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## RESEARCH REPORT

**Human Trafficking across borders: Human Rights Violations of women and children, challenges and remedies**

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## Research Report

### Human Trafficking Across Borders: Human Rights Violations of Women and Children, Challenges and Remedies

• Om Prakash Vyas <sup>1</sup>

*This paper seeks to deliberate upon the human trafficking in women and children in Nepal focusing on the need for regional coordination and cooperation in particular between Nepal and India for combating this menace effectively. It explores the issue within the ambit of the potential reasons behind trafficking such as abject poverty; underemployment, poor working conditions in source countries, vis-a-vis better conditions in affluent destination countries. It is important to understand human trafficking in its totality, by taking into consideration the social, economic and political reasons (structural factors) and seek to co-relate this to policy formulation and governance issues (proximate factors). There are numerous push and pull factors in human trafficking in Nepal's context. There is significant, although still insufficient, knowledge about the networking of human traffickers and a range of policy options exist at the domestic and regional levels to address this problem. An understanding of the structural factors and their relationship to proximate factors is thus vital for combating the problem at both the site of origin and at destination and ultimately at the regional level. Quintessentially, current efforts to address the problem of human trafficking across the Indo Nepal border can definitely improved through bilateral cooperation between the two countries through adequate homework.*

#### Introduction

Trafficking in human beings has, sadly, taken the shape of an organized transnational crime, generating annual business of more than 8 to 10 billion dollars.<sup>2</sup> While not a new problem, the appalling new dimensions it has reached in recent years means it is now a crime of epidemic proportions. It is a global concern and no region or country is immune. As a form of organized crime, trafficking targets the sustainable development and the rule of law because illicit profits may be used for corruption, other criminal activities and at times even for

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<sup>2</sup> A.S. Anand, 'Key Note Address,' in National Seminar on Trafficking in Human Beings (India Habitat Centre 2005).

terrorism.<sup>3</sup> The issue of trafficking is an occasion for all human rights activists to have introspection and self-assessment. In the present era of globalization and the plight of the very poor, the time has now come not just for the civil society but for all stakeholders to deliver proper policy formulation in order to identify gaps in the existing domestic and international laws on trafficking and finally to devise the mechanism for trans-border coordination and cooperation.

Trafficking in human beings is not only confined to sexual exploitation but also takes other forms and the most vulnerable, for example, children - particularly girls - from minority, ethnic, tribal groups or poor families are trafficked to work as domestic servants in big cities, as labor in hazardous industries, for begging, for public sports (such as camel races in gulf countries), bonded labor, human organ smuggling etc. In 1994, the UN General Assembly defined trafficking as

“the illicit and clandestine movements of persons across national borders, largely from developing countries with economies in transition, with the end goal of forcing women and girls into sexually or economically oppressive and exploitative situation for the profit of recruiters, traffickers, and crime syndicates, as well as other illegal clandestine employment and false adoption”.<sup>4</sup>

The *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol)*, supplementing the *United Nations Convention against Transnational Organized Crime (UN TOC Convention)* entered into force on 25 December 2005 contains the most comprehensive definition of human trafficking which defines trafficking inclusively, as

“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 purposes of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or others form of sexual

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<sup>3</sup> Ibid.

<sup>4</sup> United Nations General Assembly, ‘Trafficking’ (2010), available at <http://www.un.org/documents/ga/res/49/a49r060.htm> (accessed on 05 October 2010).

exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>5</sup>

### **A specific case from ground**

The famous *Gonda Circus Case* dealt with by the National Human Rights Commission (NHRC) of India, is an eye-opener on the issue of human trafficking. The testimonies of Nepalese girls, mostly minors, rescued by the NHRC team shocks the conscience of mankind.<sup>6</sup> It explains how the organized network of traffickers is operating between Nepal and India. The case is a textbook example of how the girls are trafficked, confined, kept in bondage and exploited physically, sexually and mentally. Poor parents were lured by the traffickers with a paltry sum paid in advance, and made to sign a contract forcing their children to work in the Circus in violation of labor laws and the juvenile justice act. Even after years of service, the children were not returned to their parents on the pretext of bondage debt. The case necessitated an urgent need for coordination between India and Nepal and Justice Sujata V. Manohar, Member of the NHRC India, was made the focal point on the issue of trafficking.<sup>7</sup> Further operational modalities and policy guidelines on bilateral coordination and cooperation are however, yet to be finalized by the governments of Nepal and India. This was the case which prompted the author and generated interest to work on the issue of trafficking.

### **Major Stakeholders**

The central stakeholders for the purpose of this paper are the trafficked girls and the traffickers; however trafficking could not have reached its current epidemic proportions without the involvement of others. Other contributors to the problem are the victims' families and other members of their communities. These cohorts must have a direct or indirect relationship to debtors in order to survive due to their abject poverty. Not so obvious is the influence of the media and modernization itself.

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<sup>5</sup> United Nations Office on Drugs and Crime, 'Toolkit to Combat 16 Trafficking in Persons,' (16 December 2008), available at [http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296\\_tool\\_1-1.pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_1-1.pdf) (accessed on 8 October 2010). There are currently 133 members to the Trafficking Protocol.

<sup>6</sup> Exploitation of Children by the Great Roman Circus in Gonda District of Uttar Pradesh, Case No.7993/24/2004-2005. National Human Rights Commission, New Delhi, India(2005).

