

Analysis **of** **Laws and Policies on Labor Migration** **and Trafficking**



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“Analysis of Law and Policy on Labor Migration and Trafficking” is one of several important research activities conducted by CeLRRd. As many are aware, CeLRRd has been deeply and strongly involved in prevention of trafficking of women and girls for sexual exploitation. The concept of “Community Surveillance System Against Trafficking” (CSSAT) has been an innovative and pragmatic model of prevention developed by CeLRRd. The contribution of CeLRRd in this sense is not simply limited to generating awareness of the community against the increasing phenomenon of trafficking in Nepal and the whole region of SAARC, but it has largely helped to understand the complexities of the problem and thereby designing a pragmatic intervention. Over the last 6 years, CeLRRd has developed a network of lawyers against trafficking nationwide. With the help of lawyers’ network-Community Legal Research Centers- the paralegal women’s network has been expanded to 239 Village Development Committees. Thousands of women and men have been organized under the concept of CSSAT.

The law enforcement situation to curb the problem of trafficking is still not effective, although it is significantly improved than in the past. CeLRRd is conscious of this problem. No prevention program would be successfully implemented without cooperation of effective and efficient law enforcement situation. To address this problem effectively, CeLRRd has recently developed “Manuals for Effective Investigation, Prosecution and Adjudication” in two volumes. Orientation workshops have been conducted for over one hundred police officers, prosecutors, judges and defense lawyers. These manuals have been developed considering the special characteristics the crime of trafficking involves. Crime of trafficking is a type of organized crimes, which involves number of people and tactics in series of stages. It is an “intention” intensified crime. It means that the act of crime of trafficking does not arise without fully worked plan and efficiently implemented preparation. Trafficking takes place in multiple forms. Many forms of trafficking may occur in the form of “migration” for work. The study of incidents of trafficking from Thailand, Burma, East Europe and several other countries suggest that migration has been utilized by traffickers as one of the several modes of trafficking of women and girls for sexual exploitation. Even in Nepal there are number of incidents that establish the nexus between migration and trafficking.

This present study is therefore important to show the linkage between the process of migration and the trafficking. Although there is long ongoing debate on distinction of between “migrants” and “trafficked persons” and about “trafficked persons” and “smuggled persons”. A rigid distinction is definitely not necessary, but the misconception of any of them will have adverse situation created on freedoms and liberty of women. Migration is a fundamental right under the Constitution of the Kingdom of Nepal as well as international human rights instruments. The wrong notion towards the migration will often encourage the governments to adopt hard protectionist attitude towards women that will, in turn, deprive women of their rights to free movement and work of choice. To develop a theory of separation between migration and trafficking, the “compulsion” for mobility had been once used as an important element. It, however, has become off-track at present; all migrants are compelled for mobility in various degrees and by various reasons. Objective behind the migration may help to some extent to draw distinction between two acts. However, the change in the objective in the middle of migration process or during or after the migration process is ended is not impossible. Thus the objective theory is also not adequately helpful to this purpose. Conceptually, the process of migration is directly linked up with rights of persons whereas the trafficking a violation of the rights of persons. Thus there is a possibility of trafficking putting the migration in a crime control or crime prevention context. But if the “crime element” associated or likely to be associated in the migration is ignored, the life of migrant person may be subjected to a condition of slavery. Migration generally involves an element of voluntary human activity. Person is, by her/his own consciousness, takes decision to move from one place to other. There may be compelling reasons for that decision; however,

the movement is taken for the purpose or interest of wellbeing of the person. The condition of trafficking lacks voluntariness on the part of the person taking movement to migrate. In the act of trafficking the presence of middle agent is essential. It is the agent who works out the plan for mobility of the trafficked persons. The persuasion, or deception, or use of force (actual or threat) or abduction are general forms used to move persons from one place to other. The earning of benefits from such act for the agents or somebody else is also an important element to render the migration an act of trafficking.

This discussion is made to draw the attention of people to the complexities associated in the crime of trafficking, and its nexus with migration process. Nepal over the years has been facing a severe problem of trafficking of women and girls for sexual exploitation in number of Indian brothels. The vulnerability of the problem both in the sense of catchment areas as well as the expansion of the market beyond India is big. The rise of practice for migration of people to work in foreign countries also possesses vulnerability of nexus between the migration and trafficking. In this context, the preparation of government in terms of law and policy for encouraging migration for work and alertness for preventing migration to be exploited for trafficking of women and girls for sexual exploitation is an important aspect of the good governance. This study has been carried out to look into the current situation of the laws and policy in these regards.

The study has looked into number of issues within the scope. It is found that the policy of government concerning migrant workers is neither adequate nor effective. In fact, there is hardly any policy which can be analyzed as the "policy on migrant workers". The issue of protecting of rights of Nepalese migrant workers in the international labor market is completely overshadowed. The protectionist attitude of the government towards women is evident as the current "Foreign Employment Regulations and Orders" put number of obstacles or barriers for mobility of women abroad. The Foreign Employment Act 2042 is the basic law governing the participation of Nepalese in labor in the international market. Unfortunately, this Act not intended to protect the best interest of migrant workers, but it is a employment regulatory instruments and as such mainly deals with the prevention of crime and irregularities in the course of employment. Thus the Act has very less significance in terms of protection of women and girls from being trafficked through disguised migration, or from being exploited sexually once arrived in the destination.

The study has elaborately studied the existing "anti-trafficking legal regime" of Nepal. The study covers the proposed bill too. The study has been carried out by a team of lawyers with adequate exposure to development affairs and social issues. The attention is therefore given adequately to various aspects of the problem of trafficking in connection with its nexus with migration process.

The study is based on overview of laws and policy, so that it does not include the qualitative and quantitative analysis of primary data. The objective of the study was limited. However, the findings and suggestions have shared with experts and people involved in field of study and action concerning migrant labor and trafficking. The sharing of ideas includes both the governmental and non-governmental sectors. It is thus hoped that the study will provide help to understand the problem more deeply and accurately.

The study being a part of the regular activity of CeLRRd in relation to the prevention of trafficking is not a sporadic and isolated act. So that we commit ourselves towards continuous study in this field in days to come. Therefore, we would appreciate suggestions or comments in this study, so that the quality of research would be strengthened.

At this juncture, I would like to thank my colleagues for their sincere efforts to complete the study. I have to appreciate the cooperation of Kathmandu School of Law for giving us unrestricted access to its rich documentation of information. I should also thank the staff of CeLRRd for their cooperation. Last, but not least, I would like to thank The Asia Foundation for providing the financial support to conduct this study.

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1. Introduction:

A) Migration and Factors:

Literally, phenomena like crossing intra or international national geographical boundaries, people-women, men, children- being in transit and people's geographical mobility refer to migration. The search for better life is an underlying aim of the migration. Economic advancement has been the driving force behind the migration people all over the world.

Migration has helped pushing social formations into their advanced state. It has promoted the cultural exchanges among people from different parts of the world, and has virtually brought the concept of global village into being. The migration of people is also a vehicle for developing divergent cultural tolerance in the world.

Yet, the last four decades of 20th century have demonstrated a contrary. The overwhelming trend of transnational mobility of people has given rise of number of problems, the labor and sexual exploitation of children and women being the most worst one. The massive industrialization and accessibility of any nook and corner of the world due to transportation linkages have influenced the current phenomenon of the transnational mobility of the people. Statistics show that 130 million of the world's population-one in every 50 human beings- live outside their country of origin as refugees, migrants or permanent immigrants.

Motive for migration includes political, economic, social and environmental causes, which are based on number of reasons. Both the positive and negative factors compel migration. These compulsions may be interpreted as voluntary and involuntary reasons to migrate. Many people choosing to migrate from one place to other or one country to other do so in response to factors compelling them in order for survival, safety and dignity, and for well being of themselves and their families.

Definition of Migrants:

A migrant is a person who moves across political border, with the intention of settling for a

temporary period of time, for work or other reasons. This simple definition is however far less adequate to give full comprehension of the phenomenon of migration. There are many different categories of migrants. These categories depend on whether migration has been within or outside the country of origin, or the reasons compelling people to migrate and their legal status, and the mode of migration. The issue of migration should not be so simplified as to blur its true character or shape.

Reasons of Migration:

People migrate for various reasons. However, voluntarily a large number of people migrate for works. The economic crisis has been one of the most appealing factors for migration. The poor growth of economy and per-capita income of the people in the third world resulting in vast unemployment and hardship of people is a major reason for migration to work.

The present trend shows that the migration is intensive phenomenon of mobility of people from poor to rich country, rural and agricultural economy to industrial economy, conservative and despotic nations to democratic countries and so on. The trend is obvious in a country like Nepal, where a very huge youth population has migrated to countries in Gulf, Japan, Korea, Malaysia, etc. The crisis of insurgency engulfing the country over the last decade has aggravated the migration implausibly.

The reasons for migration for works are therefore coveted. The fight between the state and Maoists rebels has created extreme difficulty in life in hill villages. The possibility of youths being engaged in traditional agriculture is largely diminished due to insurgency resulted crisis, the threat of coming into cross fire, suspicion of fighting groups and resulting actions and compulsion to inform the government of rebels in the one hand and to join the rebellion armed force on the other being the major reasons.

