

**REPATRIATION OF VICTIMS OF HUMAN TRAFFICKING: A SOUTH ASIAN PERSPECTIVE**

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**Abstract**

*Human trafficking is the new age embodiment of the classical concept of slavery. This multi-billion-dollar industry thrives on the vulnerable, and entraps them such that their plight perpetuates, even after they escape from the traffickers. Though it is the victims who suffer the most, it is the perpetrators that are accorded the most attention by the academicians through their emphasis on the criminal justice-oriented approach of human trafficking. South Asia is one such region where this grim phenomenon is rapidly growing, and assuming enormous proportions. The authors in this paper establish the need for addressing the human trafficking through a victim-oriented approach and focus on one of the essential aspects of victim protection, namely the repatriation of victims and discuss this in the South Asian context. The authors then discuss the international framework on the issue vis-à-vis the position of the South Asian countries. This follows a critique of the inadequacies of the regional efforts along with key recommendations on the same to ameliorate the sufferings of victims of human trafficking.*

**Keywords:** Human Trafficking, South Asia, Reintegration, Repatriation, Victim – Oriented approach

**I. INTRODUCTION**

Nearly two hundred years after the abolishment of slavery, the reprehensible phenomenon stubbornly persists in the modern market through 45.8 million victims of human trafficking around the world.<sup>1</sup> Human Trafficking is regarded as the “*greatest human rights issue of our*

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<sup>1</sup> Walk Free Foundation, *Unravelling the Numbers*, GLOBAL SLAVERY INDEX (Oct. 29, 2018, 10:04 A.M.), <https://www.globallslaveryindex.org/findings/>.

*time*”<sup>2</sup> due to the diabolical proportions it has assumed. At present, the trafficking industry accrues almost \$150 billion per year<sup>3</sup> with more than 70,000 new victims being trafficked every year.<sup>4</sup> Even though the proportion of trafficked men might have increased over the last decade;<sup>5</sup> almost 80% of victims are women, half of them being less than 18 years of age.<sup>6</sup> Trafficking of persons takes place for a plethora of exploitative purposes. Sexual exploitation and forced labour are the two primary reasons, but the practice also includes other motives such as begging, forced marriages, pornography, benefit fraud, or organ removal.<sup>7</sup> Though human trafficking is a global phenomenon, the South Asian region seems to be especially affected by it as it is considered as the fastest growing and second largest transnational organized crime in this region with more than 150,000 people being affected by trafficking every year.<sup>8</sup> Needless to say, this chilling statistical picture requires combined efforts from the international community, regional blocks, national governments, as well as civil societies in a committed and streamlined manner for absolute eradication of this evil. The approaches to studying human trafficking generally include the criminal-justice approach; human rights-based approach, refugee approach, victim-oriented approach, organized-crime approach and cooperation approach.<sup>9</sup> Until recently, most efforts towards eradication of human trafficking focused on the criminal justice approach to human trafficking, with a consequent under-representation of the victim- oriented approach.

This paper adopts a victim-oriented approach to human trafficking and focuses on repatriation of victims in the South Asian context. The first part of the paper primarily deals with cases concerning intra-regional cross border human trafficking. The second part of the article discusses the concepts of human trafficking under the International Human Rights Law (*hereinafter* “IHRL”) and the need for a victim-oriented approach. The third part explains the concept of repatriation and discusses the international legal framework on the

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<sup>2</sup> May Theresa, *My Government will lead the way in defeating modern slavery*, THE TELEGRAPH, U.K., July 30, 2017.

<sup>3</sup> INTERNATIONAL LABOUR ORGANISATION, PROFITS AND POVERTY: THE ECONOMICS OF FORCED LABOUR13 (International Labour Office 2014)

<sup>4</sup> UNITED NATIONS OFFICE ON DRUGS AND CRIMES (UNDOC), GLOBAL REPORT ON TRAFFICKING IN PERSONS 2016 8 (U.N. Publications 2016)

<sup>5</sup> *Id.* at 6.

<sup>6</sup> Federico Lenzerini, *Trafficking of Human Beings*, HUMAN RIGHTS, CULTURE OF RIGHTS AND DIGNITY OF THE PERSON IN THE AGE OF GLOBALIZATION 1294-1296 (M. Flores ed., 2007).

<sup>7</sup> UNODC, *Supra*, note 4, at 8.

<sup>8</sup> Department of State, United States of America, *Global Report on Prevention of Human Trafficking*, 2017, U.S. DEPARTMENT OF STATE (Oct. 30, 2018, 12:50 P.M.) <https://www.unodc.org/southasia/en/topics/frontpage/2009/preventin-of-human-trafficking.html>.

<sup>9</sup> SARASU ESTHER THOMAS, COOPERATION TO COMBAT CROSS-BORDER TRAFFICKING: INDIA-NEPAL-BANGLADESH 21 (WISCOMP 2010).

same. The fourth part follows an assessment of the position of each of the eight South Asian countries on the issue of victim repatriation of human trafficking. The fifth part reflects on the South Asian grounding and then, finally concludes the discussion with several recommendations for the region.

## **II. THE GRIM PHENOMENON OF HUMAN TRAFFICKING AND CALL FOR A VICTIM ORIENTED APPROACH**

### **A. UNDERSTANDING THE TERM “HUMAN TRAFFICKING”**

The term ‘*mixed migration*’ covers various situations that connote complicated population movements often made up of people having distinct reasons for such exodus.<sup>10</sup> These include refugees, smuggled migrants and victims of human trafficking, all of whom often use the same mode of transportation and routes.<sup>11</sup> According to the most widely accepted definition of human trafficking<sup>12</sup> it is “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion ... for the purpose of exploitation.”<sup>13</sup> Smuggling of migrants, on the other hand, involves the element of consent, wherein there is an agreement between the smuggler and the individual, and the latter is paid for illegal transportation to another country.<sup>14</sup> Further, a refugee is considered as one who is forced to flee his/her country due to persecution, war or violence<sup>15</sup>. Trafficking can be distinguished from smuggling or migration due to it being a non-consensual act. There might be an initial consent given by the victim because they were made to understand something else, but the very nature of the act of trafficking for a purpose other than the one promised to the victim, negates the consent. .<sup>16</sup> Though the three concepts differ significantly, human trafficking victims are often labelled as refugees or migrants who have been smuggled or *vice-versa*.<sup>17</sup>

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<sup>10</sup> Marina Sharpe, *Mixed Up: International Law and the Meaning(s) of “Mixed Migration”*, 37(1) REFUGEE SURVEY QUARTERLY 116 (2018).

<sup>11</sup> UNODC *Supra* note 4, at 18.

<sup>12</sup> Pooja Gupta, *Human trafficking and the “new slavery”* JOURNALIST’S RESOURCE, Jan 7, 2015

<sup>13</sup> Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3(a), Nov. 15, 2000, T.I.A.S. No. 13,127, 2237 U.N.T.S. 319

<sup>14</sup> Jorgen Carling, *Migration, Human Smuggling And Trafficking From Nigeria To Europe*, 9 INTERNATIONAL ORGANIZATION FOR MIGRATION (2006).

<sup>15</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S.137.

<sup>16</sup> United Nations Office on Drugs and Crime, *Combating Trafficking In Persons: A Handbook for Parliamentarians*, 21-22 UNODC (2009).

<sup>17</sup> UNODC *supra* note 4, at 13.

## B. THE NEED FOR ADOPTING A VICTIM-ORIENTED APPROACH

The victim-oriented approach to human trafficking puts the victim at the centre of all the anti-trafficking policies by placing their needs as the priority.<sup>18</sup> It is often defined as the systematic focus on the needs and concerns of a victim to ensure compassionate and sensitive delivery of services in a non-judgmental manner.<sup>19</sup> This approach can be coupled with the human rights based-approach, that seeks to rectify discriminatory practices and unequal power distribution that often affect the victims.<sup>20</sup> In the international legal scenario, victims have been defined as persons who, individually or collectively, have suffered physically or mentally, emotionally, economically or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within States, including those laws proscribing criminal abuse of power.<sup>21</sup> The term “victim” also includes where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.<sup>22</sup> It is however, unfortunate to see that, despite having accepted this broad definition of victim under the gamut of human trafficking, the threshold of satisfaction in the treatment meted out to the victims remains gravely low.<sup>23</sup>

In recent times there has been a shift from the human trafficking approach to a victim-oriented approach which has considerably enabled in overcoming the problems posed by the criminal justice perspective or *ordre public*.<sup>24</sup> A reason for such shift can be ascribed to the gaining realization of the alarming rise of human trafficking cases vis-à-vis the absurdly low records of conviction of traffickers,<sup>25</sup> despite the concentration of all efforts towards apprehending them. In 2014, 40% of the countries recorded few, or no convictions.<sup>26</sup> While

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<sup>18</sup> THOMAS, *supra*, note 9, at 27.

