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The Exploitation-Trafficking Continuum in Labor Migration and the Need for Reform in Nepal

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SUMMARY

Every year, Nepali migrant workers report experiencing severe abuse, exploitation, debt bondage and forced labor while abroad. In some cases, where abuses are linked to coercion, fraud or abuses of power in the pre-departure phase of migration, these migrant workers could be considered victims of trafficking. At present, however, persons trafficked in the course of labor migration are falling through the cracks in Nepal's law and its implementation – the foreign employment framework targets lower level abuses and the human trafficking framework is focused mainly on sexual exploitation and prostitution. Reform of the legal framework and its implementation is needed to better protect these vulnerable workers and to ensure their ability to access compensation and services as victims of trafficking, and to hold perpetrators accountable.**

I. Introduction and Background

Nepal's citizens engage in foreign employment at the highest per capita rate of any other country in Asia, and their remittances account for 25 percent of the country's GDP. The Middle East is now the most popular destination for Nepalis - nearly 700,000 were working in the Middle East in 2011 on temporary labor contracts. These migrant workers are predominantly men employed in the manufacturing and construction industries, but Nepali women also travel to the region to perform primarily, but not exclusively, domestic work. In 2012,

women under 30 were prohibited from migrating to work in the Gulf but many continue to depart unofficially.

For some Nepalis, working abroad provides much-needed household wealth. For others, their contributions to Nepal come at great personal cost. Migrant workers in the Gulf, for example, routinely report wage theft, lack of time off and unsafe and unhealthy working conditions. Women engaged in domestic work are often isolated in the home, where they have little control over their living and working conditions. Irregular status compounds

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Manish's Case

Manish travelled to Qatar for work as a carpenter, for which his agent had promised him a salary of 900 Riyal and 200 Riyal in other benefits per month (although she asked him to sign a contract promising 1000 Riyal plus benefits). When they arrived, the new workers were asked to sign a substitute contract for just 700 Riyal per month. All initially refused, but the agency locked them in their hotel room without food or water until they agreed to the new conditions. Once the contract was signed, Manish found he had also been deceived about the nature as well as the conditions of the work – he was put to work as a laborer rather than as a carpenter, and moved from site to site as a contract worker. After some months he fell ill but was denied medical treatment and not given any payment for the weeks he could not work. He was very unhappy, and asked to go home on several occasions, but his *kafeel* (sponsor) refused until Manish said that his mother and wife were ill.

As soon as he arrived back in Kathmandu, Manish submitted a complaint to DoFE. Despite his allegations of deception and forced labor, DoFE, the lawyer he hired to advise him, and the police who arrested the agent, all approached this case as one of compensation for fraud under the FEA 2007, and never as one of human trafficking or unlawful transportation. He was unsuccessful in his attempts to seek redress or accountability

the abuse and exploitation to which female migrant workers are subject throughout the region, as well as in transit. Some migrant workers, both men and women, report psychological and physical abuse, and other forms of labor exploitation that may rise to the level of forced labor, debt bondage or other forms of trafficking.

The conditions that give rise to labor trafficking are often set pre-departure in the recruitment phase itself. Workers may be charged excessive fees, for which they often take out high interest loans, leaving them and their families economically vulnerable.

Delays in departure or in transit, or abandonment in transit or upon arrival in the destination country, increase their economic vulnerability. In many cases, workers incur debt based on false promises about the nature of foreign employment. When they do learn that the job is different from that promised, or the wages are below the agreed upon salary these workers feel trapped, and are effectively coerced into accepting and sustaining the employment offered no matter how exploitative or dangerous, in order to repay their debts.

Between 2012 and 2014, researchers from Nepal, Australia and the United States conducted a study on migrant workers' access to justice in Nepal, including for exploitation and trafficking. Justice was defined to comprise both compensation for losses, and the holding of perpetrators accountable, for example through fines, licensing sanctions, or even imprisonment. The study found that overall access to justice in Nepal was extremely low, especially for migrant workers who have been survivors of labor trafficking. However, clear routes exist to improvement. The full results of the study, and related recommendations, are contained in the report *Migrant Workers Access to Justice at Home: Nepal*.

II. Approach and Findings of the Access to Justice Study

The study on migrant workers' access to justice was carried out through desk research and field research across Nepal between 2012 and 2014. It included interviews and focus groups with 54 migrant workers. In addition, researchers reviewed Nepal's foreign employment policy framework, and interviewed more than 20 representatives of government, civil society, unions and the recruitment industry. Researchers were also given access to a random sample of 202 cases from the offices of the Department of Foreign Employment (DoFE), and 12 cases from the Foreign Employment Tribunal. Together, these sources provided information about awareness and perceptions

Human Trafficking and Forced Labor in International Law

Forced labor and human trafficking are crimes under international law, related to transnational organized crime. The key international law document on trafficking is the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) (“TIP Protocol”). A number of conventions also ban slavery and forced labor.

Nepal has not ratified the TIP Protocol or the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990). It has, however, ratified most of the core UN international human rights treaties, as well as 11 International Labor Organization (ILO) conventions. All of these prohibit the kinds of abuse many migrant workers endure and require access to the courts and a remedy when rights are violated.

of the labor migration system and redress available to migrant workers.