The youth population in many hill districts is therefore deprived of traditional employment, thus leading to migrate for works as well as to avoid the risk of life.¹ Similar situation was found in many countries in Asia in the past which drove a number

1. Yubaraj Sangroula, "A Background Paper for Facilitating the Process of Political Dialogue Between State and Rebels. 2003. Unpublished. (Kathmandu School of Law Library) 36.

of people to leave their country for work and safety.²

B) Legal Status of Migrants:

From the point of view of government or legal authorities, the migrants are entitled to the following privileges:

- a. **Regular (legal) Migrants:** Regular migrants possess travel documents and valid visa. The receiving country authorizes their entry and stay. They are entitled under the law of receiving country to all those facilities, subject to exceptions; the citizens of that country are entitled to. The entry and stay both are legal and thus they do not give rise to circumstance of arrest or prosecution while arriving at the entry point and while being in the country. Unless the employment of such people is specifically prohibited,³ the migrants entering the country with valid passport and visa are allowed to work.
- b. **Irregular (illegal) Migrants:** Irregular migrants do not have legal travel documents and valid visas. These include people who used fake/forged travel documents, and those who work under fake, illegally substituted, or non-existent contracts. Receiving countries also refer to these people as “illegal aliens/foreigners. Under laws of many countries, such people may be prosecuted and charged with criminal offence. For instance, under the Immigration Act of Nepal, illegal entry or overstay is a crime punishable with terms of imprisonment. The crime is prosecuted by the state itself.

Mode of Migration:

Migration takes place in numerous ways. Documented or contract migrant workers go abroad through the authorized channels. Undocumented migrant include those people who:

- a. migrate without passing through the authorized channels; or
- b. “jump” their visa (originally authorized to

stay but subsequently chose to stay/work illegally), or

- c. originally had legal status in the receiving country, but due to changes in the policy/law they end up becoming unauthorized;
- d. overstayed their visa/limit of stay and opted to remain without getting the proper visa extension;
- e. children/family members of undocumented migrants

Trafficking and smuggling of people are also taken as mode of migration.⁴ Broadly speaking trafficked and smuggled people are also undocumented migrants. However, they have been especially treated due to vulnerability of exploitation. The “ignorance” of trafficked person of arrival in the country and the laws and regulations concerning migration is a good excuse for non-prosecution of such persons. The mental element of the crime is another major difference between the illegal migrants and the trafficked persons. The trafficked person has no intention, plan or implementation of plan to override or violate the law of the receiving country, whereas the illegal migrants, with some exceptions, may have design to override or violate the law of arriving country, or may have known the consequence thereupon. The trafficked person is therefore not involved in “crime”, in fact the person himself/herself is a victim of crime. This circumstance entitles him/her to obtain a special treatment from the country he/she has been taken in.

Migration or Trafficking:

There is long ongoing debate about distinction between “migrants” and trafficked persons”, and about “trafficked and smuggled persons”. Of course, a rigid distinction is not necessary. A framework developed by AMC is as follows:

- a. The use of “compulsion” as determinant factor to distinguish between migration and trafficking is off-track; all migrants are compelled in various degrees and by various reasons, to go abroad. The defining

2. Sri-Lanka is an example in SAARC region. Many African countries also demonstrate the same reality.

3. The legal system of countries may have prohibited employment of those migrants who have entered the boundary of that particular country with a tourist visa. Generally, the legal system of all countries requires the migrants to obtain residential visa and work permit for employment. The knowledge based on general observation of legal systems of many countries show that no person entering the country in tourist visa can be entitled to obtain work permit until and unless the visa is converted into residential visa or obtained the refugee status.

4. See, Premier on Migrant Workers' Rights. AMC and MFA. 2001. Hong Kong.

characteristics are the presence of middle agents who move the person across the borders, and the use of deception or force (actual or threat) to effect the movement.

- b. It must be emphasized that migration is the general phenomenon, and trafficking is the only mode of migration. Over-emphasizing trafficking and taking it out of context (interrelation to migration) is strategically counter productive in the fight for human rights because:⁵
 - “Trafficking puts migration in a crime control, crime prevention context, rather than talking about migrants’ human rights first and then talking about trafficking in the context of human rights; and
 - Trafficking is being used by governments as a vehicle to develop more restrictive approaches to migration in general.

C) Migrant Workers’ Rights:

Migrant workers have same rights as all other persons under the generally-accepted principles of human rights recognized by the United Nations and the international community. Human Rights are the basic, universal, inalienable, indivisible rights inherent to every person to ensure his/her dignity as a human being.

Basic Rights:

There are many ways to categorize migrant workers’ rights. In order to provide an over-arching general thematic organization of these rights, AMC and MFA developed the “20 Basic Rights of Migrant Rights”. Based on the approach of AMC and MFA, migrants’ specific rights could be categorized in a number of ways:

- a. in terms of where they should be recognized;
- b. in terms of when they should be recognized; or
- c. Along functional lines, for example: (1) economic, social and cultural rights (2) civil, political and legal rights, and /or (3) particular rights.

The following 20 basic rights were first introduced by AMC MFA in 1999. These are universal,

applicable to migrant workers regardless of their VISA or employment status. These rights do not rely on political or state boundaries. They are as follows:

1. Right to leave any state, including a migrant worker’s State of origin and employment.
2. Right to livelihood and access to economic resources and opportunities in State of origin and employment.
3. Right to work.
4. Right to fair, just and humane working conditions.
5. Right to fair and equal treatment in the workplace.
6. Right to rest and leisure, to engage in recreational activities and to participate freely in cultural life.
7. Right to mobility within the State of employment.
8. Right to be protected from cruel, inhuman or degrading treatment or punishment.
9. Right to be protected from discrimination and exploitation.
10. Right to life, including access to urgent medical care and protection from physical or other abuse.
11. Right to freedom of association and peaceful assembly, including the right to form associations and unions in the State of employment to protect migrant worker’s economic, social, cultural and other interests.
12. Right to participate in public affairs of their State of origin, including voting.
13. Right to be consulted on policies affecting migrant workers in their States of origin and employment.
14. Right to personal and professional development, including the right of access to educational and social services in the State of origin and employment
15. Right to recognition everywhere as a person before the law.
16. Right to protect, preserve and maintain the unity of the family.

5. Patrci Taran, Migrants Rights International, at the 6th RMC, March 2000, Thailand.

17. Right to sexual reproduction including maternity protection and reproductive choice, and to sexual preference.
18. Right to freedom of thought, conscience and religion.
19. Right to preserve cultural identities and roots.
20. Right to liberty and security of person.

The violation of migrants' rights is infringement on their human rights. Depending on their Visa status, mode of migration and job category, migrants suffer varying degrees of abuses, exploitation and human rights violations. Violations range from deception, extortion/excessive fees, poor working/living conditions, contract violations, physical, sexual, and physiological abuse, violence, up to various forms of racism, discrimination and exclusion from social, economic and cultural and political life.

Violation of human rights is typically worse for irregular migrants, women, or those in low-paid, low-end job categories. Although, the situation is of these migrant workers differ substantially, they are all entitled to have their human rights protected. Migrants' human rights violation occurs each time the migrants' basic rights are violated regardless of whether or not any national law covers it.

International Efforts to Protect migrants' Human Rights: The fifty-fifth session of the UN Commission on Human Rights adopted resolution (1999/44) by which it decided to appoint, for three years period, a special Rapporteur on the human rights of migrants to examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of this vulnerable group. The commission requested the Rapporteur to take into account a gender perspective when requesting and analyzing information, a perspective that will also be taken into account while analyzing existing legislation and making recommendations.

Ms. Gabriel Rodriguez Pizarro from Costa Rica was appointed as Special Rapporteur on 6th August 1999.

The General Assembly, by its resolution 45/158 of 18 December 1990, adopted and opened for signature, ratification and accession to the International Convention on the protection of the rights of All Migrant Workers and Members of Their families and called upon Member States to consider signing and ratifying or acceding to the

convention as a matter of priority.

In its resolution 54/158 of 17 December 1999, the general Assembly requested the Secretary General to provide all the facilities and assistance necessary for the promotion of the convention through the public information campaign for human rights and the program of advisory services in the field of human rights; welcomed the global campaign for the entry into force of the convention and invited the organizations and agencies of the United Nations system and inter-governmental and non-governmental organizations to intensify their efforts with the view to disseminating information and promoting understanding of the convention; and requested the secretary general to submit to the General Assembly at its fifty fifth session an updated report on the status of the convention. The Commission on Human Rights adopted a similar resolution (resolution 2000/49) of 25 April 2000.

Promotion of the international human rights treaties, including the Convention, is an ongoing priority of the Secretary General and the United Nation's High Commissioner for Human Rights. In a follow up to their 1997's appeal to the Governments urging ratification of the treaties, secretary General and the High Commissioner sent a joint letter to the Heads of Governments on 19 January, 1999, to which some positive responses had already been received. In addition, on 15 May, 2000, the Secretary General sent a letter to all heads of states or government inviting them to take the opportunity presented by the millenium summit, to be held in new York from 6 to 8 September, 2000, to sign or accede to the multilateral treaties deposited with him. The 25 treaties representing the United Nation's key objectives were listed in an attachment to the letter. The international Convention on the Protection of the Rights of All Migrant Workers and Members of their Families was included in that core group of treaties.

Under the joint program between the offices of the United Nation's High Commissioner for Human Rights and United Nations Development Program entitled "Human Rights Strengthening" a series of workshops at the sub-regional and national were organized in 2000 and 2001. These workshops aimed at raising understanding of the main treaty provisions, examining the implications of ratification, and informing governments of the kinds of assistance that were available from the United Nations for pursuing ratification. The convention on the rights of migrants is one of the

seven treaties covered by these workshops.