<sup>19</sup> Office for Victims of Crime, *Victim Centred Approach*, OFFICE FOR JUSTICE PROGRAMS (Oct. 25, 2018, 5:30 P.M.) <https://www.ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/13-victim-centered-approach/>

<sup>20</sup> Janina Pescinski, *A Human Rights Approach to Human Trafficking*, OURWORLD (Oct 26, 2018, 5:50 P.M.) <https://ourworld.unu.edu/en/a-human-rights-approach-to-human-trafficking>.

<sup>21</sup> The United Nations Commission on Prevention of Crime, Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, A/CONF.121/22/Rev.1.

<sup>22</sup> Handbook on Human Rights for Judicial Officers, NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, BANGALORE 161 (2000).

<sup>23</sup> THOMAS, *Supra*, note 9, at 36

<sup>24</sup> TOMOYA OBOKATA, *TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A HOLISTIC APPROACH* (Martinus Nijhoff Publishers 2006).

<sup>25</sup> UNODC *Supra*, note 4.

<sup>26</sup> UNODC, Global Report on Trafficking in Persons 2014 (United Nations publication, Sales No. E.14.V.10).

the conviction rate has relatively gone up in the recent times, impunity still prevails in large parts of the globe.<sup>27</sup>

### **III. THE REALITIES OF REPATRIATION AND THE INTERNATIONAL LEGAL FRAMEWORK**

#### **A. DEFINITION AND PROCESS OF REPATRIATION: MUCH BEYOND RETURNING THE VICTIM TO THE COUNTRY OF ORIGIN**

Repatriation is defined as the process of the official return of trafficked victims from the country they are identified in, to their country of citizenship.<sup>28</sup> A general understanding of the concept is that it pertains to a state intervention, which occurs at the end of the trafficking chain. However, the authors disagree with this view as it fails to capture the essence and objective of a successful repatriation *i.e.* to ensure effective reintegration of the victims of trafficking. The authors believe that reintegration is in fact a process by which a returning trafficking victim is reintroduced into the economic and social structure of the country of origin, which enables him or her to earn his or her own livelihood.<sup>29</sup> In order to ensure the same, a host or an origin state is required to take more steps than just simply ensuring a person is returning back to his/her country of origin. Therefore, these states are required to conduct an effective background check of the victim, look into the prevailing situation in the origin country and likelihood of re-trafficking of the victim, take into account the consent of the victim, before and during the course of repatriation, and further assist and follow-up to ensure the reestablishment of the lives of the victims within communities they consider as home.<sup>30</sup> This process is essential in helping the States to eradicate the root causes of trafficking and avoid any potential re-trafficking of the victims.<sup>31</sup> The authors are going to dissect each possible reasons for obstacles to a successful repatriation below.

#### **B. OBSTACLES TO SUCCESSFUL REPATRIATION**

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<sup>27</sup> UNODC, Global Report on Trafficking in Persons 2018 (United Nations publication, Sales No. E.19.IV.2)

<sup>28</sup> UNODC *Supra*, note 4, at 19.

<sup>29</sup> Ana Fonseca, Laurence Hart and Susanne Klink, *Reintegration effective approaches, Position Paper*, INTERNATIONAL ORGANISATION FOR MIGRATION 2015, 9 (Oct. 26, 2018 10:30 A.M.) [https://www.iom.int/sites/default/files/our\\_work/DMM/AVRR/Reintegration-Position-Paper-final.pdf](https://www.iom.int/sites/default/files/our_work/DMM/AVRR/Reintegration-Position-Paper-final.pdf)

<sup>30</sup> Kuniko Takamatsu & Susu Thatun, *Some Reflections on the Repatriation of Trafficked Persons: Case of Myanmar and Thailand*, SOCIAL SCIENCE PUBLISHING HOUSE, HANOI (2004).

<sup>31</sup> UNODC, GLOBAL PROGRAMME AGAINST TRAFFICKING IN HUMAN BEINGS, TOOLKIT TO COMBAT TRAFFICKING IN PERSONS 343, (U.N. Publication No. E.08.V.14, Ch.9.2, 2008).

### **1. Problems Arising in the Host Country**

*Firstly*, often the victims of human trafficking travel without the travel documents, and in some cases, their travel documents are taken away by the traffickers. They are forced to face months of detention by police authorities before being identified as victims due to lack of proper legal documentation.<sup>32</sup> *Secondly*, the framework on repatriation remains ambiguous in most countries due to lack of domestic framework, interstate agreements and unclear international or regional guidelines. This leads to arbitrariness in the process resulting in unreasonable delays. *Thirdly*, the lack of adequate shelter home facilities in the host countries further aggravates the plight of the victims. In such a scenario, the cooperation between the host country and the origin country is of utmost importance, as in many cases, the home country refuses to provide information on the victim, due to its own unwillingness to take them back.

### **2. Problems arising in the Country of Origin**

*Firstly*, the victims are often ashamed to return home without having earned enough money from the destination country, as that was the false pretence that they were led to believe by the traffickers and ended up being trafficked. *Secondly*, victims also tend to develop a strong sentiment of resentment where they start detesting their families for their sufferings.<sup>33</sup> In many cases, the society may refuse to accept the victim, or may always stigmatize such a victim which disincentivises a victim to return. *Thirdly*, the work opportunities in the home country may sometimes be very grim; the wages might be painfully low, or the work maybe a lot more demanding than the work they did in the destination country. *Fourthly*, the victims may be in the fear of some form of retaliation by the traffickers, especially so if the trafficked victims had been involved in some criminal activities such as, trade in arms or drug trade. The victims maybe threatened by such traffickers, and if they are not adequately protected, they might fall into the web of re-victimisation.

## **C. THE INTERNATIONAL LEGAL FRAMEWORK ON REPATRIATION**

### **1. The Earlier Developments and Key Human Rights Treaties**

The focus on victim-oriented approach to effectively deal with human trafficking is not a new phenomenon as evidenced from the nascent developments on the legal framework preventing

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<sup>32</sup> TAKAMATSU & THATUN, *supra*, note 28.

<sup>33</sup> UNODC, *Supra*, note 29, at 344.

human trafficking.<sup>34</sup> Right after the formation of the United Nations (*hereinafter* “UN”), the matter was quickly addressed by the member states and in the Trafficking Convention of 1949.<sup>35</sup> In this, considerable provisions for victim protection were provided, which *inter alia* included the obligations to repatriate the victims under various circumstances,<sup>36</sup> and at the same time ensuring cost coverage of such repatriation.<sup>37</sup> However, the 1949 Convention being limited in its scope did not have a major impact on international human rights law (*hereinafter* “IHRL”) which is evidenced by its limited ratification of 74 states.<sup>38</sup> A direct or indirect reference to the repatriation of victims of human trafficking is also made in other key human rights treaties.<sup>39</sup> However, these instruments have not adequately detailed the process of repatriation or the additional reintegration steps concerning the same.

## 2. The Modern Game Changer: The Palermo Protocol

A sense of victim protection to prevent the scourge of human trafficking is present in Article 8 of the Palermo Protocol.<sup>40</sup> Article 8(1) requires the receiving country to ensure the facilitation of the victims of human trafficking to the country of origin without any unreasonable delay. Article 8(2) prescribes that the state party that is returning the victim must have due regard to the safety of the victim and for the status of any legal proceeding relating to the trafficking victim, such as the involvement of the victim in any manner whatsoever in the criminal proceedings of the host state. In the case of child victims, States should also consider whether repatriation of the child is in their best interest. Further, prior to their return, states must identify a suitable relative or guardian who has agreed and is able to take responsibility and offer care and protection for the child.<sup>41</sup> The article also requires that

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<sup>34</sup> International Agreement for the Suppression of the “White Slave Traffic”, May 18, 1904, 1 L.N.T.S. 83, Article 1 & 2; International Convention for the Suppression of the “White Slave Traffic”, May 4, 1910, 211 Consol. T.S. 45, Article 1 & 2; M. Cherif Bassiouni, *Crimes Against Humanity*, INTERNATIONAL CRIMINAL LAW 349 (2nd rev. ed. 1999).

<sup>35</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, G.A. Res. 317(IV), entered into force July 25, 1951.

<sup>36</sup> *Id.*, at Article 19(2).

<sup>37</sup> *Id.*,

<sup>38</sup> Convention for Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1950.

<sup>39</sup> Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Art.13 (2); International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S.171, Art. 12(4); Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, Nov. 19, 2000, I.L.O. No. 182, Art. 3; Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, Dec. 18, 1979, Art. 4 & 6; Convention on the Rights of the Child, G.A. Res. 44/25, November 20, 1989, Art. 35; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography May 25, 2000, GA Res. 54/263, Art. 8.

<sup>40</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, G.A. Res 55/25, January 8, 2001.

