



Coalition of NGOs for Nepal on Anti-Trafficking

SUBMISSION TO THE HUMAN RIGHTS COUNCIL FOR THE 37TH SESSION OF THE UNIVERSAL PERIODIC REVIEW (UPR)

Forum for Protection of People's Rights (PPR) is making this submission prepared and coordinated by Forum for Women, Law and Development (FWLD) along with the coalition of other organizations namely Legal Aid and Consultancy Center (LACC), Centre for Legal Research and Resource Development (CeLRRd), Maiti Nepal, Swatantrata Abhiyan Nepal (SAN) and Saathi to the Human Rights Council on the issue of Rights based Approach to Human Trafficking. This report highlights on the shifting trend of human trafficking in Nepal, forced labor migration and emphasizes on the necessary changes needed in laws and policies related to human trafficking in Nepal, establishment and strengthening of the institutional mechanisms, coordination between authorities and necessity of ratification of international conventions to protect migrant workers.

PPR is a non-governmental, non-profit organization established in 2002 to advocate and work in the area of human rights and access to justice. PPR Nepal is established and run by lawyers, human rights activists, health professionals, peace workers and sociologists.

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1. Background

- 1.1 Human Trafficking and Transportation is a grievous form of organized crime and serious violation of human rights. The heinous act against people's human rights has been especially making women and children its victims along with other groups of people. "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.¹ Although the victims of human trafficking and transportation range from women, children to men, owing to the violent nature of organized crime, there are less number of male victims and the trend that shows there are less number of offences against male. It is evident that women and children are the prime target groups of human trafficking and transportation. There has been a drastic change in the present context of human trafficking in comparison to the previous situation where sexual exploitation was the main reason for trafficking and transportation of women and children. However, due to the effect of globalization, liberalization, end of cold war and free market system, the crime has been expanded to trafficking of women and children for labor exploitation, domestic work and transporting them in the name of adopted son and daughter as well.
- 1.2 As per the report published by International Labor Organization (ILO) and Walk Free Foundation in partnership with IOM in 2017, an estimated 40.3 million people are in modern slavery, including 24.9 million in forced labour;² 1 in 4 victims of modern slavery are children;³ Of the 24.9 million victims of forced labour, 16 million were in the private economy, another 4.8 million were in forced sexual exploitation, and 4.1 million were in forced labour imposed by state authorities; Women and girls are disproportionately affected by modern slavery, accounting for 28.7 million, or 71 per cent of the overall total. More precisely, women and girls represent 99 per cent of victims of forced labour in the commercial sex industry and 58 per cent in other sectors.⁴

1. Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children, 2000, Article 6(a)
2. Global Estimate of Modern Slavery: Forced Labour and Forced Marriage, International Labor Organization, Walk Free Foundation in Partnership with International Organization for Migration, Geneva, September 2017 p. 9
3. Ibid, p. 10
4. Ibid

1.3 The Trafficking in Person Report of 2019 published by National Human Rights Commission (NHRC) of Nepal shows that as per Nepal Police every year 13,678 people disappear in Nepal and out of them only 47 percent are traced back. The report states that most of the time the disappeared people have been trafficked.⁵ As per Nepal police, the number of human trafficking cases registered in Nepal was 305 in FY 2017/18 and the number of cases registered till September 2019 of the FY 2019/20 was 258.⁶ These numbers have increased compared to previous fiscal years and this also proves that there has been increase in trafficking due to new emerging forms of trafficking.