<sup>7</sup> *Ibid*, 5.

From the traffickers' side, the most obvious stakeholders are the business owners seeking to procure sex workers for their brothels, or other cheap labor to inflate their profit margins. Without the extent of the demand for these workers the problem could not have escalated to its current proportions. This is the obvious reason that the provisions addressing demand in recent international documents mark at least the ceremonial acknowledgement that it is the demand for prostitution and commercial services that is central cause of trafficking in various manifestations.<sup>8</sup>

Other stakeholders involved are law enforcement bodies (also the NHRIs of India and Nepal) and government bodies from both India and Nepal. In the broader sense, it is imperative that the international community including the United Nations, Human Rights Commissions and other treaties take into consideration the involvement of all parties; not just the traffickers and their victims. There is a need to think about human rights in a way that are not confined to the boxes of sovereignty and the nation state.<sup>9</sup> In order to obtain a deeper understanding, this paper will further discuss various important aspects concerning this issue.

### **Violation of Human Rights and/or a Failure to Respect Human Rights**

As aforementioned, even though migration within the country or outside is the fundamental human right of human beings,<sup>10</sup> trafficking may be defined as the movement of persons under a circumstance of deceit, force, threat, debt bondage etc. involving exploitation and violation of their human rights.<sup>11</sup> *"Human rights are those entitlements that become consistently eroded with the construction of vulnerabilities such that these rights or entitlements end up becoming privileges and are inversely related to the vulnerabilities of the subject."*<sup>12</sup>

It is well known that trafficking in women for sexual exploitation is a multi-billion dollar business which is a violation of human rights as a direct attack on liberty and human

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<sup>8</sup> Beverly Balos, 'The Wrong way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation', (2004) 27 *Harr. Women's LJ* 137, 1-28.

<sup>9</sup> Centre For Feminist Legal Research and OHCHR, *International Seminar on Cross Border Movements and Human Rights January* (New Delhi 2004).

<sup>10</sup> "Universal Declaration of Human Rights", available at <http://www.answers.com/topic/universal-declaration-of-human-rights> (accessed on 22 September 2010).

<sup>11</sup> 'Model Law against Trafficking in Persons', United Nations Office on Drugs and Crime (E.09.V.11, 2010), available at [http://www.unodc.org/documents/human-trafficking/Model\\_Law\\_against\\_TIP.pdf](http://www.unodc.org/documents/human-trafficking/Model_Law_against_TIP.pdf) (accessed on 02 October 2010).

<sup>12</sup> Centre For Feminist Legal Research and OHCHR, 'International Seminar on Cross Border Movements and Human Rights', January 9-10, 2004, New Delhi, India.

dignity.<sup>13</sup> The problem of trafficking is not new and its causes are “as old as the world”<sup>14</sup> and the reluctance of the international human rights community to address the role of key players undermines efforts towards gender equality and entrenches the notion of belief that economic and social power of men entitles them to sexually access to women.<sup>15</sup> Human trafficking is accepted as a complex process, involving organized networks that need different responses from governments and civil society.<sup>16</sup> The Advisor on Trafficking from the Office of the High Commissioner for Human Rights (OHCHR) Dr. Jyoti Sanghera, in Geneva, has also highlighted the need to understand and acknowledge that trafficking in persons is both a cause and consequence of the violations of human rights.<sup>17</sup>

### **Main Causes (Push and Pull Factors)**

The poor economic and social conditions provide a distinct explanation for the direction and flow of trafficking. Trafficking generally flows from poorer to more prosperous countries. Huge and unaccountable profit drives every aspect of the trafficking industry from the standpoint of the perpetrators of this crime. Resources and money for survival are the central driving force that renders potential victims more vulnerable to deception, coercion and exploitation.<sup>18</sup> Such hapless individuals are also often powerless physically, legally and politically to extricate themselves from exploitative coercive labour, perhaps largely due to their social position.

Agents of trafficking industry often offer to help victims migrate and gain employment, in some instances with direct reference to prostitution.<sup>19</sup> Traffickers can then extract transport costs usually through a debt to be paid off once they join employment forming thus the basis

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<sup>13</sup> INTERPOL, "Trafficking in Women for Sexual Exploitation," INTERPOL (05 March 2010), available at <http://www.interpol.int/public/thb/default.asp> (accessed on 5 October 2010).

<sup>14</sup> Cole Alison, 'Reconceptualizing Female Trafficking: The Inhuman Trade in Women', (2006), 12 *Cardozo J.L. and Gender* 789; *Reference Material MHRD*, Vol.1, Kathmandu School of Law, 219-245.

<sup>15</sup> Beverly Balos, 'The Wrong way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation', (2004), 27 *Harr. Women's LJ* 137, 1-28.

<sup>16</sup> 'Combating Trafficking of Women and Children in South Asia,' Asia Development Bank (A/CONF.177/20/Rev.1, May 2002), available at <http://www.adb.org/gender/bangladesh.pdf> viewed on 09 October 2010,

<sup>17</sup> Centre for Feminist Legal Research, "Trafficking Reform: An Analysis of the Protection of the Rights of Positive People, Children, and Sex Workers" (January, 2006), New Delhi, India.