<sup>41</sup> UNODC, LEGISLATIVE GUIDES FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST

the repatriation of the victim “shall preferably be voluntary”. While the Protocol does not prohibit compulsory repatriation against the known wishes of the victim, it calls on signatories to abstain from applying force in order to compel victims to return to their home country.<sup>42</sup> Under Article 8(3) and (4) of the Palermo Protocol also obliges State Parties to cooperate in the course of the return proceedings of the victims. Upon request of the receiving state, state of origin shall verify whether the trafficked person is a national or had the right to permanent residence at the time of entering the receiving state and accordingly issue the necessary travel or other documents to enable the person to re-enter its territory.

While the authors acknowledge that the said provision places an over-emphasis on the obligations of the receiving state vis-à-vis the origin state and could have gone steps ahead to incorporate principles such as of non-refoulement in the domain of trafficking, it still forms a milestone development and is therefore, explained in the discussion above.

#### **IV. UNDERSTANDING THE DYNAMICS OF REPATRIATION IN THE SOUTH ASIAN REGION**

##### **A. REGIONAL OVERVIEW**

South Asia as a region comprises of eight countries namely Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka.<sup>43</sup> South Asia is indeed regarded as the fastest growing region of the world<sup>44</sup>, however, amidst such regional economic prospects; it also bears the misfortune of suffering from high numbers of human trafficking crimes. Human trafficking in South Asia is not a new phenomenon, and for centuries, certain communities have been lured to trafficking in the guise of employment opportunities.<sup>45</sup>

Out of the total persons trafficked, 88% of the victims in South Asia are trafficked domestically and 8% are subjected to intra-regional trafficking, facilitated by the open and

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TRANSNATIONAL ORGANISED CRIME AND THE PROTOCOLS THERETO 290 (New York UN, 2004).

<sup>42</sup> UN General Assembly, Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, 73 UN docs. A/55/383/ Add. 1, 3 Nov. 2000.

<sup>43</sup> SAARC “About SAARC”, SOUTH ASIAN ASSOCIATION OF REGIONAL COUNTRIES (Oct. 28, 2018, 2:15 PM) <http://saarc-sec.org/about-saarc>.

<sup>44</sup> Press Release, *South Asia Remains World’s fastest Growing Region, but should be vigilant to failing tailwinds*, WORLD BANK (Oct 30, 2018, 2:30 PM) <http://www.worldbank.org/en/news/press-release/2016/04/09/south-asia-fastest-growing-region-world-vigilant-fading-tailwinds>.

<sup>45</sup> ASIAN DEVELOPMENT BANK, COMBATING TRAFFICKING OF WOMEN AND CHILDREN IN SOUTH ASIA, ASIAN DEVELOPMENT BANK (Asian Development Bank 2003).

porous borders between some neighbouring South Asian countries.<sup>46</sup> The 2018 Global Slavery Index shows that India and Pakistan have the highest number of victims of human trafficking in the entire Asia-Pacific region.<sup>47</sup> Witnesses reported that forced labour is the most prevalent form of human trafficking, followed by forced sexual exploitation.<sup>48</sup> Men and boys are most commonly victims of forced labour in the region, while, as previously discussed, sex traffickers target mainly women and girls.<sup>49</sup> Bangladesh and Nepal are considered as the most vulnerable countries for victims of human trafficking<sup>50</sup>; however, India has emerged as the top destination for trafficking in South Asia.<sup>51</sup> The key factors for human trafficking in South Asia are economic insolvency and social vulnerability of the masses.<sup>52</sup>

Only five out of the eight countries have ratified the Palermo Protocol to the exclusion of Bangladesh, Bhutan, and Nepal.<sup>53</sup> The domestic policies of these countries though at their nascent stage have started reflecting a victim-oriented approach to human trafficking. In this chapter, the authors reflect upon the regional efforts taken up by the SAARC on the issue of repatriation of victims of human trafficking, followed by an analysis of the efforts taken by each of the eight countries regarding their national and bilateral framework.

## **B. REGIONAL EFFORTS BY SAARC**

### **1. SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution**

To promote the welfare of the South Asian Region and combat social and economic issues the countries came together to establish the South Asian Association for Regional Cooperation (*hereinafter* “SAARC”).<sup>54</sup> In relation to human trafficking, the SAARC Convention on Preventing and Combating Trafficking in Women and Children for

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<sup>46</sup> UNODC, *Supra*, note 4, at 110.

<sup>47</sup> Walk Free Foundation, Regional Analysis- Asia and the Pacific, The Global Slavery Index 2018 (March 30, 2019, 10:30 AM) <https://www.globallslaveryindex.org/2018/findings/regional-analysis/asia-and-the-pacific/>

<sup>48</sup> UNODC, *supra* note 4, at 109.

<sup>49</sup> *Id.*

<sup>50</sup> Razidur Rahaman, *Human Trafficking in South Asia (Special preferences on Bangladesh, India and Nepal): A Human Rights Perspective*, 20(3) IOSR JOURNAL OF HUMANITIES AND SOCIAL SCIENCE (2015).

<sup>51</sup> Gulf News India, *India tops in South Asia Human Trafficking: UN*, GULF NEWS (Oct. 25, 2018, 4:00 PM) <https://gulfnews.com/news/asia/india/india-tops-in-south-asia-s-human-trafficking-un-1.1364474>

<sup>52</sup> *Id.*

<sup>53</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

<sup>54</sup> UNODC, *Supra* note 4 at 110.

Prostitution<sup>55</sup> (*hereinafter* “SAARC Convention”) was signed by all eight member countries with an objective to promote cooperation and curb the various aspects of trafficking in women and children including repatriation and reintegration.<sup>56</sup> Article II of the Convention specifically lays down these obligations particularly for when the SAARC Countries are a country of origin, transit or destination. Article IX relates to repatriation which places a specific obligation on the destination country to safeguard the rights of the victims till the completion of the repatriation process. It requires that the while modalities of repatriation are negotiated between countries suitable provisions must be made for the care of the victims including legal aid and health care.

## 2. Other Regional Efforts

Other efforts undertaken by the South Asian countries include using of new software and technology methods to speed up the process of repatriation.<sup>57</sup> The Missing Child Alert (*hereinafter*, “MCA”) database has been developed by a collaboration of aid agency Plan India and Bangladeshi social enterprise, Dnet which would store victim’s data such as their name, photographs and place of origin which can be shared between countries and facilitate repatriation.<sup>58</sup> International organisations such as the International Labour Organisation (*hereinafter* “ILO”) have also undertaken regional projects like *Preventing Trafficking of women and girls in South Asia* which is a part of the program on *Work in Freedom*<sup>59</sup> as well as the Program on *Strengthening service provisions for protection and assistance to victims of cross-border trafficking between Bangladesh, India and Nepal*<sup>60</sup> which aims at facilitating cooperation along with strengthening the capacities of law enforcement agencies, immigration and labour officers in Bangladesh and India to detect, investigate and prosecute human trafficking.

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<sup>55</sup> South Asian Association for Regional Cooperation, Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, (Kathmandu-Jan, 2002).

<sup>56</sup> Global Database on Violence against Women, *SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*, UN WOMEN (Oct 29, 2018, 4:15 PM) <http://evaw-global-database.unwomen.org/fr/countries/asia/india/2002/south-asian-association-for-regional-cooperation>

<sup>57</sup> Nita Bhalla, *Interview: New technology aims to speedily repatriate South Asia's trafficked children*, REUTERS (Oct. 26, 2018, 4:30 PM) <https://www.reuters.com/article/india-trafficking-bangladesh-nepal/interview-new-technology-aims-to-speedily-repatriate-south-asias-trafficked-children-idUSKCN0VO0C1>

<sup>58</sup> *Id.*

<sup>59</sup>United Nations office on Drugs and Crimes, *Work in Freedom: Preventing Trafficking of women and girls in South Asia*, UNDOC (Oct. 26, 2018, 4:40 PM) [https://www.unodc.org/documents/southasia/webstories/2014/Project\\_factsheet\\_XSAZ19.pdf](https://www.unodc.org/documents/southasia/webstories/2014/Project_factsheet_XSAZ19.pdf)

<sup>60</sup> United Nations office on Drugs and Crimes, *Strengthening service provisions for protection and assistance to victims of cross-border trafficking between Bangladesh, India and Nepal*, UNDOC (Oct. 26, 2018, 5:00 PM) [https://www.unodc.org/documents/southasia/webstories/2014/Project\\_factsheet\\_XSAZ12.pdf](https://www.unodc.org/documents/southasia/webstories/2014/Project_factsheet_XSAZ12.pdf)

## C. NATIONAL FRAMEWORKS

Despite the existence of international and regional frameworks and guidelines, the South Asian nations have been unable to build cooperation. The primary focus is still accorded to the domestic legislation which appear to be grossly inadequate for facilitating repatriation of victims. Some of the South Asian nations have implemented specific trafficking legislations, yet the crime seems to be majorly regulated through their general criminal codes. The national legislations vary in each country leading to the lack of uniform repatriation processes and consequent obligations in the region.