Furthermore, the International Steering Committee of the global campaign for ratification of the convention on the rights migrants, which was formed in March 1998, for the purpose of building and popularizing a global campaign to promote the ratification and entry into force of convention, continued its activities, including its national counterpart. The office of the United Nations High Commissioner for Human Rights participated in and supported these initiatives. In particular, a round table was held on 12 April 2000 during the fifty sixth session of the commission on Human Rights. The High Commissioner, the special Rapporteur on the Human Rights of Migrants attended the Round table, the Special Rapporteur on Violence against Women and Special Rapporteur on the Sale of Children, child Pornography and Child prostitution. The Special Rapporteur of the Human Rights Migrants has recommended that action be taken to promote the ratification of the Convention. She has also participated in meeting of the Steering Committee.

Right to work has been closely associated with the right to movement, which is one of the inalienable fundamental rights of persons. The right is non-derogable right. The International Covenant on Civil and Political Rights (ICCPR) provides that each person has right to movement, within and beyond the territory of his/her nation. The Article 12 (2) of the Constitution of the Kingdom of Nepal, 1990, has guaranteed the right to freedom of movement. By nature itself, the right to work largely depends on circumstance of the right to movement; hence, the curtailment of the right to movement necessarily affects the right to work. The International Covenant on Economic, Social and Cultural Rights recognizes the right to work as inalienable rights of human being, as a prelude to the standard living. Moreover, the property market and consumer spending remained depressed too.

D) Trends of Migration in Asia:

Despite tremendous success of South East Asian countries in economic recovery after 1999, the problem of massive unemployment and economic difficulties remained primary forces which pushed

more people to seek employment abroad. Countries with slow pace of low GDP growth and lacking employment opportunity in their own nations were forced to accept labor export as a pivotal foreign currency earning industry and short term solution to massive unemployment. For example, the Philippines was dead set to implement the full deregulation of the labor export industry in 2000.⁶ Thailand, Indonesia, Sri-Lanka, Bangladesh have set their export targets and aggressively tapped the international markets. However, countries like Nepal, despite tremendous growth in flow of people for work in other countries, have seriously failed to tap the rich and safe market.

The growth of migrant workers has resulted in many types of problems despite its contribution to poor and ailing economy of countries like Nepal. To observe the reports of the past couple years, the number of human rights violations has seriously increased.

The general migrants' human rights situation in Asia in 1999 and 2000 remained peppered with serious abuses and violations. Irregular migration, trafficking and human smuggling remained among the worst forms of abuse. Mekong region (Thailand, Cambodia, Laos, Vietnam, and Burma) continued to be hub of trafficking and irregular migration. China remained a major source of smuggled people going to North America, Europe, Australia, and Singapore⁷. Hong Kong has become one of the transit points used by smuggling syndicates.⁸

The Middle East has recorded the most serious violation of human rights both in terms of severity and number of incidents due to lack of transparency, restrictive laws and executes of migrant workers. Most of the countries in the Middle East have put restrictions on unionization of migrant workers, advocacy of their rights, operations of NGOs. These circumstances have further worsened the condition of human rights violation. Inhuman working conditions, forced confinement, non-payment of wages, beating, and violence against women, harassment and incidents of rape have been widely reported forms of human rights violation. As reported by the Asian Migrant Center, 59 migrant workers had been executed or

6. See, Philippines Report in Asian Migrants' Yearbook, 2000. P. 208

7. Ibid. P.5

8. See for detail, Hong Kong Report, P. 130. Asian Migrants' Yearbook. 2000.

condemned to death sentence in Saudi Arabia and UAE in 1999 alone.⁹ The violence against women remained major form of human rights violation in rest of other Asian countries receiving migrant workers. Hong Kong, Malaysia and Singapore, as stated by Asian Migrants Center, had allegedly been in high position in matters of physical abuses (burning with a flat iron or metal rod, beating, etc) and sexual abuses of women migrant workers. Majority of victims of such human rights violation was the Indonesian migrant workers. Thai, Sri-Lankan, Bangladeshi, Indian, Nepalese migrant workers also had been subjected to such cruelty in considerably large number.

Illegal recruitment, unscrupulous agencies and extortionate agency fees, long standing problems in the Philippines, Sri-Lanka, Bangladesh, Thailand and other countries including Nepal, were further worsened after 1999. The unscrupulous policy of receiving countries like Japan, Korea, Malaysia, Singapore and the Middle East are also nascent source of exploitation of migrant workers. These countries, Japan, Korea and Singapore in particular, used migrant workers extensively to come out of their economic recession. However, once they obtained the position safer, they immediately jumped into reinforcing discriminatory restrictive policies and practices like forced medical/pregnancy/AIDs test of migrant workers. The wage discrimination was the problem in all receiving countries. They continuously reduced the wages of migrant workers, and put ban on works during pending of labor dispute. Countries like UAE, Oman, Saudi Arabia, Singapore, and Malaysia, who exploited serviced of migrant workers for long time, have introduced policy of banning or reducing, and getting rid of low skilled workers. Other countries have launched intense clampdowns on undocumented workers (Thailand, Singapore, Malaysia, Korea, etc) while employers continued hiring many of them.

E) Scenario of Women Migrant Workers:

The trafficking of women for sexual exploitation and the violence are serious problems associated with women migrant workers. Although, the key issues and trends on migration largely remain the same over the years, some concerns have become more pronounced in the last couple of years.

Trafficking and smuggling of women, abuse or violence against women and discriminatory payment for same work of women has been recognized high on the agenda of migrant workers. To observe the incidents of human rights violation in the last couple of years, women have been most terribly subjected to exploitation, torture and inhuman treatment. The receiving states and employers, in stead of protecting rights of migrant workers, have launched direct attack against migrant workers and their human rights, at times becoming outrightly racist/xenophobic. Even in this situation, the problems of women migrant workers are seen multifold. In many instances they are raped because of their race. Despite all hardship and weakness, the migration of women has tremendously increased, the Philippines, in particular, setting the exemplary trend. The following indicators show increasing international participation of the Philippine women in migration:¹⁰

1. In 1975, women migrants constituted 12% of Philippine overseas workers
2. In 1987, they constituted 47% of the total overseas workers
3. In 1995, they comprised 52%(721,200) of the deployed overseas contract workers.

The position of Sri-Lankan women too is very encouraging in the overseas employment. The

Year	Male	Female
1993	17,199	24,240
1994	16,555	36,104
1995	47,171	113,861
1996	43,122	110,480
1997	38,295	99,429
1998	54,167	85,349
1999	54,108	75,220

following statistics¹¹ proves the statement:

These statistics clearly shows the overwhelmingly high proportion of women participation in the overseas employment. However, situation of many countries like Nepal is extremely negative in

9. See for detail, Middle East Report, P. 180. Asian Migrants' Yearbook. 2000

10. Ilo, Jeanne Frances: "Women in the Philippines," Manila. Asian Development Bank, 1997.

11. Asian Migrant Yearbook. 2000. P. 239.

privilege of women's participation in migration or overseas employment. The main reason for this is the state's projectionist role towards women.

However, women workers have been often subjected to violence and exploitation. Based on the documentation of an NGO, there had been 26 reported cases of Philippine migrant workers who died while working abroad.¹² These are the extreme cases, including the case of Flor Contemplacion who was hanged in Singapore in 1995 for alleged killing of another migrant worker. This situation mirrors a clear indication of the absence of respect of human rights of migrant workers. The problems like physical abuse, sexual violence and poor working conditions and violation of terms of conditions of contract are phenomenal. All these amidst women's personal transitions of loneliness, alienation and homesickness. It is said that women sacrifice all these so that others may live, particularly the families they left behind.

The participation of women in overseas work is similarly encouraged in many countries. Although, the migrant women workers are severely subjected to violence and exploitation, the opportunity for migration to work brings number of benefits to women and their families at large. In general, migration benefits the already developed countries by using women migrant workers from poor and underdeveloped countries (third world human resource) to make developed countries' household survive, and allow their economy to function. In the productive sphere, women nationals of developed countries contribute to the economy by relegating foreign working women to domestic works.

F) Scenario of Migrant Workers and Trafficking in Nepal:

Current Situation of Nepalese Migrant Workers and Government's Policy:

Almost 80% of the work force of Nepal is engaged in agriculture and agriculture related occupation. Only 26% of workforce is wage earners; the vast majority of 74% are self-employed. Of about 2.99 million wage earners 2 million are in agricultural sector. With an annual population of growth rate

of 2.36% and an estimated 3,00,000 new entrants join the labor market each year, but few jobs are available. The manufacture sector, which hardly grows employees less than 3% of labor force. The service sector is flourishing but observes less than 17% of workers. Therefore, more than 80% of these new entrants ultimately end up in agriculture. Unemployment is severe and estimated as 47%. Unemployment is sharply increasing according to National living survey (1996). Currently, its stand at around 4.9%. Private estimate put it as high as 14%. However, the labor force survey in 1999, with its very broad definition of employment, indicates that the rate of unemployment is only 8.89% working condition are generally poor.¹³

Migration has been a phenomenon in Nepal over the years. In the remote past, the migration from hills of Nepal to tea production areas of India was phenomenon. In a cruel circumstance of family oligarchy of Ranas, and incidents of famine, resulting from low productivity of the lands in hills, hundreds of thousand of people migrated to India as tea plantation workers. The process of migration continued for long time. Following 1950s, the internal migration from rural to urban areas and hills to plain (Terai) became predominant phenomenon.