1.4 Nepal is on Tier 2 as per US Trafficking in Persons Report of 2020 as The Government of Nepal does not fully meet the minimum standards for the elimination of trafficking but is making significant efforts to do so. The government demonstrated overall increasing efforts compared to the previous reporting period; therefore Nepal remained on Tier 2. These efforts included investigating multiple government officials for complicity in human trafficking, identifying and removing more children, including trafficking victims, from exploitative care homes, and funding repatriation for more Nepali trafficking victims overseas. The government continued to stand up its law enforcement unit dedicated to human trafficking—the Anti-Trafficking-in-Persons Bureau (Anti-TIP Bureau)—and parliament voted to accede to the 2000 UN TIP Protocol. However, the government did not meet the minimum standards in several key areas. The government’s laws do not criminalize all forms of labor trafficking and sex trafficking, and officials’ identification of, and protection for, male trafficking victims and transnational labor trafficking victims remained severely inadequate compared to the size of the problem. Official complicity in trafficking offenses remained a serious problem, both direct complicity and negligence, and the government did not report investigations into several documented allegations. In addition, some police continued to arrest, detain, and fine adult and child sex trafficking victims identified in the adult entertainment sector (AES). Furthermore, officials continued to encourage migrant workers exploited abroad to register cases under the 2007 Foreign Employment Act (2007 FEA), which criminalized fraudulent recruitment, rather than refer cases to police for criminal investigation of labor trafficking.⁷

2. Relevant 2nd UPR Cycle Recommendations on Prohibition of Trafficking and Migrant Workers

S.NO.	Recommendations	Recommending State
1.	Make increased efforts to introduce and effectively carry out new measures to deal with human trafficking of women and children	Japan
2.	Consider ratifying the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children	Egypt
3.	Collaborate with civil society, regional and global organizations to protect the rights of Nepalese migrant workers abroad	Australia
4.	Ratify/Consider to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Their Families	Timor-Leste Sierra Leone Egypt Philippines Indonesia

5. Trafficking in Persons National Report 2019, National Human Rights Commission (NHRC), p. 2

6. *Yatra* Bulletin published in the auspicious of National Day against Human Trafficking, Ministry of Women, Children and Senior Citizen, p. 2

7. Trafficking in Persons Report, Department of State, United States of America, June 2020, p. 364

3. Owing to the above recommendations that Nepal received from different nations, Nepal has ratified the Palermo Protocol and the notification of ratification was deposited on 16 June 2020 with the Secretary-General of the United Nations.

4. Gaps and Weaknesses of the Legal Instruments, Enforcement and Institutional Mechanisms to Combat Trafficking

4.1. Definition of Human Trafficking and Exploitation

It has been reported that out of total victims of human trafficking i.e. 546 people (of registered cases in police) in FY 2017/18, the number of victims of labor exploitation stands at 206.⁸

As the definition section of the Human Trafficking and Transportation Act, 2007 has not clearly defined labor exploitation, and more of fails to define what would happen if someone commit labor exploitation in the name of foreign employment. The law emphasizes on sexual exploitation as main purpose of trafficking. "Exploitation" as per the Act means an act of keeping human being as a slave and bonded and this word also includes to remove human organ except otherwise provided by prevailing law.⁹ The definition of "exploitation" does not include labor exploitation and is not in line with Palermo Protocol.¹⁰ Furthermore, the cases generally on such exploitation in the name of foreign employment under this act have been filed in a negligent way.

Similarly, the provisions in Foreign Employment Act, 2007 lacks to envisage that human trafficking occurs in the process of foreign employment or under its name. It is not clearly defined in the Act on what to do in conditions where elements of human trafficking are found in foreign employment cases. No legal provision is architected to prevent illegal migration under the Foreign Employment Act. The Preamble of the Act has focused on regularizing foreign employment, but it does not cover the protection of the rights and interest of all migrant workers including undocumented workers.

4.2. Misunderstanding of the Concept of Double jeopardy

There has been misunderstanding about the Principle of Double Jeopardy relating to the filing of a case under both Human Trafficking and Transportation (Control) Act 2007 and Foreign Employment Act 2007 and other laws as per required. ICCPR states that No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.¹¹ Constitution of Nepal provides that 'No person shall be tried and punished for the same offence in a court more than once'.¹² The principle states that a person cannot be tried for the same case in the same court for more than once for the same offence which definitely does not mean that it has barred from filing a case which has elements of both human trafficking and foreign labor migration or any other offences including child labor, rape, sexual abuse, etc. Hence, there is no any law or principle that forbids or prohibits to file a case under different laws if those laws are relevant for the offense committed.

8. *Yatra* Bulletin, Ministry of Women, Children and Senior Citizen (MOWCSC), p. 7 cited from Nepal Police Headquarter

9. Human Trafficking and Transportation (Control) Act 2007, Section 2 (e)

10. (a) "..... 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;
(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
(d) "Child" shall mean any person under eighteen years of age.

