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What About a Human Rights Based Approach?

-a case study of the legal situation of victims
of child trafficking in Nepal

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Summary

This paper aims to establish to what extent a human rights-based approach could contribute to an improvement of the enforcement of the rights of children who are victims of trafficking in Nepal. A Minor Field Study based on interviews was conducted in Nepal in order to gather data about the structure of the current legal treatment of children who are victims of trafficking and to what extent potential problems or challenges derives from it.

The empirical findings showed that the problem did not stem from the domestic anti-trafficking legislations but rather from the poor implementation of the existing provisions. The main reasons for the lack in implementing the said legislations concluded to six causes, namely; the lack of administrative coordination and efficiency, the lack of resources, the lack of authentic data, the lack of knowledge of the law enforcement personnel, the open border policy towards India and the lack of reported cases.

These causes were then analyzed through an analytical framework of a human rights-based approach. Since there exist no universal definition of a human rights-based approach, the general characteristics of the framework employed in this paper was established by drawing relevant principles from existing framework into one which was specifically designed for the problem of child trafficking.

The analysis showed that a human rights-based approach on the specific situation for children who are victims of trafficking in Nepal has an added value in the sense that it gives a more holistic approach on the problem of implementing anti-trafficking legislations and since it focuses on the enforcement of their rights.

Sammanfattning

Den här uppsatsen syftar till att fastställa om ett mänskliga rättigheters perspektiv (MR-perspektiv) har något att tillföra den rättsliga hanteringen av barn som fallit offer för trafficking i Nepal. En mindre fältstudie (MFS) baserad på intervjuer företogs i Nepal för att få en uppfattning om den struktur som reglerar den rättsliga hanteringen av barn som är offer för trafficking, och vilka utmaningar eller problem denna struktur har.

Den empiriska data som samlats in visade att problemet inte beror på den nationella anti-trafficking lagstiftningen som sådan, utan problemet återfinns istället i själva implementeringen av lagstiftningen. Sex orsaker till den otillräckliga implementeringen av lagstiftningen kunde skönjas ur den sammanställda data nämligen; bristen på administrativ koordination och effektivitet, bristen på resurser, bristen på tillförlitlig data, bristen på kunskap hos personal inom rättsväsendet, policyn vad gäller den öppna gränsen mot Indien samt bristen på rapporterade fall till polisen.

Dessa orsaker analyserades sedan genom ett analytiskt MR-perspektiv ramverk. Eftersom det inte existerar någon universell definition av ett MR-perspektiv så plockades ramverkets generella egenskaper ihop från ett antal redan existerande ramverk för att passa den specifika frågan om trafficking av barn.

Analysen visade att tillämpandet av ett MR-perspektiv på den specifika kontexten av barns som fallit offer för trafficking i Nepal kan innebära förbättringar i den rättsliga hanteringen av dem, eftersom den tillför en helhetssyn på problemet med implementeringen av anti-trafficking lagstiftningen samt att den fokuserar på förverkligandet av deras rättigheter.

Preface

Firstly, I would like to extend my gratitude towards SIDA and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law for granting me the Minor Field Study scholarship, which enabled me to go to Nepal where part of the work of this thesis was carried out.

Furthermore, I am very grateful for the help I received in Nepal upon arrival. I wish to extend my warmest thanks to Dr Kul Ratna Bhurtel for his support and advice in relation to my study. Without the help of Sumnima Tuladhar and her colleagues at CWIN Nepal, especially at the CWIN Helpline Office, this paper would not have been possible, and I owe her and Bikash Thapa many thanks for their help throughout my stay in Kathmandu.

Finally, I wish to acknowledge my supervisor Leila Brännström, who guided me in the right direction when I needed it the most. Thank you.

Abbreviations

AATWIN	Alliance Against Trafficking in Women and Children in Nepal
CBS	Central Bureau of Statistics
CCWB	Central Child Welfare Board
CEDAW	Convention on the Elimination of Discrimination against Women
CRC	Convention on the Rights of the Child
CVICT	Centre for Victims of Torture in Nepal
CWIN	Child Workers in Nepal Concerned Centre
DCWO	District Children and Women Office
FWLD	Forum for Women and Law Development
GDP	Gross Domestic Product
GoN	Government of Nepal
HRC	Human Rights Council
I/NGO	International/ Non-Governmental Organisation
ICCPR	International Covenant on Civil and Political Rights
ICRSCR	International Covenant on Economic, Social and Cultural Rights
IOM	International Organisation for Migration
LACC	Legal Aid and Consultancy Centre
MoHA	Ministry of Home Affairs
MoWCSW	Ministry of Women, Children and Social Welfare

NHRC	National Human Rights Commission
NLC	Nepal Law Commission
NPA	National Plan of Action against Trafficking in Women and Children for Sexual and Labour Exploitation (2001)
OAG	Office of the Attorney General
OSRT	Office of the Special Rapporteur on Trafficking
SAARC	South Asian Association for Regional Cooperation
UN	United Nations
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
WCSC	Women and Children Service Centre, Nepal Police Force
WOREC	Women's Rehabilitation Centre

1 Introduction

‘Children are the future’. Mentioned as a simple fact, it is as logic as it is true. Yet, if used in the context of promoting the protection of children’s rights, the constant misuse of the maxim seems to have left the content void of any meaning.

In Nepal, with its recent history of civil war and unstable political situation, the younger generations are truly the creators of what is to come next. However, the protection and safeguard of these children leaves much to desire. This is not a unique phenomenon for just Nepal. Nevertheless, its complex history together with its socioeconomic status as one of the world’s poorest countries, situated in between two of the world’s super powers, made this author intrigued to explore the existing challenges the state faces in its implementation of human rights, especially regarding the issue of child trafficking.

Due to the clandestine nature of human trafficking, completely reliable statistics about its extent is hard to gather and one must be cautious when referring to it. With that in mind, human trafficking is considered, second to drug trafficking, the most lucrative illegal industry in the world today, with an approximate annual turnover of more than 30 billion U.S dollars.¹ Contributing to that sum are the estimated 1.2 million children who are trafficked within and across borders each year, some of which originate from Nepal.²

While many victims of trafficking are stuck in their exploitative situations, some are able to escape. But only a few of these have the energy, the ability and the courage to file a police report against their offenders. The ones that do face a struggle to achieve some justification.

The contemporary criticism of the existing anti-trafficking framework is mainly directed towards its interpretation that justification for victims is equivalent to the criminalization of the offenders. This so called criminal law approach was initially chosen by the international community as the main strategy to address the problem of human trafficking. In brief, its focus lies mainly on the usage of criminal justice efforts to stifle the existence of trafficking. Identifying and prosecuting the traffickers is according to the approach of primary importance. The victim of trafficking is generally only seen as an important tool for the conviction of the traffickers, since their

¹ Patrick Belser, ‘Forced Labour and Human Trafficking: Estimating the Profits’ (2005) International Labor Organization Working Paper, <http://dx.doi.org/10.2139/ssrn.1838403> accessed 17 May 2012.

² HRC ‘Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo’ (2009) UN Doc A/HRC/10/16, 6.

testimony in most cases is the determining factor in the judgement.³ The adoption of the Trafficking Protocol within the framework of the UN Convention on Transnational and Organized Crime could be seen as a clear sign of the criminal approach taken on the issue. This criminal justice approach has been criticised by many scholars who consider that the current international legal framework is neglecting the human rights of the victims. It is claimed that the trafficking agenda is used as a border control tool for governments and thus deprive persons of their right of freedom of mobility. In general, the approach is accused of simply dealing with the effects and consequences of trafficking instead of trying to identify and find solutions for the root causes.⁴

As a counterpoise, many scholars advocate in favour of a human rights-based approach to trafficking. They argue that by merely addressing the criminal aspect, the multi-disciplinary nature of trafficking is neglected and the need for counter-measures influenced by a more comprehensive approach is ignored. Since trafficking according to these scholars, are both a cause and a result of human rights violations, treating it as a simple crime would be like putting a band-aid on internal injuries.⁵ The human rights-based approach thus centres on the victims of trafficking, and promotes efforts that are intended to ensure the human rights of the victims.⁶

To what extent a paper of this proportion could help clarify, which of the both anti-trafficking paradigms is to prefer in general, will be left unstated. The aim with this paper is merely to examine the specific legal context in Nepal as regards child trafficking, through using one of the paradigms, namely the human rights based approach.

1.1 Purpose and research question

While conducting a minor field study in Nepal earlier this year as a part of this paper, the general view perceived among the interviewees, was that although improvements has been made in the area of anti-trafficking efforts, there still remain a lot of work to be done. In 2001, a revised National Plan of Action against Trafficking in Women and Children for Sexual and

³ E.g. Alexandra Amiel, 'Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation' (2006) 12 Buffalo Human Rights Law Review 12, 27-34.

⁴ Neil Howard and Mumtaz Lalani, 'Editorial Introduction: The Politics of Human Trafficking' 4:1 STAIR 5, 9f.

⁵ E.g. Ann D Jordan, 'Human rights or wrong? The struggle for a rights-based response to trafficking in human beings' (2002) 10:1 Gender and Development 28; Moshoula C Desyllas, 'A critique of the global trafficking discourse and U.S. Policy' (2007) 34:4 Journal of Sociology & Welfare 57; Tom Obokata, *Trafficking of human beings from a human rights perspective: Towards a Holistic Approach* (Martinus Nijhoff Publishers 2006).

⁶ Conny Rijken, Dagmar Koster, 'A Human Rights Based Approach to Trafficking in Human Beings in Theory and Practice' (2008) <<http://ssrn.com/abstract=1135108> or <http://dx.doi.org/10.2139/ssrn.1135108>> accessed 20 May 2012.

Labour Exploitation was adopted by the Government of Nepal. Still in use today, the NPA clearly stresses the need for a human rights-based approach on all anti-trafficking efforts, both in the stages of planning and execution.⁷ While the paper will not contain an evaluation of to what extent the recommendation in the NPA is complied with, an attempt will be made to see what added value an application of a human rights approach actually would have on the issue of child trafficking in Nepal. The research question is therefore formulated as follows;

- In the specific context of the fight against child trafficking in Nepal, could the application of a human rights-based approach potentially contribute to an improvement of the enforcement of the rights of victims; and if so, how?

In order to be able to answer the main question above, following sub questions must firstly be addressed. Initially, it is important to examine the structure of the current legal treatment of children who are victims of trafficking and to what extent potential problems or challenges derive from it. Those answers will create a clear point of departure for the following analysis. To further facilitate the analysis, the meaning of a human rights-based approach in relation to trafficking must be established prior to its initiation so that the analysis itself only focus on the significance an actual implementation of a human rights-based approach on child trafficking would have in Nepal. Additionally, the relationship between the domestic anti-trafficking legislation in Nepal and the existing international legal framework will be explored in order to see if there is an alignment between the two today and if that could be improved through a human rights-based approach.

For the purpose of this paper, human trafficking will be defined according to the internationally recognized definition laid down in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children⁸ (hereinafter the Trafficking Protocol) which supplements the United Nations Convention on Transnational and Organized Crime.⁹ Even though Nepal has not ratified the Trafficking Protocol, the national definition of trafficking is highly influenced by it, which will be shown later on in this paper. Thus, child trafficking should henceforth be considered “the recruitment, transportation, transfer, harbouring or receipt” of a person under the age of 18 years “for the purpose of exploitation”.¹⁰ Forms of exploitation according to the definition are e g forced labour, sexual exploitation and organ removal. Contrary to trafficking of adults, the means

⁷ National Plan of Action against Trafficking in Women and Children for Sexual and Labour Exploitation (Ministry of Women, Children and Social Welfare 2001) 11.

⁸ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 December 2000 UNGA Res 55/25, entered into force 25 December 2003).

⁹ United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) (UNTOC) UNGA Res 55/25

¹⁰ Trafficking Protocol, supra note 8, art 3.

by which the act is taken i a by threat or use of force, deception or abduction is irrelevant, since children according to the Trafficking Protocol never can be said to have consented to trafficking.¹¹

1.2 Delimitations

When addressing a problem like the phenomenon of trafficking in children there is a multitude of different aspects relevant to examine. To ensure the feasibility, the paper only covers the legal issues that are actualized when children have been trafficked. Focus will therefore not be directed on the questions of why trafficking in children is an occurring problem in Nepal or what push and pull factors exists in this specific context.

The paper is furthermore limited to analyse only the fulfilment of the rights of victims. The question of the human rights of the alleged perpetrator will not be included. The victims in question for this paper are children i e persons below eighteen years of age. Yet, it is difficult to differentiate between children and adults in the cases of trafficking in Nepal. Children are often trafficked when they are as young as six years old and if or when they are able to escape; they have usually reached the age of eighteen years or older, thus no longer qualifying legally as children.¹² This adds another level of complexity to the analysis and it is important to acknowledge this throughout the paper.

Moreover, the paper will emphasis mostly on trafficking for purposes of commercial sexual exploitation. Lately, different forms of trafficking for purposes of e g forced labour, domestic labour, organ trade and even for circus performances has increased within the area of child trafficking in Nepal.¹³ However, due to the stigmatization in the Nepalese society of trafficking for commercial sexual exploitation, the victims subjected to this are more at risk to have their right to an effective remedy impeded, which will be further elaborate on in the paper.

1.3 Analytical framework

Human trafficking is a multi-disciplinary problem, which for a long time has been addressed through a criminal justice approach. Many alternative anti-trafficking agendas have emerged and examples to be mentioned are perspectives focused on labour, migration and sexual exploitation. The common denominator between these is their emphasis on approaching the problem through one specific aspect. The ‘labour approach’ focus on integrating international labour standards to fight trafficking while the ‘migration approach’ promotes stricter border controls and migration

¹¹ Trafficking Protocol, supra note 8, art 3(c).

¹² Interview with members of AATWIN, (Kathmandu, Nepal 12 March 2012).

¹³ NHRC ‘Trafficking in Persons Especially on Women and Children in Nepal: National Report 2009-2010 (2011) 17-21.

flows.¹⁴ In contrast to these, the human rights-based approach focuses on the fact that trafficking is violating the human rights of its victims and therefore advocates the importance of a more holistic strategy.

