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# India's Human Trafficking Laws and Policies and the UN Trafficking Protocol: Achieving Clarity



**Cornell University**  
**Law School**



# India's Human Trafficking Laws and Policies and the UN Trafficking Protocol: Achieving Clarity

**Policy Brief**  
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### **Avon Global Center for Women and Justice at Cornell Law School**

The Avon Global Center for Women and Justice at Cornell Law School works with judges, legal professionals, and governmental and non-governmental organizations to improve access to justice in an effort to eliminate violence against women and girls. For more information, please visit: [www.womenandjustice.org](http://www.womenandjustice.org).

### **Centre for Health Law, Ethics and Technology at Jindal Global Law School**

The Centre for Health Law, Ethics and Technology (CHLET) at Jindal Global Law School (JGLS) undertakes research on issues related to healthcare and gender from a developing world perspective on social justice. CHLET adopts a multidisciplinary approach and focuses particularly on access to drugs, health and sexuality, sexual and gender minority rights, reproductive rights, realization of a constitutional right to health, implication of advancement in technology on access to healthcare and anti-discrimination law and policy relating to contagious diseases in India and abroad. CHLET seeks to foster informed dialogue among various stakeholders including policymakers, lawyers, activists, and the medical industry and profession.

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## Executive Summary

In 2013, India enacted groundbreaking legislation, the Criminal Law (Amendment) Act of 2013 (hereinafter referred to as the Amendment Act),<sup>4</sup> which amended various sections of the Indian Penal Code, including provisions on human trafficking in India. These reforms reflect a step towards aligning the country with its obligations under the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN Trafficking Protocol).<sup>5</sup>

In particular, the Amendment Act redefines the offense of human trafficking under Section 370 of the Indian Penal Code to closely parallel the definition in the UN Trafficking Protocol. Although these reforms have brought India into closer alignment with international standards, gaps still remain between India's current laws and the UN Trafficking Protocol.

First, India's laws do not explicitly recognize and penalize all forms of labour trafficking to the extent required by the UN Trafficking Protocol. The definition of human trafficking contained in the now-amended Section 370 of the Indian Penal Code excludes forced labour from its definition. As a result, such conduct is not covered by Section 370's trafficking prohibition. Other existing laws on forced labour in India do not adequately address the intricate problems involved in the trafficking of persons for the purpose of labour. Furthermore, the Amendment Act reformed Section 370 to punish those who engage victims of sex trafficking, yet it did not similarly criminalize the acts of those who engage victims of labour trafficking.<sup>6</sup>

Second, India's laws (including the Amendment Act) do not provide an effective system for the safety, recovery and compensation of human trafficking victims as required by the UN Trafficking Protocol. The UN Trafficking Protocol states that State Parties should ensure the safety of trafficking victims after rescue as well as consider instituting measures to assist victim recovery and integration into society.<sup>7</sup> In addition, the UN Trafficking Protocol requires that domestic legislation and systems be established to offer victims of human trafficking "compensation for damage suffered."<sup>8</sup> Such compensation systems are necessary to provide trafficking victims with the economic resources and protection to avoid being re-trafficked, the financial resources to afford psychological recovery services, and the means to reintegrate into society.<sup>9</sup>

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<sup>4</sup>The Criminal Law (Amendment) Act, No. 13 of 2013, *available at* <http://indiacode.nic.in/acts-in-pdf/132013.pdf>. In December 2012, in response to an outcry to address violence against women in India, the government of India commissioned a committee, led by now-deceased former Supreme Court Justice J.S. Verma, to determine possible amendments to the criminal law in order to "provide for quicker trial and enhanced punishment for criminals committing sexual assault of extreme nature against women." The Amendment Act was adopted according to the recommendations in the committee's report. Letter from Justice J.S. Verma to Prime Minister Dr. Manmohan Singh (Jan. 23, 2013), *in* JUSTICE J.S. VERMA ET AL, REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW (2013), *available at* <http://nlrd.org/wp-content/uploads/2013/01/121798698-Justice-Verma-Committee-report.pdf>.

<sup>5</sup>Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319, *available at* <http://www.osce.org/odihp/19223> [hereinafter UN Trafficking Protocol].

<sup>6</sup>*See* The Criminal Law (Amendment) Act, *supra* note 4, § 8.

<sup>7</sup>"Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society." UN Trafficking Protocol, *supra* note 5, art. 6(3).

<sup>8</sup>*Id.*, art. 6(6).

<sup>9</sup>United Nations Office on Drugs and Crime, *Anti-Human Trafficking Manual for Criminal Justice Practitioners*, Module 13 at 1 (2009), *available at* [http://www.unodc.org/documents/human-trafficking/TIP\\_module13\\_Ebook.pdf](http://www.unodc.org/documents/human-trafficking/TIP_module13_Ebook.pdf).

Third, the UN Trafficking Protocol requires State Parties to adopt measures aimed at preventing human trafficking.<sup>10</sup> India has only a handful of policies that specifically address prevention, most of which focus only on trafficking for the purposes of sexual exploitation and not trafficking for other purposes like labour.

Fourth, the UN Trafficking Protocol states that State Parties shall consider adopting measures that permit victims of cross-national trafficking to stay within the country.<sup>11</sup> Interviews revealed that India's migration policies create significant barriers for victims of cross-national human trafficking. These policies have the effect of treating cross-national victims of human trafficking as illegal immigrants.<sup>12</sup>

This policy brief observes that in order to comply with the UN Trafficking Protocol, India must (1) formally recognize and proscribe all forms of labour trafficking, as required by the UN Trafficking Protocol, (2) establish centrally implemented, accessible and uniform procedures for the safety, recovery and compensation of victims of human trafficking, (3) establish additional effective human trafficking prevention services made in cooperation with NGO and civil society members, and (4) decriminalize cross-border trafficking victims' illegal immigrant status and provide for their safe repatriation. These reforms will bring India into alignment with the country's obligations under the UN Trafficking Protocol, safeguard migrants' rights to freedom of movement, and ensure the physical safety of sex workers from law enforcement abuse. The objective of this policy brief is to inform policy makers of the points of departure between India's obligations under the UN Trafficking Protocol and the country's current anti-human trafficking policies and the realities of human trafficking in India on the ground. Specifically, the policy brief aims to provide details on these points of departure and provides concluding observations on how to bring India's policies in line with the UN Trafficking Protocol in light of information received from interviews with key stakeholders.

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<sup>10</sup> See UN Trafficking Protocol, *supra* note 5, art. 9.

<sup>11</sup> See UN Trafficking Protocol, *supra* note 5, art. 7.

<sup>12</sup> UNODC, Responses to Human Trafficking in Bangladesh, India, Nepal and Sri Lanka, Legal and Policy Review (2011); available at [http://www.unodc.org/documents/human\\_trafficking/2011/Responses\\_to\\_Human\\_Trafficking\\_in\\_Bangladesh\\_India\\_Nepal\\_and\\_Sri\\_Lanka.pdf](http://www.unodc.org/documents/human_trafficking/2011/Responses_to_Human_Trafficking_in_Bangladesh_India_Nepal_and_Sri_Lanka.pdf).



## I. Methodology

This policy brief is based on a one-year study conducted by the Centre for Health Law, Ethics and Technology at Jindal Global Law School, Cornell Law School's Avon Global Center for Women and Justice and International Human Rights Clinic, and the International Human Rights Clinic at The University of Chicago Law School. In preparing this policy brief, student researchers conducted field interviews, undertook detailed public policy research, and analyzed the available Indian legislation and case law.

### A. FIELD RESEARCH

In October 2012, Cornell Law School researchers, accompanied by members of the non-governmental organization Shakti Vahini and students from Jindal Global Law School, conducted interviews in and around New Delhi, India. Interviewers used a common interview script but varied the questions asked for the particular interviews according to the interviewee and substance of the answers. Interviewees included judges, professors of law, officials from the National Human Rights Commission, a Director-General of the Indian Police Service, officials of the Women and Child Development Department, and various NGOs engaged in rehabilitation and advocacy efforts. In February 2013, researchers from Jindal Global Law School interviewed law enforcement officials in Bangalore, India. In March 2013, researchers from Jindal Global Law School, Cornell Law School and The University of Chicago Law School conducted interviews in Kolkata, India with members and affiliates of the sex workers' collective Durbar Mahila Samanwaya Committee (DMSC), as well as with local law enforcement and government officials. Interviews were conducted in English, Hindi and Bengali. For interviews that were administered in Hindi and Bengali, Hindi-speaking and Bengali-speaking interviewers interpreted for the other interviewers.

### B. DESK RESEARCH

In addition to in-person interviews, researchers conducted an extensive literature and policy review on the nature and scope of human trafficking in India, the law and policy steps India has taken to address human trafficking, and the compliance of these laws and policies with the UN Trafficking Protocol. Researchers used a variety of sources, including international treaties, reports by international organizations, publications by academic institutions, scholarly articles, case law from the Indian Supreme Court and High Courts, domestic laws and other legislative documents.

## II. Introduction

Human trafficking is an egregious human rights violation that occurs throughout the world.<sup>13</sup> Due to its complex cross-border nature, human trafficking requires a coordinated, multi-disciplinary national and international response.<sup>14</sup> The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the UN Trafficking Protocol)<sup>15</sup> provides a roadmap for cross-national collaboration as well as recommendations for enacting effective domestic human trafficking laws. In May 2011, India ratified the three protocols of the United Nations Convention against Transnational Organized Crime, including the UN Trafficking Protocol.<sup>16</sup> Yet despite its ratification of the Protocol, India continued to lack a unified comprehensive policy for human trafficking. Rather, its anti-trafficking policies have largely operated under a fragmented and piecemeal set of laws addressing various components of human trafficking such as slavery, child labour, and child marriage.