<sup>18</sup> Fiona David, *Trafficking in Humans : Social, Cultural and Political Dimensions*, Sally Cameron and Edward Newman (eds.), Sally Cameron and Edward Newman (trans) (New York: United Nations University Press 2008).

<sup>19</sup> Cole Alison, 'Reconceptualizing Female Trafficking: The Inhuman Trade in Women', (2006) 12 *Cardozo J.L. and Gender* 789; *Reference Material MHRD*, Vol.1, 219-245.



for debt bondage. The trafficker then provides accommodation and maintenance in a way that the debt continues to rise at a rate beyond their earnings. The victims are therefore, rarely paid and never know when they will be released from debt bondage.<sup>20</sup>

The structural factors responsible for trafficking include economic deprivation, extreme poverty, and the effect of globalization, aspiration for modernity, attitude to gender, the demand for sex and situations of conflict. The proximate factors include lax national and international legal regimes, poor law enforcement, corruption, organized criminal entrepreneurship, weak education campaigns and lack of coordination between the neighbouring countries.<sup>21</sup>

### a) Push Factors

Only a few cases of missing girls are registered at police stations compared to the actual number of girls and women missing. Cases are either not reported or not registered for many reasons, several of which are associated with poor governance. Therefore, large numbers of cases go unreported and impugned without any action<sup>22</sup>. Poor compliance with the UN conventions and treaties may be considered a push factor for trafficking even though push factors mainly operate at the place of origin. It can also be said that the law enforcement agency is neither free from corruption nor strong patriarchal values, and lack of accountability. Reports indicate that it is not unusual for officials to accept or require bribes or sexual services and to discourage trafficking victims from reporting crimes.<sup>23</sup>

The sex sector flourishes because it is shielded, protected and supported by corrupt politicians, law enforcement agencies including police, armed forces and civil servants, who receive bribes, demand sexual favours and are themselves customers of the sex establishments, or may even be partners or owners of such establishments<sup>24</sup>. The reports also indicate that law enforcement and immigration officials are often complicit or at least tolerant

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<sup>20</sup> *Ibid.*

<sup>21</sup> Fiona David, *Trafficking in Humans : Social, Cultural and Political Dimensions*, Sally Cameron and Edward Newman (eds) (New York: United Nations University Press 2008).

<sup>22</sup> Geeta Pathak Sangroula, 'Magnitude and Consequences of Trafficking in Women and Girls for Sexual Exploitation With Special Reference to Nepal', *Reference Material MHRD*, Vol.1 (2011), 246-259.

<sup>23</sup> Christensen, Tyler Marie, 'New Issues in Refugee Research: Trafficking for sexual exploitation: Victim protection in international and domestic asylum law' (2011), *Research Paper No.206, Policy Development and Evaluation Service*, United Nations High Commissioner for Refugees, Geneva 2, Switzerland.

<sup>24</sup> Beverly Balos, "the Wrong way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation", (2004), *27 Harr. Women's LJ* 137,1-28.

of trafficking activities.<sup>25</sup> Nepal is a state party to 18 international human rights treaties and 4 Geneva Conventions including the ILO convention (182), but the prevailing realities have not changed.

The push factors in the historical context, cultural patterns and gender discrimination, poverty and economic pressure and social pressure have been discussed at length in the literature review.

## **b) Pull Factors**

### **i) Globalization**

Globalization is the context within which the elements (supply and demand) governing migrant labor, rather, trafficked labor, is created. *“Migration is the conduit for delivering the migrant subject to her site of work. Trafficking is a harm that is encountered in the process of migration and is also one of the means through which globalization intensifies the vulnerability of the migrant subject and renders her more amenable to forced labor and slavery like conditions”*.<sup>26</sup> What we see now is the trafficking industry growing stronger each year and the widening of the recruitment net. Minor and younger girls are being sold, abducted, or duped into internal or international sex markets where the chances of escape are minimal and their health continuously compromised.

It is rather extremely difficult to assess the scale of human trafficking across the world because of the clandestine nature of this transnational crime.<sup>27</sup> Around 4 million women/girls are trafficked every year around the world, of which 1 million are pushed into the sex industry. This figure may be even higher as many cases go undetected and unreported.<sup>28</sup> It has been estimated that there are over 1 million prostitutes in Nepal, of which 5000 work in Kathmandu alone. Further to this there are about 350000 Nepalese prostitutes in India; 60000 are in Mumbai alone.<sup>29</sup> Trafficked women become durable consumer goods, ultimately

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<sup>25</sup> *Ibid.*

<sup>26</sup> Centre For Feminist Legal Research and OHCHR, ‘International Seminar on Cross Border Movements and Human Rights’, January 9-10, 2004, New Delhi, India.

<sup>27</sup> Christensen (n 44).

<sup>28</sup> Lara Fergus, ‘Trafficking in Women for Sexual Exploitation’, Australian Centre for the Study of Sexual Assault (Briefing No. 5 June 2005), available at <http://www.aifs.gov.au/acssa/pubs/briefing/b5.html> (accessed on 01 October 2010).

<sup>29</sup> ONRT, ‘Trafficking in Person Especially on Women and Children in Nepal’.



saleable for a further accretion of profit<sup>30</sup> and the huge profit margin attracts new and consolidates the traffickers. The ILO estimates that annual illegal profits from the trafficked labor is around \$32 billion out of which 67 percent is generated from the sex industry<sup>31</sup> and we do not know the quantum of illicit profits involving human organs illegal transplant business.