The concept of a human rights-based approach originated from the field of development, where it was employed to broaden the focus from solutions based on traditional economical strategies to a more overarching human rights perspective.¹⁵ Today, the use of the human rights-based approach has extended and is also applied on other contexts e.g. regarding migrant workers, food insecurity, health and in this case human trafficking.¹⁶ Even though no universally acknowledged definition of the human rights-based approach exists, it has been described as a “methodology that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights”.¹⁷ International human rights treaties serve as a base for the human rights-based approach and the main principles referred to are the principles of “accountability, universality, indivisibility and interdependence, international cooperation, participation and non discrimination”.¹⁸ Thus, when utilizing a human rights based approach, these principles shall permeate all decisions and activities in order to fulfil the rights of the identified rights-holders and the obligations for the duty-bearers. Depending on whom the recognized rights-holder is other principles may also actualize. When taking a human rights-based approach on children’s issues for example, the principle of the best interest of the child¹⁹ shall be taken into consideration throughout the entire process.²⁰ Even if the concept sounds good, it can be hard to imagine how the human rights-based approach would actually be realized. The difficulty in operationalizing the approach adequately is part of the main criticism of it along with its vague formulation.²¹ Yet, the concept’s vagueness serves both to its advantage and to its weakness, since the imprecision increases the applicability of the approach to various situations, while the flexibility at the same time compromises the framework’s authority.²² One of the reasons for choosing this approach to analyze the legal treatment of victims is that although trafficking is a recognized problem in Nepal that is addressed through various programmes, by utilizing a human rights-based approach, the already existing anti-trafficking initiatives are incorporated into a more comprehensive framework.²³ In a developing country like

¹⁴ UNICEF ‘South Asia in Action: Preventing and Responding to Child Trafficking: Analysis of Anti-Trafficking Initiatives in the Region’ (August 2009) 36.

¹⁵ Antonella Invernizzi and Jane Williams (eds), *The Human Rights of Children: From Vision to Implementation* (Ashgate Publishing Limited 2011) 62.

¹⁶ Invernizzi, *supra* note 15, 63ff.

¹⁷ UN ‘Prevent Combat Protect Human Trafficking: Joint UN Commentary on the EU Directive: A Human Rights-Based Approach’ (November 2011) 26.

¹⁸ Invernizzi, *supra* note 15, 67f.

¹⁹ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNGA Res 44/25 (CRC) art 3.

²⁰ Invernizzi, *supra* note 15, 88ff.

²¹ Jakob Kirkemann Boesen and Tomas Martin, ‘Applying a Rights-Based Approach: An Inspirational Guide for Civil Society’ (The Danish Institute for Human Rights 2007) 15.

²² Invernizzi, *supra* note 15, 63ff.

²³ Kirkemann Boesen, *supra* note 21, 13.

Nepal, newly democratized with a recent history of civil war, trafficking is not the only difficulty the government is faced with. Still, by addressing the problem of trafficking from a human rights perspective, the equal significance of all rights is ensured as well as prevention of any usage of anti-trafficking efforts that negatively affect other human rights.²⁴ Thus, the effects of the approach do not only influence the field of trafficking but affects the entire human rights framework in the society.

Consequently, for the purpose of this paper the human rights-based approach is chosen as an analytical framework and should be understood as having two functions. Firstly, it promotes the normative values of the human rights laid down in the applicable international human rights instruments; and secondly, it is used as a method to infuse these normative values into the decision-making process within the specific area of concern.²⁵ The examination of the alignment between the domestic legislation in Nepal and the international legal framework therefore form the initial part of the analysis in Chapter 5, while the second part study the practical implementation of these normative values into the legal treatment of children who are victims of trafficking.

1.4 Methodology and material

In this paper, two methods are utilized. Firstly, the material used as a basis for the analysis in this paper was gathered during a minor field study in Nepal between January and March in 2012. The minor field study was financed through a scholarship granted by SIDA, the Swedish International Development Cooperation Agency. In Nepal, key informant interviews with relevant actors were conducted. Since the aim with the study was to explore the existing anti-trafficking framework in Nepal and its potential challenges interviews were made with different sectors of society to get an overall view of the current situation. Thus, interviews were conducted at governmental level, with the judiciary, the police, INGOs and NGOs. The interviews were semi structured and qualitative in nature to allow a more relaxed atmosphere since trafficking still is overall a sensitive subject in Nepal. The aim with the interviews was to learn what the interviewees' typical experience of the topic was as well as actually gain fact-based information.²⁶ Even though the subject of the paper is focused on children, who are victims of trafficking no interviews with individuals from this specific group was carried out. The aim with the paper is to discern structural problems and challenges with the legal treatment of children who are victims of trafficking. While, interviews with victims would provide their individual experiences, it would not be possible to draw any conclusion of those in relation to the more overarching structure.

²⁴ Alexandra Amiel, 'Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation' (2006) 12 Buffalo Human Rights Law Review 5 39.

²⁵ Tom Obokata, *Trafficking of human beings from a human rights perspective: Towards a Holistic Approach* (Martinus Nijhoff Publishers 2006) 35.

²⁶ Steinar Kvale, *Den kvalitative forskningsintervjuen* (Studentlitteratur 2009) 167.

At one point, a focal group interview was conducted with a coalition of anti-trafficking NGOs.²⁷ It was a non-direct interview form and the goal was to let representatives from all organisations interact and share with each other their different ideas and views instead of asking them individually. A downside to this method was that the interviewer had a more difficult task as a mediator to keep the discussion right on track and at the same time absorb the answers from the group.²⁸

Secondly, the empirical findings of the minor field study is analysed through the framework of the human rights-based approach. This was found to be a suitable parameter to compare the existing anti-trafficking efforts in Nepal with. The general characteristics of the approach will be presented in the following chapter.

In addition to the data collected through the interviews in Nepal, the paper is based on literature on the issue of trafficking and the framework of human rights based approach as well as reports from NGOs like e.g UNICEF, OHCHR and the UN Special Rapporteur on trafficking in persons, especially women and children. Secondary data like statistics over the number of filed cases in courts regarding child trafficking has been collected from the Office of Attorney General and the National Human Rights Commission in Nepal.

Moreover, domestic legislation in Nepal was consulted, analysed and compared with the international legal framework consisting of international instruments like e.g the CRC, ICCPR and the ICESCR.

1.5 Criticism of sources

One of the major challenges, which also form a part of the main conclusion of the analysis, is the lack of authentic data of the annual number of trafficked children in Nepal. Presented in the paper is the reported documentation from the Office of the Attorney General and the National Human Rights Commission. However, there exist a big number of unknown cases of child trafficking in Nepal according to all of the interviewees. The presented data may therefore be regarded as incomplete. Yet it is still possible to analyse the data keeping the deficiency of accuracy as a parameter of the study.

Another major challenge when conducting the interviews was the evident language barrier between the facilitator and the key informants. All of the interviews were conducted in English and in a few of them, an interpreter assisted. However, even with an interpreter present, some information might still have been lost in translation.

²⁷ Interview with members of AATWIN (Kathmandu, Nepal 12 March 2012).

²⁸ Kvale, *supra* note 26, 166.

For the author the initial intention was to record every interview. However, none of the interviewees approved this form of sampling data. Between the choice of not attaining the information at all or going through with the interviews by taking notes, the latter was decided on even if it to some extent might compromise the credibility of the data used in the paper.

Considerations of the ethical dilemma the interviewees experienced when speaking about the issue of trafficking in children was also a necessity. Nepal is a country that recently has recovered from a decade of civil war. It is still in a transition period with political instability. Even though Nepal now is a democratic society people are still reluctant to speak their mind as open as they could. When analyzing the interviews this has also been taken into consideration by the author. In addition to this, there will not be a full disclosure of the identity of three of the persons with whom interviews have been conducted, due to their wish of keeping it confidential.

1.6 Disposition

The disposition of the paper is structured as follows. Chapter 1 introduces the reader to the subject of trafficking, the basis of a human rights-based approach as well as the methodology used both during the minor field study and during the construction of the paper. In Chapter 2, the analytical framework chosen as a tool to analyze the collected data is presented, while Chapter 3 displays a case study of Nepal. It examines the current legal treatment of the issue of child trafficking in Nepal and the relevant existing domestic and international legislation in place.

The result of an interview-based minor field study conducted in Nepal is presented in Chapter 4, with the interviewees' opinions on the existing anti-trafficking legislation and its implementation. A small, integrated comparison is attempted between the national legislation and the existing international human rights framework against trafficking, to examine whether or not the instruments differ in normative content while the main focus will be directed on the quality of their enforcement.

Chapter 5 will contain an analysis of the results of the data collected in the minor field study. The analysis will be conducted through a human rights-based approach and will put the challenges of implementing anti-trafficking legislation in Nepal at the centre of attention. Finally, the last chapter offer the reader some concluding remarks.

2 Human rights-based approach as an analytical tool

2.1 General characteristics of the employed analytical framework

As explained in previous chapters, there is no universal definition of a human rights based approach, let alone one specified towards human trafficking. Presented below is a reconstruction of a human rights-based approach based on a collection of sources created by institutions and legal scientists. The characteristics of the version presented in the end of this chapter, have derived mainly from a practical guide to programming developed by the United Nations Populations Fund²⁹. This manual is aimed specifically for the purposes of the UNPF. However, a general structure of the implementation of a human rights-based approach in practice was observed, and used as a basis for a version specified towards human trafficking. This version will be utilized on the specific field study of the victims of child trafficking in Nepal.

2.1.1 Victim-centred approach

Firstly, it is important to recognize that the essential feature of the approach is to ensure and protect the human rights of the victims of trafficking. The victims, who in this specific context are children who have been trafficked, and their human rights are at the very focal point of the perspective, which it is also called a victim-centred approach. According to the approach, “trafficked persons should first and foremost be seen as rights holders, and not as merely instrumental to investigations or prosecutions”.³⁰ It is therefore important that child trafficking is ensured its own appropriate attention and priority so that specifically adopted provisions for child trafficking can be referred to when individuals claim that a violation of their rights have occurred. In every aspect of the anti-trafficking agenda, legislative, judicial or practical, the rights of the victims needs to be considered. The approach does not only require the enforcement of human rights but it also assures that the anti-trafficking efforts do not adversely affect the rights of the children.³¹ Focus on the victims’ rights must thus be consistent through the entirety of the analysis of the human rights-based approaching chapter four.

²⁹ UNFPA ‘A Human Rights-Based Approach to Programming: Practical Implementation Manual and Training Materials Program’ (2010).

³⁰ UN supra note 17, 26.

³¹ UNICEF, supra note 14, 36.

2.1.2 The identification of rights-holders and duty-bearers

Secondly, determining the identity of the entitled rights-holders and obligated duty-bearers are essential to a human rights based approach. In a general human rights-based approach, the rights-holders are considered to be every human being since human rights are entitled to every person. However, there are requirements that the rights-holders must be able to “exercise rights, formulate claims and seek redress”.³² In the specific case of child trafficking in Nepal, the rights-holders are thus children who have been victims of trafficking or those who are at risk of becoming victims of trafficking. Hence, these are the ones who are able to claim that their human rights have been violated according to the human rights based approach. The corresponding obligations to the claimed rights are supposed to be addressed by the identified duty-bearer. The identity of the duty-bearer in the case of child trafficking is most likely the State to which the victims belong but when concerning cross-border trafficking also the destination state could be considered as a duty-bearer to a certain extent. Obligations to cooperate adequately with the source state to ensure the fulfilment of the rights of the victims may be deemed attributable to the destination state. If taken it one step further the international community as a whole, may be found to have obligations to help the enforcement of the rights of the children, supposedly the source state fails to meet its obligations.³³

2.1.3 The relevant principles

Thirdly, the principles of universality, inalienability, indivisibility, interdependence, interrelatedness, non-discrimination, equality, participation, inclusion, accountability, rule of law and the best interest of the child are all necessary to take into consideration when applying a human rights-based approach on anti-trafficking efforts aimed specifically at child trafficking. These principles are derived from international instruments such as the ICCPR, ICESCR, CRC and CEDAW.³⁴ The principles form a base for examining the human rights violations occurring in cases of trafficking. Among these are the violations of the right to life, physical and mental security, self-determination, health and development. The violations actualize the victim’s right to an effective remedy.³⁵ However, in the human rights-based approach this does not only entail the right to prosecute the offenders but also the right to medical care, protection and rehabilitation if needed. Thus, the approach equalizes the importance of criminalizing the

³² UNFPA, *supra* note 29, 79.

³³ Anne T Gallagher, *The International Law of Human Trafficking*, (Cambridge University Press 2010) 418.

³⁴ Obokata, *supra* note 25, 33f.

³⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2(3); The Convention on the Elimination of All Forms of Discrimination against Women (adopted on 18 December 1979, entered into force 3 September 1981) (CEDAW) art 2(c).

perpetrators with the need for the enforcement of the human rights of the survivors of trafficking.³⁶

The long list of principles is of no value if the content of the principles are not determined. Therefore, a short description of the meaning of these principles in relation to the specific context of child trafficking will follow below.

Universality and inalienability

These principles make the foundation of the approach by clearly outlining that every human being is entitled to their human rights simply because they are humans. By emphasising the importance of these principles the approach grants every child the fulfilment of their rights regardless of where they are situated or what economical conditions they are living under. It is therefore of utmost importance to include every child's human rights into the framework of the anti-trafficking initiatives.³⁷

Indivisibility

Since human rights are inseparable from other rights, deficiencies in enforcing one right will therefore undeniably affect the fulfilment of others. All rights, civil and political as well as social, economical and cultural, are thus of equal importance. In relation to child trafficking the principle of the indivisibility accentuates the importance to not see human rights as individual without any connection to each other. Without the fulfilment of e.g. the right to non-discrimination the right to security may be impeded and attenuated. Therefore, a holistic approach such as the human rights-based approach requires the duty-bearers to acknowledge the significance of every right.³⁸

Interdependence and Interrelatedness

All human rights are considered interdependent and interrelated to each other why the implementation of one is conditional upon the realization of another. In relation to child trafficking these principles can be interpreted as promoting cooperation between actors across sectors of society for improved results.³⁹ If the right for a child to acquire a nationality⁴⁰ is not enforced for example, a number of rights might be impossible for a child to obtain according to domestic legislation in the state in which the child resides. In turn, this could lead to a more vulnerable situation for the child in relation to risks of being trafficked.

³⁶ UN, supra note 17, 26.

³⁷ UNFPA, supra note 29, 74.

³⁸ UNFPA, supra note 29, 74.

³⁹ UNFPA, supra note 29, 74.

⁴⁰ CRC, supra note 19, art 7.

Non-discrimination and equality

These principles are advocating the belief that all human beings are equal and that no discriminatory acts can change that. It is important to adopt or amend legal instruments regulating trafficking to make sure that the principle of non-discrimination is permeating every aspect of the right to the fulfilment of every persons human rights. As an example the amendment of rules of inheritance, that discriminates women and girls are necessary to enforce. It could otherwise force some women and children into risk-filled areas of work due to their need to make a living for themselves and their family.⁴¹ In some instances, affirmative actions and prioritization of marginalised individuals or groups are justified in order to fulfil the principles of non-discrimination and equality.⁴² In trafficking cases, this could include prioritizing efforts directed towards discriminated children more vulnerable to being trafficked.