In respect to redress in cases of labor exploitation and abuse, the study found the following:

The Foreign Employment Act 2007 does not adequately address serious harm and exploitation, debt bondage, and physical or emotional abuse in the course of migrating for work.

The Foreign Employment Act 2007 (FEA 2007) makes no mention of serious labor exploitation, and does not provide for redress or accountability when workers are seriously exploited either in transit or in the destination country.

The FEA 2007 allows workers to claim compensation if the terms and conditions of employment are different from those promised in Nepal, or if the recruitment agency or individual agent committed fraud. However these claims are in practice targeted at differences in salary and benefits. If they involve recruitment agencies they are treated as low-level complaints resolvable by DoFE. The Foreign Employment Tribunal (hereafter, Tribunal), therefore, does not have an opportunity under

the law to hear cases of abuse and exploitation – its work is mainly focused on fraud in the migrant labor system. The law also does not address compensation for more serious abuse and exploitation at the hands of agents, recruitment agencies or employer institutions.

Further, while the Foreign Employment Welfare Fund and private insurance provide compensation for death or mutilation, they do not compensate non-catastrophic workplace injuries or other harms endured in the course of labor migration.

The Human Trafficking and Transportation (Control) Act 2007, (hereafter, HTTCA) is similarly unclear about how prosecutions for severe exploitation in the migrant labor context are to be handled. The Act may cover cases of severe labor exploitation, but the offenses in the Act are much narrower than those recognized under international law.

“Trafficking” under the HTTCA is limited to sexual exploitation an/or prostitution (Section 4(1)), so would not cover migrant workers unless they were also forced into prostitution or were sexually exploited.

The broader offence of “human transportation” involves taking a person by misinformation, coercion, influence or other means for the purpose of “exploitation” (Section 4(2)), but exploitation is confined to “keeping a human being as a slave and bonded.” (Section 2(e)). This is much narrower than the UN definition, which defines “exploitation” as, “at a minimum,” prostitution and other forms of sexual exploitation, forced labor, slavery, or practices similar to slavery, and servitude. (Art. 3(a)). This would only apply to migrant workers if it can be proven they were kept as a slave or bonded which is a very high bar.

Also, the HTTCA treats the crime of “human transportation” as a lesser offense with weaker penalties than “human trafficking.” When it comes to making claims for compensation or other remedies or support under the HTTCA, victims of forced labor or other forms of labor exploitation may be excluded because “victims”



Five Facts about Human Trafficking

1. Anyone can be trafficked – men, women and children could all be victims of trafficking.
2. People can be trafficked into many industries – some examples are construction, cleaning, hospitality, factory work and domestic work. Trafficking does not only occur in the sex industry/prostitution.
3. Trafficking occurs when a person is forced or tricked into exploitation. Exploitation can be many things. Under the international definition, it includes sexual exploitation, forced labor, slavery, servitude and removal of organs.
4. Migrant workers are vulnerable to trafficking into forced labor because they rely on promises made in Nepal with little ability to check the veracity of the promises, they often take on large debts to travel, and they have little ability to change employers or challenge their conditions once they arrive in the destination country.
5. Whether a person is in a situation of forced labor depends on all the circumstances of the case. Factors to consider include non-payment of wages, confiscation of documents, restricted movement (such as confinement in a labor camp or home), no time off, being trapped by debt, and suffering physical, sexual or emotional abuse.

is defined only as those who are “sold, transported or put into prostitution” (Section 2(c)).

The HTTCA is also limited in its application. DoFE officials do not appear to recognize trafficking in the labor migration context unless sexual exploitation is involved, and police also are not addressing labor exploitation in Nepal or abroad. From July 2011 to July 2012, 118 cases of human trafficking were recorded by the Nepali Police, all of which involved cases of forced prostitution. No cases of labor exploitation were prosecuted. Equating trafficking and claims under the HTTCA exclusively with prostitution stigmatizes individuals seeking to bring claims under the Act, and discourages them from doing so.

Limited integration among mechanisms for investigating and determining cases of worker exploitation frustrates access to justice.

The FEA 2007 and the HTTCA are not mutually exclusive and cases could theoretically be prosecuted under either. However because of the lack of integration between mechanisms this does not occur in practice. Complaints under the FEA 2007 are prosecuted through specialized mechanisms created under the Act itself, namely DoFE and the Foreign Employment Tribunal. Cases brought under the HTTCA are to be filed with the police and adjudicated by the district courts. Neither law creates a process or criteria for referring cases to the other system, and DoFE and the police do not have a protocol for cooperating on cases of severe labor exploitation. Information sharing between the mechanisms also appears to be limited.

Both laws are unclear about how cases of extreme exploitation in foreign employment should be handled. Legal experts believed that DoFE or the prosecution would refer cases of trafficking to the police, but could not identify specific cases where this had occurred. Police generally refer labor migration cases to DoFE, regardless of whether they could also be investigated for trafficking, believing that DoFE retains exclusive jurisdiction over cases of foreign employment.