Another interesting fact to emerge from the era of globalization is the number of fair-skinned prostitutes from various countries such as the erstwhile Soviet Union who are replacing and threatening the business or network of Nepalese traffickers and prostitutes in India and the persons from Nepal now preferring the gulf countries for higher income<sup>32</sup> and India being the transit country.

## ii) Inadequate Legal Frameworks

In general, the state authorities often resort to the quick-fix solution of deporting trafficked victims as illegal immigrants.<sup>33</sup> This has never helped the victims, who simply returned to the same set up that led to their moving in the first place.<sup>34</sup> This is contrary to the provisions of Article 7 of the Trafficking Protocol which states that each state party “shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases”.<sup>35</sup>

Trafficked women often arrive in a different country without possessing travel documents or legitimate identification papers; moreover they cannot speak the local language and are thus forced into an illegal trade. It is to be remembered that whether a victim escapes from the clutches of her trafficker or is rescued/recovered by law enforcement officials, she will seldom have documents in support of her identity in her possession as the confiscation of these documents is a tool of control often used by traffickers.<sup>36</sup> The victims often fear the ordeal of

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<sup>30</sup> Alison, Cole, “Reconceptualizing Female Trafficking: The Inhuman Trade in Women”, (2006), 12 *Cardozo J.L. and Gender* 789, Yeshiva University, Reference Material MHRD, Vol.1, pp-219-245.

<sup>31</sup> *Ibid*, 62.

<sup>32</sup> Geeta Pathak Sangroula, ‘Magnitude and Consequences of Trafficking in Women and Girls for Sexual Exploitation With Special Reference to Nepal’, *Reference Material MHRD*, Vol.1 (2011), 246-259.

<sup>33</sup> Cole Alison, ‘Reconceptualizing Female Trafficking: The Inhuman Trade in Women’, (2006), 12 *Cardozo J.L. and Gender* 789; *Reference Material MHRD*, Vol.1, 219-245.

<sup>34</sup> Centre for Feminist Legal Research, *Trafficking Reform: An Analysis of the Protection of the Rights of Positive People, Children, and Sex Workers* (New Delhi: 2006).

<sup>35</sup> Christensen (n 44).

<sup>36</sup> *Ibid*.

making a formal complaint as the prosecution process itself may put them on trial. Trafficking in women has been universally accepted as an act of violence against women, about which there is global consensus.<sup>37</sup> At the fourth world conference on women in Beijing in 1995, combating this form of violence against women was a concern strongly shared by all and the issue of trafficking has been dealt with in various international human rights instruments but the instruments are still weak and inadequate.

It is true that the *SAARC Convention* (Article VIII) has provisions to prevent and interdict trafficking in women and children and “*it is interesting to note preventive measures such as training and assistance to authorities, sensitisation of law enforcement agencies, formulation of a Regional Task Force and bilateral mechanism for exchange of information are worded in obligatory terms. The measures such as those which go to the root of problem by removing discrimination and encouraging development efforts are worded in discriminatory terms without addressing the root cause of trafficking; other preventive measures have only cosmetic value*”.<sup>38</sup> The current anti-trafficking framework therefore, needs to be seriously interrogated and revised.<sup>39</sup>

### c) Global Context

A large number of international and national instruments for prohibiting trafficking have been developed in 21<sup>st</sup> century as human trafficking has become a serious human rights issue.<sup>40</sup> These strategies and mechanisms have to be developed in order to provide practical, right-based policy guidance on the prevention of trafficking and for the protection of victims of trafficking with conceptual clarity.<sup>41</sup> According to the Secretary General of United Nations, the “disparity in the laws of different countries may act as an insurmountable barrier” to efforts to combat trafficking.<sup>42</sup> The UN High Commissioner for Human Rights has

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<sup>37</sup> ‘Violence against Women: Harmful Traditional and Cultural Practices in the Asian and Pacific Region’, Economic and Social Commission for Asia and the Pacific, available at [http://www.unescap.org/ESID/GAD/Publication/Others/Publication\\_EGM-VAW.pdf](http://www.unescap.org/ESID/GAD/Publication/Others/Publication_EGM-VAW.pdf) (accessed on 06 October 2010).

<sup>38</sup> Gunjan Kinnu, *From Bondage to Freedom: An Analysis of International Legal Regime on Human Trafficking* (New Delhi: National Human Rights Commission, India 2006).

<sup>39</sup> Centre For Feminist Legal Research and OHCHR, ‘International Seminar on Cross Border Movements and Human Rights’, January 9-10, 2004, New Delhi, India.

<sup>40</sup> *Ibid*, 72.

<sup>41</sup> *Regional study for the harmonization of Anti-trafficking legal framework in India, Bangladesh and Nepal with International Standards* (Kathmandu School of Law 2004).