Until recently, Indian law did not contain a comprehensive definition of human trafficking. The Constitution of India prohibits trafficking of human beings and forced labour, but it does not define either term.<sup>17</sup> India penalizes many forms of forced labour under the Bonded Labour System (Abolition) Act,<sup>18</sup> as well as the Child Labour (Prohibition and Regulation) Act,<sup>19</sup> and the Juvenile Justice (Care and Protection of Children) Act.<sup>20</sup> The Immoral Traffic (Prevention) Act (hereafter referred to as the ITPA) criminalizes most forms of sex trafficking.<sup>21</sup> The ITPA, however, also criminalizes some transactional aspects of voluntary sex work (e.g., solicitation). It thus ends up punishing both sex workers who solicit sex work voluntarily and sex trafficking victims who are coerced into doing so.<sup>22</sup>

In March 2013, India passed the Criminal Law (Amendment) Act of 2013, which amended Section 370 of the Indian Penal Code and included India's first definition of human trafficking based on the UN Trafficking Protocol:

“Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by  
First.—using threats, or  
Secondly.—using force, or any other form of coercion, or  
Thirdly.—by abduction, or

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<sup>13</sup> S.C. Inglis, *Expanding International and National Protections Against Trafficking for Forced Labor Using a Human Rights Framework*, 7 BUFF. HUM. RTS. L. REV. 55, 98, 100 (2001).

<sup>14</sup> K.V. Impe, *People for Sale: The Need for a Multidisciplinary Approach Towards Human Trafficking*, 38(3) INT'L. MIG. 113, 122 (2000).

<sup>15</sup> See UN Trafficking Protocol, *supra* note 5.

<sup>16</sup> UN Trafficking Protocol, *supra* note 5, Status of Ratification, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en).

<sup>17</sup> INDIA CONST. art. 23(1).

<sup>18</sup> The Bonded Labour System (Abolition) Act, No. 19 of 1976, available at <http://indiacode.nic.in/fullact1.asp?tfnm=197619>.

<sup>19</sup> The Child Labour (Prohibition and Regulation) Act, No. 61 of 1986, available at <http://indiacode.nic.in/fullact1.asp?tfnm=198661>.

<sup>20</sup> See The Juvenile Justice (Care and Protection of Children) Act, No. 56 of 2000, available at <http://indiacode.nic.in/fullact1.asp?tfnm=200056>, §24 (prohibiting exploitation of juvenile and child employees).

<sup>21</sup> See The Immoral Traffic (Prevention) Act, No. 104 of 1956, available at <http://wcd.nic.in/act/itpa1956.htm>, §§5A, 5B, 5C.

<sup>22</sup> See U.S. STATE DEPARTMENT, *TRAFFICKING IN PERSONS REPORT 196* (2013).

Fourthly.—by practising fraud, or deception, or

Fifthly.—by abuse of power, or

Sixthly.—by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.”<sup>23</sup>

Section 370, as amended, now defines exploitation as including “any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.”<sup>24</sup>

The new Amendment Act expanded the types of offenses criminalized as a trafficking violation and instituted heightened sentences for perpetrators. It is a significant step towards bringing India in line with the international law obligations it assumed on ratifying the UN Trafficking Protocol. However, there are significant gaps between India's multitude of human trafficking laws and realities and compliance with the UN Trafficking Protocol. This policy brief identifies existing gaps and offers recommendations for policy-makers to engender compliance with the UN Trafficking Protocol and other human rights standards.

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<sup>23</sup> The Criminal Law (Amendment) Act, *supra* note 4, §8.

<sup>24</sup> *Id.*, §8, Explanation 1.

### III. Human Trafficking In India: Prevalence, Trends, and Root Causes

India is a source, destination and transit country for labour and sex trafficking.<sup>25</sup> In India, 90% of trafficking occurs domestically (intra-state or inter-state), and 10% occurs across national borders.<sup>26</sup> The country serves as a destination for persons trafficked from neighboring countries such as Nepal and Bangladesh, and as a transit country for individuals being trafficked to the Middle East and other parts of the world.<sup>27</sup> In addition, India is a source country for individuals trafficked to Europe, the Middle East and North America.<sup>28</sup>

The majority of trafficked persons in India, including men, women, boys and girls, are trafficked for purposes of forced labour.<sup>29</sup> Labour trafficking is the trafficking of a person by means of fraud, coercion or duress for the purpose of exploiting him or her for forced labour or services or slavery or practices similar to slavery, including involuntary servitude, peonage and debt bondage.<sup>30</sup>

Sex trafficking is also prevalent within India and predominantly affects women and girls.<sup>31</sup> Sex trafficking is the trafficking of a person by means of fraud, coercion or duress for the purpose of exploiting him or her for involuntary commercial sex acts, prostitution of that person or other forms of sexual exploitation.<sup>32</sup>

The number of persons trafficked for either labour or sex is difficult to estimate, given the inherently clandestine nature of this criminal enterprise.<sup>33</sup> The United States Department of State's 2013 Trafficking in Persons Report estimates the number of persons trafficked for forced labour in India within the range of 20 to 65 million.<sup>34</sup> However, the actual number of labour trafficking victims is often difficult, if not impossible, to calculate. The primary difficulty lies in distinguishing between migrant labourers who move into or around India voluntarily in search of employment and labourers who have been lured into exploitative labour through the means of trafficking outlined in the UN Trafficking Protocol. Furthermore, many migrant workers may begin their journey voluntarily but then become vulnerable to trafficking when they are unable to secure adequate employment or the work for which they originally migrated terminates.<sup>35</sup>

It is equally difficult to ascertain the presence and extent of sex trafficking. A study conducted in 2008 by the Ministry of Women and Child Development in India found that there were an estimated three million sex

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<sup>25</sup> U. S. STATE DEP'T, *Supra* note 22, at 195.

<sup>26</sup> *Id.* See also SADIK A HAMEED ET AL., HUMAN TRAFFICKING IN INDIA: DYNAMICS, CURRENT EFFORTS AND INTERVENTION OPPORTUNITIES FOR THE ASIA FOUNDATION vi (2010), available at <http://asiafoundation.org/resources/pdfs/StanfordHumanTraffickingIndiaFinalReport.pdf>.

<sup>27</sup> HAMEED ET AL., *supra* note 26, at 11.

<sup>28</sup> *Id.*

<sup>29</sup> U. S. STATE DEP'T, *Supra* note 22, at 195.

<sup>30</sup> UN Trafficking Protocol, *supra* note 5, art. 3(a).

<sup>31</sup> U. S. STATE DEP'T, TRAFFICKING IN PERSONS REPORT 184 (2012).

<sup>32</sup> See UN Trafficking Protocol, *supra* note 5, art. 3(a).

<sup>33</sup> MINISTRY OF WOMEN AND CHILD DEVELOPMENT, INDIA COUNTRY REPORT TO PREVENT AND COMBAT TRAFFICKING AND COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN AND WOMEN 4 (2008) [hereinafter INDIA COUNTRY REPORT].

<sup>34</sup> U. S. STATE DEP'T, *Supra* note 22, at 195.

<sup>35</sup> See U. S. STATE DEP'T, *supra* note 31, at 184 (“[I]n some cases, such workers are lured from their communities through fraudulent recruitment, lending them directly to situations of forced, including debt bondage; in other cases, high debts incurred to pay recruitment fees leave them vulnerable to labour trafficking.”).

workers in India.<sup>36</sup> It is possible that many of these sex workers are victims of sex trafficking. Interviews with government officials suggest that the number of individuals trafficked for the purposes of sexual exploitation is particularly difficult to estimate as these victims, after escaping from their traffickers, may return to sex work in the face of limited alternatives. Lack of education or vocational training limits the ability of many former trafficking victims to find sustainable employment in other sectors, and even work that is available in sectors like domestic labour may have much lower earning potential.<sup>37</sup> Alternative employment options outside of sex work are frequently limited for victims of sex trafficking due to the social stigma attached to having engaged in commercial sex acts.<sup>38</sup> Therefore, in some cases it may be difficult to ascertain whether a sex worker is presently a victim of trafficking, was a victim of trafficking and chose to remain engaged in sex work, or was always voluntarily employed in this sector.

Poverty is a primary cause of human trafficking in India.<sup>39</sup> Other factors include “low employment prospects, a patriarchal culture, low regard for women’s rights, low levels of education, discrimination and marginalization of women, and cultural factors such as dowry issues.”<sup>40</sup> Labour trafficking is particularly driven by poverty, which increases vulnerability to trafficking, and by the increased demand for cheap labour and the lack of governance, which in turn facilitates trafficking in persons.<sup>41</sup> Sex trafficking, which largely impacts women and girls forced into prostitution, is facilitated by similar factors, as well as the low female-to-male child sex ratio in northern India (namely, Uttar Pradesh and Haryana) and the large number of migrant labourers in certain regions of India, which increases the demand for commercial sex workers and also for trafficked brides.<sup>42</sup>

Caste further compounds the situation. Belonging to a “lower” caste increases an individual’s vulnerability to trafficking.<sup>43</sup> Lower caste women face dual and simultaneous discrimination on account of both their caste and gender: gender and caste contribute to the denial of access to education and sustainable employment, making it is easier to exploit and traffic them due to their vulnerable economic position.<sup>44</sup>

In addition, societal lack of awareness about human trafficking, combined with the absence of a strong legal framework, has contributed to the continued prevalence of this serious problem.<sup>45</sup> In this regard, the enactment of the Amendment Act signifies a vast improvement in the legal framework. However it remains to be seen whether the amended legislation will be implemented in ways that enhance the prevention and prosecution of human trafficking in India.

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<sup>36</sup> INDIA COUNTRY REPORT, *supra* note 33, at 4.