Participation and inclusion

Every individual has a right to participate in the work towards the realization of his or her human rights, may they be of civil, political, social or economical nature. These principles emphasise the importance of empowering the rights-holders, in this case the children, so they are able to make informed decisions for themselves regarding their own life and well-being. But the principle also entail an obligation to include children who have survived trafficking in policy decisions regarding e g the issue of rehabilitation of victim or the question of how to improve a secure involvement of victims in prosecution of traffickers.⁴³

Accountability and rule of law

The principles of accountability and rule of law ensure that the recognized duty-bearers are held responsible if there are any discrepancies in the fulfilment of legally binding norms granting individuals their human rights. Furthermore, it entitles rights-holders to claim their breached rights and remedy for the violations committed through recognized institutions such as courts. For these principles to be upheld, a transparent system that easily can trace the chain of responsibility is necessary as well as effective and strong instruments, which can assert that the ones responsible are held accountable.⁴⁴ For most international instruments, a reporting system is utilized to ensure its effective implementation and some offer individuals the possibility to have their complaints tried.⁴⁵ The establishment of such a mechanism, which address human rights violations caused by trafficking

⁴¹ Bal KC Kumar (et al), 'Nepal: Trafficking in Girls With Special Reference to Prostitution: A Rapid Assessment' (2001 ILO/IPEC) 52.

⁴² UNFPA, supra note 29, 75.

⁴³ UNFPA, supra note 29, 76.

⁴⁴ UNFPA, supra note 29, 76.

⁴⁵ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (entered into force 22 December 2000) art 1,2.

could arguably enhance the enforcement of the rights of victims of trafficking or a comparable function mandated to National Rapporteurs on trafficking.⁴⁶

Furthermore, the concept of due diligence must be taken into consideration when addressing the issue of accountability, since it entails the actualization of state responsibility.⁴⁷ In the Guidelines adopted by OHCHR “states have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons”⁴⁸. The content of the concept of “due diligence” is nevertheless not clearly described, but it has been interpreted as demanding a certain level of seriousness of the efforts taken by the state in question.⁴⁹ The UN Human Rights Council has among others⁵⁰ taken it one step further in order to avoid the problem of withdrawal of trafficking cases due to intimidation of victims and witnesses. The council consider that within the concept of “due diligence”, an ex officio obligation for each state to investigate cases of trafficking is included, by stating that the participation or accusations of victims should not be “a precondition to the prosecution of trafficking.”⁵¹

Best interest of the child

The principle of the best interest of the child originates from art 3 in the CRC. It entails an obligation for duty-bearer in every decision as well as during a process to enforce a decision, to consider what the best interest of the child is. Thus, when making e.g. policy or legal decisions on child trafficking, the decisive factor whether it be of positive or negative nature, must at all times be the affect the decision will have on the children.⁵²

Summary

The analytical tool that will be utilized to analyze the gathered data from the minor field study in the next chapter is thus based on the combination of all of the above-mentioned principles. The tool is not claimed to be exhaustive, nor a reflection of the absolute truth. However, this version of a human rights-based approach is what the author sees as the most logical one in relation to the area of child trafficking. While reading the general characteristics of the framework, which later on will be utilized, it is important to bear in mind that a complete fulfilment of such a human rights-based approach probably is impossible since no society, with the exception of Utopia, is perfect.

⁴⁶ Amiel, *supra* note 24, 39ff.

⁴⁷ Commonwealth Secretariat ‘Report of the Expert Group on Strategies for Combating Trafficking of Women and Children: Best Practice’ (2002) art 2.

⁴⁸ OHCHR, ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’ (July 2002) 1 para 2.

⁴⁹ Gallagher, *supra* note 33, 382ff.

⁵⁰ Council of Europe ‘Convention on Action against Trafficking in Human Beings’ (adopted 15 May 2005, entered into force 1 February 2008) CETS No.: 197 art 27(1).

⁵¹ Trafficking Protocol, *supra* 8, art 3(b).

⁵² CRC, *supra* note 19, art 3.

In the following chapter, the collected information about the Nepalese legislation on anti-trafficking will be scrutinized with help of this framework. The box below serves as a summary of what the author believes to be a human rights-based approach appropriate to use on the issue of child trafficking. It could be helpful for the reader to have an overview over the factors and principles that needs to be taken into consideration while conducting the analysis.

Table 1

HUMAN RIGHTS BASED APPROACH
<ul style="list-style-type: none">• Victims-centered approach• Identification of rights-holders and duty-bearers• Consider the principles in every aspect of anti-trafficking efforts:<ul style="list-style-type: none">- Universality, Indivisibility, Interdependence, Inalienability and Interrelatedness of Human Rights- Participation and Inclusion- Non-discrimination and Equality- Accountability and Rule of Law- The best interest of the child

3 National case study: Nepal

3.1 Background on Nepal

The Federal Republic of Nepal is a non-coastal state, which is situated on the slope of the Himalayas in between two of the world's super powers; India and China. The political system in Nepal has undergone drastic changes in the past years. Between 1996 until 2007, a civil war plagued the country with hostilities between the Maoist rebels and the government forces under the command of the then regnant King Gyanendra. Factors contributing to the insurgency were the poor economic and social conditions the people of Nepal were and still are living under. In 2006, parliamentary democracy was reinstated by the King after pressure by the rebels and in the elections held in 2008 the Maoist Party gained the majority of the votes. Nepal was thereafter transformed from monarchy to republic. The then existing Maoist Party split in 2009. However, in the currently ruling coalition government the Maoist Party is represented.⁵³

The population in Nepal has increased vastly since the 1950's and is now calculated to more than 26,6 million.⁵⁴ Nearly 40 % of the population was in 2009 under the age of 14 years.⁵⁵

A national living standards survey conducted in 2011 by the World Bank implies that the poverty rate is decreasing; nevertheless 25.2 % of the population still lives in poverty. With a GDP of 490 USD per capita, Nepal comes on seventh place on the list of the world's poorest countries.

Religion plays generally a significant part in the everyday life of the citizens of Nepal. Back in the 1990's Nepal was the only country in the world that in its Constitution presented itself as a Hindu kingdom⁵⁶. Today, the interim constitution regulates religious freedom.⁵⁷ The demography of the religion in 2007 showed that 81 % of the population in Nepal identifies themselves as Hindus but also the Buddhist community is strongly represented. The Nepalese society is also divided into an intrinsic caste system, inspired by the Hindu system, with four varnas (castes) consisting of; Brahmins, Khsatryia, Vaishya, Sudra and the untouchables. Within the four or rather five different castes several subcategories exists which confuses the system

⁵³The World Bank 'Nepal Country Overview 2012', <<http://www.worldbank.org/np/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/NEPALEXTN/0,,contentMDK:22147453~pagePK:141137~piPK:141127~theSitePK:223555,00.html>> accessed 17 May 2012.

⁵⁴ Central Bureau of Statistics Nepal 'Preliminary Result of National Population Census 2011 Released' <<http://census.gov.np/>> accessed 10 April 2012.

⁵⁵ Central Bureau of Statistics Nepal 'Area and Population: Population Projection by Age and Sex for Nepal, 2001 – 2021', http://www.cbs.gov.np/Year_Book_2009/images/Final_Chapters/chapter1/1.16.pdf accessed 10 April 2012.

⁵⁶ Constitution of Nepal (1990) art 4(1).

⁵⁷ The Interim Constitution of Nepal, 2063 (2007) art 23.

further for an outsider.⁵⁸ Discrimination based on caste identity is now forbidden in the interim constitution.⁵⁹ However, the groups of Dalits and Janajatis are among those still discriminated against.⁶⁰ This also has shown to have a correlation to persons being vulnerable to trafficking.⁶¹

In relation to the poor conditions in Nepal a census showed that between 2010 and 2011, 400 000 Nepalese migrated abroad to seek work opportunities.⁶² Within Nepal, the unemployment rate is high⁶³ and as much as 42% of children below the age of 14 are being used as child labour and of these 21% are between 5-9 years with a prevalence of girl children. The majority of the child labour takes place within the agriculture sector.⁶⁴ This has obvious effects on the educational status of persons when looking at in particular the high illiteracy rates that are especially rampant in the rural areas of Nepal.⁶⁵

3.2 Trafficking in Nepal

The first signs of cases of trafficking date back to before the 1950's. At that time it was mostly girls being transported within the Nepalese borders for the purposes of forced labor and sexual exploitation. They were taken from the rural areas to the capital where they were forced to serve their rich employers.⁶⁶ Over time, the character of trafficking changed and evolved to include also cross border trafficking mainly to India. When the civil war begun in 1996, the presence of trafficking exploded due to the insecure conditions people were living under. The constant risks of violence made people seek ways of ensuring safety for themselves and family members. This included migration both within the borders as well as cross borders exposing them as migrants to unsafe environments and danger of exploitative situations.⁶⁷

Nepal is today known as mainly a source country for human trafficking. Women and girls are trafficked from Nepal to other countries or within the borders of Nepal mostly for the purpose of sexual exploitation while young boys are mainly victims of forced labour. Due to the problem of limited

⁵⁸ Lynn Bennett, Dahal Dilli Ram, Govindasamy Pav, 'Caste, Ethnic and Regional Identity in Nepal: Further Analysis of the 2006 Nepal Demographic and Health Survey' (2008) Macro International Inc 1f.

⁵⁹ The Interim Constitution of Nepal, 2063 (2007) art 14.

⁶⁰ Bennett, supra note 57, 4.

⁶¹ NHRC, supra note 13, 24.2

⁶² The World Bank 'Nepal Economic Update: Poverty Reduction and Economic Management, SAR' (September 2011) 11.

⁶³ Central Bureau of Statistics 'Nepal Living Standards Survey 2010/11 Reports' Vol 2 50f.

⁶⁴ Ibid. 51f.

⁶⁵ The World Bank 'Data: Nepal' <<http://data.worldbank.org/country/Nepal>> accessed 9 April 2012.

⁶⁶ NHRC, supra note 13, 8.

⁶⁷ NHRC, supra note 13, 8f.

ability to gain authentic statistics the exact number of children trafficked from Nepal every year is not confirmed.⁶⁸

3.2.1 Child trafficking in Nepal

As with the overall number of cases of trafficking, the statistic regarding trafficking in children is an area that is not fully reliable. No nationwide study has been conducted to establish an exact number. However, I/NGOs has made several attempts over the years to reach valid statistic of the number of children trafficked. One figure, which is often referred to, is the one estimated by a report by ILO/IPEC. It claims that 12 000 children yearly are trafficked over the Indian borders ending up in brothels where they are subjected to commercial sexual exploitation.

Table 2

Year	Record of OAG		Record of WCSC	
	Number	% out of total survivors	Number	% out of total survivors
2007/08	24	12.5	35	24.1
2008/09	6	4.3	87	44.2
2009/10	45	16.0	63	32.6
Average	25	12.2	62	34.6

Source: National Human Rights Commission, National report 2009-2010. (In the record of OAG only the cases registered in the District Courts are displayed)

As one can see in the table above the statistics vary to a large extent between the different actors. The record of OAG displays a significantly lower number than the record from the police. Another problem related to the issue of statistics is how to define trafficked children. In Nepal, there is a vast amount of missing children reported to the police, whom no one knows what has happened to. In the CCWB's annual report of 2010, 2 186 children were reported missing; 52% boys and 48% girls. Of these, 901 children are still not found.⁶⁹ In the Kathmandu Valley alone 983 children were missing 2010 with 63.4 % never to be found again according to the WCSC, Office of the Metropolitan Police Commissioner in the Kathmandu Valley.⁷⁰ These children may very well have become victims of human trafficking.⁷¹

The existing statistics show that the majority of child victims of trafficking for sexual exploitation are children who origin from the rural areas of Nepal. Often their families are poor and lack in education and therefore their children are easy prays for the organized gangs. Either the children are taken

⁶⁸ NHRC, supra note 13, iif.

⁶⁹ NHRC, supra note 13, 19.

⁷⁰ NHRC, supra note 13, 19f.

⁷¹ NHRC, supra note 13, 19.

from the families or the parents sell their children in hope of giving them a better future and to secure an income for the family.⁷²

The purpose of trafficking does not always entail sexual commercial exploitation. Children are also trafficked e g into the illicit trade of organs or for exploitation as bonded labour and as circus performers.⁷³

In the following chapter, the legal instruments in Nepal, which have shown to have an effect in the fight against child trafficking will be presented.

⁷² NHRC, supra note 13, 24.

⁷³ NHRC, supra note 13, 17, 19-21.

4 The Human Rights Legal Framework in Nepal

As explained in Chapter 2, a human rights-based approach is structured through a variety of international human rights principles. However, the content of the human rights-based approach is determined by the norms laid down in applicable legal instruments. It is therefore important to examine what the human rights legal framework in Nepal consists of.

Presented first in this chapter are those ratified international human rights treaties, which are considered to have most relevance for the specific issue of child trafficking. An examination of how, and to what extent these instruments are part of domestic law in Nepal follows.

Secondly, an overview is given of the domestic legislations in Nepal, which are believed to serve the greatest purpose in the fight against child trafficking. In this section, an attempt is made to incorporate a comparison between the international standards to which Nepal by ratification has agreed to and the content of provisions in the national legislation. The Chapter ends with a presentation of the actors in Nepal responsible for law enforcement.

4.1 International treaties ratified by Nepal

Nepal is a party to several of the treaties, which form part of the current international human rights framework. Out of the now nine core international human rights treaties,⁷⁴ Nepal has ratified six⁷⁵. Of these are the ICCPR, CEDAW and CRC most relevant to mention in the specific context of trafficking in Nepal. Although not legally binding, the articles in UDHR should also be considered since the declaration is generally viewed as part of customary international law.⁷⁶ These international instruments all contain human rights, which are violated by the acts of trafficking. Examples of these are the rights of the victims to liberty and security, self-determination, family life, privacy and non-discrimination.⁷⁷

As regards the issue of child trafficking, the provisions laid down in the CRC are of most importance. Nepal was one of the first countries to ratify the Convention on the Rights of the Child already back in 1990. One of the main provisions in the CRC is the well-known principle of the best interest of the child. As the name reveals, the provision entails a responsibility to always consider the best interest of children in actions and decisions taken concerning them. Besides the general rights of children like the right to life,

⁷⁴ OCHCR 'International Law: The Core International Human Rights Instruments and their monitoring bodies' <<http://www2.ohchr.org/english/law/>> accessed 20 May 2012.

⁷⁵ ICCPR, CEDAW, CRC, ICESCR, CERD, CAT.

⁷⁶ Henry Steiner, Philip Alston, Ryan Goodman, *International Human Rights In Context: Law, Politics, Morals* (3rd edn, Oxford University Press, 2007) 161.