<sup>42</sup> Cole (n 53), 219-245.

issued guidelines describing for the non-criminalization of victims of trafficking for offences committed as a direct result of being trafficked.<sup>43</sup>

The rights of victims of trafficking to a remedy for violations of international human rights law can be found in various international human rights instruments including the *Universal Declaration of Human Rights* (Article 8), the *International Covenant on Civil and Political Rights* (Article 2), the *International Convention on Elimination of All Forms of Racial Discrimination* (Article 6), the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Article 14)<sup>44</sup> and other instruments. In Article 6 of the *Convention on Elimination of All forms of Discrimination against Women* (CEDAW) obliged “state parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”.<sup>45</sup> Likewise, there are many international mechanisms to control trafficking, such as *Slavery Convention*,<sup>46</sup> *International Covenant on Civil and Political Rights*,<sup>47</sup> *Child Rights Convention*<sup>48</sup> and other instruments as well.

The OHCHR has also issued 11 guidelines<sup>49</sup> which are the obligations of the state parties to ensure protection and promotion of the human rights of trafficked persons. However, in the absence of effective enforcement mechanisms, UN guidelines have not been translated into action.

Similarly, the UN convention for the suppression of trafficking in persons and of the exploitation and prostitution of others, describes in Article 1 that the state parties to this convention are obligated to

“punish any person who, to gratify the passions of another”, “procures, entices or leads away, for the purposes of prostitution, another person, even with the consent

<sup>43</sup> UNHCR Trafficking Principals, Guideline 3, Substantive session 2002, UN Doc. E/2002/68/Add.1.

<sup>44</sup> Christensen (n 44).

<sup>45</sup> International Covenant on Civil and Political Rights, available at <http://www.hrweb.org/legal/cpr.html> (accessed on 4 October 2010).

<sup>46</sup> Slavery Convention, available at <http://www2.ohchr.org/english/law/slavery.htm> (accessed on 4 October 2010).

<sup>47</sup> International Covenant on Civil and Political Rights (n 65).

<sup>48</sup> Convention on the Rights of the Child, available at <http://www2.ohchr.org/english/law/crc.htm> (accessed on 4 October 2010).

<sup>49</sup> Mary Robinson, ‘Building Relationships That Make a Difference’, in *The Annual Conference of Business for Social Responsibility* (San Francisco: United Nations Global Compact, 1999).

of that person, “or” exploits the prostitution of another person, even with the consent of that person”.<sup>50</sup>

The provisions of law enforcement and border control are enumerated in chapter III of the Trafficking Protocol captioned “Prevention, Cooperation and Other Measures” according to which “in the area of law enforcement, state parties accept a general obligation to cooperate in information exchange aimed at identifying perpetrators or victims of trafficking, as well as methods and means employed by traffickers. State parties are also to provide or strengthen, training for law enforcement, immigration, and other relevant personnel aimed at preventing trafficking as well as prosecuting traffickers and protecting the rights of victims. Training is to include focus on methods to protect the rights of victims. It should take in to account the need to consider human rights, children, and gender-sensitive issues while also encouraging cooperation with NGOs as well as other relevant organisations and elements of civil society”.<sup>51</sup>

The stakeholders must be encouraged to make use of UN principles and guidelines in their own efforts to prevent trafficking and to protect the rights of trafficked persons.<sup>52</sup> In the present era of globalization, labour migration is increasing daily and the problem of trafficking is increasing rapidly. The crime of trafficking is indeed a form of organized crime, involving a number of channels and innovative criminal networking and strategies.

The Asian Regional Initiative Against Trafficking (ARIAT) in its first meeting in Manila in March, 2000 declared a regional plan of action for 23 countries in the Asia-Pacific region.<sup>53</sup> “The Plan of Action encourages countries to cooperate with one another and with the civil society at all levels in the strategic areas of prevention, protection, prosecution, rehabilitation and reintegration”.<sup>54</sup> The SAARC (South Asian Association for Regional Cooperation)

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<sup>50</sup> Alexandra Amiel, ‘Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation’ (2006), available at <https://litigationessentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=12+Buff.+Hum.+Rts.+L.+Rev.+5&srctype=smi&srcid=3B15&key=56a5f4f178cd3075a73abcda44dae08f> (accessed on October 2010)

<sup>51</sup> Gunjan Kinnu, *From Bondage to Freedom: An Analysis of International Legal Regime on Human Trafficking* (New Delhi : National Human Rights Commission, India 2006).

<sup>52</sup> “Recommended Principles and Guidelines on Human Rights and Human Trafficking,” Office of the High Commissioner for Human Rights, available at <http://www.ohchr.org/Documents/Publications/Traffickingen.pdf> (accessed on 06 October 2010).

<sup>53</sup> Kinnu (n 71).

<sup>54</sup> *Ibid.*

*Convention on the Prevention and Combating Trafficking in Women and Children for Prostitution*, 2000 is a significant initiative emphasizing bilateral cooperation not only for addressing the problem, but also in introducing constitutional standards and preventive measures in all countries of the region.<sup>55</sup> However, so far no concrete steps have been taken by the member states (Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka) for its implementation. It could therefore be seen that though trafficking in persons is a multidimensional regional problem in South Asia, yet there exists no comprehensive agreed upon regional framework<sup>56</sup> to combat trafficking and any bilateral cooperation between India and Nepal.

