organized crime, and provisions relevant to organized crime are not made use of in trafficking cases.
- Cooperation mechanisms are ad hoc or non-existent as far as cross border trafficking is concerned. Especially concerning:
 - a. Legal assistance
 - b. Providing information
 - c. Transfer of sentenced persons
 - d. Joint investigations
- Prosecutions overall are not satisfactory, although there are some law enforcement efforts.²⁶⁵

Key Gaps in Protection

- There is no positive duty cast upon States to provide sufficient shelters or for rehabilitation or rescue, though it runs shelters both in the Gulf for those fraudulently recruited to the Gulf and also within the country especially for child soldiers in the latter case.²⁶⁶
- Civil remedies in tort law are not used against employers who violate labor standards or force employment.
- Financial support for existing programs is often insufficient.
- A conducive atmosphere to make it safe for victims to testify is not created. There is no witness protection program either.²⁶⁷
- There is dearth of case law from higher courts on trafficking.²⁶⁸

Key Gaps in Prevention

- Trainings are done and so is awareness generation,²⁶⁹ but it is not enough, as ground realities show. Trainings must be continued with added vigor across all implementing authorities, NGOs and other stakeholders.
- Licensing of recruitment agencies and their monitoring is not satisfactory.²⁷⁰

²⁶⁴ Trafficking In Persons Report, 2010, United States Department of State, 14 June 2010 sourced from <http://www.unhcr.org/refworld/docid/4c1883c52d.html> accessed on 08 July 2010

²⁶⁵ Ibid. There have been some innovations such as expanding the powers of the Sri Lanka Bureau of Foreign Employment (SLBFE) to prosecute recruitment agents who are involved in fraudulent practices. Also, after amendments to the Penal Code, there have been prosecutions on trafficking including that of children.

²⁶⁶ The shelters are at Jordan, Kuwait, Libya, Oman and the UAE TIP Report 2010 Ibid

²⁶⁷ The government did not specifically encourage victims to assist in the proceedings. TIP Report, 2010 Ibid.

²⁶⁸ Refer to earlier sub-chapter on 'Case Law on Trafficking'

²⁶⁹ Programs have been conducted by the National Child Protection Authority and the SLBFE to the public and to workers leaving for employment abroad

²⁷⁰ An NGO study cited in the TIP Report 2010 found that below-age workers got forged documents from employers, and that there were discrepancies in job description, employer and salary compared with what was promised.

- Law reform, policy and prevention measures are slow to respond to ground realities of trafficking as is evidenced by the lack of a law on trafficking specifically.
- Systems, like referrals and identification of support staff and service providers or authorities at different levels, are absent.

Gaps Examined under the Protocol

While Sri Lanka has signed and ratified the UNTOC, the Trafficking Protocol still needs to be ratified. Domestic laws of Sri Lanka focus mainly on preventing and combating trafficking in persons which is the objective (a) in the statement of purpose.²⁷¹ Both other objectives: (b) dealing with protecting and assisting victims of trafficking with full respect for their human rights, and (c) promoting cooperation among States parties in order to meet these objectives, have not been taken care of in the domestic legal system. This is primarily because of the lack of a separate law on trafficking in force, with all the procedural and substantive support such a law could bring. The Penal Code which is what is used to prosecute offences of trafficking is poorly equipped to deal with victims' rights.

There is a need to bring about a law incorporating the definition of trafficking in the Protocol completely, although many elements are to be found in the existing Penal Code post amendment²⁷² which defines certain offences and gives a definition of trafficking. The law still is in the criminal justice mode and a comprehensive law on trafficking covering substantive and procedural aspects is required. It is perhaps because of this lack of a definition, until recently, that at the level of reported cases, there are no identifiable cases on trafficking.

On organized crime, the Sri Lankan Penal Code does deal with abetment, criminal conspiracy and other forms of wrongdoing where there is a common intention. This may broadly cover elements of organized crime detailed in the Convention, though there is neither mention of the term, nor are there any legislations specifically tackling organized crime. This is a limitation, as dealing with transnational offences and protecting victims of transnational offences becomes difficult.²⁷³

Article 5 of the Protocol deals with criminalization of trafficking. Sri Lanka has criminalized a number of offences relating to trafficking for commercial sexual exploitation, labor and for use of child soldiers, but there is no comprehensive law criminalizing all forms of trafficking.