⁷⁷ E.g. ICCPR art 1, 9; CEDAW art 7; CRC art. 16.

education and health the issue of trafficking and sexual exploitation is addressed. Art 34 prohibits the sexual exploitation in children while art 35 prohibits child trafficking for any purpose. In addition to the rules in CRC, Nepal is also obliged to follow the provisions established in the Optional Protocol to the CRC, on the sale of children, child prostitution and child pornography, which Nepal ratified in 2006.⁷⁸ Amongst other rules, art 8 focuses on the child's right in relation to judicial proceedings. The article emphasizes the obligation on the State to adjust the proceedings after children's needs. The child shall be given support all through the process, the identity of the child shall be protected and appropriate measures shall be taken in case of necessity to protect the child and his/her family from retaliation or intimidation.⁷⁹

By ratifying these international instruments, Nepal has undertaken obligations to also enforce the regulations in its domestic setting. One aspect, which might affect the efficiency of the implementation, is the unclear position of ratified international treaties in relation to national law in Nepal. Nepal is not categorized as either a monist or dualist state. In other words, it is not clear if an international treaty is directly applicable when ratified or if it requires a transformation into domestic law before it is enforceable. The Nepal Treaty Act, which was adopted first in 1990, gives prevalence to international treaties in case there is a conflict with domestic law.⁸⁰ However, this does not reveal anything about the status of international law within the domestic system as such, and clear, guiding precedents from the Nepali courts has been absent thus far.⁸¹

Despite of the uncertain status of ratified international treaties, the international legal framework of human rights has had an impact on the domestic legislation in Nepal. From the practice of the Supreme Court, one can discern an increasing liberal approach towards applying the provisions in the ratified conventions indirectly, namely by viewing constitutional provisions in the light of the human rights provisions. However, if the Supreme Court finds a conflict between domestic law and a treaty rule, it refers the issue to the GoN for appropriate alteration of the national law. Thus, while the latter process has a dualistic character, the actions of the Supreme Court suggest a system closer to monism.⁸² Consequently, there exist a high uncertainty of the status of ratified international legal instruments in the domestic legislation in Nepal which could have an affect on the implementation of the actual human rights standards laid down in some of them. Below will this be further examined when the national legislations in Nepal will be presented.

⁷⁸ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (adopted 25 May 2000, entered into force 18 January 2002) UNGA Res A/RES/54/263

⁷⁹ CRC, supra note 19, art 8.

⁸⁰ Nepal Treaty Act, 2047 (1990) art 9(1).

⁸¹ Edda Ed Kristjandsdottir, André Nollkaemper, Cedric Ryngaert, 'International law in domestic courts: Rule of law reform in post-conflict states' (2012) Oxford Transitional Justice Research 86f.

⁸² Ibid., 89-91.

4.2 Domestic legislations relating to child trafficking

Among the national legal instruments in Nepal, the Human Trafficking and Transportation (Control) Act is the legislative tool of most central importance in relation to trafficking in children. Even so, other legislative acts are also of interest in this specific context. By presenting the provision in the Interim Constitution first, a base is established from which the rest of the legal instruments can be presented. However, the order of the presentation of the legislations is also based on their practical relevance. While the Children's Act and the Human Trafficking and Transportation (Control) Act are legislative acts, which de facto are applied in trafficking cases involving children, the Interim Constitution and the Muluki Ain more generally address the issue of trafficking.

4.2.1 Interim Constitution of Nepal (2063), 2007

After the peace accord in 2006, an interim constitution was established to temporarily govern Nepal. However, four years later the government of Nepal has yet to adopt a final constitution for the country. The process has already been prolonged for several years and although another deadline for adoption of the new Constitution is set at May this year (2012), there is little hope among the population that this actually will happen.⁸³ Until the adoption takes place, the state of Nepal is serving under the Interim Constitution, which entered into force in 2007.⁸⁴ The overall protection of the Nepali citizen's human rights is laid down in the document and the Interim Constitution is actually progressive in its regulation specifically regarding the protection of children's rights. Hopefully, this will be kept in the final version of the Constitution or even better additionally improved. Article 22 is specifically aimed at granting children rights it includes a right for every child not to be exploited. Trafficking is explicitly referred to in art 29 (3), a paragraph which covers all persons not only children. The article states that no citizen of Nepal should be subject to human trafficking, slavery or bonded labour.

4.2.2 Muluki Ain (General Code)

The Muluki Ain is a general code, which was adopted in 1910 by the then regnant King. The most recent alterations and amendments were made in the Nepali year of 2064, which in the Gregorian calendar translates to 2007/2008.⁸⁵ Before 1986, the Mulukin Act was the only legislation that addressed crimes that come closest to acts now considered trafficking. However, it was not until the Trafficking and Transportation (Control) Act

⁸³ Interview with Dr Meena Poudel, National Programme Advisor, IOM Nepal (Katmandu, Nepal 27 February 2012).

⁸⁴ The Interim Constitution of Nepal, 2063 (2007).

⁸⁵ Muluki Ain (General Code) 2019 Nepal, preamble.

was implemented and later on amended that regulation on trafficking was introduced properly in Nepal.⁸⁶

Chapter 11 of the Muluki Ain is in its entirety dedicated to the issue of human trafficking and it states that it is prohibited to lure and take a person outside the territory of Nepal for the purpose of selling the him or her. If the suspect is apprehended before the actual exchange of the person, the prison sentence should render a maximum of 10 years whilst the sentence doubles if the “purchase” has finalized. If arrested on the territory of Nepal the buyer is subject to the same regulation.⁸⁷ In the second paragraph the punishment for luring a minor, a child below the age of 16 years, is regulated. The requirement of the act is to separate or lure to separate the child from his or hers legal guardian without the latter’s consent. The punishment for this is a fine of 500 USD and/or a prison sentence not exceeding three years.⁸⁸

4.2.3 Children’s Act

The Children’s Act, adopted in 1992 lays down several rights of children but for this study the right to access justice is in focus. The Act grants the right to any person to file a petition on behalf of a child if the child is subject to abuse. It also obliges Courts to prioritize petitions regarding children. However, the child does not need to be represented in the proceedings and his or hers views or wishes does not need to be taken into consideration by the Court. The only provision relating to the issue of trafficking is article 16, which prohibits persons to involve children in any ‘immoral profession’⁸⁹. Nowhere can a definition of ‘immoral provision’ be found and this has been a problem for the implementation of the provision in relation to trafficking for sexual exploitation. The legal age of maturity is determined to 16 years in the Children’s Act according to art 2 (a), which stands in contrast to the international standard of 18 years.

4.2.4 Human Trafficking and Transportation (Control) Act, 2064

The Human Trafficking and Transportation (Control) Act (hereinafter the Human Trafficking Act) specifically addresses the issue of trafficking in Nepal. In the English translation of the Human Trafficking Act the definition of trafficking reads as follows;

“Acts considered as Human Trafficking and Transportation:

(1) If anyone commits any of the following acts, that shall be deemed to have committed human trafficking:

(a) To sell or purchase a person for any purpose,

⁸⁶ Interview with Mr Pokhrel, Legal Counsel at CVICT (Kathmandu, Nepal 16 February 2012)

⁸⁷ Muluki Ain (General Code) 2019 Nepal, section 11:1.

⁸⁸ Muluki Ain (General Code) 2019 Nepal section 11:2.

⁸⁹ Children’s Act, 2048 (1992) Nepal, art 16.

- (b) To use someone into prostitution, with or without any benefit,
- (c) To extract human organ except otherwise determined by law,
- (d) To go for in prostitution.

(2) If anyone commits any of the following acts, that shall be deemed to have committed human transportation:

- (a) To take a person out of the country for the purpose of buying and selling,
- (b) To take anyone from his /her home, place of residence or from a person by any means such as enticement, inducement, misinformation, forgery, tricks, coercion, abduction, hostage, allurements, influence, threat, abuse of power and by means of inducement, fear, threat or coercion to the guardian or custodian and keep him/her into ones custody or take to any place within Nepal or abroad or handover him/her to somebody else for the purpose of prostitution and exploitation.”⁹⁰

Even though Nepal has not ratified the Trafficking Protocol, the definition presented above is highly influenced by the internationally recognized definition therein. As a comparison the definition in the Trafficking Protocol is presented below;

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

⁹⁰ Human Trafficking and Transportation (Control) Act 2064(2007) Nepal, art 4.

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.”⁹¹

The major visible difference between the two definitions is the fact that the Nepalese definition separates between acts constituting human trafficking and acts defined as human transportation. In alignment with the Trafficking Protocol, but in contrast to the Children’s Act, the Human Trafficking Act recognizes the legal maturity age to be 18 years.⁹² The very definition of trafficking has also broadened. In previous legislations, only cross border trafficking has been criminalized but now the Human Trafficking Act also include internal trafficking.⁹³

The Human Trafficking Act is very elaborate and covers many aspects of trafficking. It is not a mere criminal justice instrument serving as a base for the prosecution of the offenders, but it also includes regulations regarding the rights of victims. The Human Trafficking Act thus contains provision establishing the procedure of the police in trafficking cases⁹⁴, the establishment of rehabilitation centres for victims⁹⁵ as well as the right to compensation for victims⁹⁶. In the judicial process, several rules are included to ensure the rights of the victims. The identity of the victim as well as any information relating to the victim shall be kept confidential if so requested.⁹⁷ Furthermore, in-camera hearings where none other than the parties to the case and their representatives are allowed presence in the courtroom, is the principal rule in trafficking cases.⁹⁸

Furthermore, the Human Trafficking Act regulates that the Court should attest the initial statement made by the victim immediately after it is given. This means that the prosecutor has the possibility to proceed with cases even if the victims choose not to be present in the courtroom or even if they choose to withdraw their statement. The testimony is thus still valid and the prosecutor can present it as evidence of the defendant’s guilt. The rule was introduced after the courts experienced several withdrawals of statements in trafficking cases, which most likely depended on the victim being intimidated, threatened or bribed to silence. In fear of reprisals victims denied their initial statement and accusations made against the defendants. It is a positive and important addition to the Act especially since there is no specific witness protection legislation in place in Nepal at the moment.⁹⁹

⁹¹ Trafficking Protocol, supra note 8, art 3.

⁹² Human Trafficking Act, supra note 89, art 2 (d).

⁹³ Interview with members of AATWIN (Kathmandu, Nepal 12 March 2012).

⁹⁴ Human Trafficking Act, supra note 89, art 7.

⁹⁵ Human Trafficking Act, supra note 89, art 13.

⁹⁶ Human Trafficking Act, supra note 89, art 17.

⁹⁷ Human Trafficking Act, supra note 89, art 25.

⁹⁸ Human Trafficking Act, supra note 89, art 27 (2).

⁹⁹ Interview with members of AATWIN (Kathmandu, Nepal 12 March 2012).

However, there is a provision in the Human Trafficking Act, which is supposed to serve as the Act's base for victims protect. It grants the victims of trafficking the right to request and receive protection from the police if he or she can provide reasonable grounds for the need of the security.¹⁰⁰

Another interesting rule of procedure exclusively for trafficking cases is the reversed burden of proof. In other criminal cases, it is the prosecutor's responsibility to prove the defendant's guilt. However, in trafficking cases the defendant has lost his or her right to remain silence, and is instead forced to prove his or her innocence.¹⁰¹

Finally, it is important to note that trafficking cases are so called Government Cases which procedural wise means that the GoN takes the position of plaintiff. Hence, in cases of child trafficking, the victim is not the plaintiff but serves only as a witness in the trial.¹⁰²

4.3 Law enforcement actors in Nepal

Due to the complex nature of trafficking, several actors in the Nepalese society are involved as legal enforcement officials.

At macro level, the governmental institution responsible for the monitoring of children's right is the Ministry of Women, Children and Social Welfare. The MoWCSW was earlier only focused on women and social welfare and it was just in 2000, that the rights of children were included in the mandate of the ministry.¹⁰³ In 2001, the MoWCSW presented a National Action Plan against children and women for sexual and labour exploitation in which it mentioned that the ministry will "act as the "focal point" for carrying out programmes against trafficking".¹⁰⁴ However, the Ministry of Home Affairs is the ministry responsible of ensuring the actual adherence of the Nepalese laws.

Under the MoWCSW, the Central Children Welfare Board exists as a statutory body with the power to monitor the rights of children. The CCWB is responsible "for the full realization of the rights of the children of Nepal"¹⁰⁵. The CCWB is together with the MoWCSW main responsible for writing and submitting the periodic reports of the Convention on the Rights of the Child to the Committee of the Children's Right. Furthermore 75 District Children Welfare Boards are established, one in each district in

¹⁰⁰ Human Trafficking Act, supra note 89, art 26.

¹⁰¹ Interview with members of AATWIN (Kathmandu, Nepal 12 March 2012.

¹⁰² Human Trafficking Act, supra note 89, art 28.

¹⁰³ Government of Nepal Ministry of Women, Children and Social Welfare. 'Background' <<http://www.mowcsw.gov.np/background-7-en.html>> accessed 4 April 2012.

¹⁰⁴ MoWCSW supra note 7, 7.

¹⁰⁵ Central Children Welfare Board 'Objectives'

<<http://www.ccwb.gov.np/content.php?id=25>> accessed 4 April 2012.

Nepal, to ensure the local implementation of the governmental policies etc.¹⁰⁶

The constitutional quasi-judicial National Human Rights Commission has its own appointed Special Rapporteur on Trafficking in Women and Children, which is intended to be a focal mechanism for the specific issue of trafficking in Nepal. Monitoring the implementation of policies and laws and coordinating existing policies and programmes are amongst others the tasks for the OSRT.¹⁰⁷

The judiciary in Nepal consists of 75 District Courts, 16 Courts of Appeals and one Supreme Court, situated in Kathmandu. In the Interim Constitution, there is also a provision that enable the establishment of special courts from which e.g. the Labour Court and a Debt Recovery Tribunal have been created.¹⁰⁸

By a governmental initiative from the MoHA, the police system in Nepal has added special offices at every police district office specifically devoted to women and children. These so-called Women and Children Offices are intended to be established in every district, however up until today only a few offices have been set up. The staff at the Women and Children Offices is solely consisting of females, in an attempt to take the victims vulnerability into consideration.¹⁰⁹

Last but definitely not least, the big number of INGOs and NGOs present in Nepal are worth mentioning although they are not formally legal enforcement mechanisms. To a varying degree, their work and advocacy are making an impact in the enforcement of existing policies and laws in Nepal.

¹⁰⁶ Central Children Welfare Board 'Objectives'
<<http://www.ccwb.gov.np/content.php?id=25>> accessed 4 April 2012.

¹⁰⁷ NHRC, supra note 13, 17, 1f.1f.

¹⁰⁸ The Interim Constitution of Nepal, 2063 (2007) section 10.

¹⁰⁹ NHRC, supra note 13, 17, ix.ix.

5 Analysis of law enforcement in Nepal

This part of the paper continues with the presentation of the data gathered through the minor field study in Nepal. Interviews with actors on different structural levels were conducted in order to see to what extent the human rights legal framework in Nepal actually is implemented. Thus, this chapter reproduces the image of the current situation of law enforcement in relation to child trafficking in Nepal, which emerged from the interviews.