#### d) National Context

There are a number of domestic legal laws in Nepal, such as the *Interim Constitution of Nepal-2007*<sup>57</sup> which likewise guarantee the right to protection from exploitation of any form and country code devotes a separate chapter to the offence of human trafficking.<sup>58</sup> *Human Trafficking and Transportation Control Act 2007* is a specific law relating to the crime of trafficking in human beings.<sup>59</sup>

There are other domestic laws in Nepal that directly or indirectly address trafficking and the victims of trafficking, such as *Foreign Employment Act 2007*,<sup>60</sup> *Children Act 1991*,<sup>61</sup> and other related legislation. However, there is a need for strong initiation and enforcement mechanisms to combat the menace of trafficking in women and children. Increased efforts to investigate, prosecute and punish traffickers are also needed and the punishment should reflect the gravity of the offences. Such efforts will not be successful until officials provide trafficking victims with the due assistance and protection needed to gain their trust and

<sup>55</sup> Savitri Goonesekere, 'Overview: Reflections on Violence against Women and the Legal Systems of some South Asian Countries', *Reference Material MHRD*, Vol.2, (2011), Kathmandu School of Law, 1-35.

<sup>56</sup> *Regional study for the harmonization of Anti-trafficking legal framework in India, Bangladesh and Nepal with International Standards* (Kathmandu School of Law 2004).

<sup>57</sup> Jill Cottrell et al., 'The Interim Constitution of Nepal, 2063 (2007)', UNDP NEPAL, available at <http://www.unmin.org.np/downloads/keydocs/Interim.Constitution.Bilingual.UNDP.pdf> (accessed on 05 October 2010).

<sup>58</sup> Bharat Raj Upreti, *Latest Trends and Developments in Insolvency Law in Nepal*, in *The Fifth Forum for Asian Insolvency Reform (FAIR)* (Beijing: OECD 2006).

<sup>59</sup> Human Trafficking and Transportation (Control) Act 2007 (2064).

<sup>60</sup> Nepal Foreign Employment Act, 1985 (2042)

<sup>61</sup> Nepal, The Children's Act 1992.

cooperation as informants and witnesses to enable successful prosecution processes before law.

While looking at all the legislations, it could be seen that no compatible legislation is there in the region addressing the problems, contradictions or lacuna. There is a need for strengthening of information networking between NGOs, between states and between SAARC countries and in particular between India and Nepal.<sup>62</sup> Human trafficking can never be addressed properly and effectively without a comprehensive understanding of the multiple factors and causes, as discussed above, that create the problem, and without knowledge of the complete range of legal instruments that can be used in response. “Law enforcement officials of ‘sending countries (like Nepal or Bangladesh), for instance, are hardly aware of laws of the receiving country like India (or Pakistan in the case of Bangladeshi girls trafficked to Karachi) and vice versa. There is wrong perception that because of the proximity of the countries (Bangladesh, India, Nepal and Sri Lanka) with each other, the level of cooperation and coordination is achieved. Contrarily, factors like political instability, lack of human rights culture and good governance, widespread gender and racial or caste discrimination make any regional cooperation difficult.”<sup>63</sup>

The stories are legion about women being held in sexual servitude, escaping and going to the police, only to be handed back to the offenders. Realizing that human trafficking involves a chain of criminal activities, the law enforcement machinery must cooperate across borders and must engage in proactive rather than reactive investigation. It is to be kept under consideration that there is hardly any institutionalized and concerted follow-up once victims have been returned to their country of origin.

The problem of poor implementation of laws is because of lack of resources, political will and rampant corruption in government machinery in both Nepal and India. Moreover, “Since India approaches the problem as one of illegal migration and/or as a national social and security problem, it aggravates the situation for Nepal and Bangladesh, because their nationals are treated as violators of immigration laws and policies rather than as victims. This situation contemplates a genuine intervention for resolving the problem, the harmonization

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<sup>62</sup> Regional study (n 76).

<sup>63</sup> *Ibid*, 100.



and rationalization of laws and building a greater cooperation and collaboration between and amongst themselves being the first and foremost priority.”<sup>64</sup>

### **State Cooperation**

The mutual bilateral or regional cooperation between states is required for combating the menace of trafficking effectively.”*States must work together to ensure that traffickers are never able to find a ‘safe heaven’ anywhere in the world. Without such a concerted and coordinated effort; trafficking will never be stopped or even minimized. Thus, State cooperation is an essential precondition for countering the menace of trafficking”.*<sup>65</sup> Therefore, it is essential that extraterritorial application of criminal laws is allowed and traffickers are extradited for effective prosecution. There should be bilateral agreements to help trafficked women and children which should also include coordination for repatriation, assistance in reintegration, extradition agreements and cooperation in bringing offenders to justice.<sup>66</sup>

It is also necessary that attempts are made to analyse laws and relevant regulations in each country and to harmonize them with the normative law among the countries. There should be ample provisions for sharing information and conducting joint investigations. Each country should appoint or designate Nodal Officers for better coordination and cooperation among the destination, transit and sending countries. Apart from this summits and seminars be organized periodically at bilateral/sub-regional and regional levels for discussing common concerns and devising better strategies. Efforts should also be made in evolving bilateral and regional conventions and agreements in order to institutionalize cooperation for permanent benefits. Last but not least, the civil society and NGOs should also be encouraged for cooperation at the bilateral and regional level.<sup>67</sup>

### **Findings on the issue**

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<sup>64</sup> *Ibid*, 101.

<sup>65</sup> Kinnu (n 71).

<sup>66</sup> *Ibid*.

<sup>67</sup> *Ibid*, 104.