This part thus aims to discuss the existing legal framework on repatriation of human trafficking victims present in the South Asian Countries. This will be done by first analysing the position of each country as per the 2018 Trafficking in Persons Report<sup>61</sup> (*hereinafter* “TIP Report”) which places each country in one of the four tiers depending upon the extent of their compliance with the “minimum standards for the elimination of trafficking” laid down under the US Trafficking Victims Protection Act, 2000 (*hereinafter* “TVPA”)<sup>62</sup> Accordingly, tier I countries include those nations that are fully compliant with the TVPA; tier II and tier II (Watch List) refers to the category of countries that are not fully compliant with the TVPA, but are making significant efforts to do so. Finally, Tier III refers to those countries whose governments do not comply with the TVPA and are not making enough efforts to do so.<sup>63</sup> An analysis as per the TIP reports would be followed by understanding the national framework including provisions present in their constitutional, criminal codes, special legislations and government policy measures.

### 1. Afghanistan

#### a. BACKGROUND

Afghanistan is labelled as a tier- two country of origin, transit and destination of human trafficking.<sup>64</sup> Women are often kidnapped and sold for sexual exploitation and forced marriages primarily between the networks of Afghanistan and Pakistan<sup>65</sup> while people from

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<sup>61</sup> UNITED STATES DEPARTMENT OF STATE, 2018 TRAFFICKING IN PERSONS REPORT (U.S. Department of State Publication 2018)

<sup>62</sup> Section 108 of the Trafficking Victims Protection Act, 2000 *Id.* at 39

<sup>63</sup> Tier Placements, US DEPARTMENT OF STATE, (March 28, 2019, 10:04 am) <https://www.state.gov/j/tip/rls/tiprpt/2015/243366.htm>

<sup>64</sup> *Id.* at 64

<sup>65</sup> KATRIN MARCHAND ET. AL., MIGRATION PROFILE- AFGHANISTAN, (International Organisation for Migration Publication 2014).

the Afghan tribes are trafficked for forced labour.<sup>66</sup> The government and the non-state actors, such as the Taliban, recruit and use children in combat and non-combat roles.<sup>67</sup> The major problem in the country is the stronghold of militant groups over the police and other law enforcement agencies, effectively weakening the protection available to the victims.<sup>68</sup> Despite the recent elaborate legislative developments for minimum standards of compliance, human trafficking is on the rise in Afghanistan.<sup>69</sup>

b. LEGAL AND POLICY FRAMEWORK

The Constitution of Afghanistan provides for upholding international treaties<sup>70</sup> and protects the fundamental right of human dignity.<sup>71</sup> The same is achieved by prohibiting forced labour of any kind<sup>72</sup> which extends not only to their nationals but also to any foreign citizens on their land.<sup>73</sup>

i. *Law on Combating Human Trafficking and Abduction, 2008*

Afghanistan has implemented the *Law on Combating Human Trafficking and Abduction*.<sup>74</sup> This establishes the High Commission to Combat Crimes of Abduction and Human Trafficking<sup>75</sup> by coordinating and facilitating collective efforts of different justice organs of the country<sup>76</sup> thus facilitating in the repatriation process.

ii. *Law Prohibiting Human Trafficking and Migrant Smuggling, 2017*

Afghanistan has implemented the *Law Prohibiting Human Trafficking and Migrant Smuggling*<sup>77</sup>, which not only deals with the criminal aspect of human trafficking, but also focuses on adequate reintegration of victims. The Act distinguishes between human

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<sup>66</sup> INTERNATIONAL ORGANISATION OF MIGRATION, *TRAFFICKING IN PERSONS REPORT-AN ANALYSIS OF AFGHANISTAN* 40 (International Organisation of Migration 2004).

<sup>67</sup> MARCHAND ET. AL., *supra*, note 62, at 64.

<sup>68</sup> SAARC Human Resource Development Centre, *Human Trafficking Situation in SAARC Region: Bridging the Gaps*, Expediency International, Islamabad Pakistan (2012).

<sup>69</sup> Jared Ferrie, *Human Trafficking on the rise in Afghanistan despite new laws*, REUTERS, (Oct. 25, 2018, 11:35 AM) <https://www.reuters.com/article/us-afghanistan-humantrafficking-laws/human-trafficking-on-the-rise-in-afghanistan-despite-new-laws-idUSKBN1H52U8>

<sup>70</sup> The Constitution of Afghanistan, 2004, Article 7.

<sup>71</sup> *Id.*, at Article 24.

<sup>72</sup> *Id.* at Article 49.

<sup>73</sup> *Id.*, at Article 57.

<sup>74</sup> Law on the Campaign Against Abduction and Human Trafficking, 2008.

<sup>75</sup> *Id.* at Article 4.

<sup>76</sup> Afghanistan Justice Sector Support Programme, *Trafficking in Persons, U.S. Department of State, BUREAU OF INTERNATIONAL NARCOTICS AND LAW ENFORCEMENT AFFAIRS, AFGHANISTAN*, (Oct. 25, 2018, 3:00 PM) <http://jsspaafghanistan.com/index.php/who-we-are.html>

<sup>77</sup> Law Prohibiting Human Trafficking and Migrant Smuggling, 2017.

trafficking and smuggling,<sup>78</sup> which now secures the specific rights of victims of human trafficking, who were otherwise denied benefits due to their active consent in illegal smuggling.<sup>79</sup> The Act elaborately lays down the rights and liabilities of the victims, which includes the right to be exempted from prosecution<sup>80</sup> and be compensated for their loss by the perpetrator.<sup>81</sup> With an explicit reference to cross-border trafficking, the act places duty on Afghanistan, which as a country of origin, must adequately provide legal assistance to the victims and in provision of the necessary documents for their safe return.<sup>82</sup> On the other hand, as a destination country, the Afghan authorities have a duty to inform the country of origin the details of the identified victims. In situations where such identification is not possible or the returning of victims to their home country would be against their best interests, they would be allowed to stay in Afghanistan and be provided with housing, medical and legal facilities.<sup>83</sup> The Act also explicitly bans the infamous “*bacha-bazi*”(child-selling) that is widespread in the region.<sup>84</sup>

## 2. Bangladesh

### a. BACKGROUND

Bangladesh is a tier two watch-list country<sup>85</sup> from where people are trafficked for the purposes of forced labour, prostitution and domestic servitude, primarily into India, but also to Pakistan, Bahrain and Kuwait.<sup>86</sup> One of the aggravating factors enabling trafficking in the country is the presence of recruitment agencies which under the guise of providing employment opportunities charge a high fee from migrants in exchange for providing them with the job that ultimately forces the victims to stay in the destination country illegally for longer in order to repay the fees.<sup>87</sup> More recently, the Rohingya refugee camps have also

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Law Prohibiting Human Trafficking and Migrant Smuggling, 2017, Article 23(1)(3) & 23(2)

<sup>81</sup> *Id.* at Article 23(1)(4).

<sup>82</sup> *Id.* at Article 23(3).

<sup>83</sup> *Id.* at Article 23(4).

<sup>84</sup> MARCHAND ET. AL., *supra*, note 62, at 65.

<sup>85</sup> *Supra*, note 59, at 88.

<sup>86</sup> Sigma Huda, *Sex Trafficking in South Asia*, 94(3) INTERNATIONAL JOURNAL OF GYNAECOLOGY AND OBSTETRICS 377 (2006).

<sup>87</sup> *Id.*

served as a major source of trafficking due to the absence of documentation, citizenship and basic rights of the community.<sup>88</sup>

b. LEGAL FRAMEWORK

The Constitution of Bangladesh envisages a just and egalitarian society, which is free from exploitation of man by man.<sup>89</sup> This is endeavoured to ensure the right to life<sup>90</sup> and prohibition of forced labour.<sup>91</sup> The Bangladesh Penal Code<sup>92</sup> does not directly address human trafficking as a crime<sup>93</sup> but prohibits associated acts such as engaging of minors in prostitution,<sup>94</sup> kidnapping,<sup>95</sup> abduction,<sup>96</sup> slavery<sup>97</sup> and forced labour.<sup>98</sup>

i. *Prevention and Suppression of Human Trafficking Act, 2012*

Bangladesh has implemented the *Prevention and Suppression of Human Trafficking Act, 2012*<sup>99</sup> which legally recognizes the concept of human trafficking and establishes a special tribunal for the speedy trial of such cases.<sup>100</sup> The Act mandates a victim oriented approach to be adopted<sup>101</sup> but delegates the responsibility of making procedural rules regarding repatriation to the government through the use of non-governmental partnerships.<sup>102</sup>

c. POLICY FRAMEWORK

The country has developed Special Operating Procedures (*hereinafter* “SOPs”) for proactive identification of victims and the police operate a number of victim support centres in the country. However, the Government does not provide shelter or rehabilitation services, other than repatriation and job placement, to adult male victims. The Government nevertheless continues to implement its 2015 Memorandum of Understanding (*hereinafter* “MoU”) with the Government of India on human trafficking, which facilitates coordination between the

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<sup>88</sup> Antolín Avezuela & Carlos Galache, *Citizenship for a few: Rights for none: the Rohingya in Myanmar*, EQUALTIMES (Oct 25, 2018, 4:00 PM) <https://www.equaltimes.org/citizenship-for-a-few-rights-for?lang=en#.WsJQ4iinGEs>

<sup>89</sup>The Constitution of Bangladesh, 1972, Article 10

<sup>90</sup> *Id.* Article 32

<sup>91</sup> *Id.* Article 34

<sup>92</sup> The Penal Code, 1860 (Act XLV of 1860).