5.1 General opinion on the construction of the domestic anti-trafficking legislation and its alignment with international human rights treaties

As the headline reveals, this section is mainly based on the interviewees' general opinions on the existing human rights legal framework in Nepal and its compliance with ratified international human rights treaties.

Since the Human Trafficking Act and the Children's Act are the two legislative instruments that in practice are applied in cases of child trafficking, the following section is focused on their construction.

Children's Act

The adoption of the Children's Act in 1992, was clearly influenced by Nepal's ratification of the CRC in 1990. However, the Children's Act does not fully comply with the provisions in the CRC. Many loopholes in the Act are still unaddressed especially when it comes to child protection provisions.¹¹⁰ This caught the attention of the Committee on the Rights of the Child, which expressed its concern about the divergence from the international standards laid down in the CRC.¹¹¹ Nevertheless, the opinion of the Children's Act insufficiency does not stand uncontested. Some of the interviewees did claim the opposite and argued that in general is the legislation to a large extent an enactment of the ratified CRC.¹¹² Yet, all acknowledged the need for an amendment of the maturity age. Currently in Nepal, everyone younger than 16 years old is a child according to the Act.¹¹³

¹¹⁰ Interview with Tika Ram Pokhrel, Legal Counsel, CVICT (Kathmandu, Nepal) 16 February 2012); Interview with Patrizia Benvenuti, Child Protection Specialist, UNICEF (Kathmandu, Nepal 21 February 2012).

¹¹¹ Committee on the Convention on the Rights of the Child 'Concluding Observations: Nepal' (21 September 2005) CRC/C/15/Add.26, para 16.

¹¹² Interview with Mahesh Sharma Poudel, Joint Government Attorney, Office of the General Attorney (Kathmandu, Nepal 11 March 2012), Interview with Babu Ram, Executive Director, WOREC (Kathmandu, Nepal 1 March 2012).

¹¹³ Children's Act, 2048 (1992) Nepal, art 2(a).

The regulation therefore conflicts with the Human Trafficking Act as well as the CRC, which both follow the internationally recognized age of a child being any person younger than 18 years old.¹¹⁴

For the specific purpose of child trafficking, the Children's Act leaves a lot to desire since it does not contain a provision that prohibits trafficking in children. Art 16 of the CRC prohibits the involvement of children in immoral professions. As mentioned before, no clear definition on what exactly constitutes an immoral profession is given. Thus, only through interpretation has the crime of child trafficking for sexual exploitation been considered as included in the paragraph.¹¹⁵ Moreover, the sentencing of offenders of this regulation is a maximum of only 1 year of imprisonment together with a fine of 10 000 Nepalese rupees¹¹⁶, which is considered too lenient.¹¹⁷

These weaknesses results in the fact that the Children's Act does not really serve its purpose in practice. Neither the judiciary; when adjudicating cases of child trafficking nor the police; when investigation allegations of child trafficking, utilize the Children's Act. Instead both actors fully rely on the Human Trafficking Act, which is not an instrument specified for children's rights.¹¹⁸

At the moment in Nepal the MoWCSW has proposed amendments to the current Children's Act, and a draft is now under consideration in the Cabinet. The draft is not an official document available to the public; hence it cannot be analyzed in this paper. Nevertheless, through the interviews it appeared that the draft contains specific provisions targeting trafficking of children. Different forms of exploitation are added, expanding the crime of trafficking to include more than exploitation of sexual nature. The draft also raises the maturity age, from sixteen years to eighteen years, in conformity with other domestic legislation and international standards. Furthermore, witness protection provisions are incorporated into the revised draft although these are not only intended for children who are victims of trafficking but for all children whose rights have been violated in any way.¹¹⁹

¹¹⁴ Interview with Mahesh Sharma Poudel, Joint Government Attorney, Office of the General Attorney (Kathmandu, Nepal 11 March 2012).

¹¹⁵ Interview with Rup Narayan, Legal Counsel, FWLD (Kathmandu, Nepal the 29 February 2012); Interview with Patrizia Benvenuti, Child Protection Specialist, UNICEF (Kathmandu, Nepal 21 February 2012).

¹¹⁶ Children's Act, 2048 (1992) Nepal, art 53(4).

¹¹⁷ Interview with K.C Gokarna, Legal Counsel, MAITI Nepal (Kathmandu, Nepal 4 March 2012).

¹¹⁸ Interview with Judge X at the District Court (Kathmandu, Nepal 28 February 2012); Interview with police officer, Women Cell Department (Kathmandu, Nepal 29 February 2012).

¹¹⁹ Interview with Laxmi Prasad Tripathi, Under Secretary of the Ministry of Women, Children and Social Welfare (Kathmandu, Nepal 5 March 2012).

The Human Trafficking and Transportation (Control) Act

The Human Trafficking Act is rather extensive and elaborate in its structure, as presented in earlier chapters. Thus, it has become the domestic tool which is utilized most in practice as regards cases of child trafficking, by both NGOs, the judiciary and the police.¹²⁰ While the general opinion of the legislation is good, adjustments on specific issues needs to be done.¹²¹

The Human Trafficking Act is considered progressive in comparison to its predecessors. The main highlighted qualities are its provision which ensures a child friendly judicial process. These include the possibility to hold closed in camera hearings in court, the emphasis on the victim's right to privacy and the guarantee of a legal representative if the child and the child's family cannot afford it themselves.¹²² Furthermore, the provisions of the shifted burden of proof and the inclusion of internal trafficking into the definition are also warmly welcomed.¹²³

One source of criticism is voiced from the judiciary where some judges believe the severity of the punishment in the Human Trafficking Act actually might result in a counter effect. Art 15(1) in the Act states that if the defendant is found guilty of selling or buying a person then he or she should be sentenced to imprisonment for 20 years in combination with a fine of 200 000 Nepalese rupees. Forcing someone into prostitution results in a prison sentence of ten years,¹²⁴ while taking a child out of the country for sexual exploitation purposes is punished with prison for fifteen to twenty years.¹²⁵ Since the judges are not allowed any discretionary power in trafficking cases, the grade of severity of the acts committed by the defendant cannot be considered. If the suspect is found guilty of the crime then the judges must pass the sentence even if mitigating circumstances exists. This lack of discretion claims to have resulted in the acquittal of cases; not because the crime of trafficking could not be established but simply because the judges believed the punishment was too harsh in comparison to the nature of the crime and actions in question.¹²⁶

However, considering the effects of the wide margin of appreciation the predecessor to the current Human Trafficking Act had, the argument above can be counter argued. Back then, the discretionary power for the judge to determine a prison sentence for a crime of trafficking ranged between one year and up to twenty years. This resulted in 3-4 years imprisonment in the

¹²⁰ Interview with police officer at the Women Cell Department (Kathmandu, Nepal 29 February 2012).

¹²¹ Interview with K C Gokarna, Legal Counsel, MAITI Nepal (Kathmandu, Nepal 4 March 2012). Interview with Beshraj Sharma, Secretary of the Ministry of Law and Justice (Kathmandu, Nepal 2 March).

¹²² Interview with Judge Y at the Appeals Court (Kathmandu, Nepal 12 February 2012).

¹²³ Interview with members of AATWIN, (Kathmandu, Nepal 12 March 2012).

¹²⁴ Human Trafficking Act, *supra* note 89, art 15 (2).

¹²⁵ Human Trafficking Act, *supra* note 89, art 15 (1) (e) (1) and (2).

¹²⁶ Interview with Judge X at the District Court (Kathmandu, Nepal 28 February 2012).

majority of cases in the adjudicated by the District Courts, which often also was reduced after appeal. Adding to that, a procedural rule granted the defendant freedom from custody until it was time to serve the sentence, given that the sentence was less than six years imprisonment. Thus, the defendant often absconded, and never served any time at all. To some, this justifies the stricter punishment now legislated in the Human Trafficking Act. Yet, a balance between the two could be of greater value.¹²⁷

The alignment between the Human Trafficking Act and the ratified international human rights instruments are of good quality if compared to the Children's Act. Its focus on victim' protection and rehabilitation complies with the international regulations.¹²⁸ However, the lack of a specific definition for child trafficking should be addressed.

Conclusion

Overall, the interviewees' opinion of the anti-trafficking legislation is positive. Although some amendments are requested, especially in the case of the Children's Act, the existing legislation is considered sufficient for its purpose to address trafficking. This might make one believe that no problems exist in Nepal as regards child trafficking. It could not be further from the truth.

Yes, the content of the anti-trafficking legislation, at least when it comes to the Human Trafficking Act, is sufficient. However, this does not say anything about the actual implementation of rules. The unanimous answer received in the interviews was that the problems Nepal face as regards child trafficking does not stem from poor legislation but rather from an inadequate implementation of the existing provisions.¹²⁹ Simply because there exist provisions granting victims, the right to protection does not mean that it is actually given.¹³⁰ The question of why the implementation of the anti-trafficking legislation in Nepal is lacking will be further elaborated on in the next section.

¹²⁷ Interview with Rup Narayan, Legal Counsel, FWLD (Kathmandu, Nepal the 29 February 2012).

¹²⁸ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (adopted 25 May 2000, entered into force 18 January 2002) UNGA Res A/RES/54/263 art 8.

¹²⁹ E.g. Interview with Laxmi Prasad Tripathi, Under Secretary of the Ministry of Women, Children and Social Welfare (Kathmandu, Nepal 5 March 2012; Interview with police officer at the Women Cell Department (Kathmandu, Nepal 29 February 2012); Interview with K C Gokarna, Legal Counsel at MAITI Nepal (Kathmandu, Nepal 4 March 2012); Interview with Padma Mathema, Special Rapporteur on Trafficking in Persons on Women and Children, National Human Rights Commission (Kathmandu, Nepal 28 February 2012).

¹³⁰ Human Trafficking Act, *supra* note 89, art 26.

5.2 Challenges with the implementation of anti-trafficking legislation

As explained above, the problem with the legal treatment of child trafficking in Nepal does not stem from an inadequate legislation. From the obtained data, six main reasons emerged which according to the opinion's of the interviewees are causing the poor implementation of the anti-trafficking legislation. These will be addressed in this section.

5.2.1 Lack of administrative coordination and efficiency

A frequent explanation used by the Government of Nepal to explain the poor implementation of the trafficking legislation is that the country is in a transitional period after the civil war. It is therefore justified that focus is entirely directed towards ensuring the success of the peace process and the completion of the new constitution. The strengthening of the implementation of legislation on trafficking is thus not a priority. As much as this is the reality at the moment for Nepal, one could question how long the GoN can blame its passivity on this issue on the process of drafting a constitution, which parenthetically should have been adopted years ago.¹³¹

The transitional period also results in an instable and almost chaotic political power structure. Since the political situation in Nepal the last couple of years has meant that the party holding political power is shifted every 7-12 months, personnel are transferred from one Ministry to another at the same rate. This leaves any possibility for continuity in the work of the Ministries impossible to obtain. The personnel at the Ministries are furthermore overwhelmed by all of the different NGOs and INGOs approaching the Ministries with request for support and funds. They all have the same goal, to find a solution to the crime of trafficking, but approach the Ministries with different plans, which results in frustration rather than progress.¹³² This problem is thus not isolated to the works of the NGOs but exist also at governmental level. There is no functioning cooperation between the different Ministries in the fight against trafficking and no effective monitoring or evaluation of the anti-trafficking efforts actually initiated.¹³³ The Ministry, which should serve as a focal point for joint efforts, is the MoWCSW. This is also the Ministry within the GoN, which is considered main responsible for ensuring an effective implementation of the

¹³¹ Interview with Babu Ram, Executive Director, WOREC (Kathmandu, Nepal 1 March 2012); Interview with Dr Meena Poudel, National Programme Advisor, IOM (Kathmandu, Nepal 27 February 2012).

¹³² Interview with Babu Ram, Executive Director, WOREC (Kathmandu, Nepal 1 March 2012); Interview with Dr Meena Poudel, National Programme Advisor, IOM (Kathmandu, Nepal 27 February 2012).

¹³³ Interview with Dr Meena Poudel, National Programme Advisor, IOM (Kathmandu, Nepal 27 February 2012).

anti-trafficking legislation.¹³⁴ However, this opinion is not shared by the MoWCSW itself which stresses the complexity of the issues involving the implementations of children's rights. Not one Ministry is responsible for enforcing these rights since the consequences of trafficking overlap between different Ministries. Therefore, should the affected Ministries instead jointly address the problem and share the burden of responsibility.¹³⁵

The lack of strength the MoWCSW display in its attempt to be the focal point of all anti-trafficking efforts is believed to be a result of the Ministries lack in both human and financial resources. This lack in allocated funds could stem from the fact that the MoWCSW is not the most prioritized Ministry in the GoN. Its non-profit nature and focus on women and children is believed to be the reason for this treatment.¹³⁶ Signs of this view of the MoWCSW could be discerned when the GoN in 2010, the year which was dedicated to end gender based violence, chose to establish a specific office for this purpose as a part of the Prime Minister's Office, instead giving the primary responsibility to the MoWCSW. This resulted in both an allocation of financial support away from the MoWCSW and to the ad hoc office but also in the undermining of the importance and role of the Ministry.¹³⁷ However, representatives from the MoWCSW itself does not agree with this opinion but rather consider the establishment of the office for gender based violence as a progressive step made by the GoN.¹³⁸

Overall, are the opinions of the interviewees' on the political leadership in Nepal not overly positive. There is no trust in the political leadership's will to achieve any progress in the fight against child trafficking, nor in the way the resources are spent.¹³⁹ Corruption is rampant in Nepal, which gets a 2.2 on the Transparency International scale where 10 is given to countries with no corruption.¹⁴⁰ Even though the existing corruption is general, it cannot be excluded that cases of trafficking is affected by e.g. bribes to judges or police officers in order to close cases.¹⁴¹ The lack of adherence to the principle of accountability and rule of law is here very visible. Transparency in decision-making through monitoring mechanisms functioning as checks

¹³⁴ Interview with Judge X at the District Court (Kathmandu, Nepal 28 February 2012);¹³⁴ Interview with Babu Ram, Executive Director, WOREC (Kathmandu, Nepal 1 March 2012); Interview with Punyahshita Dawadi, Legal Counsel, LACC (Kathmandu, Nepal 15 February 2012); Interview with Pramod Kumar Karki, Secretary of the Nepal Law Commission (Kathmandu, Nepal 26 February 2012).

¹³⁵ Interview with Laxmi Prasad Tripathi, Under Secretary of the Ministry of Women, Children and Social Welfare (Kathmandu, Nepal 5 March 2012).

¹³⁶ Interview with members of AATWIN (Kathmandu, Nepal 12 March 2012).

¹³⁷ Interview with Dr Meena Poudel, National Programme Advisor, IOM (Kathmandu, Nepal 27 February 2012).

¹³⁸ Interview with Laxmi Prasad Tripathi, Under Secretary of the Ministry of Women, Children and Social Welfare (Kathmandu, Nepal 5 March 2012).