Undoubtedly, migration for works both internally and abroad, is has been prevalent in Nepal as a established tradition. Recruitment of Nepalese in the British Army, during colonial regime in India and subsequently, is being practiced since 1816, and so far over a million Nepalese have participated in migration for military job under the British Government. The practice still continues with United Kingdom and India. Similarly, Nepalese have opportunity to work under Singapore and Brunei Governments as police and security guards respectively. Moreover, a large number of people migrate every year to India to work in the government as well as private sectors. In the government sector, a large number of Nepalese are consumed as border security force, central reserve police force, and security guards in various government undertakings. In the private sector, a large number of people are engaged in the field of private security, construction works, tea plantation, etc. Estimates of total number of Nepalese migrant

12. Asian Migrant Yearbook, 1999.

13. Information are based on "Nepal: Update" contibuted by GEFONT. With additional information from Far Eastern Economic Review, Yearbook Asia, 2000. UHCHR, 55th session agenda item 14, Specific groups and individuals.: Migrants Workers, (E/CN.4/L/L.73).

workers in India vary from 2 to 3,5 million. Because of the open border between two countries, it would be almost impossible to determine the exact figure of the Nepalese migrant workers in India, as no documentation is available or possible to have. Moreover, a significant number of Nepalese migrant workers in India are self-employed.

The Nepalese migrant workers in India like other countries faces ranges of problems. Most of the jobs offered to Nepalese in India are low paid jobs. Frequently, workers are driven away from works without payment or under payment. There has been discrimination in payment to the Nepalese in the same work. Most interestingly, the Nepalese migrant workers are excluded from benefits such as insurance, severance payment, and long service payment and injury compensation. Physical and sexual abuses are rampant.

Nepalese migrants abroad, excluding those in India, are estimated to number 350000. Migration destination is Gulf, Europe, North America and South East Asia. The following table (table 1)

provides a recent situation of the migrants:¹⁴

Level of Nepalese Migrant Workers:

Overwhelmingly large numbers of the Nepalese overseas workers are unskilled laborers. Obviously, they are hired in low paid manual jobs with little protection. However, they bring a substantial amount of remittance to the country.¹⁵

G) The Nepalese Women's Participation in Migration is Almost None.

Although the Constitution of the Kingdom of Nepal, 1990, recognizes absolute equality of sex. The Governing law on foreign employment is "Foreign Employment Act, 2042". The Act has not put ban on women's participation in migration to work overseas countries. However, by decisions of Government in different dates has restricted the employment of women in foreign countries like Saudi Arabia, Qatar, UAE, etc S.C Decision. The different procedural requirements to man and woman under section 12 of the Labor Act (as

Table 1

Country	Till 050/51	051/52	052/53	053/54	054/55	055/56	056/57	057/58	058/59	Total
Saudi Arabia	2290	1041	1469	1959	4825	14948	17867	17966	21094	83,459
Kuwait	361	13	18	107	137	609	465	885	378	2,973
Oman	43				7	90	32	68	96	336
Qatar	391	245	505	477	1802	9030	8791	14086	19895	55,222
UAE	132		23	95	284	1417	6360	8950	8411	25,672
Bharain	91				111	787	583	904	695	3,171
Hong Kong	63	86	59	67	155	301	209	331	482	1,753
Singapore						1			16	17
S. Korea	234	774	55	455	192	267	766	245	131	3,119
Brunei				51					132	183
Malaysia					89	151	171	11306	52926	64,643
Saipan			5	48	143		1	11	38	246
Macao						102	119	82	50	353
Maldives						46	71	35	39	191
Kosovo							27	21	34	82
Israel & others						47	81	135	322	585
Total=>	3605	2159	2134	3259	7745	27796	35543	55025	104739	242,005

Source: Trade and Employment Promotion Department

14. Source, Ministry of Labour.

15. The remittance brought in 1999 was Rs. 35 Billion. See, Asian Migrant Yearbook, 2000. P. 202.

amended by the second amended Act) was challenged as discriminatory to women and contrary to right to equality, profession and property. The court ruled that regulation and restriction are different and there was no intention of the legislation to prohibit women from foreign employment. The constitution itself authorizes the state to enact law, providing conditions for any profession. The prescribed procedures applicable to the license holder don't impose unreasonable restriction to a woman's right to acquire, consume and disposing of property. The court found the provision is made for protection and development of women. Hence it was not unequal and discriminatory to woman.¹⁶ The restriction on regular migration of women for works in overseas countries has supposedly intensified the trafficking and irregular migration of women. Human Rights Organizations and various non-governmental organizations involved in prevention trafficking have reported extensively on the forced trafficking of the Nepalese girls to India. In India police and local officials patronize brothels and protect brothel owners and traffickers. In return, brothel owners pay bribes to the police and other concerned officers to avoid raids.¹⁷ Neither India nor Nepal has taken serious steps to prevent trafficking of women and girls.

Migration to work in foreign countries generally takes place through companies. They charge high fees, and often, in unholy nexus with foreign

employers, cheat the ignorant people. Although, the government discourages women, employment companies are allegedly involved in trafficking or smuggling of women.

There are several incidents, which point out to the established nexus of trafficking with migration. Hundred of girls have been deceptively moved to India with false assurance of employment, but eventually they end up in brothels.

The Nepalese government's response to the problems and issues of the migrant workers in India and overseas is not promising. Government bureaucracy is often slow to act, and corrupt in many spheres. Most importantly it is largely insensible to the problems of migrant workers; as a matter of fact its protective measures are limited and insignificant. As pointed out by the AMC and MFA, the most basic problem that faces migrant Nepalese workers is the lack or absence of protection from embassies and diplomatic mission of Nepal abroad.¹⁹ In the recent years, however, the continuous efforts for sensitizing the government concerning the plights and many sorrow stories of the migrant workers have helped to highlight the interventions of the government. The pressure has resulted in the following developments:

- a. Establishment of the Labor Desk at Tribhuvan International Airport.
- b. Appointment of Labor attaches in some receiving countries like Saudi Arabia.
- c. Opening of Embassy in Qatar.
- d. Legal actions against some Manpower Agencies, resulting in cancellation of registration of 47 such companies.
- e. Government claims bans on employment of women in some countries like Saudi Arabia as positive response to the problem. However, this policy mirrors the protectionist role of state

(Two girls from Panchathar district had been taken by Sun Manpower Company to Bangladesh on the way to Gulf. They were kept in a house. They eventually revealed that their destination had come to an end. While in Bangladesh, a few days after arrival, they had to encounter a sexual violence, and at that point they knew that they had been held in Bangladesh to be used in sex market. These girls somehow escaped. They stopped a three wheeler (tempo), and requested to help them. They said they were Nepalese. The three wheeler driver who had chance to commute some Nepalese in the past to the Nepalese Embassy at Dhaka, took them to the Embassy. These girls had been brought to Nepal. The manager of the Sun Manpower could not be arrested. There was a pressure to hide the case. The Women Foundation, a Kathmandu Based NGO, made attempt to prosecute the culprit in vain. There had allegedly been involvement of the Assistance Home Minister).¹⁸

16. *Sabin Shrestha v. Ministry of Law Justice and Parliamentary Affairs*, Supreme Court Bulletin, Year 10, Issue No 19, Vol 229, P-4.

17. *Supra* 15, P-204.

18. Detail information is available from Women Cell, District Police Office, Hanuman Dhoka. The name of Girls is deliberately avoided.

19. *Supra* Note 18. 205.

over females, and in consequence it results in violation of the Article 11 (1) of the Constitution of the Kingdom of Nepal. This policy therefore should not be taken into consideration as a positive development.

The most important setback in the government's policy is its failure to ratify the International Convention on the Protection of the Rights of Migrant Workers and Member of their Families. The reason of staying back from ratifying the convention is not known, albeit it helps the Government to protect its citizens abroad. Moreover, the Government's concerned agencies are not unaware of the convention. The National Human Rights too has been inactive in this regard, although it participated in the UN Commission on Human Rights meeting. Importantly, at the 56th session of the Commission, Nepal was one of the 16 countries involved in drafting a resolution "encouraging States to consider signing and ratifying or acceding to the Migrant Convention, as well as the Slavery Convention of 1923. At the UN experts' meeting in September 2000 in Thailand, Nepal also attended and endorsed the draft recommendation calling on all countries to ratify conventions. Given the facts that Nepal's migrants abroad suffer-typically worse than other nationalities from poor working conditions, discrimination, abuse and maltreatment- there is no excuse why Government continues to pull its feet from ratifying the Migration Convention.

The lack of systematic regulation with adequate measures for protection of workers against manpower companies, employers and officials of the receiving countries maintain the connection of trafficking of women girls with migration. Although, the trafficking of the Nepalese women and girls abroad has not been known as serious problem, there are sporadic incidents reported by the media. The media however, regularly exposes the incidents of sexual exploitation of Nepalese women workers in Malaysia, Saudi Arabia, Qatar, and so on. The deception and cheating by the manpower companies are found main causes behind such exploitation.

The problem of trafficking is largely a problem of associated with India, and the main cause for it is the open border between two countries. Women are generally enticed or abducted for trafficking. In the past, women and girls had been trafficked straight from villages, however, the trend has been largely changed in the last couple of years. At present, the cities like

Kathmandu constitute transit points for trafficking. Obviously, the problem of trafficking maintains invisible but direct nexus with migration of women and girls from rural villages to cities.²⁰

H) Freedom of Movement, Migration and Trafficking:

Fundamental freedom of movement has significantly contributed to in-country and Trans-country mobility of individuals. These movements take place in different forms, and for different purposes. Migration is understood as moving of individual from the place of birth or residence for relatively permanent period. Fundamental rights in most of the countries ensure this movement without reservations. But it does not mean that there would be no migration without guarantee of this right. There was migration in every part of the world before the law recognized these rights. Migration takes place even in a condition, when law puts ban on it. Freedom of movement facilitates migration but restricted migrations are also very common.