<sup>93</sup> R.J. Farhana & Md. Easin, *SAARC Trafficking Convention and Human Trafficking Crisis in Bangladesh: A Critical Appraisal*, 20(12) IOSR JOURNAL OF HUMANITIES AND SOCIAL SCIENCE 70 (2015).

<sup>94</sup> The Penal Code, 1860 S.372, 373

<sup>95</sup> *Id.* S.359

<sup>96</sup> *Id.* S.362

<sup>97</sup> *Id.* S.371

<sup>98</sup> *Id.* S.374

<sup>99</sup> The Prevention and Suppression of Human Trafficking Act, 2012 ( Act No. 3 of 2012 )

<sup>100</sup> *Id.*, S.22(2)

<sup>101</sup> *Id.*, S.32(2)

<sup>102</sup> *Id.*, S.32(1)

countries on the rescue and repatriation of Bangladeshi victims. Though the onus to cover the cost of repatriation is on the government, it is seen that cost for only the necessary travel documents for repatriation is borne by the government, while the rest of the cost is borne by either the NGOs or the victim's family.<sup>103</sup>

### **3. Bhutan**

#### **a. BACKGROUND**

Bhutan is a tier two watch-list country<sup>104</sup> of source and destination for men, women and children vulnerable to force labour and sexual abuse. Recruitment agencies tend to exploit Bhutanese migrants overseas through their unscrupulous and unlicensed practices. Further, Bhutanese girls who often work in in *drayang*s or Bhutanese karaoke bars are often subjected to sex trafficking.<sup>105</sup>

#### **b. LEGAL FRAMEWORK**

The Constitution of Bhutan puts an obligation on the government to protect human rights and dignity as a part of its Principles of State Policy.<sup>106</sup> The Penal Code,<sup>107</sup> explicitly prohibits and penalizes trafficking as a serious offence.<sup>108</sup> It has enacted legislations such as the *Labour and Employment Act, 2007*<sup>109</sup> and *Child Care and Protection Act, 2011*<sup>110</sup> that prohibit forced labour and child trafficking respectively. However, these legislations do not cover all forms of trafficking in persons, and further, they cannot be labelled as victim-oriented as they do not provide adequate guidelines for victim protection.

#### **c. POLICY FRAMEWORK**

Regarding repatriation of victims, an autonomous agency of Bhutan called the National Commission for Women and Children, which works closely with the United Nations Office on Drugs and Crime (*hereinafter* "UNODC"), has been developing the SOPs on victim identification and referral. These are being drafted for over three years now with no

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<sup>103</sup> *Supra*, note 59, at 90.

<sup>104</sup> *Supra*, note 59, at 100.

<sup>105</sup> Robert Lorway et. al., *The Drayang Girls of Thimphu: sexual network formation, transactional sex and emerging modernities in Bhutan*, CULTURE, HEALTH & SEXUALITY: AN INTERNATIONAL JOURNAL FOR RESEARCH, INTERVENTION AND CARE 296 (2011).

<sup>106</sup> The Constitution of Kingdom of Bhutan, 2008, Article 9(3).

<sup>107</sup> The Bhutan Penal Code, 2004

<sup>108</sup> *Id.* Articles 152-154, 165,169, 227,228, 375, 379, 380.

<sup>109</sup> The Labour and Employment Act of Bhutan, 2007.

<sup>110</sup> The Child Care and Protection Act of Bhutan, 2011.

completion in view. However, as of 2017, the Government has maintained two women and child protection units and funded an NGO to provide shelter to victims of human trafficking.

#### 4. India

##### a. BACKGROUND

India is a tier-two country<sup>111</sup> of origin, destination as well as transit for men, women and children who are subjected to forced labour and sex trafficking.<sup>112</sup> Cross-border human trafficking constitutes ten percent of the human trafficking in India,<sup>113</sup> with those from the lower castes and social strata most affected.<sup>114</sup>

##### b. LEGISLATIVE FRAMEWORK

The Indian Constitution assures to every person the right to life and personal liberty irrespective of their nationality<sup>115</sup> and explicitly prohibits the trafficking of human beings and forced labour.<sup>116</sup> The Indian Penal Code<sup>117</sup> criminalizes trading in girls for sexual exploitation<sup>118</sup> and specifically addresses trafficking and slavery as well.<sup>119</sup> There are various other legislations that have been implemented by the Indian parliament<sup>120</sup> which prohibit specific aspects of human trafficking in the country. There is however no consolidated statute that deals with the issue of human trafficking in its entirety and thus there is an absence of a statutory obligation to repatriate victims. The Anti-Trafficking Bill however, may bring about the needed change which has been drafted on the lines of a victim-centric approach, thus increasing the obligations of the State with regard to the repatriation of victims of trafficking.<sup>121</sup>

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<sup>111</sup> *Supra*, note 59, at 221

<sup>112</sup> *Id.*

<sup>113</sup> GOVERNMENT OF INDIA, INDIA COUNTRY REPORT: TO PREVENT AND COMBAT TRAFFICKING AND COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN AND WOMEN, (Ministry of Women and Child Development 2008).

<sup>114</sup> Chanchal Kumar, *Human Trafficking in the South Asian Region: SAARC's Response and Initiatives*, 1(1) JOURNAL OF SOCIAL SCIENCE AND HUMANITIES 17 (2015).

<sup>115</sup> The Constitution of India, 1950, Article 21.

<sup>116</sup> *Id.*, Article 23.

<sup>117</sup> Indian Penal Code, 1860 (Act 45 of 1860)

<sup>118</sup> *Id.*, S.366A & 366B

<sup>119</sup> *Id.*, S.370 & S.370A

<sup>120</sup> Employment of Children Act, 1938, The Immoral Traffic (Prevention) Act, 1956, the Bonded Labour (Abolition) Act, 1976, the Child Labour (Prohibition and Regulation) Act, 1986, the Juvenile Justice (Care and Protection of Children) Act, 2015 and the Protection of Children from Sexual Offences Act, 2012

<sup>121</sup> The Trafficking of Persons (Prevention, Protection And Rehabilitation) Bill, 2018; Tanima Kishore, *The Anti-Trafficking Bill Is Necessary*, LIVEMINT (Oct. 25, 2018, 6:20 PM) <https://www.livemint.com/Opinion/PSRVMkJFvSiF1pSJJH60iJ/Opinion-The-antitrafficking-Bill-is-necessary.html>

c. POLICY FRAMEWORK

Despite the lack of legislation, there is an effective policy framework in the country with regard to victim rehabilitation. ‘Ujjawala’ is one such governmental scheme<sup>122</sup> which provides victims with funds to meet the travel costs incurred *en route* to their home country. Further, a national portal called ‘TrackChild’ has been developed for facilitating the rescue of missing children and their subsequent repatriation.<sup>123</sup> However, certain mechanisms stand in way of effective remedies to victims such as *The Foreigner’s Act*, 1946 which states that persons possessing forged passports will be treated as illegal immigrants punishable by law<sup>124</sup> irrespective of the fact that they were forced to possess such documents, thus creating major barriers for the victims.<sup>125</sup>

**5. Maldives**

a. BACKGROUND

Maldives is a tier two watch-list country<sup>126</sup> and is primarily a destination country for forced migrant labour<sup>127</sup> from Bangladesh and India.<sup>128</sup> One of the major causes of human trafficking in the country is the presence of international recruiting agencies, just like in Bangladesh and Bhutan. The lack of border control measures also adds to this as it makes it difficult for authorities to distinguish between illegal migrant workers and those being trafficked.

b. LEGAL AND POLICY FRAMEWORK

Maldives has implemented the Anti-Human Trafficking Act, 2013<sup>129</sup> that criminalizes human trafficking, forced labour and fraudulent recruitment. The Act adopts a multi-stakeholder approach by creating a steering committee requiring cooperation between the government,

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<sup>122</sup> Ministry of Women and Child Development, *UJJAWALA: A Comprehensive Scheme for Prevention of trafficking and Rescue, Rehabilitation and Re-integration of Victims of Trafficking and Commercial Sexual Exploitation*, MINISTRY OF WOMEN AND CHILD DEVELOPMENT (Dec. 28, 2018, 8:05 PM) <http://www.wcd.nic.in/schemes/ujjawala-comprehensive-scheme-prevention-trafficking-and-rescue-rehabilitation-and-re>

<sup>123</sup> Bhagyashri Dingle, *Use digital technology to fight cross-border trafficking in South Asia*, HINDUSTAN TIMES, (Oct. 25, 2018, 6:30 PM) <https://www.hindustantimes.com/opinion/use-digital-technology-to-fight-cross-border-trafficking-in-south-asia/story-2gQmiYmtgty1xNiYooy7vI.html>

<sup>124</sup> The Foreigners Act, 1946, Sec.14B.