¹³⁹ Interview with Tika Ram Pokhrel, Legal Counsel, CVICT (Kathmandu, Nepal) 16 February 2012).

¹⁴⁰ Transparency International 'Corruption by Country: Nepal'
<http://www.transparency.org/country#NPL_DataResearch_SurveysIndices> accessed 1 May 2012.

¹⁴¹ Interview with Mahesh Sharma Poudel, Joint Government Attorney, Office of the General Attorney (Kathmandu, Nepal 11 March 2012).

and balance is necessary to stifle these acts. In connection with the existence of corruption is the problem of the power relation in society that presents itself in trafficking cases. Trafficking networks are often very powerful and financially strong and the involvement of politicians is not uncommon. These networks often subject anti-trafficking organizations, the victims and the legal counsels to drop charges of trafficking. This is especially frequent if the suspect in any way is related to a political party, since a conviction could through media attention affect the outcome of future elections. Without the actual political will to change the situation for trafficking victims and ensure implementation, improvements are hard to reach.¹⁴²

5.2.2 Lack of resources

Another factor, which affects the poor implementation of the anti-trafficking legislation, is the lack of both economical and human resources in Nepal. The country is as previously stated, one of the poorest in the world and this evidently affects the ability of the law enforcement mechanisms.¹⁴³

Brief examples of this is the lack of human resources within the police force results in the fact that personnel allocated to investigate trafficking cases does not include criminal investigators who have the necessary judicial knowledge. Furthermore, the police are given no special budget from the GoN to allocate to the complex cases of trafficking, which makes them more reluctant to prioritize the cases.¹⁴⁴ At the Women Cell Department in Kathmandu, they cannot even afford vehicles. Consequently, they are forced to go by foot in order to investigate crimes. They are neither able to send suspects to court nor send victims to hospital for treatment if needed.¹⁴⁵

But it is also important to remember that social welfare actors are at least as significant as the police or the judiciary in the implementation of children's rights. Poor economic conditions in Nepal results in a practically non-existing social welfare system, why there are no service provisions that effectively can be implemented in Nepal.¹⁴⁶

¹⁴² Interview with Babu Ram, Executive Director, WOREC (Kathmandu, Nepal 1 March 2012).

¹⁴³ Interview with Padma Mathema, Special Rapporteur on Trafficking in Persons on Women and Children, National Human Rights Commission (Kathmandu, Nepal 28 February 2012).

¹⁴⁴ Interview with K C Gokarna, Legal Counsel at MAITI Nepal (Kathmandu, Nepal 4 March 2012).

¹⁴⁵ Interview with a police officer at the Women Cell Department (Kathmandu, Nepal 29 February 2012).

¹⁴⁶ Interview with Patrizia Benvenuti, Child Protection Specialist, UNICEF (Kathmandu, Nepal 21 February 2012).

5.2.3 Lack of authentic data

Furthermore, when addressing the issue of trafficking in general, the access to reliable statistics is a prerequisite in order to find adequate solutions to the problem and its root causes. Among the interviewees, there was a consensus that no authentic data regarding trafficking exist in Nepal.¹⁴⁷

The Central Bureau of Statistics, which is the agency for collecting statistic in Nepal, does not present any data regarding trafficking and its different aspects. However, even if CBS would present statistics it is questioned if it would represent the real scenario in Nepal today, since trafficking is a clandestine crime, which demands more complex methods than simple surveys. According to many of the interviewees, there definitely exist more cases of trafficking than what is reported to the police today. However, identifying and obtaining data from victims of trafficking is almost impossible unless they are registered at the police.¹⁴⁸

Even if the existing statistics are lacking in trustworthiness, estimations are often made by various organizations. The estimated numbers produced by different actors are significantly higher than what is shown in documentation from the police and the courts.¹⁴⁹ An often referred to estimation of trafficking victims for sexual exploitation in Nepal is 12 000 women and children annually.¹⁵⁰ However, there are concerns that the discrepancy between the reported cases of trafficking and the estimated unknown number is not so big and that the high statistics presented by the NGOs possibly make trafficking seem to be a bigger problem than it in reality is.¹⁵¹

The lack of any authentic data makes the work with advocacy and prevention of trafficking at grass root level difficult and confusing. When the existing data is not trustworthy NGOs does not have any indication whether or not cases of trafficking are increasing or decreasing. Another aggravating circumstance is that the statistics of trafficking cases documented by the courts in Nepal does not separate children from adults, thus making it even harder to estimate the number of children trafficked

¹⁴⁷ Interview with Sharada Basyal, Women Development Officer at the Office of Women and Children (Kathmandu, Nepal 15 March 2012); Interview with Laxmi Prasad Tripathi, Under Secretary of the Ministry of Women, Children and Social Welfare (Kathmandu, Nepal 5 March 2012); Interview with Judge X at the District Court (Kathmandu, Nepal 28 February 2012); Interview with judge of the Court of Appeals (Kathmandu, Nepal 12 February); Interview with Babu Ram, Executive Director, WOREC (Kathmandu, Nepal 1 March 2012); Interview with Mr Rup Narayan, Counsel at the FWLD, (Kathmandu, Nepal 29 February 2012); Interview with Punyashita Dawadi, Legal Counsel at LACC (Kathmandu, Nepal 15 February 2012).

¹⁴⁸ Interview with Laxmi Prasad Tripathi, Under Secretary of the Ministry of Women, Children and Social Welfare (Kathmandu, Nepal 5 March 2012).

¹⁴⁹ Interview with Mr Rup Narayan, Counsel at the FWLD, (Kathmandu, Nepal 29 February 2012).

¹⁵⁰ Bal KC Kumar (et al), 'Nepal: Trafficking in Girls With Special Reference to Prostitution: A Rapid Assessment' (2001 ILO/IPEC) 1.

¹⁵¹ Interview with Judge X at the District Court (Kathmandu, Nepal 28 February 2012).

every year.¹⁵² If the data concerning trafficking victims would be correct and specific, the situation would be clarified and thus appropriate efforts could be issued.¹⁵³

5.2.4 Lack of knowledge of the law enforcement personnel

A crucial part of a successful implementation of anti-trafficking legislation is to ensure that persons working with law enforcement are updated on the content and meaning of the legal provisions but also that they are sensitized as to how to handle victims of trafficking.

The lack of knowledge is spread throughout all levels of law enforcement, thus also within the judicial sphere. It is claimed that the procedural laws regulated in the Human Trafficking Act is not applied consistently in the courts of Nepal. The provisions ensuring the victims of trafficking the right to closed hearings and hidden identity are not always implemented due to the fact that often are neither the police nor the public prosecutor of the existence of these rights. The referral to old versions of legislation is not uncommon which leads to the conclusion that if the persons working in the judiciary is not up to date with the rights of the victims, it comes as no surprise that many of the victims are themselves unaware of their rights.¹⁵⁴

The lack of knowledge is also evident when it comes to internal trafficking within the borders of Nepal. The Human Trafficking Act now recognizes this as a crime but many law enforcement officials has not been made aware of this thus they still regard only cross border trafficking as a crime. A directive by the Supreme Court was drafted regarding the issue of internal trafficking and in 2007; a Monitoring Committee was established to deal with this specific problem. It is however claimed that today, four years later, the members of this committee are not even aware of the directive let alone their supposed task to be a member of the committee.¹⁵⁵

However, there is anti-trafficking education provided to both the police as well as the public prosecutors. The police are trained by the Police Academy on how to investigate cases of trafficking while the judiciary is provided with education from the National Judicial Academy. The NJA has during the last year established its own prosecuting centre but specific training programmes for trafficking is still neglected. While it is very positive that training is provided for personnel within the law enforcement sector it should be more adapted to the changing context of trafficking. A chance for Nepalese attorneys to be exposed to foreign standards of procedures, e.g.

¹⁵² Interview with Judge Y at the Court of Appeals (Kathmandu 12 February 2012).

¹⁵³ Interview with Babu Ram, Executive Director, WOREC (Kathmandu, Nepal 1 March 2012).

¹⁵⁴ Interview with members of AATWIN (Kathmandu, Nepal 12 March 2012).

¹⁵⁵ Interview with members of AATWIN (Kathmandu, Nepal 12 March 2012).

through exchange of training is advocated as a solution to broaden the skills on the area of child trafficking.¹⁵⁶

The way in which anti-trafficking strategies are taught is also an important factor to consider. A defective approach might namely lead to negative consequences. One example of this is the questionable anti-trafficking methods used by some NGOs active in the border area between Nepal and India. Since there is no border control in between the two neighbouring countries, a question that will be further explored in the coming section, children can easily be transported over the border to Indian brothels or factories. Therefore, NGOs has resorted to drastic measures, often treating women or children crossing the border to India as criminals. The NGOs question them as if they were subject to a police interrogation and demand to know their place of destination and they intend to do there. They sometimes also physically prevent women and children from crossing the border. These actions only put more restrictions on women and children's freedom and thus works counter act the purpose of enforcing the human rights of women and children.¹⁵⁷

5.2.5 Open border policy towards India

In 1956, a bilateral agreement between Nepal and India was adopted, which determined that the border between the neighbouring countries was open without any passport controls. While the policy probably was adequate when established, the context of the situation today requires a change.¹⁵⁸

The majority of the victims the Women and Children's Office in Kathmandu encounters are girls rescued from India or the border area in between Nepal and India. They have in the majority of cases been subjected to sexual exploitation in Indian brothels. This is believed to be the fault of the open border policy since it facilitates the very problem of the existence of trafficking.¹⁵⁹

Another consequence of the open border policy towards India is the fact that it also impedes justice delivery for victims. A prominent problem in the Nepali courts when adjudicating trafficking cases is the lack of sufficient evidence. India is in many cases of child trafficking, the country of destination and since Nepal has an open border policy towards India but no legal assistance agreement, and it is difficult for the Nepalese police to obtain the necessary evidence for securing prosecution of cases.¹⁶⁰ Since no registration whatsoever is required when crossing the border it can be hard

¹⁵⁶ Interview with Mahesh Sharma Poudel, Joint Government Attorney, Office of the General Attorney (Kathmandu, Nepal 11 March 2012).

¹⁵⁷ Interview with members of AATWIN (Kathmandu, Nepal 12 March 2012).

¹⁵⁸ Interview with Dr Meena Poudel, National Programme Advisor, IOM (Kathmandu, Nepal 27 February 2012).

¹⁵⁹ Interview with Sharada Basyal, Women Development Officer, Women and children's office (Kathmandu, Nepal 15 March 2012).

¹⁶⁰ Interview with Judge X at the District Court (Kathmandu, Nepal 28 February 2012).

for victims to actually prove that they have crossed the border at all. Most of the times the victim has been away for several years being exploited and cannot recall the details of the trip over the border or the name or identity of the initial trafficker.¹⁶¹

However, the solution to the problem is not to close the border or to restrict the mobility of persons to go to India. India and Nepal are so close when it comes to culture, economies and politics so a closed border would not work.¹⁶² Nevertheless, some kind of mechanism should regulate the border so that it ensures the freedom of mobility without the existing possibility for criminals to manipulate it.¹⁶³ There is also a need for a mutual assistance act to allow joint investigations with countries, not only India. Today no sufficient bilateral treaties regarding joint investigations or extradition exist. However, there are two bills regarding extradition and mutual legal assistance under consideration in the Parliament at the moment which hopefully will be approved.¹⁶⁴

5.2.6 Lack of reported cases

One reason to the insufficient implementation of anti-trafficking regulation that is of key importance is the fact that so few cases of trafficking in general, and child trafficking in particular, are reported. The number of reported trafficking cases in 2011 was 150, a significantly lower number than what the NGOs believe to be true.¹⁶⁵ Some victims of trafficking are not aware that they are trafficked, some are not aware that they have a right to file a case and some say it is their destiny to have been subjected to this situation.¹⁶⁶

There are many different aspects to why cases of trafficking are not reported to the authorities in Nepal. Below are four categories that reflect the main root-causes according to the opinion of the interviewees.

Unfriendly victim environment

One major factor deterring victims from filing police reports of exploitation through trafficking is the unfriendly environment that awaits them in court. Even if legislation is in place to ensure a victim friendly environment these

¹⁶¹ Interview with Judge X at the Court of Appeals (Kathmandu 12 February 2012).

¹⁶² Interview with Sharada Basyal, Women Development Officer, Women and children's office (Kathmandu, Nepal 15 March 2012). Interview with members of AATWIN (Kathmandu, Nepal 12 March 2012).

¹⁶³ Interview with Dr Meena Poudel, National Programme Advisor, IOM (Kathmandu, Nepal 27 February 2012).

¹⁶⁴ Interview with Besh Raj Sharma, Secretary, Ministry of Law and Justice (Kathmandu, Nepal 2 March 2012).

¹⁶⁵ Interview with Padma Mathema, Special Rapporteur on Trafficking in Women and Children, National Human Rights Commission (Kathmandu, Nepal 28 February 2012).

¹⁶⁶ Interview with members of AATWIN (Kathmandu, Nepal 12 March 2012).

are not effectively ensured and most victims or witnesses do not feel comfortable asking for protection or help.¹⁶⁷

Since trafficking is considered a public crime, the victims are not the ones filing the case but instead the state is the plaintiff.¹⁶⁸ The victims are therefore only called to court as witnesses. Most likely the victims only gets to meet the public prosecutor one time before the proceedings starts. Often they are not sufficiently prepared for what is about to happen in the courtroom and are therefore overwhelmed when the trial begins. When arriving at the court there is often a big crowd of persons around the courts vicinity. The defendant is not kept apart from the victim and in the majority of cases no one is making sure that the victim does not feel threatened. Another issue is the fact that victims are responsible for their own transportation to and from court. In a country like Nepal, not many persons can afford their own vehicle why this also contributes to a stress factor for victims since they often are frightened to meet the perpetrator on the public transportation.¹⁶⁹

Furthermore, the lengthy proceedings deter victims from bringing their case to court. Today it takes at least a year for a trafficking case to be completed. During this period the victim needs to be present in the court several times which of course can be very difficult mentally for him or her due to above mentioned circumstances. One known case of trafficking took 15 years to finalize adding to reasons for people's reluctance to rely on the Nepalese legal system.¹⁷⁰

A serious impediment of justice delivery for victims of trafficking is the intimidation victims and witnesses are subjected to by the perpetrators and their network, if they report the crimes committed to the police. The responsibility to ensure the protection of victims lies with the Government.¹⁷¹ At the political level, the opinion is that the implementation of the provisions ensuring protection is sufficient and that they are implemented properly.¹⁷² The police however claim that their budget does not allow them to ensure the victims' safety.¹⁷³ A big concern is that the offenders often are or have contact with influential persons whose position in society alone can make victims of trafficking hesitate to report them to the police.¹⁷⁴

¹⁶⁷ Interview with members of AATWIN (Kathmandu, Nepal 12 March 2012).