Trafficking of human, too, being involves an element of movement that is essential for migration. However, the migration essentially involves an element of voluntary human activity. But the condition of trafficking is different as it lacks voluntariness of the movement. The trafficking therefore renders the migration vulnerable. People intending to migrate, women and children in particular, are, therefore, always at risk of being trafficked and exploited, provided the migration is irregular or undocumented.

The Constitution of the Kingdom of Nepal, 1990 guarantees, inter alia, the basic human rights, including freedom and unrestricted movement, to every citizens of Nepal regardless of their sex, religion, caste, etc. Under the guiding principles of the State, the State is obliged to pursue a policy of making the female population participate, to a greater extent, in the task of national development. And for this purpose the State is obliged to make special provisions for their education, health and employment, and to make necessary arrangements for safeguard of rights and interests of children and women so that they are not subjected to exploitation.

Article 11 of the Constitution provides for unconditional

20. See, Sangrouka, Yubaqj. "Condemned to Exploitation: Trafficking of Women and Girls in Nepal". 2000. Kathmandu School of Law.

equality of men and women in matters of application of general laws. The special Proviso of the Article 11(3) empowers the state to enact laws for special protection of women and children. Similarly, Article 12 guarantees freedom of movement and residence throughout the Kingdom of Nepal. Nevertheless, women and children are not able to realize the fruit of these provisions mainly due to intensely enforced defective value system that discards the independent socio-legal position of women. Discrimination and violence against women is therefore a serious problem in every sphere of the Nepalese societal structure. The sexual exploitation of women is a worse result of the defective value system, as it recognizes the concept of women's body as the sexual commodity. Although, the Article 20(1) of the Constitution categorically prohibits trafficking in human slavery, serfdom or forced labor in any form, the problem of trafficking of women and girl children for sexual exploitation is an immensely serious problem that receives no adequate and sensible intervention from the State. Obviously, the Anti-trafficking laws are pieces of legislation that have been largely failing in their objectives.

2. Overview of Counter Trafficking Laws

Muluki Ain:

The New Muluki Ain is a comprehensive code relating to civil, criminal as well as procedural and substantive laws of the Kingdom. Part 4 Chapter 11 of the Ain deals exclusively with the crime and punishment relating to trafficking of human beings. Under this chapter, the following types of act are prohibited as offence of trafficking of human beings:

- (1) **Trafficking of Human Beings:** No one shall take anybody out of Kingdom of Nepal for the purpose of sale. Unfortunately, this provision does not prohibit the sale of human being within the territory of Nepal.
- (2) **Deprivation from Legal Guardian:** To separate or to persuade someone to separate an insane, or a minor, who has not completed age of sixteen years, from his legal guardian is prohibited as an offence.
- (3) **Slavery and Bonded Labor:** To subject someone into slavery, to make a person bonded labour is restricted.

The Chapter of Muluki Ain on Trafficking of Human Beings suffers from several gaps and lacunas. Most importantly, it fails to prohibit trafficking of human being as such within the territory of the Kingdom of Nepal. Obviously, this law defines trafficking in terms of "boundaries" but not in terms of "criminal intention" associated with. The crime of trafficking of human being originates first in the mind of offenders, and then is translated into action. However, the action might be incomplete due to intervention of some factors. If the law becomes inapplicable in such a condition, the crime of trafficking becomes unaddressed ever. For instance, a girl being moved out of village for the purpose of trafficking might be caught before she is taken across the border by someone, and thus is protected from being sold. This circumstance avoids the action being defined as an offence. Nevertheless, the mental element of crime is so strongly established along with the state of its partial execution. The Chapter on Trafficking of Human Beings, therefore, absolutely denies the concept of internal trafficking.

The chapter provides for stringent form of Punishment for the crime of trafficking of human beings²¹ But it has never been implemented and as such the importance this law has been subjected to good-for-nothing. Moreover, in the perspective of specific enactment, Trafficking in Human Beings (Control) Act, 2033, made, the scope of enforcement of this law had almost diminished.

A) Trafficking in Human Beings (Control) Act, 1986

The Trafficking in Human Beings (Control) Act is hardly different in matters of substantive provisions, definition of crimes and punishment, from the Chapter on Human Trafficking of the Muluki Ain. In procedural matters, however, the changes made are easily noticeable. One of the most important characteristics of the Act, it has extraterritorial application in scope and as such the possibility of Act's enforcement extends from traditional boundary of criminal law. Section 3 of the Act provides that any person residing outside of Nepal who commits any act punishable under the Act should be brought in action under the Act. Similarly, the Act has shifted the burden of proof from prosecution to accused if there has been an issue proving that the person accompanying was an relative of victim. This provision departs from existing universal rule of the burden of proof²².

21. Twenty years imprisonment for sale and ten years imprisonment for crossing the boarder for sale but the sale has not taken place.

22. See, Section 7. of the Trafficking in Human Beings (Control) Act, 2033.

B) Definition of Trafficking

The Act defines trafficking of human beings vaguely in broader terms. Instead of defining in a precise statement, the Section 2 of the Act incorporates the following acts within the scope of trafficking in human beings:

- (i) to sell an individual for any purpose;
- (ii) to take an individual abroad for the purpose of selling;
- (iii) to have a woman engaged in prostitution, by way of persuasion, or enticement, or deception, or fraud or undue influence; and
- (iv) to make an attempt to commit any of the above mentioned acts, or to abet for committing any such acts or assist to commit such acts

Obviously, the Act fails to incorporate elements that render the given act a crime of trafficking. Most importantly, the Act fails to take into account the international standard of the definition of trafficking. Elements like use of force, deception, coercion, etc., which are involved in the process of trafficking, are ignored by the Act. To put it in other terms, the element of voluntary or involuntary state of victim is not taken into consideration by the Act while making attempt to define the act of trafficking. Furthermore, as already mentioned the “guilty mind” of the offender plays crucial role in origin and completion of the crime of trafficking. However, the Act has obviously failed to take into account of the “mental constituent” of the crime of trafficking. Thus, the scope of the effective implementation of the Act is largely restricted.²³

As has been mentioned earlier, the section 7 of the Act rests on accused, except he/she is a guardian or close relative, the burden of proof that, if there has been a complaint of trafficking for sell, the woman or girl being taken by him/her to a foreign country had been taken to foreign country for the purpose of selling, or to have engaged in prostitution. Manifestly, the provision has been inserted in order to provide safeguard to women considering the situation of extreme vulnerability. Moreover, the provision has been inserted to frustrate design of trafficking. However, two negative impacts are likely to emerge out of the provision. Firstly, the provision is potential of restricting the right to free movement of women; and Secondly, it may violate the right of suspects to fair and impartial trial as the provision obviously departs from the universal

principle of suspects “presumed innocence”. This provision is therefore vulnerable of inequality of access to justice, and as such the provision contradicts with the basic concept of human rights.

The section 6 provides for a special provision of complaint. If a woman complains that she was taken for sale or prostitution, or she was sold out or caused to engage on prostitution, the statement thus made should be recorded in presence of public prosecutor, it must be authenticated the trial court judge at nearest district court judge within twenty four hours. The objective of the provision is not clear. If the provision has been enshrined to protect the interest of the affected party, it, in fact, does not serve the objective. Firstly, the privacy of the affected woman lies in stake, as there are hardly any women public prosecutors in Nepal. Secondly, the provision indirectly requires compulsory appearance of affected woman at the police office, which is not necessary in other criminal cases. In the light of the section 18 of the Evidence Act, which obliges the victims to appear in the court for testimony, the appearance of the affected person before the trial court judge during very primary stage of the investigation seems to be meaningless and unnecessary burden on the affected person.

These kinds of provisions, albeit they look pro-affected persons in face, are rendering the smooth enforcement of the Act virtually difficult. These provisions often lead the investigation pro-confession oriented, thus causing the investigating agency ignoring the objective evidence to prove the charges against suspects. Due to various factors, such as threat to life, affected person become unable to appear in the court for testimony leading to failure of the prosecution. So in practice, the enforcement of the Act has virtually come to a situation of stagnation. This fact is proved by the dismal situation of the sustainability of prosecution at trial court. The existing situation is that the rate of sustainability of the charge against suspects at trial court is simply 38%, to exclude the partial conviction rate.²⁴

C) Proposed Trafficking in Human Beings (Control) Bill, 2002

Recently in the present session of the parliament a new anti-trafficking Bill Trafficking on Human Beings (Act) 2002 has been introduced. The Act intends to effect changes in the in prevailing counter-trafficking law. The proposed Bill has introduced the following changes.

23. See for detail, Sangroula. “Condemned to Exploitation (Legal Framework Chapter)”. (2001).

24. See for detail figures, CeLRd, Trial Court System in Nepal. 2002. Katmandu Nepal. P. 72.

D) Criminalization of Prostitution

The Bill has proposed for the criminalization of prostitution as such. The section 3(c) defines prostitution as an act of selling, buying or hiring the body of anyone for the purpose of sexual exploitation or causing sexual exploitation with or without something in return". The proposed bill, however, fails to define the term "sexual exploitation". The proposed bill has made the voluntarily engagement in prostitution as punishable by imprisonment of one month in minimum and three months in maximum, along with fine up to fifty thousand rupees. The proposed bill has obviously gone against the emerging principle of de-criminalization of prostitution. Consequently, it is potential of being enforced against the interest of women.

Prohibited Acts/Definition of Trafficking of Human Beings

The section 4(1) of the proposed bill prohibits trafficking in human beings, and the section 4(2) stipulates the commission of the following acts as offence of trafficking:

- sale and purchase of human beings for any purpose,
- engage someone in prostitution or cause to engage in prostitution
- sexual abuse of minors, or cause to sexual abuse of minors,
- taking away of minor or insane person for the purpose of engaging in prostitution, and
- having sexual intercourse with prostitute.