On protection of victims, there is no special status in Sri Lanka for a victim of trafficking. Illegal immigrants including victims of trafficking are confined awaiting deportation, and there are no funds to repatriate²⁷⁴ them. There is no move to legislate to provide for this as suggested by Article 7.

Article 9 deals with a number of cooperation strategies. None of these have been incorporated into domestic law, although there have been efforts made by non- governmental and governmental organizations on a case to case basis.

There are thus a number of provisions of the Protocol which remain unfulfilled in letter and spirit.

²⁷¹ Article 2 Protocol

²⁷² Section 360C Penal Code

²⁷³ See Article 4

²⁷⁴ Article 8. See TIP Report, 2010

10. KEY RECOMMENDATIONS FOR SRI LANKA

Some recommendations are common to prosecution, protection and prevention. These include the following:

- In order to have a common understanding of trafficking and also to ensure that all forms of trafficking are penalized, and that victims are adequately protected, the definition under the Protocol must be adhered to. Even if this is not done under one comprehensive law on trafficking, it must be woven into existing legal frameworks.
- There must be a greater sensitivity to the violations of rights of women and children who have been trafficked.²⁷⁵

Key Recommendations in Prosecution

- Trafficking must be seen as an organized crime in criminal procedure and substantive criminal law. Existing principles, such as common intention, conspiracy, etc., must be used in cases of trafficking.
- There should be more prosecutions. There are no standard-setting cases in higher courts as well; a few test cases may be taken up.
- Cases must be taken up in designated courts, e.g., courts dealing with violence against women, and judges must be trained and sensitized to handle matters on trafficking.
- A legislation incorporating the definition of trafficking, as well as procedural standards given in the Protocol, is absent and may be considered.

Key Recommendations in Protection

- There must be a clear line drawn between the trafficker and the victim. Victims must not be further penalized, and a distinction must be made between trafficking on the one hand, and prostitution or unsafe migration on the other.
- The survivors of trafficking, whether nationals or foreign citizens, should have the right to exercise independent agency rather than being compelled to do whatever the State thinks is best for them.
- Civil remedies, like torts claims and compensation, must be created and enforced against traffickers or employers.
- States must commit finances for more and better schemes to rehabilitate victims.
- Witness protection must be explored to create an atmosphere free from fear within which a victim can testify.

Key Recommendations in Prevention

Anti trafficking trainings must continue with renewed vigor for different implementing agencies. Trainings must be done continuously and at three levels:

- Basic/ Qualification Training
- Trainings to in-service personnel

²⁷⁵ All detainees who were held for visa violations, including trafficking victims, could not return until they could raise enough money for their plane ticket home, and some had remained there for years. Trafficking In Persons Report, 2010, United States Department of State, 14 June 2010 sourced from <http://www.unhcr.org/refworld/docid/4c1883c52d.html> accessed on 08 July 2010.

- Trainings to those deputed to anti-trafficking squads/ police²⁷⁶
- Employment and recruitment agencies must be closely monitored.
- There must be greater awareness at all stages of source, demand and transit and whistleblowers must be protected.
- There is a need to generate awareness in communities and also build capacity to be able to prevent vulnerable persons being trafficked. Awareness must focus especially on the hazards of labour trafficking and child trafficking.

In Conclusion

While there is a definition of trafficking in the Penal Code, the special law existing on trafficking should be notified, so that it can come into effect and be used. There needs to be a better system of cooperation built up to deal with cases of cross border trafficking. The lack of reported cases shows that many stakeholders including the judiciary and the public prosecutors may need to be trained on this issue.

²⁷⁶ This is already happening to some extent, and the training, awareness and raids on fraudulent recruitment agencies done by the SLBFE should be continued.

CONCLUSIONS AND RECOMMENDATIONS



While it is clear that all the countries in the study have made progress towards combating human trafficking, the region still does not comply with international standards, and much still needs to be done to tackle the problem of cross border trafficking.

GAPS IN SOUTH ASIA WITH REGARD TO THE PROTOCOL

On Ratification

The major gap as far as cross border anti-trafficking standards in South Asia are concerned is that the Protocol has not been ratified by the States concerned. Bangladesh and Nepal have not yet signed it, either. A comparison of domestic standards is colored by this major limitation. The Protocols supplement the UNTOC, are interpreted with the UNTOC and play a major role in standard setting for protection, prevention and prosecution. Standards on protection, prevention and prosecution are scattered across different Articles, as seen earlier, and a single Article may have elements of either two or even three parameters. Comparisons, therefore, need to be based on Articles individually for clarity.