<sup>125</sup> THOMAS, *Supra* note 9.

<sup>126</sup> *Supra* note 59, at 289.

<sup>127</sup> United Nations Economic and Social Commission for Asia and the Pacific, *Human Trafficking*, UNESCAP (Oct. 25, 2018, 7:15 PM) <https://sitreport.unescap.org/maldives/human-trafficking>

<sup>128</sup> Hamid Fathulla, *First Ad-hoc group meeting, Bali Process: The Human Trafficking*, BALI PROCESS, REPUBLIC OF MALDIVES, (Oct 25, 2018, 7:30 PM) <https://www.baliprocess.net/UserFiles/baliprocess/File/Maldives.pdf>

<sup>129</sup> Act No. 12/2013 through the Maldives Anti-Human Trafficking National Action Plan, 2015-2019

judiciary as well as civil societies.<sup>130</sup> There are a few other legislations that govern human trafficking in the region.<sup>131</sup> One unique legislation is the *The Home Work Convention, 1996*<sup>132</sup> which protects the rights of all workers, both citizens and foreigners thus, providing a better opportunity for the trafficked victims to protect themselves and seek redressal. Though their legislations appear to be victim oriented, they do not provide for the facility or process of repatriation. Even without any legislation, the country grossly lacks resources to facilitate repatriation as evidenced by the failed attempts of the Immigration department to facilitate the victims in the past.<sup>133</sup>

## 6. Nepal

### a. BACKGROUND

Nepal is a tier two country<sup>134</sup> and is primarily a source country for labourers and sex-workers to India and Pakistan, but also acts as a transit country for trafficking originating from Bangladesh.<sup>135</sup> It is frightening to note that the number of people trafficked from Nepal to India has increased by 500 times in 2017.<sup>136</sup> The open-border policy between the two countries is further being utilized for this nefarious practice.<sup>137</sup> Nepal has reportedly deployed drones to its borders to monitor and prevent the scourge of human trafficking in the region.<sup>138</sup>

### b. LEGAL AND POLICY FRAMEWORK

The Constitution of Nepal explicitly prohibits human trafficking,<sup>139</sup> especially of children.<sup>140</sup> Additionally, the *Human Trafficking and Transportation (Control) Act, 2007*<sup>141</sup> serves as a code with regards to the investigation, rehabilitation, and punishments of trafficked victims.

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<sup>130</sup> *Id.*, Article 60

<sup>131</sup> The Child Sex Abuse Act, 2009; The Suppression of Immoral Traffic Act, 1933 (Act No. VI of 1933); The Factories Act, 1965; The Children Act, 1974; Human Trafficking Deterrence and Suppression Act, 2012 (Act No. 3 of 2012).

<sup>132</sup> The Home Work Convention, 1996.

<sup>133</sup> *Supra*, note 129

<sup>134</sup> UNITED STATES DEPARTMENT OF STATE, 2018 TRAFFICKING IN PERSONS REPORT; COUNTRY NARRATIVES- NEPAL 317 (U.S. Department of State Publication 2018).

<sup>135</sup> *Supra* note 113, at 19.

<sup>136</sup> Neeraj Chauhan, *Nepal girls trafficked into India up by 500% in last 5 years: SSB Report*, TIMES OF INDIA (Oct 27, 2018, 10:30 AM) <https://timesofindia.indiatimes.com/india/nepal-girls-trafficked-into-india-up-by-500-in-last-5-years-ssb-report/articleshow/63551720.cms>

<sup>137</sup> Kishor Panthi, *Nepal: At Risk of Being International Terrorist's Transit Point*, HUFFPOST (Oct 27, 2018, 11:00 AM) [https://www.huffingtonpost.com/kishor-panthi/nepal-at-risk-of-being-in\\_b\\_10249676.html](https://www.huffingtonpost.com/kishor-panthi/nepal-at-risk-of-being-in_b_10249676.html)

<sup>138</sup> Anil Giri, *Nepal To Deploy Drones Along India Border*, BUSINESS STANDARD (Oct. 27, 2018, 11:35 AM) [http://www.business-standard.com/article/news-ians/nepal-to-deploy-drones-along-india-border-118040200978\\_1.html](http://www.business-standard.com/article/news-ians/nepal-to-deploy-drones-along-india-border-118040200978_1.html)

<sup>139</sup> Constitution of Nepal, 1950, Article 29(3)

<sup>140</sup> *Id.*, Article 39(5).

<sup>141</sup> Human Trafficking and Transportation (Control) Act, 2007

Its penal code, the *Muluki Ain*, 1963<sup>142</sup> is the primary legal document which punishes cross-border trafficking along with various other legislations.<sup>143</sup> such as the These however do not explicitly provide for the repatriation of victims.

## 7. Pakistan

### a. BACKGROUND

Pakistan is a tier two country<sup>144</sup>, which is a source, transit and destination country for victims who are primarily subjected to forced labour and sex trafficking. The presence of illegal labour agents is high in the region. Their tasks are equivalent to the work of international recruitment agencies explained above. The militant groups in the country are often responsible for kidnapping or buying children from the destitute parents. In many cases, Pakistani men and women who have gone voluntarily gone to work in the gulf states have reportedly become victims of forced labour on account of misleading job offers.<sup>145</sup>

### b. LEGAL FRAMEWORK

Pakistan has several constitutional safeguards that protect the rights of its citizens by ensuring inviolable personal liberty and dignity<sup>146</sup> eliminating all forms of exploitation,<sup>147</sup> slavery and forced labour.<sup>148</sup> Its Penal Code<sup>149</sup> further punishes the crimes of prostitution,<sup>150</sup> kidnapping,<sup>151</sup> and abduction for forced marriages.<sup>152</sup> The *Prevention and Control of Human Trafficking Ordinance, 2002*<sup>153</sup> was passed to provide for a special law on human trafficking, which criminalizes the trafficking of people both into and out of Pakistan. The Ordinance also provides for shelter, food and medical treatment for the victims; however, such amenities are ensured only to unaccompanied minors or destitute women, which is in addition to the compensation and expenses given to victims as per the Penal Code.<sup>154</sup> Additionally, the *Victim Assistance, Protection and Rehabilitation (Rules), 2004*<sup>155</sup> seek to ensure safe

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<sup>142</sup> National Code (Muluki Ain), 1963.

<sup>143</sup> Child Labor (Prohibition and Regularization) Act, 2000; The Labour Act, 1992.

<sup>144</sup> UNITED STATES DEPARTMENT OF STATE, 2018 TRAFFICKING IN PERSONS REPORT; COUNTRY NARRATIVES-PAKISTAN 336 (U.S. Department of State Publication June 2018).

<sup>145</sup> *Id.* at 367.

<sup>146</sup> Constitution of Pakistan, 1973, Article 14

<sup>147</sup> *Id.*, Article 3.

<sup>148</sup> *Id.*, Article 11.

<sup>149</sup> Penal Code of Pakistan, 1860 (Act XLV of 1860)

<sup>150</sup> *Id.*, Section 366A, 371A, 371B.

<sup>151</sup> *Id.*, Section 359, 360, 361, 363.

<sup>152</sup> *Id.*, Section 365B.

<sup>153</sup> Prevention and Control of Human Trafficking Ordinance, 2002.

<sup>154</sup> *Id.*, Section 6(2).