The proposed bill, too, has taken the crime of trafficking in conventional paradigm. It makes a crime to have sexual intercourse with prostitute without having precise and internationally accepted definition of prostitute. Thus the provision opens a wide room for misuse or abuse of the law for vested interest. As in the existing Act, the proposed bill has failed to address the lacuna concerning the mental element associated with the crime of trafficking.

Prohibition on Operation of Brothel

The section 5 of the proposed bill has specifically put ban on the operation of brothel within the Kingdom of Nepal. It stipulates "No one shall allow to use his/her building, land, place or vehicle to a person who is

operating brothel with or without knowledge that the person is operating brothel". The act of operating brothel, or allowing the use of property for the purpose of operating brothel is punishable by terms of minimum imprisonment of three years, but not exceeding five years, and fine of minimum fifty thousand rupees, but not exceeding one hundred thousands.

Presumption against Innocence

The section 14 has made a provision for application of the principle against the presumption of innocence under certain conditions. The section states that if unless proved contrary, the commission of following acts shall be presumed as trafficking on human beings.

- (a) Where it is found that somebody is kept in brothel or is made ready for prostitution by force, threat, and misrepresentation or with or without economic enticement.
- (b) Where it is found that somebody is being taken outside the Kingdom of Nepal by persuasion or enticement or deception and fraud or force or any kind of enticement.
- (c) Where it is found a child is being sexually abused.
- (d) Where it is found that some public official or official of NGO, or officials of local authority prepares false document or statement assisting the offences punishable under Act.

In such acts, the accused is presumed to be guilty unless he/she proves contrary. This provision not only departs from the notion of fair and impartial trial, but also challenges the established principles of fair trial under the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights.

Investigation and Trial

General procedure of investigation and trial of offences committed under the proposed bill are similar to that of the existing Act. However, there have been some changes made, which are as follows:

Arrest and Search without Warrant:

The proposed bill, notwithstanding any provision in other laws, the police officer in charge of investigation is empowered to take arrest of the person without warrant, or conduct search and seizure in buildings, lands and places where there is an apprehension of commission of offences described in the bill.

Authentication of Statement of Victim and Burden of Proof:

Like the existing Act, the proposed bill has made a provision for statement of victim to be made before the Government Attorney, and authenticated by the judge of the nearest district court. The proposed bill, however, unlike the existing Act has made the statement as an admissible proof even in the case that the victim has not been able to appear in the court.

Burden of Proof:

The burden of proof is completely shifted from prosecution side to the defendant under the proposed bill. The section 10 states: "Notwithstanding anything in any other law in force for the time being a person who is accused of committing any offence under this Act shall prove his innocence".

Detention for Trial:

For trial of offence punishable under the Act, the section 9 of the proposed bill has overriding effect to other laws in force. It states: "Notwithstanding anything in laws in force, if the court finds there enough grounds to detain the accused for trial it may order for so".

Proceedings in Camera:

Under section 26, the bill provides for, on request of the victim, proceedings of the case to be conducted in closed camera court. Similarly, the proposed bill prohibits publication and transmission of information without consent of the victim, provided that such publication or transmission is likely to adversely affect the character of the victim. This provision is innovative initiatives in order to protect affected persons from stigma and socially degrading treatment.

Compensation:

The section 16 of the Act incorporates a provision of compensation from the offenders. This section provides for 50% of the fine paid by the offenders goes to the victim. In case of death of the victim before the trial is completed, the minor children below the age of the eighteen years of the victim shall be entitled to obtain the compensation. This provision is also a positive development.

Rehabilitation Center and Rehabilitation Fund:

The proposed bill purposes for establishing a center

and fund for the rehabilitation. The bill contains a provision that the HMG may establish necessary rehabilitation centers for the purpose of social rehabilitation of women returned from brothel or rescued from brothel. For operation and management of the center, HMG is obliged to establish a rehabilitation fund. The amount contributed by HMG, contributed by nationals and non-national individuals and organizations would be deposited in the fund. Similarly, the fine paid by the convicts, 50% of the total, will also go to the fund.

E) National Policy to Combat Trafficking and Sexual Exploitation of Women and Children

The national policy has accepted the seriousness of the problem of trafficking of women and children within and outside the Kingdom of Nepal. The Government has recognized the intricacies of the problem of trafficking, and its links with socio-economic status of the women. To address the problem, the government had adopted the following fundamental policy guidelines:

- combat all discriminatory and exploitative practices directed against women
- to uplift socio-economic status of women
- to prevent, protect and rehabilitate the victims of sexual exploitation

F) National Plan of Action For Combating Trafficking in Women Children for Commercial Sexual Exploitation

HMG Ministry of Women Children and Social Welfare has framed a National Plan of Action to effectively combat the trafficking, which was approved by the Council of Ministers' meeting in July 1999. The plan of action, inter alia, comprises the national strategy for combating trafficking and its root cause. Strategically, the plan of action has adopted six types of interventions:

1. Policy Research and Institutional Development
2. Legislation and Enforcement
3. Awareness Creation, Advocacy, Networking and Social Mobilization
4. Health and Education
5. Income and Employment Generation

6. Rescue and Reintegration

Institutional Mechanism to Implement the Plan of Action

The MWCSW has been designated as the focal point for the implementation of the plan of action. At the National-level a coordination committee is constituted under the chairmanship of Minister of Women, Children and Social Welfare. The committee comprises other sixteen members from line ministries and NGOs. Similarly, the plan of actions includes an agenda for formation task force at national, district and VDC/ Municipality levels.

G. Labor Laws and Migrant Workers:

In Nepal, there is no separate law applicable to migrant labor law. The existing labor law contains some provisions concerning women and children. The Labor Act, 1991 is a basic legislation to deal with labor matters in Nepal

Definition of Child and Minor:

For the purpose of the Act, children are classified into two categories, child and minor. A person who has not attained the age of eighteen years is classified as a minor and a person who has attained the age of fourteen years but not completed eighteen years is a minor. In relation to prohibition of child labor, the Labor Act and the Children Act, 2048 have made similar provisions. Under these laws, no child below the age of 14 years can be engaged as a worker in any enterprises. However, a minor can be employed as a worker from 6:00 a.m. to 6:00 p.m. only. The section 16 of the Children Act contains a provision, which restricts employment of a child (not attained the age of 16 years) in immoral profession. But the Act does not specify professions what are immoral. If the indication of the Act is to pornographic matters, this is a matter, which is not permitted for adult too. These matters are dealt with under Public Offence Act 1970.

Labor Act prescribes that woman shall be engaged in work normally from 6:00 am till 6:00 pm. This restriction is, however, relaxed to women who are working in hotel and travel agency business. Hence, women can be deployed at works any time in a hotel or travel agency, provided that special arrangement of safety according to the nature of

works is made. This provision of the Act empowers the state to play a “protectionist” role in relation to women’s employment in industrial sectors. There is no reasons for allowing women to engage in works during nighttime in tourism, and not in other sectors. The state for its convenience cannot simply deprive women of their rights to make choice of works, as the prohibition on women to work during nighttime indirectly deprives women of their right to make choice of works. As such the Labor Act’s said provision obviously contradicts with the Article 11(1) and (2) of the Constitution of the Kingdom of Nepal.

The section 41 of Labor Act has made a provision for residence, which is essential for safety and welfare of migrant worker, the women and minors in particular. However, the provision is hardly enforced, except in few big enterprises. Moreover, the section also obliges the proprietors to allocate each year not less than five percent of the gross profit to develop residence for workers and employees. The Act stipulates for provision of separate fund for this purpose. The provision is, however, hardly in practice, mainly due to lack of adequate monitoring system of the government. The Labor Act does not provide for any sanction against establishment for having non-compliance of such obligations. The migrant workers are therefore not privileged of having very basic facilities provided by the Act.

National Labor Policy:

His Majesty Government has issued a National Labor Policy, 1999. This documents primarily deals with general labor policies, and as such the policy guidelines adopted by the government apply for workers in general. The policy document does not refer to migrant workers in particular. Obviously, HMG has no policy and practice of treating migrant workers specifically. However, the following provisions are indirectly concerned with migrant workers also:

- One of the objectives of the labor policy is to make special attempts for institutional development of the regime of foreign employment of Nepalese, and secure its continuity. Since, the policy document refers to institutional development of foreign employment of Nepalese, it can be inferred that the Nepalese migrant workers

in other countries are matter of concern under it. However, this connotation does not include internal migrant workers. It means that the Policy document ignores the different status of internal migrant workers.

- The following policies specially relate to women and children too.
- To make labor administration more effective, and to carry on the amendment of legal provisions as to accommodate and enforce labor rights, shall be secured in accordance with standards set by labor conventions.
- The rights of labor shall be secured by making social security system more strengthened.
- Child labor eradication program shall be conducted in national level in a planned way by mobilizing the help of national and international organizations.
- To increase foreign employment and to make reliability on it, appropriate changes and amendments on prevailing foreign employment Act and Policy to encourage foreign employment company shall be adopted.

In addition, the National Policy document states:

- “For the expansion of foreign employment and increment of the reliability of its business, a high level advisory committee shall be constituted with the participation of ministry of Labor, Home, Finance and National Planning Commission and foreign employment entrepreneurs organizations.”
- “For the development of foreign employment, if necessary foreign employment institution shall be established with the participation of the private sector also.”

To implement these policies, the following plan of actions need to be developed.