To complicate matters further, cases of death and permanent disability go through neither system, but are instead referred to the Foreign Employment Promotion Board (and channeled to the Foreign Employment Welfare Fund) and/or a private insurance company. Both provide compensation but do not investigate the circumstances of the death and/or disability including culpability of actors in Nepal.

Workers in an irregular status and female migrant workers are particularly vulnerable to exploitation and trafficking, and confront even greater barriers to accessing justice.

The FEA 2007 is silent on the rights of workers who have engaged in foreign employment

outside of formal channels or otherwise find themselves in an irregular status, even when irregular status is the fault of third parties -- as often occurs in trafficking cases. In theory, migrant workers who depart Nepal irregularly should have equal access to all redress mechanisms apart from the Foreign Employment Welfare Fund. In practice, workers in an irregular status usually find themselves unable to access justice because they lack documentary evidence such as receipts and contracts to support their claims. Their inability to obtain redress and compensation perpetuates their vulnerability and contributes to a cycle of debt, forced labor, and human trafficking.

Restrictions on the migration of young women to the Gulf result in young women undertaking more risky forms of migration, such as traveling through third countries, or traveling on false documents. Women comprise a disproportionate share of migrant workers in an irregular status. This compounds their vulnerability to trafficking and severe forms of exploitation. It also limits their ability to access justice when their rights are violated. More study is needed to fully understand the additional barriers female migrant worker survivors of human trafficking confront when seeking redress, and the particular needs of those women, such as maternal and child health services and counseling, not currently conceived of under the FEA 2007.

III. Conclusion and Recommendations

Through regulation of the recruitment industry and pre-departure requirements, the FEA 2007 addresses some of the harms that give rise to labor trafficking and debt bondage. For example it establishes recruitment fee limits, contract requirements, and manpower agency licensing requirements. However legal and structural reform is required to ensure redress to workers subjected to egregious forms of labor exploitation and abuse in the workplace, and to ensure Nepal is meeting its obligations under international human rights law to pro-

tect and fulfill the human rights of its citizens traveling for work. The authors recommend:

1. The government should establish enforceable protections and remedies for workers who suffer severe abuse, exploitation, debt bondage or trafficking, in line with its international obligations.

- The legislature should create new offenses under the Foreign Employment Act 2007 that recognize serious harms, impose appropriate penalties on offenders, and provide a complaints process designed to ensure both accountability and just compensation to the individual harmed.
- The legislature should amend the HTTCA to clearly prohibit and provide redress for all forms of labor trafficking, consistent with the definition in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.
- DoFE and the police, in close consultation with civil society representatives, legal experts, and other recognized experts in the area of labor exploitation and trafficking, should create a protocol for determining when such cases should be handled by DoFE and the tribunal, and when they should be referred to the police for prosecution under the HTTCA.
- DoFE should develop guidelines for compensation that encompass not just differences in salary but also payment of medical costs and damages for physical and emotional suffering, as well as workers' other reasonable expenses related to bringing a claim.
- The Government should consider expanding the scope of compensable losses under the Welfare Fund and/or under private insurance, e.g., for uncovered medical expenses or for a broader range of injuries or serious abuse.



2. **The legislature and government should ensure enforceable rights and remedies for workers in an irregular status and for female migrant workers, who are particularly vulnerable to labor exploitation and trafficking.**
 - Ensure irregular workers the right to seek compensation and accountability under the FEA 2007 and/or the HTTCA when they have been subjected to all forms of labor exploitation and/or trafficking.
 - Ensure female migrant workers receive the necessary supports to pursue claims of labor exploitation, abuse and trafficking, and to obtain compensation and other forms of redress. For example, ensure that migrant resource centers and other services provide empowering information to prospective women migrant workers including their rights as workers, and contact numbers for assistance abroad and in Nepal; provide confidential, free, and voluntary health assessments for returning women migrant workers; and, create a women's desk at DoFE to handle sensitive claims submitted by women, and to link women with other relevant services.
 - DoFE, the tribunal and the Foreign Employment Promotion Board should collect disaggregated data by gender, and analyze the processing of women's cases through their systems to ensure they are providing full and equal access to justice.
3. **All stakeholders in Nepal should work together to share knowledge and resources and coordinate advocacy to address the needs of this vulnerable population.** Civil society organizations, unions, and the international donor community, engaged in human rights, labor migration, and human trafficking should work together to develop trainings, strategic litigation, and other forms of advocacy to combat the full continuum of abuses that migrant workers confront, including systemic pre-departure problems that give rise to exploitation and trafficking. They should work collaboratively to facilitate workers' access to the courts and to just compensation for severe forms of labor exploitation.
4. **The Government should ratify and implement key UN and ILO conventions that protect migrant workers from labor exploitation and trafficking and require states to ensure accountability of all responsible actors, including:** The UN Convention on the Rights of All Migrant Workers and Members of their Families (1990); UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000); ILO Domestic Workers Convention 2011 (C. 189); ILO Migration for Employment Convention (Revised) 1949 (C. 97); ILO Migrant Workers (Supplementary Provisions) Convention 1975 (C. 143).

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