11. Article 14 (7), International Covenant on Civil and Political Rights, 1966

12. Article 20 (6), Constitution of Nepal

4.3 *Federalized Institutional Mechanisms*

There is National Coordination Committee for Human Trafficking (NCCHT) headed by Ministry of Women, Children and Senior Citizen (MOWCSC) at national level to deal with the issues of human trafficking including rescue and repatriation. However, the District Coordination Committee for Human Trafficking (DCCHT) which was operating in the district level has been dysfunctional due to restructuring of the state structures as the Women and Children Office which operated the DCCHT has been dissolved. As Nepal is undergoing federal restructure and has provinces and local government, the Human Trafficking and Transportation (Control) Act should make provisions for Provincial Coordination Committee on Human Trafficking in all provinces and Local Level Coordination Committee in order to effectively functionalize the effort to deal with issues of human trafficking. The Human Trafficking and Transportation (Control) Act 2007 was amended on March 3, 2019 to allow provincial and local governments to establish rehabilitation centers¹³ in coordination with the federal government and a rehabilitation fund¹⁴ for the management and operation of the shelters. Hence, the provincial and local governments have now been given right to formulate laws and policies for rehabilitation centers and funds for TIP survivors and formulate other policies related to Trafficking In Person as required. However, the lack of these institutions have made it difficult for the provincial and local level government to execute its responsibilities.

4.4 *Ratification of Palermo Protocol and necessary Amendments in Laws in line with Protocol*

After a long and continuous advocacy, the Protocol to Prevent, Suppress and Punish Trafficking in Person especially Women and Children (Palermo Protocol) has been ratified by Nepal and the notification of ratification has also been deposited with the Secretary General of United Nations. Since the notice of ratification was deposited on 16 June 2020, the protocol will be effective after 90 days of the deposition i.e. from 17 September 2020 after which necessary amendments can be made and laws and policies can be enacted to bring it in line with the Palermo Protocol for its effective implementation. The laws that need necessary amendments to fulfill legal compliance under the Palermo Protocol are as follows:

- Human Trafficking and Transportation (Control) Act 2007
- Foreign Employment Act 2007
- Organized Crime Prevention Act 2014
- Immigration Act 1992
- Labor Act 2018
- Mutual Legal Assistance Act 2014
- Child Labor (Prohibition and Regulation) Act 2000
- Extradition Act 2014
- Children Act 2018
- Country Criminal Code 2017

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13. Human Trafficking and Transportation (Control) Act 2007, Section 13(1) – Government of Nepal can establish rehabilitation centers as per necessity for social rehabilitation of victim, physical and mental treatment of victim and for reintegration with family. Section 13 (1)(a) – Provincial Government and Local level can establish rehabilitation center as per necessity in coordination with Government of Nepal
Section 13 (1)(b) –If provincial government and local level wishes to operate rehabilitation centers established by the Government of Nepal then the Government can handover such centers to be operated by provincial government and local level.
 14. Section 14 (1) – Government of Nepal can establish rehabilitation fund to operate rehabilitation centers established as per Section 13 (1) and to provide compensation to the victim from the offender as per Section 17 (1)(a)
Section 14 (1)(a) – The provincial government and local level willing to manage and operate rehabilitation center established and handed over as per Section 13 (1)(a) and 13 (1)(b) can establish such rehabilitation fund by managing its resources as per provincial law and local law respectively.

4.5 *Coordination between authorities*

There is lack of coordination between focal governmental bodies dealing with human trafficking and foreign employment issues. Although the two issues used to be indifferent to each other before, but the current shifting trend of human trafficking has made it necessary for the concerned government bodies to act together to combat trafficking in person. It is also because of the indifferent nature of the laws related to human trafficking and foreign employment. The Foreign Employment Act has provided for a steering committee¹⁵ for formulating policies and making other arrangements for systematic, competitive and transparent procedures while sending workers. But the steering committee does not include Ministry of Women, Children and Senior Citizen which is a focal Ministry for combating trafficking.