The Statement of Purpose of the Trafficking Protocol lists out the following objectives:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children
- (b) To protect and assist the victims of such trafficking with full respect for their human rights
- (c) To promote cooperation among States Parties in order to meet these objectives.²⁷⁷

Examining the Statement of Purpose, it is seen that domestic laws cover and deal with prevention and combating of trafficking as well as protecting and assisting victims of trafficking. Cooperation among States is not something one usually finds in the domestic laws of any of the States. Mechanisms which exist are in the political sphere, rather than in the legal sphere. This is also reflected in the approach to the SAARC Convention which does deal with the importance of cooperation between States but which has not trickled down from the political sphere to the legal sphere. States need to take steps to internalize standards and incorporate cooperative measures into their domestic systems in order to have any meaningful approach to trafficking.

Recent developments in the SAARC region in June 2010, where heads of States and government leaders called for greater cooperation within SAARC on a variety of areas, is a positive step.²⁷⁸

²⁷⁷ Article 2 Protocol

²⁷⁸ On terrorism in http://www.saarcsec.org/uploads/document/Ministerial%20Statement_20100730032905.pdf accessed on 18 September 2010

However, in order for it to be meaningful, it must percolate to ground level realities in order to fulfill in letter and spirit the statement of purpose in the Protocol.

Defining Trafficking

The definition under the Protocol is a comprehensive one covering various forms, means and objectives of trafficking. A number of actions would fall within the ambit of trafficking. Unfortunately, none of the definitions in any of the States surveyed have a comprehensive overview of what trafficking means, although some laws like the Penal Code of Sri Lanka may broadly comply. There are States like India which do not have a Central legislation defining trafficking. There are others which limit trafficking to that which is done in order to force prostitution or sexual exploitation. Bangladesh and Nepal fall into this latter category. Some acts which may not fall under the definition of trafficking are also sometimes covered by anti-trafficking law. For instance, in Nepal sexual intercourse with a prostitute²⁷⁹ is punishable under the anti-trafficking law, and in India, soliciting in a public place is criminalized. Law reforms to create a viable definition of trafficking are needed.

Defining Organized Crime

The Protocol specifically deals with trafficking as an organized crime. Not only is there a lack of definition of trafficking, organized crime is also not defined by any legislation in any of the States studied, although some of the States within India have legislations on organized crime. This is a drawback only to some extent as many of the elements of organized crime are dealt with in other statutory provisions. Common intention to commit an offence, criminal conspiracy and abetment are some of the provisions used to tackle organized crime.

Provisions which deal with specific areas of organized crime also play a major role. One of the most important of these is the law relating to corruption which all the States have. Available international and national reports and NGO field studies highlight that the organized crime of trafficking often happens with the overt or covert involvement of State officials, including those who are duty bound to prevent trafficking. Anti-corruption laws play a major role in combating this.

Who is a child?

Other than the above lack of a common definition of organized crime and trafficking, an additional area is the lack of a common definition of a child. The Protocol in Article 3(d) states that any person under the age of 18 years is a child. This reiterates the international standard first laid down in the UNCRC. Though all the countries studied are Parties to the UNCRC, domestic laws have not been sufficiently amended to give the same degree of protection to all children. Labor laws reflect differing standards on who a child is. The conflicting use of terms like *minor* or *child* adds to the confusion. The Minimum Age Convention of the ILO²⁸⁰ has not been ratified by Bangladesh and India, and the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child labor is not ratified by India. In any case in all four countries, ratification has not necessarily led to concrete changes at the ground level, a fact which is a matter of concern in departments dealing with children in each of the countries, and a concern that is obvious in official forums, documents and websites.

²⁷⁹ The focus of this document is on trafficking and terms used to denote this would generally be 'commercial sexual exploitation' and 'victim of commercial sexual exploitation'. However, in some places especially when law or policy is discussed the term 'prostitute' or 'prostitution' is used to reflect the terminology or context in which it has been used.

²⁸⁰ ILO Convention 138

²⁸¹ Article 4

On Procedures and Substance

The Protocol sees its scope of application to the prevention, investigation and prosecution of the offences established in accordance with the Protocol where the offences are transnational and involve organized criminal groups as well as to the protection of victims of such offences.²⁸¹ The Protocol applies to cross border trafficking, and it can play a crucial role, as all the four countries have cross border trafficking which is a cause of concern for each individually and also as a group.