¹⁶⁸ Human Trafficking Act, supra note 89, art 28.

¹⁶⁹ Interview with members of AATWIN (Kathmandu, Nepal 12 March 2012).

¹⁷⁰ Interview with Padma Mathema, Special Rapporteur on Trafficking in Women and Children, National Human Rights Commission (Kathmandu, Nepal 28 February 2012).

¹⁷¹ Interview with Besh Raj Sharma, Secretary, Ministry of Law and Justice (Kathmandu, Nepal 2 March 2012).

¹⁷² Interview with Sharada Basyal, Women Development Officer, Women and children's office (Kathmandu, Nepal 15 March 2012).

¹⁷³ Interview with police officer at the Women Cell Department (Kathmandu, Nepal 29 February 2012).

¹⁷⁴ Interview with Laxmi Prasad Tripathi, Under Secretary of the Ministry of Women, Children and Social Welfare (Kathmandu, Nepal 5 March 2012).

Intimidation is not the only way to make sure victims refrain from reporting the violations. Bribes to victims and their families are also used. Money, education or food is offered in exchange for the withdrawal of cases. In a poor country like Nepal, this is often a successful approach for the defendant.¹⁷⁵

At the moment the Nepal Law Commission has developed a draft of a Witness Protection Act specialized for the Nepali context. This is however still under process and review. Again, the draft is not official documents it cannot be reviewed here.¹⁷⁶ However, while all of the interviewees are positive towards the current draft of a Witness Protection Act, some does not recognize the correlation between the lack of reported cases of trafficking in the courts of Nepal and the fact that there is no witness protection act existing today. According to them, the Trafficking Act holds provisions addressed towards this specific issue and those provisions are adequate.¹⁷⁷ The occurrences of intimidation are the result of poor implementation of the existing provisions and not deficient legislation.¹⁷⁸ Since the draft is still under process, no one knows how the final draft will be formulated. The civil society and NGOs are not consulted until the very last part when new legislation is in the process of being adopted. At that point, the NGO feel that their opinions have a very little impact on the outcome and that no real change can be done.¹⁷⁹

Furthermore, the unfriendly environment for victims' spills over on the lawyers and activists helping the victims to achieve some justice, who also are subjected to threats against their and their families' lives. Working with the issue of trafficking means challenging the social structure in the patriarchal society existing in Nepal, which exposes them to even more risks. Even the family of the victim is sometimes threatening the lawyer or activist because he or she through helping the person is not supporting the power structure of the family.¹⁸⁰ These problems are not, to the author's knowledge, addressed in the above-mentioned draft.

¹⁷⁵ Interview with Babu Ram, Executive Director, WOREC (Kathmandu, Nepal 1 March 2012); Interview with K C Gokarna, Legal Counsel at MAITI Nepal (Kathmandu, Nepal 4 March 2012); Interview with Mr Rup Narayan, Counsel at the FWLD, (Kathmandu, Nepal 29 February 2012).

¹⁷⁶ Interview with Mr Kumar Karki, Secretary of the Nepal Law Commission, the 26th of February.

¹⁷⁷ Interview with Judge X at the District Court (Kathmandu, Nepal 28 February 2012).

¹⁷⁸ Interview with Mahesh Sharma Poudel, Joint Government Attorney, Office of the General Attorney (Kathmandu, Nepal 11 March 2012).

¹⁷⁹ Interview with members of AATWIN (Kathmandu, Nepal 12 March 2012); Interview with Dr Meena Poudel, National Programme Advisor, IOM (Kathmandu, Nepal 27 February 2012); Interview with Babu Ram, Executive Director, WOREC (Kathmandu, Nepal 1 March 2012).

¹⁸⁰ Interview with Dr Meena Poudel, National Programme Advisor, IOM (Kathmandu, Nepal 27 February 2012); Interview with Tika Ram Pokhrel, Legal Counsel, CVICT (Kathmandu, Nepal 22 February 2012); Interview with K C Gokarna, Legal Counsel at MAITI Nepal (Kathmandu, Nepal 4 March 2012).

Stigma in society

Another issue, which effects the implementation of legislation regarding trafficking, is the fact that in general trafficking is considered taboo in Nepal. An enormous stigma surrounds victims since trafficking ordinarily is equalized with sexual exploitation. Consequently, this means that society does not cooperate in investigations of trafficking cases

A good example is the right to police protection granted victims according to the Human Trafficking Act as mentioned previous mentioned. This right to protection is not taken advantage of by the victims. The reluctance to contact the police for protection stems from the risks involved. Police protection carried out in villages on the countryside would undoubtedly be very visible, making the entire community aware of the fact that the child is a victim of trafficking. The consequences would be devastating for the child due to the problem of stigma surrounding the crime of trafficking for commercial sexual exploitation. The child and his or her family would risk being object of hatred and alienation and therefore protection from the police is hardly ever requested.¹⁸¹

Mostly the victims cannot even rely on the support of their families.¹⁸² When children or adults return home after having been trafficked, they are not allowed even to enter their home village. The families receive the money the children are sending them from their exploitative labour, but when they return home again they are discarded because they are a shame to the family.¹⁸³ Paradoxically, in many cases there is a close relationship between the trafficker the victim. This is also a factor why victims choose to not report their cases to the police.¹⁸⁴

The stigma surrounding victims of trafficking and in particular victims of trafficking for commercial sexual exploitation are being addressed by different NGOs through awareness raising campaigns in the rural areas of Nepal, however a change in societal behaviour takes a long time to reach.¹⁸⁵

Weak system of compensation

The system for compensating victims of trafficking is deficient. An unofficial study by AATWIN reveals that only 2 % of the cases taken to Court are given compensation according to the verdict.¹⁸⁶

In the few cases where compensation is imposed by the court in favour of the victim, the defendant is supposed to pay. However, it is often only the

¹⁸¹ Interview with Padma Mathema, Special Rapporteur on Trafficking in Women and Children, National Human Rights Commission (Kathmandu, Nepal 28 February 2012).

¹⁸² Interview with a police officer at the Women Cell Department (Kathmandu, Nepal 29 February 2012).

¹⁸³ Interview with Padma Mathema, Special Rapporteur on Trafficking in Women and Children, National Human Rights Commission (Kathmandu, Nepal 28 February 2012).

¹⁸⁴ Interview with Padma Mathema, Special Rapporteur on Trafficking in Women and Children, National Human Rights Commission (Kathmandu, Nepal 28 February 2012).

¹⁸⁵ Interview with Besh Raj Sharma, Secretary, Ministry of Law and Justice (Kathmandu, Nepal 2 March 2012).

¹⁸⁶ Interview with members of AATWIN (Kathmandu, Nepal 12 March 2012).

intermediaries within the trafficking network that are caught by the police. These persons do in the majority of cases not have any assets, financially or property wise from which the compensation can be drawn. Instead, offenders usually prefer to serve their time in jail if the choice is given, since in prison they are at least ensured meals every day. In the cases where victims actually receive some compensation, half of the amount is by law supposed to go to the funding of the rehabilitation homes installed by the Government.¹⁸⁷ There is no monitoring system to control how the money is invested. Some of the NGOs joke about the fact that the more children trafficked, the better for the Government.

Furthermore, to actually receive the compensation imposed by the court, the victims still needs to fill in an application and hand in to court within a certain period or the compensation will be lost. This is yet another obstacle for the victim to get redress.¹⁸⁸

Citizenship

Indirectly, the issue of citizenship in Nepal affects the lives of victims of trafficking and their desire to report their cases to the police. Citizenship is one of the issues that are based on a discriminatory treatment of women in relation to men in Nepal. First, when turning 16 years old are children entitled to apply for a certificate, which ensures their citizenship rights. Until 2006, children were only able to apply for the certificate based on their fathers' identity. If the father was a Nepalese citizen then the child had the right to receive the certificate. However, the girl child always had to have their fathers or husbands support in the application. A requirement that was not obligatory for an application of a boy child. When the Interim Constitution was adopted in 2006, it contained an amendment, which granted children the right to also apply for the certificate based on the identity of their mother.¹⁸⁹ According to the interviewees in the minor field study, this amendment has yet to be implemented in practice thus; it is still discriminating against the female population in Nepal.¹⁹⁰

In relation to trafficking victims, the issue of citizenship has importance. As described by the interviewees, children who are trafficked for commercial sexual exploitation are often trafficked in the age of 7-8 years old. If they are able to return to their homes, they have often reached adulthood without having had the ability to apply for the certificate of citizenship. The lack of citizenship has significance on their motivation to report their case to the authorities. Even if the victims would remember from which part of Nepal, they come from or the names of their parents, the father is usually reluctant to acknowledge the now adult individual as his child due to the fact that the child has been trafficked. This is why citizenship for especially a girl child

¹⁸⁷ Human Trafficking Act, supra note 89, art 14(2)(c).

¹⁸⁸ Interview with members of AATWIN (Kathmandu, Nepal 12 March 2012).

¹⁸⁹ Y R Luintel (ed) *In Search of Identity: The Social and Gender Dimensions of the Impact of Nepalese Citizenship Policies on Lives of Women* (AATWIN 2006) 2.

¹⁹⁰ Interview with members of AATWIN (Kathmandu, Nepal 12 March 2012).

is very difficult to obtain.¹⁹¹ The lack of citizenship affects so many parts of a person's life, both socially, economically and legally. The victims cannot start a business, enrol in university education, own property or even have an own bank account without a certificate of citizenship. It has can go so far as even though victims file their case in court, they cannot get through the security controls within the courts because they due to their lack of citizenship do not possess any identification. Ironically, they cannot attend their own court hearing.

Without the citizenship, there is also a big risk of revictimization of the children. For example are girls facing the risk of being forced to marry someone just to get citizenship, which exposes them to potential domestic violence. NGOs are trying to raise awareness regarding this problem and they have been advocating for a change in the new Constitution, however the issue is not covered in the Interim Constitution.¹⁹² The rules regarding the acquirement of citizenship has also brought complaints by the Committee on the CRC which request a change in the existing rules so that all children may fully be able to enjoy of their rights and freedoms.¹⁹³

Considering the negative aspects presented above, which children face if they make the decision to file a report of trafficking, it is hard for prosecutors, the police or NGOs to justify for victims that a process in Court would benefit them.¹⁹⁴

Even if they would win their case in court, in most cases is all they receive a piece of paper with the judgment. Potentially it would give them some piece of mind but it is far from justice being done. One of the founders of Shakti Samuha, an NGO started and managed by and for victims of trafficking, is a survivor of trafficking and she is one of the few who filed her case in court. She won her case back in 1996, but she still suffers from threats in relation to the judgment and the fact that she was trafficked.¹⁹⁵

5.3 Conclusion

The conclusions to be drawn from the interviews conducted within this study are that the overall opinion of the interviewees regarding the anti-trafficking legislation is good even though amendments are necessary. It is rather the implementation of the anti-trafficking legislation that is of key concern. Within the judiciary, the implementation is functioning fairly sufficiently, with exception of e g the duration of the proceedings.

The main problems which are presented above lies thus outside the judicial frame and cannot be addressed through mere criminal law responses. The following chapter will therefore contain an analysis of whether or not a

¹⁹¹ Interview with members of AATWIN (Kathmandu, Nepal 12 March 2012).

¹⁹² Interview with members of AATWIN (Kathmandu, Nepal 12 March 2012).

¹⁹³ Committee on the Convention on the Rights of the Child 'Concluding Observations: Nepal' (21 September 2005) CRC/C/15/Add.261 para 42.

¹⁹⁴ Interview with members of AATWIN (Kathmandu, Nepal 12 March 2012).

¹⁹⁵ Interview with members of AATWIN (Kathmandu, Nepal 12 March 2012).

human rights-based approach would have anything to offer to mend these root-causes of the poor implementation of the anti-trafficking legislation.

6 Human rights-based approach on the Implementation of domestic laws in Nepal

6.1 Does a Human rights-based approach improve the implementation of anti-trafficking laws in Nepal?

The empirical element of the minor field study presented in the previous chapter showed that the major problem in Nepal regarding child trafficking is not the content of the domestic anti-trafficking legislation or the lack thereof, but the actual implementation of it. Therefore, will the relevance of a human rights-based approach be analyzed in the specific context of the problems existing in Nepal in this chapter. The analytical tool presented in chapter 2 will be used in the attempt to answer the question if the approach can have an added value when applied on the problem of the poor implementation of the domestic anti-trafficking legislation in Nepal?

6.1.1 Victim-centered approach

The focal point of a human rights-based approach is at all times the victim. In the context of this analysis, the question to answer is if the implementation of the anti-trafficking legislation is victim-centred. For implementation to be effective, the provisions to be implemented need to address the selected objective. Since the victims in this case are children, anti-trafficking legislation in Nepal, would according to a human rights based approach, need to add provisions which define child trafficking as an own crime. Consequently, this would facilitate the adoption of provisions aimed towards the particular needs of victims of children. However, the legislation at hand must first fulfil the international standards laid down in human rights instruments. Foremost, is the need to align the age of maturity in all domestic legislation with the established norm in the CRC.

Related to this issue is the deficiency in authentic data regarding victims of trafficking in general and child victims of trafficking in particular. The fact that cases of trafficking in children are not separated from adults is a problem, which impedes a proper implementation of the legislation. If there is no validity in the numbers of children trafficked each year, the efforts provided for in the legislation cannot effectively be actualized. A solution to this problem presented earlier in this paper, could perhaps be applied to the context of Nepal. By reallocating the responsibility of statistical gathering of victims of trafficking to the National Rapporteur on Trafficking in Women

and Children, a more precise data could possibly be obtained. The National Rapporteur have the knowledge of the particular circumstances and problems that victims of trafficking face and this could help to increase the compliance between statistics and reality. However, the National Rapporteur already struggles with shortage in both economical and human resources why to add an additional task to its objective, would require a considerable amount of funding from the GoN for its materializing.

6.1.2 The identification of rights-holders and duty-bearers

The rights-holder according to the human rights-based approach would in this case be children who have been victims of exploitation through situations of trafficking. They are able through provisions in Nepali legislation to exercise rights, formulate claims and seek redress. The GoN is the corresponding duty-bearer to the rights-holders. Some would define the MoWCSW as the primary responsible actor for the work against trafficking and for the victims of trafficking but as described above does the multidisciplinary nature of the issue demand cooperation between the different Ministries. Thus, the GoN in its entirety should according to the author be considered as the duty-bearer in this specific context. The identification of the duty-bearer is a key factor in order to ensure the fulfilment of the rights-holders right to an effective remedy. However, it is also a prerequisite for adopting efforts aimed at strengthening the GoN's capacity to fulfil its obligations. In addition, even if the political power shifts several times a year, a practical and structural decision to intertwine the efforts conducted by the different Ministries, in the fight against trafficking in general and child trafficking in particular, could bridge the gaps occurring due to the political imbalance.