<sup>155</sup> The Victim Assistance, Protection and Rehabilitation (Rules), 2004.

repatriation of the victims to their country of origin and in case repatriation is not feasible, the victim is given an opportunity to get a work permit within the country.

c. POLICY FRAMEWORK

In November 2016, the province of Baluchistan through legislative action established District Child Protection Units which are charged with providing case management to ensure abused children including trafficked victims receive appropriate government services.<sup>156</sup> The province of Punjab also opened its first wholly integrated women's shelter for victims of violence and the province of Sindh increased its budget for women's shelters.<sup>157</sup>

**8. Sri Lanka**

a. BACKGROUND

Sri Lanka is a tier two country<sup>158</sup> that is primarily a source, destination and to a lower extent, a transit country for labour and sexual trafficking.<sup>159</sup> Sri Lankans who migrate to Southeast Asia, Middle-East, Afghanistan often get trapped in the web of forced labour at the hands of international recruiting agencies. The Sri Lankan women are subjected to forced prostitution in Cyprus, Thailand, Malaysia and Singapore, and the country primarily serves a transit point for Nepalese being trafficked to other countries.<sup>160</sup>

b. LEGAL AND POLICY FRAMEWORK

The Constitution of Sri Lanka only puts an obligation on the state to ensure the protection of children<sup>161</sup> which is a small subset of the total population vulnerable to trafficking. The Penal Code nevertheless prohibits, trafficking of persons in general.<sup>162</sup> It is notable that Sri Lanka is the first South Asian country to in effect have implemented the SAARC Convention by introducing the *Convention Preventing and Combating Trafficking in Women and Children for Prostitution Act, 2005*.<sup>163</sup> Other allied legislations of the country also include certain aspects of human trafficking under its ambit such as the *Assistance to and Protection of*

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<sup>156</sup> UNITED STATES DEPARTMENT OF STATE, 2017 TRAFFICKING IN PERSONS REPORT; COUNTRY NARRATIVES-PAKISTAN (U.S. Department of State Publication 2017).

<sup>157</sup> *Id.*

<sup>158</sup> UNITED STATES DEPARTMENT OF STATE, 2018 TRAFFICKING IN PERSONS REPORT; COUNTRY NARRATIVES-SRI LANKA 394 (U.S. Department of State Publication 2018).

<sup>159</sup> *Supra* note 113 at 21.

<sup>160</sup> *Supra* note 113.

<sup>161</sup> The Constitution of Sri Lanka, 1978, Article 27.

<sup>162</sup> Penal Code of Sri Lanka, 1883 (Ordinance no.2 of 1883), Sections 288B & 360c.

<sup>163</sup> Convention Preventing and Combating Trafficking in Women and Children for Prostitution Act, No. 30 OF 2005.

*Victims of Crime and Witnesses Act, 2015*<sup>164</sup> that *inter alia* creates a special police division for aiding with the rehabilitation of victims and providing medical and counselling services to those in need. The country has also partnered with ILO to set up a task force for better protection of victims. The government has further launched a National Plan for the protection of victims<sup>165</sup> which aims at reducing trafficking in persons including providing state support for their rehabilitation.<sup>166</sup>

## 9. A Comparative Analysis

Analysis of the position of these eight SAARC countries highlights a few key facts. *Firstly*, it is observed that all the countries are either a tier-two country or a tier two watch list country exhibiting that though they have protective and remedial mechanisms in place through legislation and other government policies to tackle human trafficking, such measures remain inadequate to address harsh realities.

*Secondly*, the constitution of a country is the guide of its political and legal system being the supreme law of the land. However, it is unfortunate to see that only in India and Nepal human trafficking is explicitly prohibited in its entirety by the constitution. Other countries merely prohibit forced labour or ensure only the broad protection of ‘human dignity’.

*Thirdly*, it is observed that the primary cause of this phenomenon of human trafficking is underpinned in the functioning of illegal recruitment agencies which entice the poor and uneducated with their false promises of high paying jobs. There is thus an imminent need to regulate such organisations and spread awareness against them to curb these practices and prevent future cases of human trafficking.

*Fourthly*, a comparative analysis of the legislative framework of these SAARC exposes its dismal state. Only three countries have laws in place to facilitate repatriation and rehabilitation of victims while Bhutan has no law covering the subject of human trafficking itself. Most countries have multiple fragmented legislations on the topic making it all the more difficult to enforce them, especially, from the victim point of view who would not be aware of their legal rights in the foreign land. The need for a unified and comprehensive legislation is urgent considering the increasing trend of human trafficking in the region.

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<sup>164</sup> Protection of Victims of Crime and Witnesses Act, 2015 (Act No.04 of 2015).

<sup>165</sup> Government of Sri Lanka, *National Action Plan for the Protection and Promotion of Human Rights 2017-2021*, OHCHR (Dec 28, 2018, 12:00 AM) [https://www.ohchr.org/Documents/Issues/NHRA/NPASriLanka2011\\_2016.pdf](https://www.ohchr.org/Documents/Issues/NHRA/NPASriLanka2011_2016.pdf)

<sup>166</sup> *Id* at 9.

## **D. BILATERAL FRAMEWORK ON REPATRIATION**

The repatriation of victims comprises of a highly complex process which involves the cooperation of various parties and stakeholders. The Repatriation of foreign victims usually occurs either at a state level *i.e.* according to the intergovernmental agreements; international organisational level; or at a combined level *i.e.* collaboration between the national governments and the civil society organisations of the country.<sup>167</sup> Since the conditions prevailing in each country differ, it is difficult to establish a uniform global repatriation procedure which could be adopted and effectively implemented by all countries. The repatriation process is thus usually determined either by SOP as developed and implemented with the aid of UNODC. It is however unfortunate to note that among the South Asian nations, only India and Nepal have an SOP in place and mere guidelines are present for the repatriation between India and Bangladesh. In other countries, the framework remains ambiguous, and thereby, flexible and arbitrary. In most cases, repatriation is carried out by the governments in collaboration with the NGOs.

### **1. India-Nepal Repatriation**

#### **a. OVERVIEW**

The Indo Nepal Treaty of 1950 allows for free movement of citizens between both the countries<sup>168</sup> and is one of the major facilitators of cross-border trafficking between the two countries. An open border means that nationals can cross the border without producing any passport or visa which makes it difficult for border security to distinguish the trafficked victims from migrating workers. Nepal being a source country, the flow of repatriation is usually in one direction, *i.e.*, from India to Nepal.<sup>169</sup>

With no formal system in place for repatriation of victims between these two countries, the SOP developed by the UNODC<sup>170</sup> serves as the standard procedure followed by the countries. Various stakeholders including shelter homes, NGOs, police authorities, the

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<sup>167</sup> THE INTERNATIONAL CENTER FOR WOMEN RIGHTS PROTECTION AND PROMOTION “LA STRADA” HUMAN RIGHTS DEFENCE CENTRE – KEPAD, ARIADNE MANUAL OF GOOD PRACTICES AGAINST HUMAN TRAFFICKING: MODELS FOR PREVENTION, ASSISTANCE AND PROTECTION 40 (ARIADNE Network 2009)

<sup>168</sup> Treaty of Peace and Friendship Between The Government of India and The Government of Nepal, 1950 (India, Nepal), Article 7

<sup>169</sup> PRAVIN PATKAR & PRITI PATKAR, A CLOSE LOOK AT INDO-NEPAL CROSS-BORDER CHILD TRAFFICKING (Caritas India 2017).

<sup>170</sup> UNITED NATIONS OFFICE ON DRUGS AND CRIMES, STANDARD OPERATING PROCEDURES TO COUNTER CROSS-BORDER TRAFFICKING IN PERSONS: INDIA-NEPAL FOR FIRST RESPONDERS (UNODC 2017).

Embassy as well as the Chief District Officer play an important role in the repatriation process.

b. REPATRIATION PROCESS

The formal process begins with registering information regarding the Nepalese Survivor by the Probationary Officer or NGO to the Nepal Consulate. The Consulate Officials then visit the shelter home to take an interview of the survivor to verify the nationality. The details of the survivor are then forwarded to the Chief District Officer who deploys police personnel to verify the address of the survivor. The verification is communicated to the Consulate which forwards the information to the shelter home to initiate repatriation. A date is then mutually determined for the physical repatriation. The survivor is then accompanied by a member from the shelter home along with an officer from the consulate and a social worker from an Indian NGO who takes him to the border post closest to his home address. The victim is thereafter handed over to the Chief District Officer who along with a member from a Nepalese NGO escorts him to his home. In case it is not beneficial for the victim to go back to his home, arrangements are made for him to be provided a shelter home. The cost of travelling and repatriation is usually borne by the Nepal Consulate.

**2. India- Bangladesh Repatriation**

a. OVERVIEW

India and Bangladesh are the only two countries which have signed a Memorandum of Understanding (*hereinafter* “MoU”) on humantrafficking within the South Asian Region which specifically provides for speedy repatriation of victims.<sup>171</sup> Unfortunately, there has been no SOP developed for the same and thus the procedure lacks a proper framework. Certain operational guidelines<sup>172</sup> were nevertheless published by the Government of West Bengal providing an extensive but complicated procedure involving multiple stakeholders.<sup>173</sup>

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<sup>171</sup> Memorandum of Understanding Between The Government of the People’s Republic of Bangladesh and the Government of Republic of India on Bilateral Cooperation for Prevention of Human Trafficking Especially Trafficking in Women and Children; Rescue, Recovery, Repatriation and Reintegration of Victims of Trafficking, 2015, Article 11

<sup>172</sup> Government of West Bengal, *Operational guidelines for west Bengal on Rescue, Safe Return And Repatriation Of Women And Child Victims Of Trafficking And Cross-Border Movement from Bangladesh*, GOVERNMENT OF WEST BENGAL (Dec 28, 2018, 10:30 PM) <http://malda.gov.in/pdf/Operational%20Guidelines%20for%20WB%20on%20Rescue,%20Safe%20Return%20&%20Repatriation.pdf>.