The problem of human trafficking is covered by three frameworks which include the law enforcement, labour rights and human rights.<sup>68</sup> There is an urgent need to understand the issue of trafficking beyond prostitution. Its manifestation can be seen in domestic work, agriculture, construction, manufacturing and other industries and occupations in the informal economy, international adoptions, labor exploitation, marriage brokering services and domestic slavery.<sup>69</sup> It has been estimated that around 800,000 people, primarily women and children continue to be trafficked globally every year and further around 4 million people annually when intra-country figures are accounted for.<sup>70</sup> India also receives women and children from Bangladesh, Bhutan, Sri Lanka and Pakistan and sends them to Europe and Middle East and therefore, trafficking here has also assumed a gigantic proportion calling for comprehensive and concerted efforts on behalf of all the South Asian countries to counter the menace.<sup>71</sup>

Trafficking is a national, regional and global problem as women and children are being trafficked from one country to the other and these countries are used as both transit point and origin of trafficking. Regional cooperation is therefore, considered to be imperative since no single government can handle the problem of trafficking alone. Political willingness of the respective governments of South Asia is essential for combating this problem.<sup>72</sup> It is pertinent to mention that the South East Asian region has been successful in establishment of certain measures such as a Memorandum of Understanding between governments and NGOs, bilateral agreements between governments, and cross-border agreements between NGOs, especially in the Mekong region.<sup>73</sup> *There have been agreements signed between countries of origin and destination such as; the Armenia- United Arab Emirate agreement on extradition and legal assistance.*<sup>74</sup> A coordinated trans-border response is necessary to comprehensively address all aspects contributing to trafficking and for this the conceptualization of human

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<sup>68</sup> Janie Chaung, 'Beyond a Snapshot: Preventing Human Trafficking in the Global Economy' (2006), 1 *Indiana Journal of Global Legal Studies* 13.

<sup>69</sup> Geeta Pathak Sangroula, 'Magnitude and Consequences of Trafficking in Women and Girls for Sexual Exploitation With Special Reference to Nepal', *Reference Material MHRD*, Vol.1 (2011), 246-259.

<sup>70</sup> Todres Jonathan, 'The Importance of Realizing 'Other Rights' to Prevent Sex Trafficking' (2006) *12 Crdozo JL and Gender* 885; *Reference Material MHRD*, Vol.1 (2011), Kathmandu School of Law.

<sup>71</sup> Kinnu (n 75).

<sup>72</sup> Regional study (n 76).

<sup>73</sup> Centre For Feminist Legal Research and OHCHR, 'International Seminar on Cross Border Movements and Human Rights', January 9-10, 2004, New Delhi, India.

<sup>74</sup> *Ibid.*

trafficking is utmost important for initiating efforts to address the causes in countries of origin and the factors facilitating the problem in the countries of destination.<sup>75</sup>

It's shocking that traffickers when prosecuted are typically charged with crimes related to immigration violations and not human rights abuses and victims therefore, receive little or nothing in terms of assistance or justice.<sup>76</sup> According to the statistics of US State Department around the globe, in 2008 there were 5212 prosecutions and 3427 convictions, relatively insignificant in numbers.<sup>77</sup> There is an urgent need of increased efforts to investigate and punish traffickers, with penalties that reflect the gravity of the offence. The SAARC Convention which was opened for signature at the Eleventh SAARC Summit at Kathmandu, 2002 is yet to be ratified by the member states.<sup>78</sup> On critical analysis, it could be seen that it does not distinguish adequately between adult women and children and has failed to provide appropriate protection for children.<sup>79</sup> This will ultimately help the kingpins and perpetrators. In addition to this, the Convention has no monitoring mechanisms save the task force. Efforts therefore, are to be made for creation of regional court for adjudication of this crime.<sup>80</sup>

More so, trafficking for the purpose of organ trade is a new phenomenon in the region. Although very little information is available on this form of trafficking yet the information through print and electronic media and reports prepared by various NGOs working in this arena clearly indicates that trafficking for organ is a highly lucrative business for traffickers<sup>81</sup>. One of such example in India is where a person claiming to be a medical officer was found involved in this trade in Gurgaon, Haryana and was apprehended in Nepal with the help of Nepal police. Organ trade issue however, require a special and different type of attention than other forms of trafficking. The example however, proves that the doctor accused who was arrested and now lodged in prison and facing trial could only become possible due to bilateral cooperation between the two countries.

The following observation speaks volumes on the importance of cross border cooperation:

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<sup>75</sup> Cole (n 53), 219-245.

<sup>76</sup> *Ibid*

<sup>77</sup> Christensen (n 44).

<sup>78</sup> Kinnu (n 75).

<sup>79</sup> *Ibid*.

<sup>80</sup> *Ibid*.

<sup>81</sup> Regional study (n 76).

“Realizing that human trafficking is a chain of criminal activities explains why law enforcement must cooperate across borders and must engage in proactive rather than reactive investigation. It explains why a strategy based upon lining up ‘deterrence’ at the borders is not adequate. There are hardly any investigations of human trafficking that link up the criminal activity in the countries of origin with the criminals in the countries of destination. There is hardly any institutionalized and concerted follow-up of victims once they have been returned to their country of origin.”<sup>82</sup>

There is no comprehensive regional framework and the domestic laws are often conflicting and contradictory. The law enforcement officials are hardly aware of laws of receiving countries. The political instability, lack of human rights culture, good governance, widespread gender, and caste discrimination makes any regional cooperation difficult. To the extent that the criminal justice model requires building international, regional and bilateral networks of co-operation between enforcement, difficulties may be encountered in circumstances where political and other factors make collaboration difficult.<sup>83</sup> Ironically, India treats this menace in the form of illegal migration, social and security problems. The victims, at times, are treated as violators of immigration laws.