<sup>37</sup> Interview with Dr. Smarajit Jana, All India Institute of Hygiene and Public Health, Kolkata (Mar. 21, 2013); Interview with Mr. Jeevan Prakash Sahal, Member of Local Government and Head of Political Party, Kolkata (Mar. 22, 2013).

<sup>38</sup> Cherish Adams, *Re-Trafficked Victims: How a Human Rights Approach Can Stop the Cycle of Re-Victimization of Sex Trafficking Victims*, 43 GEO. WASH. INT’L. REV. 201, 202, 209 (2011).

<sup>39</sup> HAMEED ET AL, *supra* note 26, at 12.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at vi.

<sup>42</sup> *Id.* at vi, 13-14. See also Interview with Mr. Shafiq, Empower People, New Delhi (Oct. 11, 2012).

<sup>43</sup> U. S. STATE DEP’T, *Supra* note 22, at 195. See also Dale Youngbee, *Interview: Dr. Joseph D’souza: Understanding Human Trafficking in India*, THE EXAMINER (Jan. 18, 2010), available at <http://www.examiner.com/article/interview-dr-joseph-d-souza-understanding-human-trafficking-india>.

<sup>44</sup> See MARY CRAWFORD, SEX TRAFFICKING IN SOUTH ASIA: TELLING MAYA’S STORY 106 (2010).

<sup>45</sup> *Id.*

## IV. India's Legal Obligations and the United Nations Trafficking Protocol

### A. INTRODUCTION TO THE UN TRAFFICKING PROTOCOL

The UN Trafficking Protocol provides a comprehensive framework for addressing the trafficking of persons internationally and domestically. As discussed above, the Protocol's definition of human trafficking delineates the wide variety of conduct constituting the crime of trafficking persons. Under this definition, a person is guilty of the crime of human trafficking if they satisfy three components: (1) an act (e.g., transportation, or receipt of persons), (2) by a specified means (e.g., threat or use of force or other forms of coercion, abduction, fraud, etc.), (3) resulting in "exploitation," as defined by the Protocol.<sup>46</sup> As noted in Part II above, exploitation is defined as "including, at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or similar practices, servitude, or the removal of organs."<sup>47</sup>

The crime of human trafficking of adult victims therefore consists of at least one such act, a means and an exploitative purpose. However, for trafficking of minor-child victims, the second requirement (i.e., the "means" requirement) is waived.<sup>48</sup> Therefore, a person is guilty of child trafficking if he or she commits one of the proscribed actions for purposes of exploitation, regardless of the means by which that act is committed.<sup>49</sup> The consent of the victim is irrelevant where any of the means included in the definition has been employed or the victim is a child.<sup>50</sup> The UN Trafficking Protocol obligates States to criminalize trafficking in persons,<sup>51</sup> to take steps to prevent human trafficking,<sup>52</sup> and to assist, protect and repatriate victims of human trafficking safely.<sup>53</sup>

### B. INDIA'S OBLIGATION TO UPHOLD THE UN TRAFFICKING PROTOCOL

Almost a decade after signing the United Nations Convention Against Transnational Organized Crime (UNTOC), India officially ratified the Convention and its three Protocols, including the UN Trafficking Protocol, on May 5, 2011.<sup>54</sup> The process of ratification formally indicated the State's consent to be bound by the terms and provisions of the UNTOC and its Protocols. However, India has a dualist regime with regard to international law and international treaties. This means that, according to the Indian Constitution, ratified treaties do not automatically have the force of law in domestic courts.<sup>55</sup>

<sup>46</sup> UN Trafficking Protocol, *supra* note 5, art. 3; CENTRE FOR FEMINIST LEGAL RESEARCH, PRACTITIONER'S HANDBOOK ON HUMAN RIGHTS AND TRAFFICKING IN PERSONS 2-3 (2005).

<sup>47</sup> UN Trafficking Protocol, *supra* note 5, art. 3.

<sup>48</sup> *Id.*, art. 3(c). Importantly, the definition of trafficking contained in amended Section 370 of the Indian Penal Code does not waive this requirement in the case of trafficking of minor victims.

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

<sup>50</sup> *Id.*, art. 3(b).

<sup>51</sup> *Id.*, art. 5.

<sup>52</sup> *Id.*, art. 9.

<sup>53</sup> *Id.*, arts. 2 & 6.

<sup>54</sup> *UN Trafficking Protocol, Current Status*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en) (last visited Mar. 10, 2015).

<sup>55</sup> See *Jolly George Verghese v. Bank of Cohni*, A.I.R. 1980 S.C. 470, 914 (India). See also NAT'L COMM'N TO REVIEW THE WORKING OF THE CONSTITUTION, A CONSULTATION PAPER ON TREATY-MAKING POWER UNDER OUR CONSTITUTION (2001), available at <http://lawmin.nic.in/ncrcw/finalreport/v2b2-3.htm>.

However, the Indian Constitution states that the Government of India must adhere to its treaty obligations and “endeavor to...foster respect for international law treaty obligations in the dealings of organized peoples with one another.”<sup>56</sup> In *Gramophone Co. of India v. Birendra Bahadur Pandey*, the Indian Supreme Court declared that the Constitution itself must be interpreted in light of any international treaties that India has ratified.<sup>57</sup> In addition, the Supreme Court in *Vishaka v. Rajasthan* established that provisions of international treaties might be read into existing Indian law in order to “expand” their protections.<sup>58</sup> Moreover, in the absence of domestic law, “the contents of international conventions and norms are significant for the purpose of interpretation.”<sup>59</sup>

Thus, although India has not expressly incorporated the entirety of the UN Trafficking Protocol into its national law, the Indian government is nonetheless required to adhere to all of its obligations under the Protocol. Moreover, in line with the judicial precedents discussed above, the anti-trafficking provisions of the Indian Constitution, Penal Code, and other domestic legislation should be interpreted in light of the UN Trafficking Protocol and other international treaties to which India is a party.

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<sup>56</sup> INDIA CONST. art. 51(c).

<sup>57</sup> See *Gramophone Co. of India v. Birendra Bahadur Pandey*, (1984) S.C.C. 2 (India) (stating that the comity of nations requires that the rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament). See also *Apparel Export Promotion Council v. A.K. Chopra*, A.I.R. 1999 S.C. 625 (India); *Nilabati Behera v. State of Orissa*, (1993) 2 S.C.C. 746 (India).

<sup>58</sup> See *Vishaka v. Rajasthan*, A.I.R. 1997 S.C. 3011 (India).

<sup>59</sup> See *id.* at ¶ 7 (“In the absence of domestic law occupying the field, to formulate effective measures to check [certain evils], the contents of international Conventions and norms are significant for the purpose of interpretation...Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.”).

## V. India's Current Human Trafficking Laws and Realities Measured Against the UN Trafficking Protocol

India's recent adoption of the Amendment Act moves India closer to compliance with international standards set by the UN Trafficking Protocol. However, there are several areas in which India's laws and realities do not comply with the UN Trafficking Protocol's requirements and recommendations, including: 1) labour trafficking, 2) safety, compensation and rehabilitation, 3) prevention, and 4) migration, decriminalization and repatriation. The following sections measure India's domestic laws against the UN Trafficking Protocol on a subject-by-subject basis.

### A. LABOUR TRAFFICKING

India's human trafficking laws and efforts have historically focused nearly exclusively on trafficking for sexual exploitation purposes despite the fact that the majority of human trafficking in India is for the purpose of forced labour.<sup>60</sup> Thus, until the passage of the recent Amendment Act, the majority of human trafficking victims in India – namely those who had been trafficked for purposes of forced labour – were not recognized as such because they were not trafficked for purposes of sex. These victims of human trafficking fell outside the bounds of India's trafficking laws.<sup>61</sup>

#### 1. UN Trafficking Protocol Obligations

Article 3 of the UN Trafficking Protocol provides that human trafficking includes forced labour or services and other forms of servitude, as quoted above. According to Article 3, trafficking in persons must be for the “purpose of exploitation,”<sup>62</sup> whereby exploitation is defined as including:

“(a) at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”<sup>63</sup>

In addition, Article 5 of the UN Trafficking Protocol states that States party to the treaty must criminalize an attempted violation of Article 3:

“(1) Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offenses the conduct set forth in article 3 of this Protocol, when committed intentionally.

(2) Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offenses:

(a) Subject to the basic concepts of its legal system, attempting to commit an offense established in accordance with paragraph 1 of this article. . . .”<sup>64</sup>

Thus, the UN Trafficking Protocol prohibits both actual and attempted trafficking of persons for the purposes of labour. The Protocol does not emphasize sex trafficking as a more egregious offense than labour trafficking.

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<sup>60</sup> See, e.g., The Immoral Traffic (Prevention) Act, *supra* note 21, §5A (outlawing trafficking only for the purpose of prostitution).

<sup>61</sup> See, e.g., The Bonded Labour System (Abolition) Act, *supra* note 18, § 4, which abolishes the bonded labour system, defined in Section 2(g) as the system of “forced, or partly forced labour under which a debtor enters, or has, or is presumed to have entered into an agreement with the creditor.”

<sup>62</sup> UN Trafficking Protocol, *supra* note 5, art. 3.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*, art. 5 (1), (2)(a).