<sup>173</sup> The United Nations International Children's Emergency Fund (UNICEF), *Mapping of Bangladeshi Repatriation Process, Rescue, Recovery, Repatriation and Integration (RRRI) of Child Trafficking Cases—A Report* (UNICEF 2014).

b. REPATRIATION PROCESS

When any person is rescued either by the police, Border Security Force or an NGO, an interrogation is undertaken to identify whether the person is a victim or the trafficker themselves. In case of a child, they should be produced before the Child Welfare Commission within 24 hours of their rescue and will be dealt with under the provisions of the Juvenile Justice Act. Once the child has been placed under one of the facilities as provided under the Act, he is interviewed by either by the counsellor, probation officer or social worker to find his place of origin. The data of the victim will then be uploaded on an online portal and database. The State Task Force Secretariat is then requested to verify the address of the victim. If approved, a request for identifying or verifying the address will be sent to the branch secretariat of the Ministry of External Affairs within a week. The Secretariat will then forward the request to the Deputy High Commission of Bangladesh within two weeks. Within eight to nine weeks the Bangladesh Deputy High Commission through institutional arrangements, will trace the victim's family and issue temporary travel documents in case the family is already identified. These travel documents will be sent to the State Home Department which will issue a 'No Objection Certificate' and inform the superintendent of the police of the same who will then allow the shelter home to release the victim within one week. After a mutual consultation between the Task Force of West Bengal and Bangladesh the return of the victim will be initiated. The victim will then be handed over to the Border Security Force who will deliver the victim to the Border Guards of Bangladesh. The transport and other expenditures are usually met out of the Anti-Human Trafficking Unit funds or a request is made under the *Ujjawala* Scheme.

**V. A REFLECTION ON THE SOUTH ASIAN POSITION**

**A. LACUNAS IN THE SAARC CONVENTION**

**1. Non- Inclusion of All Forms of Trafficking**

Though SAARC Convention is instrumental in stimulating action against human trafficking, the Convention is very narrow in the sense that it essentially assumes that trafficking is synonymous with prostitution eliminating the myriad of other forms of trafficking that exist, *inter alia* such as those for the purposes of forced labour, organ transplant and domestic servitude. This results in the exclusion of many people from receiving international protection and assistance as they are not considered as victims under the Convention.

## 2. A Comparison with Other Regional Instruments

The inadequacy of the SAARC Convention as a regional convention can further be illustrated by comparing it with its European counterpart, the *Convention on Action against Trafficking in Human Beings*<sup>174</sup> which has similar objectives of promoting international cooperation in combating human trafficking. The reason for its superior relevancy can be seen in the intricacies with which it is framed without leading to rigidity.

The European Convention envisages providing protection and assistance to victims of trafficking but does so without discriminating between genders.<sup>175</sup> It is further a much more dynamic Convention as it allows flexibility in terms for researching on best practice models<sup>176</sup> which could be implemented in the European Union and even recognises the importance of the media and civil societies in fighting this crime.<sup>177</sup> Its detailed approach can be seen from its provisions which lay down broad conditions under which a residential permit may be granted to victims for cooperating with law enforcement agencies in furtherance of their best interest.<sup>178</sup> Article 16 of the Convention specifically addresses the topic of repatriation of victims and places an obligation on State parties to take measures to facilitate the same, but at the same time ensures that such repatriation is voluntary in nature on part of the victim with the aim of preventing re-victimisation. This Convention thus ensures that a victim-oriented approach is adopted in every step of the process and establishes special action groups for monitoring its implementation.<sup>179</sup> Despite coming into existence a few years before its counterpart, the SAARC Convention is far behind the European Convention in terms of its victim oriented approach.

### Inadequacy of National Policies

Certain countries in the region have made advanced legislative efforts, while others are still struggling at the nascent stage. While Bhutan, Maldives and Sri Lanka often get side-tracked from the international community on discussions of human trafficking in the region, India and Sri Lanka are the only two SAARC countries which have ratified the Palermo Protocol.<sup>180</sup> What remains common amongst these countries is the increasing numbers of

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<sup>174</sup> Council of Europe Convention on Action Against Trafficking in Human Beings, 2005, CETS 197.

<sup>175</sup> *Id.* Article 1

<sup>176</sup> *Id.* Article 6

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at Article 14

<sup>179</sup> *Id.* at Article 36

<sup>180</sup> Nepal, Bangladesh, Bhutan, Pakistan

cases of human trafficking and the countries' inability to adequately ensure effective victim protection. Admittedly, the economic state of the countries sometimes prevents the governments from making effective contribution to victim repatriation schemes; however, in most cases the cause is the lack of government dedication to fight the menace which is rooted in a deep-seated web of corruption.

Afghanistan appears to stand at the best footing in terms of its legislative efforts for repatriation of victims. The Afghan law envisages sharing of the onus of repatriation between the home country and the receiving State which is evidenced by its requirement for inter-governmental cooperation in providing legal documents as a country of origin. Commendably, its requirements as a country of destination country, are also in compliance with the international minimum standards as it even provides residential facilities to victims in situations of their non-identification.

Unlike Afghanistan, the legislations of most other South Asian countries do not mention obligations regarding repatriation let alone elaborate them in detail. India, with its upcoming bill on anti-trafficking, which is considered a highly victim-oriented legislation, seems to be moving along the right path. While these countries have attempted to compensate for their ineffectual legislative developments with advanced policy frameworks, their implementation remains grossly poor in most countries. Majority of them have not even been able to develop the required SOPs which is the foundation of a repatriation process thus leading to arbitrary arrests of the victims. Along with a victim-oriented approach, there is also a need to adopt a human rights-based approach in the system to ensure the benefits of the scheme are extended to all the victims of human trafficking. This is particularly needed in the case of Bangladesh wherein the government does not adequately address the needs of the adult male victims during the repatriation process.

#### **B. SHORTCOMINGS IN THE REPATRIATION PROCESS**

One of the primary concerns in the region is the lack of a standardised SOP between all countries. The repatriation process would become more simplified if an SOP was developed for the region, considering the similarity of the conditions prevailing in them. It is also important that such a process should be available for all victims of human trafficking irrespective of their demographic and nature or purpose of trafficking as the current regime seems to be focusing only on women and children and primarily on victims of sex trafficking.

Further, in most countries, the repatriation process takes place with the help of support from the NGOs, however, these NGOs often lack funds and are not adequately supported by the governments.

The other focus area should be on speedy repatriation as the existing processes usually take even up to 3 years to complete.<sup>181</sup> There are various contributing factors that lead to this delay such as victims not revealing their correct identities and the lack of coordination and lengthy sanction procedures between the different stakeholders. These can however be mitigated with the help of existing practices and efforts of the region such as integrating the use of databases and technology such as the earlier mentioned MCA as a part of the process. Further, all stakeholders playing a part in the process should be clearly identified and their roles should be charted out to enable better coordination between the countries.

## **VI. CONCLUSION**

Like any other regional block, the South Asian region is fraught with enormous social and economic challenges pertinently in the sphere of democracy, development, human rights, terrorism and inter-state disputes. Bearing this in mind, the efforts made by the South Asian Countries on the issue of human trafficking are highly welcomed. At present, all the States, though not in all forms, have prohibited human trafficking and have some policy measures in place. However, their efforts suffer from grave inadequacies as discussed above. The collective regional efforts too seem to be lagging far behind the other regional counterparts, such as the European Union.

Though this paper primarily approached the issue of repatriation through the victim-oriented approach, such an approach frequently colludes with the human rights, humanitarian and collaboration approach, and this indeed leaves the scope for the topic to be analysed in a broader spectrum. However, at this stage, it is suffice to say that the key challenge of the region to ensure successful repatriation of the foreign intra-regional victims is the lack of institutional and formal framework on a national as well as regional front. The inter-state agreements are minuscule in number, and the SAARC Convention does not comprehensively encompass the rights and liabilities of the victims or lay down the process of repatriation; the result is such that there is weak enforcement and lack of initiation for developing SOPs. This results in a lack of cooperation between the regional countries and a consequent abdication of

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<sup>181</sup> *Id.*

responsibility by individual countries leading to denied or arbitrary repatriation cases. The issue of repatriation and reintegration of victims of human trafficking is beyond a shadow of doubt, a complex one and thus, it is only by way of an all-inclusive approach and a shared sense of responsibility can the states ensure the feasibility of the mechanisms that are needed to effectively alleviate the plight of the masses.