Training Employment and Skill Development

- Programs must be developed to eliminate gender discrimination in employment, and to address these problem women must be provided with access to technical and skill programs.

Ratification of International Conventions:

- Priority shall be given to ratify the important conventions, ILO conventions in particular.

Social Security

- Special programs shall be conducted for security of migrant workers.

H. Effectiveness of Policy in Addressing the Problem of Migration and Trafficking:

As has been said before, the policy document does not specifically refer to problem and issues of women migrant workers. In contrary, by a decision, the government has put a ban on employment of women in certain countries. The policy document is therefore not pro-active, if not antagonistic, to promote increased participation of women in migration for work in overseas countries. The situation negates the possibility of having proper documentation of migration, so that the movement becomes regular and safer.

Since, the government, for its convenience, has put ban women migrant workers, the situation has forced to open window for access, and this situation is primarily responsible to foster trafficking. Since, legal ways are closed down, the manpower agencies take illegal ways to proceed for migration of women. In this point, the migration contains high potentiality of being ended up in trafficking.

The Government's Labor Policy is not concerned with this aspect of problem, and as such it does not contain any vision or programs to address the problem of trafficking.

3. Laws Relating to Migration

A. Migration as a Human Right

International Framework: Both interstate and intrastate migration has been recognized as a fundamental right of all people. Hence, although the process of migration can facilitate violence against women and girls, it cannot be prevented.

International Legal Framework on Migration: Various international human rights agreements have guaranteed certain rights to migration.

wing provisions related directly and / or indirectly to right to migration:

Article 6: Everyone has the right to recognition everywhere as a person before the law. This provision is significant in protecting the rights of person who migrates across a national border. This provision ensures that the migrant person will be given the recognition of a person. They are therefore protected from adverse conditions that may violate their civil and political rights, as well as the other rights guaranteed by various international human rights instruments.

2. *Article 7: All are equal before the law and are entitled without any discrimination to the equal protection of the law. All are entitled to equal protection against any form of discrimination that is in violation of this declaration, and any incitement to such discrimination. This provision basically protects against discrimination in the observation of the rights guaranteed by UDHR.*
3. *Article 13: (1) everyone has the right to freedom of movement and residence within the borders of each State. (2) Everyone has the right to leave any country, including his own, and return to his country. These provisions are specifically related to migration. It is clearly established that the right to migration covers the right to migrate within the country as well as beyond the borders of the country.*
4. *Article 14: (1) everyone has the right to seek and enjoy, in other countries, asylum from prosecution. The process of seeking asylum results in migration. Thus, the rights to seek and enjoy asylum should be taken in relation to the right to migration. However, the right to asylum is not available when a person is facing a prosecution arising out of non-political crimes or acts contrary to the purposes and principles of the United Nations (see article 14(2))*

A few more provisions of UDHR that may be indirectly related to the right of migration are as follows:

1. Article 16(1):

Men and women of full age, without any limitation due to race, nationality or religion have the right to marry and to have a family. The right to marriage is not limited to within one nation's borders. Since marriage necessarily comprises the right to a family, the marrying spouses, if they belong to different countries. No state can refuse this right. Hence, a marriage of

two people of different nationality may result under migration.

2. Article 23 :

- *(1) Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.*
- *(2) Everyone, without any discrimination, has the right to equal pay for equal work.*
- *(3) Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity and supplement, if necessary, by other means of social protection.*
- *Everyone has the right to form and join trade unions for the protection of his interest.*

One of the widely recorded reasons for migration is the search for work. Article 23 of UDHR is concerned with the protection of persons in obtaining work or protection in during work.

From the provisions discussed, the rights relation to migration may be classified into two types, as follows:

- a. **Right to migrate:** Right to migrate within the borders of the country is an unlimited right. However, migration across the border is not an unlimited right, as the law of the country, i.e. The immigration regulations, propose that migration is also relevant. The domestic law of the country migrated from necessarily regulates migration beyond its borders.
- b. **Right of migrants:** The rights of migrants to work are absolute, and there can not be discrimination against them of any kind. The rights that are guaranteed by article 23 of UDHR are available to migrant workers. This provision ensures the following rights for migrant workers:
 - The right to work with is or her free choice of employment.
 - The right to protection against unemployment.
 - The right to equal pay for equal work
 - The right to form a joint trade unions.

By virtue of article 2, which prohibits discrimination based on sex women are equally entitled to these rights.

International Covenant on Civil and Political Rights:

The following rights provided by ICCPRS and directly related migration:

1. Article 12:

- (1) Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and the freedom to choose his residence.
- (2) Everyone shall be free to leave any country, including his own.
- (3) The above-mentioned rights shall not be subject to any restriction except those, which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedom of others, and are consistent with the other rights recognized in the present covenant.
- (4) No one shall be arbitrarily deprived of the right to enter his own country.

This article reaffirms the guarantee of the right to migration protected by UDHR. The present covenant is important in the sense that it obliges State parties to ensure this right. The following provision of ICCPR is significant in relation to the migration of persons across the border:

2. Article 13:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of a national security otherwise require, be allowed to submit the reasons against his expulsions and to have his case reviewed by, and be represented for the purpose before, the competent authority.

This provision guarantees against the unlawful expulsion of a migrant. The government of the country the migrant has come to serve the following procedures before expulsion is carried out:

- a. The expulsions should be carried out in accordance with a decision reached according to law.
- b. Generally, the government must give reasons for expulsion.
- c. The migrant must be given the opportunity to submit his argument against expulsion.
- d. A competent authority must make decision on the case.

- e. A migrant should be given representation in the review of the case before it is decided.

Pursuant to article 2(1) of the covenant, these guarantees are available to men and women equally.

3. ICCPR also protects the right of migrants to be recognized as persons (article 16), the right to form and join associations including trade unions (article 22), the right to marry and found a family (article 23), the right to participate in public affairs (article 25), and the right to a fair trial (article 14). Every person, without discrimination on the basis of sex can exercise these rights.

International Covenant on Economic, Social and Cultural Rights:

The following provisions are directly relevant to migration:

1. Article 6:

- (1) The State Parties of the present Covenant recognize that the right to work includes the right of everyone to opportunity to earn a living by work which he freely chooses or accepts and that the appropriate steps should be taken to safeguard this right.
- The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

This article guarantees, among other things, the right to economic, social and cultural development as well as productive employment.

2. Article 7:

The State Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular:

- a. Remuneration which provides all workers, as a minimum, with:
 - Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men with equal pay for equal work.

- *A decent living for themselves and their families in accordance with provisions of the present conditions*
- b. *Safe and healthy working conditions*
- c. *Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence*
- d. *Rest, leisure and a responsible limitation of working hours and periodic holiday with pay, as well as remuneration of public holidays*

Delegates on Exclusion of All Forms of Discrimination Against Women :

As a convention specifically relating to women rights, CEDAW has the following guarantees for women migrants:

1. As per article 2(e), State Parties are obliged “ To take all appropriate measures to eliminate discrimination against women by any person, organizations or enterprise.”
2. Article 9 obliges State Parties to grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife render her stateless or force upon her the nationality of the husband.
3. Article 11 obliges the State Parties to ensure that:
 - The right to work is an inalienable right of all human beings:
 - The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment:
 - The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service, and the right to receive vocational training and retraining, including apprenticeship, advanced vocational training and recurrent training:
 - The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work:

All the human rights instruments above recognize migration as a involvement of human beings to advance their development, and as such restrict any acts or policies that create disadvantage in their resettlement.

B) ILO Convention 97 on Migrants

This convention sets forth the principle of equality of treatment to migrant workers with nationals of the country of residence, but the convention applies only to legal migrants. A group of 42 countries have ratified this convention. Interestingly, neither Nepal has ratified it, nor the Gulf country, where Nepal sends majority of migrant labour.

ILO Convention 143

This convention obliges signatory states to respect the basic human rights of all migrant workers, irrespective of whether they are legal or illegal migrants. As a result of this provision very few (18) states have ratified the convention. None of the Asian countries have ratified this convention.

National Legal Framework:

The national legal framework is not adequate to address the problem of migration and trafficking. The Government has yet not shown interest to enact laws concerning protection of migrant workers abroad. The situation indicates to the fact that the Government is still not prepared to take migration for work is a fundamental right of person. The Foreign Employment Act is primarily a regulatory law, which addresses the problem of registration of employment agencies. Although, it has provisions for sanctions against wrongdoing agencies, yet the provisions do not recognize the rights of persons to migrate abroad for works. This is one of the reasons for hundreds of Nepalese migrant workers being subjected to exploitation in many countries.

As has been discussed earlier, there has been a very thin layer between migration and trafficking. Many trafficking originate in the form of migration. To say in other words, many migrations end up with trafficking. Since, the Government has no appropriate legislation to deal with issues of migration, there is a danger of trafficking being camouflaged with migration. Equally, there is a danger of being migration defined as trafficking. In both circumstances, women's right to migration for work is subjected to jeopardy. To address the problem of lack of proper legislation and mechanism to address the problem, the Government has chosen to play a

protectionist role towards women's participation in the migration for work abroad. This role of the government is therefore not only prejudicial to women's freedom to migration, but also the violation of the article 12 (2d) of the Constitution of the Kingdom of Nepal.

In the backdrop discussed above, the following laws are available to regulate the issues at present:

The Constitution of the Kingdom of Nepal, 1991:

Under Article 12 (2), the constitution provides the right to the following freedoms:

- a. The freedom of opinion and expression,
- b. The freedom of assemble peaceably and without arms,
- c. The freedom to form unions and associations,
- d. The freedom to move through out the kingdom and reside in any part thereof , and
- e. The freedom to practice any profession, or to carry on any occupation, industry or trade.