The management of migration and migrant workers has shifted from labor ministries to the ministry of home affairs. The anti-immigrant legislation and its accompanying nationalist rhetoric implicate constructions of gender and sexuality, result in her victimisation, stigmatisation and/or criminalisation.<sup>84</sup> The lack of sensitization leads to secondary victimization of the victims. The victimisation does little to stop the problem as it renders migrants more vulnerable and forced to cross borders through illicit channels.<sup>85</sup> The anti-trafficking legal frameworks and criminal justice system in both India and Nepal are not friendly to victims. The victims are often arrested and prosecuted instead of the traffickers. The victim support and social rehabilitation services are not visible. There is an urgent need

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<sup>82</sup> Cameroon and Newman.

<sup>83</sup> Centre For Feminist Legal Research and OHCHR, ‘International Seminar on Cross Border Movements and Human Rights’, January 9-10, 2004, New Delhi, India.

<sup>84</sup> *Ibid*, 121.

<sup>85</sup> *Ibid*.

for harmonization of legal framework; policies, programs and cooperation at bilateral and regional level so that the problem could be handled effectively.<sup>86</sup>

## Conclusion

It is really difficult to have a precise number of persons trafficked in various forms of forced labor and other purposes but the estimates are significant to ring the alarm bells. The victims are large in numbers facing grave violation of fundamental human rights and freedoms associated with this menace. It is therefore, important to ensure that both international and domestic laws complement each other and are implemented and enforced with full force both inside and outside the borders in the region. It is to be kept in mind that the issue of trafficking is not just confined to the sexual exploitation but is also related to the forced labor<sup>87</sup> and labor migration involving women, men and children to work in agriculture, construction, and industrial and domestic work sectors under exploited conditions.<sup>88</sup> The current legal mechanism both at the global and domestic level is inadequate to address the socio-economic root cause of this problem and therefore, the circumstances under which the people are compelled to accept dirty, dangerous and difficult jobs needs to be targeted.<sup>89</sup>

The victims of trafficking are often deprived of legal protection in the countries of destination as non-citizens of that country, they are also not entitled to legal protection under domestic laws. Rather the trafficked victims are treated at times as criminals in the countries of destination.<sup>90</sup> It can be seen that although international human rights instruments and domestic laws are in place, yet concerted efforts by all stakeholders across the borders are needed to combat this problem. The legal deficiencies, if any, in domestic laws at the first instance must be addressed and attended to and the proper enforcement of legal instruments are ensured as a prerequisite to the trans-border coordination and cooperation. The bilateral cooperation between India and Nepal for combating the transnational crime trafficking is not visible and the offenders are taking advantage of the situation.

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<sup>86</sup> “Regional study (n 76).

<sup>87</sup> Elizabeth Bruch, ‘Models Wanted: The Search for an Effective Response to Human Trafficking’, (2004) 1 *Stanford Journal of International Law* 40.

<sup>88</sup> Janie Chaung, ‘Beyond a Snapshot: Preventing Human Trafficking in the Global Economy’, (2006) 1 *Indiana Journal of Global Legal Studies* 13.

<sup>89</sup> *Ibid.*

<sup>90</sup> “Regional study (n 76).

Educational programs and proper dissemination of information regarding trafficking should be undertaken and capacity building of stakeholders should be enhanced in both the countries to tackle the problem of trafficking. In order to achieve the objective further, there is an urgent need to make the SAARC Convention on trafficking of 2002 operational by forging regional and bilateral alliances and entering in to treaties. The SAARC member countries here are under obligation to grant each other the widest measure of mutual legal assistance in respect of investigations, inquiries, trials or other proceedings. The extradition treaties should be signed and made effective so that the perpetrators of this crime do not go scot free and unpunished. Further, the law enforcement, judicial and other officers dealing with the issue of trafficking in the south Asian region are to be trained suitably in order to strengthen the criminal justice system. It is to be kept in mind that even the most comprehensive law will not serve the purpose unless those responsible for enforcing are not properly informed and trained.

Effective policy framework for the aforesaid purpose is required to create awareness at mass level among the people and the policies are to be focused on prevention, intervention, interception, rehabilitation and reintegration issues. Treating this law and order problem would not solve it and hence there is an urgent need for bilateral and regional cooperation. The Palermo Protocol also calls for international crime control cooperation treaty between the nations. It involves “cooperation between national law enforcement authorities, mutual legal assistance, facilitation, extradition proceedings and establish bilateral and multilateral joint investigative bodies and techniques”.

Let all the stakeholders work towards more comprehensive approach and for better coordination cooperation and collaboration between and among the nations to eliminate this menace from the society. The problem of trafficking in Nepal and India is still continuing and to combat it effectively, the bilateral cooperation between the two countries is need of the hour. The NHRIs of both the countries can play their vibrant role as facilitators by becoming an active partner for better protection of human rights of victims of trafficking.



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