## 2. India's Laws and Policies

### a. *India's Bonded Labour System (Abolition) Act, 1976*

India's failure to consistently recognize and punish labour trafficking as a form of human trafficking is reflected in its Bonded Labour System (Abolition) Act (hereafter, referred to as “The Act”). The Act defines bonded labour in terms similar to those used for labour trafficking in the UN Trafficking Protocol, but it fails to specify that persons may be trafficked for the purposes of bonded labour.<sup>65</sup> Further, the language of the Act itself indicates that the punishment for the offence is a very limited one and hinges on the labour falling within the scope of a “bonded labour system” as defined under the Act:

“16. Punishment for enforcement of bonded labour. – Whoever, after the commencement of this Act, compels any person to render any bonded labour shall be punishable with imprisonment for a term, which may extend to three years and also with fine, which may extend to two thousand rupees.”<sup>66</sup>

Where “bonded labour” has not been rendered, i.e., where a creditor-debtor relationship does not exist, punishment is not possible according to the language of this Act.<sup>67</sup> Thus in a situation where a person, who is not indebted to the trafficker or another person compelling bonded labour, is rescued from the trafficker, the Act does not offer any remedy for the labourer. Indeed, even where a person has been trafficked and labour has been rendered, the Act would not allow for prosecution of the traffickers if the labour relationship does not constitute a “bonded labor system.” The Act, then, does not criminalize the trafficking of persons for forced labour—a form of trafficking proscribed by the UN Trafficking Protocol.<sup>68</sup>

### b. *India's Amendment Act*

The newly adopted Amendment Act's definition of human trafficking is nearly duplicative of the language in the UN Trafficking Protocol.<sup>69</sup> However, there are several gaps between the language of Articles 3 and 5 of the UN Trafficking Protocol and the corresponding portions of the Amendment Act. The most significant departure from the UN Trafficking Protocol lies in the Act's exclusion of labour trafficking from the definition of human trafficking. The Act does not include in the definition of human trafficking, trafficking for the purposes of “forced labour,” a form of trafficking included in the UN Trafficking Protocol.<sup>70</sup> Trafficking for the purposes of “forced labour” is not included in the Act's definition of human trafficking, although it is included in the UN Trafficking Protocol. However, the Criminal (Amendment) Ordinance, issued by the President prior to the Act, did include forced labour.<sup>71</sup> The final formulation of the Act's definition of human trafficking replaced the term “forced labour” with “physical exploitation.”<sup>72</sup> Although

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<sup>65</sup> United Nations Office on Drugs and Crime, *Factsheet on Human Trafficking*, available at [http://www.unodc.org/documents/human-trafficking/UNVTF\\_fs\\_HT\\_EN.pdf](http://www.unodc.org/documents/human-trafficking/UNVTF_fs_HT_EN.pdf) (last visited May 13, 2014); see Bonded Labour System (Abolition) Act, *supra* note 18, §2 (g) (defines “bonded labour system”).

<sup>66</sup> Bonded Labour System (Abolition) Act, *supra* note 18, § 16.

<sup>67</sup> Sannasomannara Somashekarappa v. Gorappa Rudraswamy, I.L.R. 2004 Kar. 4606 (India).

<sup>68</sup> UN Trafficking Protocol, *supra* note 5, art. 3.

<sup>69</sup> See *supra* text accompanying notes 4-5.

<sup>70</sup> UN Trafficking Protocol, *supra* note 5, art. 3.

<sup>71</sup> The Criminal Law (Amendment) Ordinance § 7 (Feb. 3, 2013), available at <http://pib.nic.in/newsite/erelease.aspx?reid=91979>.

<sup>72</sup> The Criminal Law (Amendment) Act, *supra* note 4, § 8, Explanation 1.

forced labour could be understood to be included within the term “physical exploitation,” this is not a certainty as “physical exploitation” is not defined within the Act or the UN Trafficking Protocol. The term “forced labour” is the only term that is excluded from the Amendment Act's definition of human trafficking as compared to the UN Trafficking Protocol's definition within Articles 3 and 5. The Justice Verma Committee Report did not advocate for the utilization of the term “physical exploitation” in lieu of “forced labour”; in fact, the text of the Verma Committee report makes no such reference to “physical exploitation” at all.<sup>73</sup>

The Amendment Act similarly falls short in penalizing persons who utilize victims of trafficking for purposes of labour. According to Section 370A of the Indian Penal Code, as amended by the Act, those who “knowingly or having reason to believe that a person has been trafficked, engages such person for sexual exploitation in any manner, shall be punished” with rigorous imprisonment for a term of three to five years and also a fine.<sup>74</sup> However, the Amendment Act does not create a similar punishment for those who engage such victims for physical exploitation. As noted above, the majority of human trafficking in India is for the purposes of labour.<sup>75</sup> Thus, Section 370's proscription against engaging sex trafficking victims fails to protect the majority of trafficking victims in India.

The UN Office of Drugs and Crime (UNODC) International Framework for Action to Implement the Trafficking in Persons Protocol underscores the importance of penalizing all forms of human trafficking (included bonded labour trafficking) and provides that State parties to the UN Trafficking Protocol must have “trafficking in persons legislation [that] cover[s] at a minimum those forms of exploitation mentioned in the Protocol.”<sup>76</sup> The exclusion of the term “forced labour” from the Act implies that the Amendment Act does not cover, as required by the UNODC, “those forms of exploitation mentioned in the Protocol.”<sup>77</sup> This failure to accord labour trafficking the same or similar treatment as sex trafficking is problematic. The Act's limited definition of human trafficking is therefore a major failing of the Amendment Act, and signifies a legislative gap that implicates India's obligations as a State Party of the UN Trafficking Protocol. The Act should be amended, in line with the UN Protocol, to explicitly include “forced labour” under the definition of human trafficking. However, until such time, the term “physical exploitation” should be interpreted to encompass “forced labour” as required by India's obligations under the Protocol.

### 3. Realities and Enforcement

As noted above, the overwhelming majority of trafficking in India is for labour related activities.<sup>78</sup> Therefore, the use of the term “physical exploitation” in lieu of “forced labour” is a foundational problem with notable potential down-stream effects. As the term “physical exploitation” is not defined in the Amendment Act nor included nor defined in the UN Trafficking Protocol, its meaning is largely ambiguous. Policy makers, law

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<sup>73</sup> See JUSTICE J.S. VERMA ET AL, *supra* note 4, at 438.

<sup>74</sup> PEN. CODE § 370A(2).

<sup>75</sup> U.S. STATE DEP'T, *supra* note 31, at 184.

<sup>76</sup> United Nations Office on Drugs and Crime, *International Framework for Action to Implement the Trafficking in Persons Protocol 20 (2009)*, available at [http://www.unodc.org/documents/human-trafficking/Framework\\_for\\_Action\\_TIP.pdf](http://www.unodc.org/documents/human-trafficking/Framework_for_Action_TIP.pdf).

<sup>77</sup> *Id.*

<sup>78</sup> U.S. STATE DEP'T, *supra* note 22, at 195.

enforcement, or judges may exploit this ambiguity to depart from the jurisprudence on “forced labour” that has developed under the UN Trafficking Protocol, and to deny that physical exploitation includes trafficking for the purpose of forced labour. This may thus lead to a significant narrowing of the scope of conduct prohibited by Section 370 of the Indian Penal Code. It remains to be seen whether this consequence will result from the legislative gap or whether courts and government actors will consistently interpret the Amendment Act to include forced labour among the proscribed forms of exploitation.

#### **4. Identified Gaps**

As the discussion above illustrates, several gaps exist between the UN Trafficking Protocol and India's legislative treatment of labour trafficking. These include:

- A definition of human trafficking in Indian law that does not include the term “forced labour” as a form of exploitation.
- The law's differential treatment of sex trafficking and labour trafficking.

### **B. SAFETY, RECOVERY AND COMPENSATION**

There are a limited number of laws and policies establishing and funding procedures and resources for the recovery, safety and compensation of survivors of human trafficking. Our interviews and review of the literature revealed that victims have trouble accessing compensation and achieving a safe recovery due to fragmented policies and implementation failures.

#### **1. UN Trafficking Protocol Obligations**

Article 6 of the UN Trafficking Protocol establishes standards for the recovery, safety, and compensation of trafficking victims.<sup>79</sup> According to Article 6:

3. “Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons . . . .<sup>80</sup>
5. Each State Party shall endeavor to provide for the physical safety of victims of trafficking in persons while they are within the territory.<sup>81</sup>
6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of

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<sup>79</sup> UN Trafficking Protocol, *supra* note 5, art. 6.

<sup>80</sup> *Id.* at art. 6(3).

<sup>81</sup> *Id.* at art. 6(5).

trafficking in persons the possibility of obtaining compensation for damage suffered.”<sup>82</sup>

Article 6 recommends that victims of trafficking be given access to appropriate housing, counsel, medical assistance, educational and training opportunities, and employment.<sup>83</sup>

## 2. India's Laws and Policies

### a. *Ujjawala: A Comprehensive Scheme for Prevention of Trafficking and Rescue, Rehabilitation and Re-Integration of Victims of Trafficking for Commercial Sexual Exploitation*

The *Ujjawala: A Comprehensive Scheme for Prevention of Trafficking and Rescue, Rehabilitation and Re-Integration of Victims of Trafficking for Commercial Sexual Exploitation*, under the Ministry for Women and Child Development,<sup>84</sup> attempts to “provide rehabilitation services both immediate and long-term to the victims by providing basic amenities/needs such as shelter, food, clothing, medical treatment including counseling, legal aid and guidance and vocational training.”<sup>85</sup> The *Ujjawala* Scheme provides victims with funding to meet the travel costs incurred en route to being restored with their families, as well as “seed money” of 5,000 INR (roughly \$83) to each victim.<sup>86</sup>

### b. *Swadhar Greh: A Scheme for Women In Difficult Circumstances*

*Swadhar Greh: A Scheme for Women in Difficult Circumstances*, also under the Ministry of Women and Child Development, represents another such programme.<sup>87</sup> The *Swadhar Greh* Scheme is meant “to provide temporary accommodation, maintenance and rehabilitative services to women and girls rendered homeless due to family discord, crime, violence, mental stress, social ostracism or [who] are being forced into prostitution and are in moral danger.”<sup>88</sup> Beneficiaries of the *Swadhar Greh* Scheme include “[t]rafficked women/girls rescued or runaway from brothels or other places where they face exploitation.”<sup>89</sup> Both schemes, however, only apply to persons trafficked for the purposes of sexual exploitation.