Each State is required to adopt legislative and other measures as necessary to establish certain conducts as criminal offences. Abetting and organizing to commit an offence is also punishable.

On criminalization, each State has laws which do criminalize trafficking, but none have comprehensive anti-trafficking laws criminalizing trafficking in all forms under one roof, so to speak, even though many aspects of trafficking such as commercial sexual exploitation, forced labor, etc., are dealt with in different laws.²⁸² Thus, labeling of crimes as trafficking is not properly done.

Victim Protection

Protection of victims of trafficking varies across countries. The privacy and identity of victims are not always protected; cases tend to use their names and are not always in camera. While some countries give legal representation to women, or legal aid in some form, it is not always the case. Cooperation with NGOs to rescue and assist victims is sporadic, and relief such as housing, counseling, education and training is seldom incorporated in law. Compensation for damage may be available, but because of the multiplicity of court procedures and the expense involved in pursuing a tort case, it is not a remedy which is often used.²⁸³

The victim has no special status in receiving States; very often the victim is treated as an illegal immigrant instead of as a victim of trafficking. States under Article 7 are required to consider adopting legislative or other appropriate measures that permit victims of trafficking to continue to live in the country temporarily or permanently. Where temporary, it is usually for the duration of the anti-trafficking case in which the victim deposes as a witness.

Conversely, victims have a right to be repatriated to their own countries where they had a permanent residence. This is a right, not a compulsion, and is detailed in Article 8. When the victim wants to return, this should be facilitated, and the State Party must accept the victim back. The safety of the victim and the voluntary nature of the return are important. Necessary arrangements such as travel documents must be made available.

Currently, none of the countries surveyed treat the victim as a temporary resident or grant any other status. If there are no travel documents, the person is detained in a women's home or some other place. States may not always have the funds to repatriate, and also sometimes the victim may not be accepted by the country of origin. India is a multi-ethnic, multicultural society and it is very difficult to prove if a particular person is Indian or not.

Cooperation Strategies

Article 9 deals with a whole gamut of cooperation strategies. Some have been attempted, but as the recent 2010 TIP Report shows, much more needs to be done. The same is true of information

²⁸² Article 5

²⁸³ See Article 6 standards

exchange and training dealt with in Article 10. In any case, Articles 9 and 10 require more political will than concrete legislation, but it would be useful if all domestic legislations pointed to a cooperative endeavor. One important area, this could be done is border measures detailed in Article 11. Laws have little role to play in a region where borders are porous and not many people use travel documents to get in and out. Strategies need to be explored for stronger border controls without violating the human rights of any person. The same applies to travel and identity documents.²⁸⁴

KEY RECOMMENDATIONS FOR THE REGION

Based on the gaps identified, the key recommendations which have been reiterated in individual reports are the following:

Better ratification status - Major conventions especially UNTOC and Protocols must be ratified for a more uniform system of anti-trafficking frameworks for tackling both internal and cross border trafficking.

Clear definitions - Ratification should be followed by incorporation of definitions on trafficking, organized crime and on who a child is, on par with what is there in the UNTOC and the Protocols. Existing domestic laws must be modified to take this into account.

Labor Standards- Must be improved to prevent the demand for cheap illegal labor and the encouragement of trafficking for labor. ILO Conventions, especially with regard to the elimination of worst forms of labor, must be given effect to.

Cooperation Mechanisms - Must be strengthened at domestic levels as well as cross border levels through the mechanisms detailed in the Protocol particularly Articles 9 and 10. These must be incorporated into domestic laws, police training programs, workshops of judicial academies, training programs of public prosecutors, etc., to foster a climate of working together to combat cross border trafficking. This must be also done at the regional level through SAARC or some other mechanism.

Audit of Domestic Mechanisms - An audit of existing machinery should be carried out to ensure that those who are given the task of working on trafficking are aware of their responsibilities, are sensitized and trained to perform them, and there is rationalization of their other responsibilities in order to enable them to work effectively. A nodal agency may be appointed at least for a short term to perform the audit and suggest reforms to structures, law and policy to improve protection, prevention and prosecution in cases of human trafficking.

²⁸⁴ Article 12



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