However, the identification of the GoN as the primary duty-bearer does not mean that the application of the human rights-based approach lies solely on its shoulders. To implement a human rights-based approach effectively, all of the actors in society, from grass root level up to the government, must work together.

6.1.3 Universality, Indivisibility, Interdependence, Inalienability and Interrelatedness of Human Rights

Children, as much as any other group in society are entitled to their human rights simply because of the fact that they are human beings. Therefore, children who are victims of trafficking have among other the right to an effective remedy. In the case of Nepal, this right is violated. Children do not dare to report their cases to the police partially due to a fear of reprisals from their perpetrator. The fact that Nepal as a state does not protect the children from those threats violates the childrens' right to life and security.

The right to an effective remedy is thus indivisible from the right to life and security in situations like the one in Nepal. Furthermore, children's right to life and security is a precondition to ensure them the right to an effective remedy, which displays the interdependence and interrelatedness of these human rights. Hence, it is of utmost importance to realize and recognize the content and importance of all human rights of children in the work towards legal consistency in the judicial process in Nepal.

Not only the intimidation of children must be addressed but also the persons working for the rights of children are being threatened to withdraw cases. To ensure the right to security of e.g. lawyers working on cases of child trafficking will in turn strengthen the right of the child to prosecute his or her perpetrator, since lawyers will probably be more open to commit to trafficking cases if they are not facing life threats against themselves or their families.

Poverty is also a factor contributing in different aspects to the lack of proper implementation of the anti-trafficking legislation. At a structural level, Nepal as being one of the poorest countries in the world evidently struggles with financial support to all sectors in society. Probably are the rights of children who have been trafficked not the number one priority of the state. However, providing law enforcement officials with the adequate training do not demand a lot of resources and the effect would in relation be of major importance.

The allocated funds to the issue of trafficking do not seem sufficient in order to tackle the implementation problems. Assumably, drafting legislations and ratifying conventions require a smaller budget than actually implementing them adequately.

However, poverty can also be a factor on an individual level. It can cause children to choose not to report their case to the police. If the perpetrators offer money, food, or possibilities for education to the children and their families, the children's economical status might lead them to deter from reporting the violations against them. Thus, the fight against poverty will also subsequently affect children's right to an effective remedy.

The other major deterring factor of children choosing not to report their case to the police is the fear of exclusion from their community and family due to the stigmatization of trafficking victims. A short-term measure to this problem is to make sure that the existing provisions regarding privacy rights are implemented. This will prevent the identity of the child to be publicised. A more long-term approach is although to focus on the right to education for all children. Education for children as well as adults would help to sensitise communities towards the issue of trafficking. NGOs in Nepal today are working with awareness-raising campaigns in order to stifle the problem of stigma. However, in the author's opinion, it requires a nationwide effort to address the issue effectively. This should be either initiated or at least fully supported by the GoN. However, the lack in political stability and an overarching coherence in its anti-trafficking efforts might impede this.

But the principles also work in the opposite direction. The author namely see a risk of counter effects with the current anti-trafficking activities like e g the unofficial border control towards India that some NGOs has initiated. These protection measures might instead of protecting women and children, violate their rights to freedom of mobility. It is very important for the state of Nepal to make sure that this does not happen. Furthermore, it is to some extent worrying that a rule, which shifts the burden of proof onto the defendant, is included in the Human Trafficking Act. The principle of being innocent until proven guilty is thus discarded and the rights of the defendant have thus been impaired.

6.1.4 Participation and Inclusion

A partial solution to the problem of intimidation of victims would be to adopt a witness and victims protection act. However, in order for such a legal instrument to reach its stated aim it is important that children who are survivors of trafficking are included in the creation of it. To the author's knowledge, victims were not consulted in the process of writing the new draft. For children to participate in the work towards the realization of their own human rights is a key aspect for both the efficiency of the final legislation but also for the victim's confidence in the judicial system in Nepal. If victims of trafficking trust that the police and the judiciary in Nepal will protect their human rights, the number of reported cases will probably increase.

It will furthermore empower children to know that the GoN takes their opinions seriously. By not only treating the children as passive victims but as active persons with a right to voice their view on issues regarding them and their rights will probably also help to prevent revictimization of the children.

Additionally, it is important that NGOs and civil society who works for the rights of victims of trafficking are included in the creation of any legislative act aimed for this purpose. Today, the civil society and the NGOs are only consulted during the very last part of the legislative process when no actual change can be achieved. Moreover, the GoN should enlist the help of these actors in the efforts of improving the implementation of the anti-trafficking legislation and aligning it to the international human rights law framework. The NGO personnel that work with the victims on a daily basis are the ones that knows better than most about the problems victims face if they choose to report their offenders to the police. The experience of these personnel is too valuable to ignore and they should be ensured participation in both legislative and practical efforts aimed at streamlining the implementation.

6.1.5 Non-discrimination and Equality

Even though there are legal provisions in Nepal prohibiting any discrimination based on caste, the caste-based system is still very much

present in the every-day life of people in Nepal. As explained in chapter 3, persons belonging to e.g. the dalit community are reported to be more vulnerable to trafficking in general. In relation to the implementation of anti-trafficking legislation, the author has not seen any statistic which shows any relation between caste belonging and willingness or reluctance to report cases of trafficking to the police. However, it is alarming that discrimination of certain groups still exists in the Nepalese society. A feeling of exclusion from society could cause distrust in authorities which might be a deterring factor refraining victims from reporting violations to the police.

The discriminatory conditions to obtain citizenship in Nepal explained in the previous chapter also affect the attitude of girls and women to report their cases to the Nepalese authorities. The inability to even identify themselves without a citizenship certificate may very well discourage any contact with the police. Even if a case would be filed, taken to court and decided in favour of the victim granting them compensation, persons without any certificate of their citizenship have nowhere to place the money since they cannot even open a bank account. There is thus no incentive for victims who do not hold a certificate to take their case to court.

Finally, an important structural step to improve the implementation of the anti-trafficking legislation in Nepal is for the GoN to view the MoWCSW as equally important as the rest of the Ministries. Now, it is imperative to remember that the MoWCSW themselves do not consider that they are less prioritized than any other Ministry. However, if more authority and funding is given to the appointed coordinator of anti-trafficking policies, more budget could be allocated towards the implementation of the legislation at hand.

6.1.6 Accountability and Rule of Law

The duty-bearer in the case of Nepal has previously in this chapter been identified as the GoN. The empirical findings of the minor field study show according to the author, violations of the victims' right to an effective remedy. The GoN should as the responsible part be held accountable for omitting to address these violations. However, this is not done.

Courts are handling cases of trafficking according to the rule of law but this is not where the problem exists. Any person with or without a Nepalese citizenship has the right to file a case in court and the courts are handling the cases according to the rule of law. However, the problem, which is the reluctance to report cases, cannot be addressed through the work of the courts but instead requires structural changes at a higher level.

According to the author's interpretation of the human rights based approach, it advocates a system of transparency in the decision-making process. Corruption is a major problem in Nepal and this impedes the efficiency of any governmental efforts, thus also the implementation of legislation. The

lack of an adequate monitoring system with checks and balances between different governmental actors does not improve the reliance on the system. In 2011, an additional optional protocol to the CRC was adopted which if ratified grants children right to bring individual cases to the Committee of the Rights of the Child. Nepal has not signed this instrument. If there is a reluctance to take a case to a national court in Nepal then it is probably unlikely that a case will be taken to an international committee. However, simply the possibility and awareness that there is an international remedy as an option to the domestic one, could potentially have a positive effect.

6.1.7 The best interest of the child

In the NPA, the principle of the best interest of the child is mentioned in the context of rehabilitation and rescue efforts. However, the intent with the principle is that it should permeate all actions taken in the fight against trafficking. In relation to the implementation of anti-trafficking legislations, efforts taken to improve the number of reported cases must consider whether they have a positive effect for children. It could be easy to claim that Nepal should follow the example of the Human Rights Council which promote an interpretation of the standard of due diligence as containing an ex officio duty for national authorities to initiate criminal investigations of trafficking cases. As progressive and positive it might sound, in the context of the situation in Nepal, this might not be of the best interest of the child. Due to the existing stigma directed towards trafficking victims in the Nepalese society, the initiation of a criminal investigation of a trafficking case without the consent of the victim might be devastating. The potential risk of being exposed as a victim of trafficking and thus excluded from ones family and community is in many cases not in the best interest of a child even if it would mean that the perpetrator is prosecuted and punished. Instead, efforts should be focused on creating a victim friendly environment on all levels of the judicial process, which ensures children protection of their human rights.

6.2 Conclusion

Above an attempt of applying, a human rights-based approach on the actual implementation of the anti-trafficking legislation in Nepal was made. By dividing the identified causes to the problem between the different principles of the chosen human rights-based approach, a greater overview of the actual effect the deficient system has on victims' rights is provided. It therefore also facilitates the understanding of what efforts are needed in order to improve the situation.

However, the analysis of the problem in Nepal through the human rights-based approach can easily be questioned. Even if the approach helps to clarify the rights-holders entitled rights and the corresponding duty-bearers obligations, the ability to achieve results in the question of accountability is

rather weak. Even if the rights-holders are aware of their rights and the fact that the GoN is responsible for not enforcing them, little guidance is given as how to actually hold the GoN accountable. The same argument can be used in the case of the political instability in Nepal, which impedes the effects of a human rights based approach. The sincere political will to apply a victim-centred approach on the issue of trafficking is questionable. Yet, it is important to remember that the human rights-based approach is not only intended to be carried out by the GoN. All relevant actors contributing to the fight against trafficking should take part in it.

And even though it might seem strange that the application of a human rights-based approach can improve the actual implementation of legislations, if looking at what constitutes the implementation problem, it make a lot of sense. Since it is factors such as the lack of resources, the existence of discriminatory regulations, the stigmatization in society, that cause the problems, it is evident that a more comprehensive approach is needed. To address merely the problem through criminal justice efforts would not suffice. Deeper structural changes need to be made through permeating all relevant processes with the principles derived from the human rights-based approach. Thus, one needs to acknowledge that, the application of a human rights-based approach probably will not help a victim of trafficking to receive judicial remedy tomorrow, which it does not purport to do. To instead recognize it as a tool for structural changes with long-term and lasting goals, the added value of the human rights-based approach becomes clearer and clearer to the specific context of Nepal.

7 Concluding remarks

In order to answer the research question, a minor field study was conducted in Nepal to receive first hand information on the structure of the legal treatment of victims established in Nepal today, as well as the challenges that derives from it. The empirical findings of the study showed that the existing problem stemmed from poor implementation of the anti-trafficking legislation rather than the existence of an inadequate legislative framework. The main challenges to the problem of poor implementation; was the lack of administrative coordination and efficiency, the lack of resources, the lack of authentic data, the lack of knowledge of the law enforcement personnel, the open border policy towards India and the lack of reported cases, was then analysed through a human rights-based approach. The human rights based-approach was established by drawing relevant principles from existing framework into one that was specifically designed for the problem of child trafficking.

By using a human rights-based approach, the aim was to see if it potentially could contribute to an improvement of the enforcement of the rights of children who are victims of trafficking in Nepal.

The added value of employing a human rights-based approach on trafficking in general are amongst other reasons the strengthening of the accountability of the duty-bearers, the holistic approach equalizing the importance of a criminal justice focus and a human rights perspective, the emphasis on finding the root-causes to the problem and its centrality around the rights of the victim. When addressing the particular issue of the poor implementation of anti-trafficking legislation in Nepal, the minor field study showed that the root causes was to be found mainly outside the judicial sphere. Therefore, a focus on only criminal justice efforts would be of no use. The holistic perspective advocated by the human rights-based approach is thus a more suitable option to address the specific issues at hand. By applying a human rights based-approach also facilitates the alignment with international human rights law in general since it is easier to see the added value of the adequate implementation of the latter from a more holistic perspective. Since the human rights-based approach in itself also include the utilization of the content of international human rights treaties, the implementation of one would thus benefit the other.

The human rights-based approach does not claim to be a quick fix since the solution to the root-causes to some extent is dependent on political and socio-economical changes. However, by visualising these and remaining a holistic perspective on the problem, the human rights-based approach may very well be a long-term answer to the enforcement of the human rights of children who are victims of trafficking in Nepal.

Supplement A

Interviews conducted within the Minor Field Study

Government level

Interview with Laxmi Prasad Tripathi, Under Secretary of the Ministry of Women, Children and Social Welfare (Kathmandu, Nepal 5 March 2012).

Interview with Beshraj Sharma, Secretary of the Ministry of Law and Justice (Kathmandu, Nepal 2 March).

Judiciary level

Interview with judge X at the Appeals Court (Kathmandu, Nepal 12 February 2012).

Interview with judge Y at the District Court (Kathmandu, Nepal 28 February 2012)

Interview with Mahesh Sharma Poudel, Joint Government Attorney, Office of the General Attorney (Kathmandu, Nepal 11 March 2012),

Police level

Interview with police officer, Women Cell Department (Kathmandu, Nepal 29 February 2012).

INGOs

Interview with Patrizia Benvenuti, Child Protection Specialist, UNICEF (Kathmandu, Nepal 21 February 2012).

Interview with Dr Meena Poudel, National Programme Advisor, IOM Nepal (Kathmandu, Nepal 27 February 2012).

NGOs

Interview with Punyahshita Dawadi, Legal Counsel, LACC (Kathmandu, Nepal 15 February 2012);

Interview with Mr Pokhrel, Legal Counsel at CVICT (Kathmandu, Nepal 16 February 2012)

Interview with Rup Narayan, Legal Counsel, FWLD (Kathmandu, Nepal the 29 February 2012)

Interview with Babu Ram, Executive Director, WOREC (Kathmandu, Nepal 1 March 2012).

Interview with K C Gokarna, Legal Counsel, MAITI Nepal (Kathmandu, Nepal 4 March 2012).

Interview with members of AATWIN (Kathmandu Nepal, 12 March 2012)

Other relevant actors

Interview with Pramod Kumar Karki, Secretary of the Nepal Law Commission (Kathmandu, Nepal 26 February 2012).

Interview with Padma Mathema, Special Rapporteur on Trafficking in Persons on Women and Children, National Human Rights Commission (Kathmandu, Nepal 28 February 2012)

Interview with Sharada Basyal, Women Development Officer at the Office of Women and Children (Kathmandu, Nepal 15 March 2012);

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Convention on the Rights of the Child (adopted 20 November 1989 , entered into force 2 September 1990) UNGA Res 44/25 (CRC)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) UNGA Res 39/46 (CERD)

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA Res 2200A (XXI) (ICESCR)

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Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 December 2000 UNGA Res 55/25, entered into force 25 December 2003)

The Convention on the Elimination of All Forms of Discrimination against Women (adopted on 18 December 1979, entered into force 3 September 1981) (CEDAW)

United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) (UNTOC) UNGA Res 55/25

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