### c. *Juvenile Justice (Care and Protection of Children) Act*

The Juvenile Justice (Care and Protection of Children) Act, 2000 defines a child in need of care and protection to include a child “who is found vulnerable and is likely to be inducted into . . . trafficking.”<sup>90</sup> The Act establishes procedures for the recovery and social reintegration of such children, including the creation of

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<sup>82</sup> *Id.* at art. 6(6).

<sup>83</sup> *Id.*

<sup>84</sup> MINISTRY OF WOMEN AND CHILD DEVELOPMENT, UJJAWALA: A COMPREHENSIVE SCHEME FOR PREVENTION OF TRAFFICKING AND RESCUE, REHABILITATION AND RE-INTEGRATION OF VICTIMS OF TRAFFICKING FOR COMMERCIAL SEXUAL EXPLOITATION (2007), available at <http://wcd.nic.in/schemes/ujjawala.pdf>.

<sup>85</sup> *Id.* at 2.

<sup>86</sup> *Id.* at 7.

<sup>87</sup> MINISTRY OF WOMEN AND CHILD DEVELOPMENT, SWADHAR GREH - A SCHEME FOR WOMEN IN DIFFICULT CIRCUMSTANCES (2001-02), available at <http://wcd.nic.in/schemes/swadhardtd07102011.pdf>.

<sup>88</sup> *Id.* Part A.

<sup>89</sup> *Id.* Part E.

<sup>90</sup> The Juvenile Justice (Care and Protection of Children) Act, *supra* note 20, § 2(d)(vii).

shelter homes and the provision of foster-care services.<sup>91</sup> However, this scheme only applies to minors defined as persons below the age of eighteen years.<sup>92</sup>

#### **d. Code of Criminal Procedure**

Responsibility for providing compensation to trafficking victims is fragmented between the central government and individual states.<sup>93</sup> This is largely the result of Section 357, Code of Criminal Procedure, which states that the Central Government should be responsible for compensating victims of any crime (not limited to trafficking) who have suffered loss or injury. However, it fails to note the form or degree of such compensation.<sup>94</sup> According to the Section:

“(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment order the whole or any part of the fine recovered to be applied .

(b) in the payment to any person of compensation for any loss or injury caused by the offence, which compensation is, the opinion of the Court, recoverable by such person in a Civil Court . . . .”

The Section addresses the compensation of trafficking victims; however, it allows for the individual State's determination of compensation procedures and amounts.<sup>95</sup> As a result, there is no centralized compensatory system for trafficking victims in India. The Centrally Sponsored Rehabilitation Scheme for Bonded Labour mandates a rehabilitation grant of Rs. 20,000 (roughly \$330) to each bonded labourer as well as assistance for rehabilitation.<sup>96</sup> Unfortunately, this amount is fixed regardless of the amount of time the labourer has provided bonded service.<sup>97</sup>

### **A. Realities and Enforcement**

#### **a. Recovery**

Interviews with law enforcement officials revealed that India's trafficking recovery laws and policies are piecemeal and haphazardly applied. During an interview, Dr. P.M. Nair of the Indian Police Service in New Delhi noted that the government's rehabilitative efforts are often ad-hoc and ineffective—they are hampered by a lack of coordination among the police and government agencies concerned at every step along the way, from rescue to rehabilitation.<sup>98</sup> The United States 2012 Trafficking in Persons Report stated that many NGOs have reported difficulty in receiving timely disbursements of national government funding for their shelters.<sup>99</sup>

Our interviews of government officials and NGO stakeholders suggest that services provided by both non-

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

<sup>92</sup> *Id.*

<sup>93</sup> CODE CRIM. PROC. § 357A.

<sup>94</sup> *Id.*

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

<sup>96</sup> Centrally Sponsored Rehabilitation Scheme for Bonded Labour (1978); Socio Economic and Educational Development Society, A REPORT ON BONDED LABOUR REHABILITATION SCHEME UNDER CENTRALLY SPONSORED BONDED LABOUR SYSTEM (ABOLITION) ACT, 1976 IN THE STATE OF MADHYA PRADESH, ORISSA, RAJASTHAN, TAMIL NADU AND UTTAR PRADESH.

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

<sup>98</sup> Interview with Dr. P.M. Nair, Indian Police Service, New Delhi (Oct. 9, 2012).

<sup>99</sup> U.S. STATE DEP'T, *supra* note 31, at 185.

state actors and the government are often ineffective and of low-quality.<sup>100</sup> For example, according to Dr. Smarajit Jana of the Sonagachi Research and Training Institute, the holding facilities for rescued trafficked girls often have miserable conditions and may be worse than the brothels in which they had previously been housed.<sup>101</sup> Dr. Jana noted that “even a government report showed how bad the conditions are at some remand homes, girls have been physically and sexually tortured.”<sup>102</sup> Interviews with NGOs overwhelmingly indicated that government-run shelter homes suffer from poor hygiene and limited services.<sup>103</sup> The United States 2013 Trafficking in Persons Report similarly found that India's government-run shelter homes were overcrowded and unhygienic, offered below average food and provided only limited services.<sup>104</sup> In some shelters, moreover, victims are not permitted to leave, in violation of international law.<sup>105</sup>

Male victims of human trafficking face a double barrier to protection because not only are they less easily identified and thus less likely to be rescued, but they are also left without any recourse after they have been rescued from their traffickers. Recovery homes and related programmes, though far from ideal, are often not available to men and boys at all.<sup>106</sup> The *Ujjawala* scheme, in which the government invested \$118 million from 2011-2012, only applies to female victims and does not cover male victims.<sup>107</sup>

In addition, the services that government-run recovery homes offer may be counterproductive for the victims of human trafficking they are supposed to assist. For example, Mr. Ramesh Halbavi of the Department of Women and Child Development (DWC) in Karnataka noted that shelter homes try to convince women to get married in order to reintegrate them back into society, believing that the girl or woman will be in a better social position after being married.<sup>108</sup> Such actions reify a woman's secondary position in society by negating her ability to be an independent, productive member of society in her own right and failing to provide her with the tools needed to be economically independent.

## **b. Safety**

Interviews with members of the sex workers collective Durbar Mahila Samanwaya Committee (DMSC) offer a unique perspective on the safety barriers facing victims of sex trafficking. First, interviews with DMSC and law enforcement officials suggest that victims of trafficking remain vulnerable to harm and intimidation from their trafficker or their trafficker's associates even after they have been rescued.<sup>109</sup> Second, interviews with DMSC highlighted the important difference between sex workers and sex trafficking victims and

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<sup>100</sup> See, e.g., Interview with Ravi Kant, Shakti Vahini, New Delhi (Oct. 7, 2012); Interview with Mr. Shafiq, Empower People, New Delhi (Oct. 11, 2012).

<sup>101</sup> Interview with Dr. Smarajit Jana, Principal, Sonagachi Research and Training Institute, Kolkata (Mar. 21, 2013).

<sup>102</sup> *Id.*

<sup>103</sup> See e.g., Interview with Ravi Kant, Shakti Vahini, New Delhi (Oct. 7, 2012); Interview with Mr. Shafiq, Empower People, New Delhi (Oct. 11, 2012); Interview with Ms. Roma Debabrata. STOP, New Delhi (Oct. 12, 2012); Interview with Dr. Smarajit Jana, Principal, Sonagachi Research and Training Institute, Kolkata (Mar. 21, 2013); Interview with Member of Local Government and Head of Political Party, Kolkata (Mar. 22, 2013).

<sup>104</sup> U.S. STATE DEP'T, *supra* note 22, at 197.

<sup>105</sup> *Id.*

<sup>106</sup> Interview with Dr. Smarajit Jana, Principal, Sonagachi Research and Training Institute, Kolkata (Mar. 21, 2013).

<sup>107</sup> Ministry for Women and Child Development, *supra* note 84.

<sup>108</sup> Interview with Mr. Ramesh Halbavi, Deputy Director, Department of Women and Child Development (DWCD), Bangalore (Jan. 27, 2013).

<sup>109</sup> See Interview with Mr. Ravi Kant, Shakti Vahini, New Delhi (Oct. 8, 2012); Phone interview with Judge Swati Chauhan, former judge of the Mumbai Fast-Track Trafficking Court, New Delhi (Oct. 9, 2012).

revealed that law enforcement officials often erroneously conflate sex workers with sex trafficking victims when enforcing anti-trafficking laws.<sup>110</sup> Not all women engaged in sex work are victims of trafficking, and not all forms of trafficking involve sex work.<sup>111</sup> This distinction is clearly recognized by international law, which includes in its definition of trafficking the “exploitation of the prostitution of another”<sup>112</sup> but does not impose obligations on states to either prohibit or permit adult sex work. This has resulted in improper detention of sex workers who were mistakenly identified as victims.<sup>113</sup> The mistaken conflation of legal sex work and human trafficking has historically led to ineffective and misguided anti-trafficking efforts.<sup>114</sup> Thus, India's anti-trafficking laws, policies and enforcement efforts should not conflate trafficking with sex workers.