Nepal has been under federal restructuring to have federal, provincial and local level governments. And as per the Constitution of Nepal, all the levels of government have power to deal with the issues related to criminal offences. However, due to lack of clear jurisdictions and rights of the governments, they have not been able to do so. Also, the ward committees have been given responsibility to take actions to end trafficking in person. However, it has not been found that they have included programs to combat trafficking under actions taken to end violence against women and children.¹⁶

4.6 *Age ban of Women Migrant Workers*

The Government has imposed provision of above 24 years of age as the minimum age limit for Women Migrant Workers in domestic work and has banned lactating mother of a child of less than 2 years old from going into foreign employment, which is directly contradictory to Foreign Employment Act. The act has specified 18 years as minimum age limit for migrant worker under Section 7.¹⁷ And the provision on prohibition of gender discrimination under Section 8¹⁸ of the act. This provision of government curtails the right of WMWs to go to foreign employment and also violates the fundamental right of equality and non-discrimination guaranteed by the Constitution. The age limit for WMWs in domestic work compels them to use illegal channel and are going as undocumented workers which make them vulnerable for various forms of exploitation including human trafficking.

4.7 *Ratification of International Convention on the Protection of Rights of All Migrant Workers and Members of Their Families, 1990 and ILO 189 – Domestic Worker Convention, 2011*

Nepal has been a source country for labor migration for many years now. Many Nepalese go to foreign countries to earn livelihood and the remittance sent by those migrant workers has been a major source of income for Nepal. However, it has been evident that Nepalese migrant workers face various forms of exploitation and vulnerabilities abroad. They become victims of trafficking, foreign employment fraud, sexual exploitation, slavery and domestic servitude, etc. Many Women Migrant Workers face harsh situations when they go through illegal channels due to the age ban and this makes it difficult for their rescue and repatriation. Despite being signatory to various international human rights conventions, Nepal has not yet ratified Convention on the Protection of Rights of All Migrant Workers and Members of Their Families 1990, and ILO Convention No. 189 on Domestic Workers, 2011. The ratification of these convention will oblige state party to take appropriate action to protect and recognizes the right of the migrant workers and their families and domestic workers.

15. Foreign Employment Act 2007, Section 6(2)

16. Trafficking in Persons National Report 2019, National Human Rights Commission (NHRC), p. 63

17. Prohibition on sending a minor for employment: Any minor who has not completed eighteen years of age shall not be sent for foreign employment.

18. No gender discrimination shall be made while sending workers for foreign employment pursuant to this Act.

5. Recommendations

- 5.1 Government of Nepal should ensure that the laws on anti-human trafficking also define labor exploitation as the part of the organized crime in line with the Palermo Protocol
- 5.2 As Nepal has been restructured into federalism, the DCCHT has been dysfunctional. Hence, Government of Nepal should establish institutional mechanisms in all levels of government i.e. formulation of Provincial level and Local Level Coordination Committee on Human Trafficking. Government of Nepal should also coordinate with Provincial Government and Local level to help them to establish rehabilitation centers and rehabilitation fund for the management and operation of shelters for TIP survivors as per the amendment in the anti-trafficking law.
- 5.3 Government of Nepal should introduce provisions in both anti-human trafficking law and foreign employment law and other concerned laws to ensure that there will be no restrictions while filing a case under different laws if the case have elements of different crimes and if those laws are relevant for the offence committed and the government should ensure that the law enforcement mechanisms have clear understanding of the nexus of human trafficking and migration and related laws in order to prosecute the cases.
- 5.4 Government of Nepal should review national laws and policies in line with the Palermo Protocol.
- 5.5 Government of Nepal should ensure coordination between concerned authorities i.e. in all federal, provincial and local level to address nexus between human trafficking and foreign labor migration and deal with related problems.
- 5.6 Government of Nepal should remove age ban and the ban on lactating mothers restricting women's opportunity for labor migration ensuring safe mechanisms and legal channels.
- 5.7 Government of Nepal should ratify International Convention on Protection of Rights of All Migrant Workers and Members of Their Families, 1990 and ILO 189 – Domestic Workers Convention, 2011.

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