The board of DMSC undertakes significant efforts to locate victims and return them, if need be, to their home countries or home regions of India.<sup>115</sup> Sex workers and other members of DMSC are trained to identify signs of sex trafficking and to report to the board. Once DMSC receives a report of a person trafficked into the district for sex, the board will interview him or her (most often a woman or girl) and will take steps to remove the victim from the situation to safety.<sup>116</sup>

Interviews with DMSC sex workers repeatedly highlighted cases of police harassment and sexual and physical abuse of victims of sex trafficking once they are taken into police custody.<sup>117</sup> Dr. Jana noted the importance of DMSC's involvement in anti-sex trafficking measures in light of poor and, in some instances, abusive conduct by police and governmental officers:

“Unofficially, DMSC doesn't usually try to involve the police when returning a victim to their home country. This is because the police have handled victims poorly in the past. Trafficking victims [originally from Bangladesh] have had a very bad experience sometimes, languishing in jail while the Bangladesh government says, 'not my citizen.' Her life becomes miserable in the police station or remand home. One of the biggest problems is when the police make raids on sex worker homes. During the raids, they beat them or treat them in all sorts of noxious ways. Then they take money to release some of them – this is a common practice.”<sup>118</sup>

Furthermore, interviews with the board of DMSC showcased the dire predicament of many of these victims. Once away from their traffickers, they are often without the financial means or support networks to successfully evade re-trafficking by their previous traffickers or associate traffickers.<sup>119</sup> In addition, victims of human trafficking may face barriers within the legal system that serve to exacerbate

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<sup>110</sup> See Interview with Self-Regulatory Board Members, DMSC, Sonagachi, Kolkata (Mar. 21, 2013).

<sup>111</sup> See Interview with Professor Ratna Kapur, Jindal Global Law School, Haryana, India (Oct. 10, 2012) (noting that there is a need to distinguish between a sex worker and a girl who is forced into prostitution).

<sup>112</sup> UN Trafficking Protocol, *supra* note 5, art. 3(a).

<sup>113</sup> *Id.*

<sup>114</sup> See Wendy Chapkis, *Trafficking, Migration and the Law: Protecting Innocents, Punishing Immigrants*, 17 *Gender and Society* 923 (2003).

<sup>115</sup> *Anti-Trafficking: DMSC is Building a Chinese Wall*, DURBAR MAHILA SAMANWAYA COMMITTEE, [http://durbar.org/html/anti\\_trafficking.aspx](http://durbar.org/html/anti_trafficking.aspx) (last visited May 13, 2014).

<sup>116</sup> See Interview with Self-Regulatory Board Members, DMSC, Sonagachi, Kolkata (Mar. 21, 2013).

<sup>117</sup> *Id.*; Interview with Dr. Smarajit Jana, Principal of the Sonagachi Research and Training Institute (Mar. 21, 2013).

<sup>118</sup> Interview with Dr. Smarajit Jana, Sonagachi, Kolkata (Mar. 21, 2013).

<sup>119</sup> *Id.*; Interview with Peer Health Educators, DMSC, Sonagachi, Kolkata (Mar. 22, 2013).

their vulnerabilities.<sup>120</sup> In particular, trafficking victims are often intimidated into refusing to testify against their trafficker.<sup>121</sup> Although judges may use their discretionary powers to order that victims receive police protection, this is not automatically provided to all victims of trafficking and is dependent on the sensitivity of each judge towards issues related to human trafficking.<sup>122</sup> Even in cases in which a judge orders police protection for the victim, this protection may be limited to the victim, thus leaving the victim vulnerable to a trafficker's threat of harm to family members and friends.<sup>123</sup>

Moreover, interviews indicated that apart from such discretionary judicial measures, there is no legislative provision (such as legally-mandated witness protection programmes) for the protection of vulnerable victims of human trafficking.<sup>124</sup> There is also no provision mandating that legal proceedings involving human trafficking victims must be confidential. This is inconsistent with the obligations laid out by the UN Trafficking Protocol requiring the protection of the privacy and identity of victims of trafficking.

### **c. Compensation**

Interviews with government officials and NGO directors revealed that victims of human trafficking are not compensated effectively. First, according to interviews, there is no streamlined process for obtaining compensation.<sup>125</sup> Second, those who are entitled to compensation by law often have difficulty accessing that compensation.<sup>126</sup> In interviews, members of local anti-trafficking NGOs and shelter home officials noted that legal aid, including assistance accessing legal compensation systems through government schemes, is amongst the most important services that could be provided to trafficked victims.<sup>127</sup> However, at present, facilitating meaningful access to compensation often falls to non-governmental actors.<sup>128</sup> Victims of human trafficking, who usually have little or no knowledge of the legal system, struggle to navigate the complex and often bureaucratic government processes necessary to receive the compensation to which they are entitled.<sup>129</sup>

## **B. Identified Gaps**

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<sup>120</sup> See Interview with Mr. Ravi Kant, Shakti Vahini, New Delhi (Oct. 8, 2012); Phone Interview with Judge Swati Chauhan, former judge of the Mumbai Fast-Track Trafficking Court, New Delhi (Oct. 9, 2012).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See Interview with Judge Nisha Shahaysaxena, Karkardooma District Court, New Delhi (Oct. 11, 2012).

<sup>124</sup> See Interview with Mr. Ravi Kant, Shakti Vahini, New Delhi (Oct. 8, 2012); Phone interview with Judge Swati Chauhan, former judge of the Mumbai Fast-Track Trafficking Court, New Delhi (Oct. 9, 2012).

<sup>125</sup> Interview with Mr. Ravi Kant, Shakti Vahini, New Delhi (Oct. 7, 2012); Interview with Mr. Subhir Roy, Shakti Vahini, New Delhi (Oct. 7, 2012); Interview with Ms. Roma Debabrata, STOP, New Delhi (Oct. 12, 2012); Interview with Mr. Robertson, Global Family Charitable Trust, New Delhi (Oct. 8, 2012).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Interview with Mr. Ravi Kant, Shakti Vahini, New Delhi (Oct. 7, 2012).

<sup>129</sup> *Id.*



There are several gaps between the UN Trafficking Protocol and India's laws, policies and realities in regards to safety, recovery and compensation. These include:

- Inadequate protections to guarantee the victims' safety, including measures to protect his or her privacy and the confidentiality of his or her identity.
- Poor conditions and violations of victim's rights in both government and NGO-run recovery homes.
- Lack of access to shelter and other recovery services for male trafficking victims.
- Lack of employment, educational and training opportunities.
- Ineffective domestic compensation systems for human trafficking victims.

## C. PREVENTION

### 1. UN Trafficking Protocol Obligations

Article 9 of the UN Trafficking Protocol requires State Parties to establish “comprehensive policies, programmes and other measures to prevent and combat” human trafficking.<sup>130</sup> Specifically, the Protocol provides that such measures “shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.”<sup>131</sup> Furthermore, State Parties “shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.”<sup>132</sup> In addition, State Parties must also adopt measures “to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.”<sup>133</sup>

### 2. India's Laws and Policies

India's current laws and policies do not comply with India's obligations to adopt measures to prevent human trafficking under the UN Trafficking Protocol. The Immoral Traffic (Prevention) Act (ITPA) (hereafter referred to as the ITPA) authorizes the Central Government to constitute an authority for the prevention of trafficking in persons.<sup>134</sup> However, outside of this enabling provision to establish such an authority, the ITPA predominantly focuses on the punishment of trafficking offenses as well as rehabilitation efforts (i.e., rehabilitation homes). There is little mention of prevention within the ITPA. Furthermore, the ITPA does not address trafficking for any purpose outside of sexual exploitation. The Bonded Labour Act similarly neglects to create human trafficking prevention measures. The Preamble of the Bonded Labour Act states that the Act is intended “to provide for the abolition of bonded labour system with a view to preventing the economic and physical exploitation of the weaker sections of people.”<sup>135</sup> However, the Act does not address prevention efforts at any other point within the text.<sup>136</sup>

As discussed above, the *Ujjawala* scheme for the “Prevention of Trafficking and Rescue, Rehabilitation and

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<sup>130</sup> UN Trafficking Protocol, *supra* note 5, art. 9.

<sup>131</sup> *Id.*, art. 9 (3).

<sup>132</sup> *Id.*, art. 9 (4).

<sup>133</sup> *Id.*, art. 9 (5).

<sup>134</sup> Immoral Traffic (Prevention) Act (1956), *supra* note 21, § 13A.

<sup>135</sup> Bonded Labour System (Abolition) Act, *supra* note 18, Preamble.

<sup>136</sup> Bonded Labour System (Abolition) Act, *supra* note 18.

Re-Integration of Victims of Trafficking for Commercial Sexual Exploitation”<sup>137</sup> aims to “prevent trafficking of women and children for commercial sexual exploitation through social mobilization and involvement of local communities, awareness generation programmes, generate public discourse through workshops/seminars and such events and any other innovative activity.”<sup>138</sup>

The *Ujjawala* scheme breaks down its prevention efforts into a five pronged approach of assistance: 1) formation of community vigilance groups; 2) formation and functioning of *Balika* (adolescent girls)/*Balak* (adolescent children) *Sanghas* (consortiums); 3) sensitization workshops/seminars; 4) awareness generation through mass media including *kalajathas* (folk theatre, songs and processions), street plays, puppetry or any other arts forms, preferably traditional; and 5) development and printing of awareness generation material such as pamphlets, leaflets and posters (in local languages).<sup>139</sup>

### 3. Realities and Enforcement

India has made considerable progress in its human trafficking prevention efforts; however, there is room for continued growth. In 2012, the Bureau of Police Research and Development held trainings on human trafficking and missing children.<sup>140</sup> In 2013, the Ministry of Home Affairs has continued to create and implement Anti-Human Trafficking Units (AHTUs) that work to create collaborative efforts between law enforcement and rehabilitation sectors to prevent trafficking.<sup>141</sup> Unfortunately, such AHTUs have been criticized as being ineffective.<sup>142</sup> Other government efforts to prevent trafficking include safe immigration awareness campaigns by the Ministry of Overseas Indian Affairs, and the Ministry of Labour and Employment's project to prevent bonded labour in Tamil Nadu, Andhra Pradesh and Odisha.<sup>143</sup> Finally, to reduce demand for sex trafficking, the government began prosecuting the clients of sex workers under Section 370A of the Amendment Act.<sup>144</sup>

The Indian government has conducted collaborative meetings with the Government of Bangladesh in an effort to promote international cooperation efforts in prevention of human trafficking.<sup>145</sup> After a meeting between the Indian and Bangladeshi home secretaries in December 2012, India and Bangladesh issued a joint statement that the two countries would cooperate to prevent human trafficking.<sup>146</sup> However, as of the date of publication of this policy brief, there is no finalized and enforceable agreement between the two countries in this regard. Bangladesh and India have established a Taskforce Regarding Rescue, Recovery, Repatriation and Integration (RRRI), but this cooperative programme applies only to child victims.<sup>147</sup>

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<sup>137</sup> Ministry of Women and Child Development, *supra* note 84.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> U.S. STATE DEP'T, *supra* note 31, at 186.

<sup>141</sup> U.S. STATE DEP'T, *supra* note 22, at 195.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 198.

<sup>144</sup> *Id.*

<sup>145</sup> *Agreed Minutes of the Second Meeting of the Task Force of India and Bangladesh on Human Trafficking Held in Kolkata From 8-10 April, 2012*, MINISTRY OF HOME AFFAIRS, <http://stophumantrafficking-mha.nic.in/writereaddata/AGREED-MINUTES-OF-SECOND-TASKFORCE-MEETING-ON-HT-HELD-IN-KOLKATA.pdf> (last visited May 13, 2014).

<sup>146</sup> Ministry of External Affairs, Annual Report (2012-2013); U.S. STATE DEP'T, *supra* note 22, at 198.

<sup>147</sup> *About Us*, RRRI TASK FORCE CELL, <http://antitraffickingcell.gov.bd/index.php/en/about-us> (last visited Mar. 10, 2015)..

According to our interviews, the Indian Government's prevention efforts often are not effective in practice.<sup>148</sup> The police were frequently cited as being one of the key points of failure in the chain of prevention. As Dr. Jana stated, “The police engage because it's part of their job. But more than that, in India, they are engaging in anti-trafficking programmes to make money, not to prevent trafficking.”<sup>149</sup> According to Dr. Jana, on an average ten to twenty women per year are rescued from the police themselves.<sup>150</sup> Furthermore, interviews with DMSC's regulatory board and peer counselors revealed a fraught and sometimes hostile relationship between the sex workers collective, which itself is engaged in anti-trafficking efforts, and law enforcement.<sup>151</sup> In interviews, DMSC noted that the organization often makes its own independent efforts to rescue cross-border trafficking victims and safely return them to their home country without the assistance of the police as, according to interviewees at DMSC, the police often allowed such victims to languish unnecessarily in recovery homes or failed to provide repatriation assistance.<sup>152</sup> According to DMSC's regulatory board, efforts by DMSC to prevent trafficking, such as regular checkups on brothels to scan for recently trafficked or under aged girls, are unsupported by police.<sup>153</sup> Furthermore, law enforcement does not cooperate with and at times attempts to impede DMSC's efforts to repatriate trafficking victims.<sup>154</sup>

In contrast, workers at the NGO Shakti Vahini, an organization that addresses the needs of sex trafficking victims and works to reduce demand for sex workers, noted in interviews that the NGO worked closely with the police and collaborated to ensure the conviction of those accused for the crime of trafficking.<sup>155</sup> According to interviews with the Director of Shakti Vahini, Mr. Subir Roy, Shakti Vahini coordinates with the police during raid and rescue operations and also participates in police follow-up investigations.<sup>156</sup> Therefore, police cooperation with the NGO anti-human trafficking sector varies considerably.

#### 4. Identified Gaps

There are several gaps between the UN Protocol's obligations on the prevention of human trafficking and India's laws and policies, including:

- Focus of prevention efforts on sex trafficking to the exclusion of other forms of trafficking.
- Absence of binding and effective bilateral and multi-lateral agreements to alleviate factors contributing to trafficking.

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<sup>148</sup> Interview with Dr. Smarajit Jana, Principal, Sonagachi Research and Training Institute, Kolkata (Mar. 21, 2013).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Interview with Self-Regulatory Board Members, DMSC Sonagachi, Kolkata (Mar. 21, 2013); Interview with DMSC Peer Counselors, Sonagachi, Kolkata (Mar. 22, 2013).

<sup>152</sup> *Id.*

<sup>153</sup> Interview with Self-Regulatory Board Members, DMSC, Sonagachi, Kolkata (Mar. 21, 2013).

<sup>154</sup> *Id.*

<sup>155</sup> Interview with Mr. Subir Roy, Shakti Vahini, New Delhi (Oct. 7, 2012).

<sup>156</sup> *Id.*

## D. DE-CRIMINALIZATION AND REPATRIATION OF CROSS-NATIONAL HUMAN TRAFFICKING VICTIMS

### 1. UN Trafficking Protocol Obligations

Article 7 of the UN Trafficking Protocol recommends that each State Party “consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases,” giving “appropriate consideration to humanitarian and compassionate factors.”<sup>157</sup> According to the United Nations Office of the High Commissioner for Human Rights Recommended Principles and Guidelines for Human Trafficking, trafficking victims should not be treated as criminals for being within another country illegally.<sup>158</sup> In addition, the UNODC Framework for Action to Implement the Trafficking in Persons Protocol recommends that State Parties consider adopting “legislative or other appropriate measures that permit victims of trafficking in persons to remain in transit or destination country, temporarily or permanently, for humanitarian reasons, to participate in judicial or administrative proceedings or for other reasons.”<sup>159</sup>

Article 8 of the UN Trafficking Protocol requires that State Parties return a victim of trafficking to his or her country of origin. It provides that “such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.”<sup>160</sup>

The UN Trafficking Protocol mandates certain border measures to be taken by State Parties under Article 11.<sup>161</sup> State Parties must implement such “border controls as may be necessary to prevent and detect trafficking in persons”<sup>162</sup> “without prejudice to international commitments in relation to the free movement of people.”<sup>163</sup> In addition, Article 11 provides that States “shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.”<sup>164</sup>

### 2. India's Laws and Realities

#### a. *De-Criminalization and Provision of Resident Status of Cross-national Human Trafficking Victims*

India currently does not comply with the UN Trafficking Protocol's recommendations for migration issues arising from the trafficking of persons. Cross-national victims of human trafficking are treated as violators and not as victims.<sup>165</sup> According to the U.S. Department of State's 2013 Trafficking in Persons report, there

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<sup>157</sup> UN Trafficking Protocol, *supra* note 5, art. 7.

<sup>158</sup> See, e.g., United Nations Office of the High Commissioner for Human Rights, Recommended Principles and Guidelines for Human Trafficking, ¶ 7, U.N. Doc. E/2002/68/Add. 1 (2002), available at <http://www.ohchr.org/Documents/Publications/Traffickingen.pdf>.

<sup>159</sup> UNITED NATIONS OFFICE ON DRUGS AND CRIME, INTERNATIONAL FRAMEWORK FOR ACTION TO IMPLEMENT THE TRAFFICKING IN PERSONS PROTOCOL 20 (2009), available at [http://www.unodc.org/documents/human-trafficking/Framework\\_for\\_Action\\_TIP.pdf](http://www.unodc.org/documents/human-trafficking/Framework_for_Action_TIP.pdf).

<sup>160</sup> UN Trafficking Protocol, *supra* note 5, art. 8.

<sup>161</sup> *Id.*, art. 11.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*, art. 11(1).

<sup>164</sup> *Id.*, art. 11(6).

<sup>165</sup> GUNJAN KINNU, FROM BONDAGE TO FREEDOM: AN ANALYSIS OF INTERNATIONAL LEGAL REGIME ON HUMAN TRAFFICKING (2006).

have been incidents in which cross-national victims of human trafficking have been detained and prosecuted on the basis of their illegal immigration status within India.<sup>166</sup> In May 2012, the Ministry of Home Affairs issued a non-binding directive restricting state governments from detaining and prosecuting foreign female sex trafficking victims. However, NGOs reported that such conduct continues to occur and that many law enforcement officials are unaware of this directive.<sup>167</sup>

Interviews with the Self Regulatory Board of DMSC suggested that the government's treatment of cross-national trafficking victims as offenders causes victims to be subjected to further discrimination, marginalization and police abuse.<sup>168</sup> According to a member of DMSC's self-regulatory board, "Migration policy is integral to the situation. Many Bangladeshi girls come and the police target them for abuse because they don't have identification. And you can't trace back where she came from, so they spend their whole lives in [government rehabilitation] homes."<sup>169</sup> India does not have any laws or policies in place that would provide an avenue for permanent or even temporary resident status for cross-national victims of human trafficking, which contributes to the continued marginalization and potential abuse of undocumented foreign victims.<sup>170</sup>

The effects of such inchoate migration policies are additionally felt by non-victim voluntary female migrants. Anti-trafficking initiatives have been shown to conflate coerced and consensual migration.<sup>171</sup> Globalization has led to an increase in migration by creating economic opportunities at one-end and disrupting livelihoods and food security at the other.<sup>172</sup> However, there is a tendency to conflate trafficking and migration by treating all female migration as coerced and addressing even women migrants who migrate consensually as "vulnerable to trafficking."<sup>173</sup> As summarized by Ratna Kapur, "The increased focus on strengthening anti-trafficking laws and policies over recent years has resulted in sex workers and migrant women being faced with evictions, forced rehabilitation/repatriation, mandatory HIV testing and police searches, all ostensibly in the interests of protecting women."<sup>174</sup> The image of migrant women as poor, dependent and/or coerced has led to misguided legal responses narrowly focused on the rescue of such 'victims of trafficking.'<sup>175</sup>

## **b. Repatriation of Cross-National Human Trafficking Victims**

Interviews with DMSC and desk research revealed several problems impeding the safe repatriation of cross-national trafficking victims to their home countries. Cross-national trafficking victims confront several legal barriers en route to repatriation. First, they often lack documentation.<sup>176</sup> A recent report by the UNODC notes that in India, repatriation of a human trafficking victim "is done where the other country acknowledges citizenship but cannot be officially done otherwise."<sup>177</sup> According to our interviews with DMSC board

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<sup>166</sup> U.S. STATE DEP'T, *supra* note 22, at 198.

<sup>167</sup> *Id.*

<sup>168</sup> Interview with Self-Regulatory Board Members DMSC, Sonagachi, Kolkata (Mar. 21, 2013).

<sup>169</sup> *Id.*

<sup>170</sup> UNITED NATIONS OFFICE ON DRUGS AND CRIME, *RESPONSES TO HUMAN TRAFFICKING IN BANGLADESH, INDIA, NEPAL AND SRI LANKA, LEGAL AND POLICY REVIEW* 34 (2011).

<sup>171</sup> Ratna Kapur, *Makeshift Migrants and the Law* 196 (2010).

<sup>172</sup> Jagori, *Migration, Trafficking, and Sites of Work: Rights and Vulnerabilities*, in *TRAFFICKING AND PROSTITUTION RECONSIDERED: NEW PERSPECTIVES ON MIGRATION, SEX WORK, AND HUMAN RIGHTS* 161 (2011).

<sup>173</sup> Kapur, *supra* note 171, at 7.

<sup>174</sup> *Id.*, at 59.

<sup>175</sup> *Id.*, at 6.

<sup>176</sup> Interview with Self-Regulatory Board Members, DMSC, Sonagachi, Kolkata (Mar. 21, 2013).

<sup>177</sup> United Nations Office on Drugs and Crime, *Responses to Human Trafficking in Bangladesh, India, Nepal and Sri Lanka, Legal and Policy Review* 34 (2011).

members, this is extremely problematic. For example, a member of the DMSC self-regulatory board described the case of a cross-national trafficking victim from Bangladesh: “She doesn’t have paperwork so she isn’t a legitimate citizen of India or Bangladesh. There isn’t anyone advocating for her to go home, other than the girl.”<sup>178</sup> In a situation such as this, it is difficult to prove citizenship (and for the country of origin to acknowledge citizenship as the law requires) and move forward with repatriation.

According to the DMSC self-regulatory board, cross-national trafficked victims are often left to languish in remand homes as a result of the slow bureaucratic measures taken while waiting to repatriate the victim. Interviews with DMSC members also highlighted the safety risks that trafficking victims often experience when being repatriated to their home country. Interviews indicated that the Indian Government’s repatriation procedure often ends at the border, with victims simply being released into the territory of the country from which they had arrived<sup>179</sup> and no further oversight. Many cross-national victims are very poor and have no safe way of returning home once they are back in their countries of origin.<sup>180</sup> Our interviews suggested that there is little regard or formal process in place to ensure that the victims safely return to their communities or support networks in the receiving country.<sup>181</sup> In addition, if not reintegrated into their communities with government support, victims may face rejection and ostracism and remain vulnerable to being re-trafficked.<sup>182</sup> Thus, repatriated individuals are often at a great risk of being re-trafficked when states do not work together to ensure their safe return.

The UN Trafficking Protocol does not explicitly require repatriation efforts beyond the border. However, Article 2(c) of the UN Protocol states that one of the purposes of the Protocol is “[t]o promote cooperation among State Parties in order to meet these objectives.”<sup>183</sup> There is indeed a real and legal need to promote coordination and cooperation between countries on the issue of safe repatriation. In addition, Article 9 of the Protocol requires that State Parties “strengthen measures, including through bilateral or multilateral cooperation to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.”<sup>184</sup> Thus, States should create coordinated procedures and infrastructure to facilitate safe repatriation; failure to do so will only increase victims’ vulnerability to being re-trafficked.

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<sup>178</sup> Interview with DMSC Self-Regulatory Board Members, Sonagachi, Kolkata (March 21, 2013).

<sup>179</sup> See Interview with Ms. Sreerupa Mitra Choudhary, Sunidalay, New Delhi (Oct. 11, 2012); Interview with Dr. P.M. Nair, Indian Police Service, New Delhi (Oct. 9, 2012).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*; Interview with Self-Regulatory Board Members, DMSC, Sonagachi, Kolkata (Mar. 21, 2013). The Board members noted that DMSC helps to ensure the safety of cross-national victims of human trafficking by liaising with border security forces and NGOs on the other side of the border.

<sup>182</sup> See Interview with Ms. Sreerupa Mitra Choudhary, Sunidalay, New Delhi (Oct. 11, 2012).

<sup>183</sup> UN Trafficking Protocol, *supra* note 5, art. 2(c).

<sup>184</sup> *Id.*, art. 9(4).

### **3. Identified Gaps**

From our interviews and detailed desk research, it is clear that India is not meeting its obligations under the UN Trafficking regarding the safety of trafficking victims. These gaps include:

- Treatment of cross-national victims of human trafficking as criminals for their presence in India illegally.
- Failure to provide cross-national trafficking victims with permanent or temporary resident status.
- Lack of due regard for victims' safety during repatriation.
- Failure to adopt policies with other States to facilitate victims' repatriation.

## VI. Concluding Observations

India's Amendment Act brought India into closer alignment with the international standards established by the UN Trafficking Protocol. However, there continue to be gaps between India's laws, policies and practices, on the one hand, and, on the other, the UN Trafficking Protocol's requirements and recommendations for State Parties. First, India's laws and policies have long prioritized preventing and punishing sex trafficking rather than labour trafficking in spite of the fact that labour trafficking is far more prevalent within India. Second, there remains a notable absence of measures to guarantee the safety, rehabilitation and compensation of trafficking victims. Current policies seem to conflate sex work with trafficking, and give inadequate attention to other forms of trafficking such as labour trafficking. While the recent amendment of the Indian Penal Code to include a comprehensive definition of trafficking is a major development in Indian law, a comprehensive effort to address the problem of trafficking through appropriate prevention, rescue and rehabilitation programmes is still required. Third, cross-border trafficking victims face a double edged sword in India- their mere presence in the country constitutes a violation, as they are within India illegally. India must decriminalize the status of such victims and work to safely repatriate cross-national human trafficking victims to their home countries. Furthermore, India should reform its laws and policies to reflect the country's obligations under the UN Trafficking Protocol in light of the realities of human trafficking in the country. Following below are concluding observations and recommendations made by experts and interviewees for reforming India's anti-trafficking laws, policies and enforcement efforts. These suggestions are intended as topics deserving of consideration and are meant to be assistive in understanding the current legal framework concerning human trafficking in India.

### 1. RECOGNIZE AND PROSCRIBE LABOUR TRAFFICKING

- Reform India's Amendment Act to include correspondingly harsh sentences for engaging persons who are victims of labour trafficking in the same measure as those who engage victims of sex trafficking.
- Amend the Bonded Labour Act to explicitly define bonded labour as a form of human trafficking.
- Amend the Amendment Act to specifically include “forced labour” in the definition of exploitation, or alternatively, clarify that the Act's term “physical exploitation” includes “forced labour.”

### 2. CREATE POLICIES FOR THE SAFETY, RECOVERY AND COMPENSATION OF VICTIMS

#### a. Safety

- Institute policies that protect trafficking victims from sexual and physical abuse after their “rescue” while in custody of law enforcement.
- Develop policies that prevent the re-trafficking of victims after they are rescued.
- Create a uniform judicial procedure for granting police protection to victims testifying in trafficking cases, as well as their families and friends, that does not depend on judicial discretion.



## **b. Recovery**

- Develop uniform rehabilitation programmes for both female and male victims of human trafficking.
- Create a centrally administered rehabilitation programme to be implemented at the state level by state governments in collaboration with local NGOs.
- Conduct a comprehensive review of state-run rehabilitation homes by a third disinterested party to identify areas of improvement.
- Improve hygiene and services offered in state-run rehabilitation homes and ensure that victims are not involuntarily detained in these facilities.
- Strengthen coordination between state-run and non-state run rehabilitation homes and services in order to maximize capacity.

## **c. Compensation**

- Create and fund a centrally administered, uniform and easily accessible compensation system for victims of all forms of human trafficking, which takes into account the particular circumstances and needs of individual cases.
- Provide easy access to legal aid services to victims of human trafficking, including assistance in accessing compensation.

## **3. PREVENTION**

- Take efforts to reduce demand for all forms of trafficking, not only trafficking for sexual exploitation.
- Finalize bilateral and multi-lateral agreements to alleviate factors contributing to trafficking.

## **4. DECRIMINALIZE AND SAFELY REPATRIATE VICTIMS OF CROSS-NATIONAL HUMAN-TRAFFICKING**

### **a. Decriminalization**

- Explicitly decriminalize immigration violations when they are committed by undocumented migrants who are present in the country as a result of having been victims of human trafficking.
- Provide accessible legal avenues for human trafficking victims to receive permanent or temporary resident status in India.

### **b. Repatriation**

- Reduce the identification requirements for the repatriation of victims of human trafficking who voluntarily choose to return to their countries of origin.
- Adopt policies that take into account the safety of victims during the repatriation process, including post-border communication and resources for the victim.
- Enter into cross-national agreements with other States to facilitate repatriation of trafficking victims.

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