In relation to migration, sub-article 2(e) and 2(d) are dependent on each other, as the entertainment of one requires the application of the other, as the entertainment of one requires the application of the other. The movement of people described is often inspired or induced by a desire or need for an occupation, profession or trade. The other freedoms contained in sub-article 2 are inseparably attached, and thus no adverse situation will be allowed to restrict a person from enjoying such rights during migration.

The freedom of movement is not merely a freedom of locomotion, but a freedom to change one's residence. Thus, the exterminate orders which were widely used during the Pnachayat era would be unlawful under the terms of the present constitution.

However, the Supreme Court of Nepal has held that the right to move freely throughout the kingdom is not equally available to foreigners as to nationals. In *Meera Gurung vs. Central Immigration Department*, the court held that a foreigner has no fundamental right to enter Nepal, move throughout the country or reside in any part of it. It further held that His Majesty's Government has an unfettered discretion to determine whom it shall allow to enter the country, for what period and under what conditions. The interpretation implies that HMG has no discretion to regulate the movement and residence

of Nepalese citizens.²⁵

Sub-article 2(e) guarantees every citizen the right to practice any profession, or to carry on any occupation, industry or trade.

By virtue of Article 11(1)(2) and (3), these freedoms cannot be affected by discrimination on the basis of sex and anything else stated in the provisions. It means that no law can prevent the free movement of women throughout the country. Thus, women can reside where they wish, based on their choice. Any restriction on such matters shall be void. However, as per the provision of sub-article (3), the government can make some special affirmative measures to benefit women migrants.

Migration should not restrict the exercise of fundamental rights guaranteed under the part three of the constitution. Hence, migrating men and women are equally entitled to:

- a. The right to a fair trial (Article 14)
- b. The right to property (Article 17)
- c. The right to religion (Article 19)
- d. The right to protection against exploitation (Article 20)
- e. The right to information (Article 16) and
- f. The right against preventive detention (Article 15)

Article 20 especially underpins a respect for human dignity. It protects migrants from being trafficked or subjected to conditions of slavery and servitude. This provision also distinguishes the act of trafficking and migration.

There is no specific legislation regulating the migration process in Nepal. However, the Private (Vital) Registration Act requires the compulsory registration of migration and for migrants to obtain a certificate thereof. The purpose of the Act however is limited to the administration of records and has no direct significance to the freedom of movement.²⁶ Yet, the registration of migration helps persons in their private affairs such as:

- Enlisting as voter in the place they have migrated to
- Procuring facilities or benefits available in migrated place like ration certificate for foods, fuel, etc.
- Certification of death, birth, marriage
- Acquisition of citizenship certificate, etc.

25. See, *Meera Gurung V. Central Immigration Department*, Nepal Law Report (NLR) 2051, P-68.

Internal migration of people has been a matter of concern for government for long time. However, the concern is not equally significant in matters of migration of Nepalese for works abroad. The government has yet to ratify the International Convention on Migrant Workers. The reason for staying back from ratifying the convention is not clear.

C. Birth, Death and Other Vital Events (Registration) Act, 2033 (1976)

As per the preamble, the purpose of the Act is to establish, and to consolidate the system of registering incidents like birth, death, marriage, divorce and migration etc. Under section 2(a) of the Act incidents like birth, marriage, divorce and migration are defined as personal incidents requiring registration. The section 2(b) defines migration as change of residence of person from one VDC or municipality to other VDC or municipality within Kingdom Nepal for the period of more than six months. The movement of people from Nepal to other countries for the purpose of changing the residence is also defined as migration. The period of time is taken as essential element of migration under the Act, as no movement from one place to other for less than period of six months is considered as the migration.

This section 4 of the Act requires the senior member of the family to provide information on migration in the prescribed form within 35 days the incident take place. However, the non-compliance of the provision does not attach sanctions, except personal benefits in certain administrative matters. The enforcement of law is therefore very weak. Moreover, the ignorance of law among common people is widespread, which also reduces the possibility of the Act's enforcement. The procedure is tedious and no people friendly too. Concerned people have to follow unnecessary formalities and spend long time for obtaining the certificate. To be very frank, the bureaucracy is not friendly to people. No registration can be easily obtained without bribing the concerned employees. In such a circumstance, the general people are not very much encouraged to invoke the law. The following figures are indicative of the situation:

Data of Migration

Vital Event Registration Record (2035-2057)

In last 23 years an number of 6,52,689 incidents (cases) of migration are registered nationwide. The most interesting character of the figure is that total 316383 incidents of migration (almost half of the total figure) are registered in last year of 2057 BS. alone. What may be the cause of such unexpected rise in registration of migration incidents is not known.

An effective enforcement of the law concerning registration of migration can be helpful to prevention of trafficking in the one hand, and enjoyment of rights under the constitution and laws on the other. As various studies have shown, deception, false promise, enticement for lucrative employment and false marriage are major modes engaged in trafficking of women and girls for sexual exploitation.²⁷ The participation of people, especially the young ones, in the increased mobility has thus been directly associated or related with the problem of trafficking. The mobility either ends up with migration or trafficking. Obviously, the effective enforcement of the provision of the law concerning registration of migration can help preventing the trafficking.

Year	Marriage Registration	Migration Registration
1.	4269	-
2.	3860	-
3.	4525	-
4.	8231	-
5.	8651	-
6.	10346	5628
7.	14499	14932
8.	15975	4679
9.	14786	5443
10.	24018	7714
11.	116695	28676
12.	48475	24968
13.	20540	8561
14.	16599	9667
15.	33558	15402
16.	33612	18930
17.	22836	13289
18.	47870	33676
19.	69417	36656
20.	28262	15698
21.	68136	53935
22.	97904	38452
23.	65947	37814
24.	87724	45227
Total	866735	419347

Source: Population Section, Local Development Ministry

26. Yubaraj Sangroula and Geeta Pathak (2002) Gender and Laws: Nepalese Perspective. Pairavi Publication. Kathmandu Nepal. P. 215.

and encouraging the women's participation in migration for works abroad in the following ways:

1. The identity of place intended to migrate is established. The person involved in or helping for migration is identified. In such situation, trafficking of women or girls through false marriage, enticement for good job, etc would simply be impossible. Hence, the compulsory registration of migration in both the places of origin and destination can play serve the purpose of prevention of trafficking as one of the best mechanisms.
2. The prevalence of trafficking by husbands, where marriage is generally consummated with criminal intent, is found one of the common modes of trafficking. The compulsory registration of marriage, which under the customary of the Nepalese society necessarily causes migration of women, can significantly help to frustrate false marriages. Since the identity of the groom will be established in such situation, it would be impossible for him to operate the plan of trafficking with false name.
3. The process of registering the incident of migration helps to mobility of person becomes publicly notified. It creates a circumstance where information can be shared between the person intending to migrate and others. It helps the potential victim to take precaution, which is the best instrument of prevention.

These situations necessarily encourage women to enjoy rights migration and work. Migration is directly associated with economic independence of women, and thus is a means of self-empowerment of women.

D. Foreign Employment Act, 2042 (1985)

Foreign Employment Act is the only law, which regulates the engagement of the Nepalese people in employment in countries other than Nepal and India. As stated before, the Act primarily regulatory, and as such prescribes rules for registration of employment agencies, their roles and responsibilities, governmental control mechanisms and punishment for violation of rules. The Act has hardly anything to do with the opportunity and convenience of obtaining job, welfare in the

destination, and remedies against the problems or exploitation encountered. The existing labor laws apply to workers of institutions within Nepal, and it has no concern with Nepalese migrant workers abroad. The present Act does not concern with rights, interest and welfare of the migrant workers. It means that the realm of foreign employment is absolutely Underregulation State in Nepal.

The following provisions of the present act are important for discussion:

Registration of Companies:

According to Section 3, persons who want to operate foreign employment enterprises must obtain license from the Government of Nepal. This provision thus prohibits persons to be engaged in activities of sending workers abroad without license. Any act of sending person abroad for work without license may therefore be prosecuted under Human Beings Trafficking (Control) Act.

Foreign Employment (Second Amendment), Act, 2054 (1998)

Section 12 of the Act restricts license holder agencies to provide foreign employment to the minors and women. Pursuant to the section, a person who has not attained the age of eighteen years is defined as minor. This section absolutely restricts to women as it prohibits employment of women in foreign countries without prior approval of HMG. The provision is apparently contradictory to article 11 (1) (2) & (3) of the Constitution of the Kingdom of Nepal, 1990. Pursuant to the article 11 (1), no discrimination can be had on the ground of sex in application of the general law of the country. Further the Act puts women under strict guardianship of male family members.

This provision is therefore violative of the personal identity of women. Under the Act the "guardian" means father or mother in respect of unmarried woman and husband in respect of a married woman. If the above mentioned person are not available then at least 21 years old elder or younger brother of the joint family in respect of unmarried woman and father-in-law or mother-in-law living in the some joint family in respect of a married woman.

27. For detail discussion see, Yubaraj Sangroula (2001): *Condemned to Exploitation: Trafficking of Girls and Women*. Kathmandu School of Law. First Edition. Kathmandu. (Chapter on Modes of Trafficking)

Foreign Employment

In two ways workers can participate in foreign employment - first, through the HMG approved manpower agencies and second by obtaining visa from foreign countries in individual capacity. According to the data available from the Trade & Employment Promotion Department, from fiscal year 2049/50 to 2058/59, altogether 1,87,398 persons have gone to foreign countries for employment. The figures are however different in different institutions. Most of the people had gone to the Gulf (mainly to Saudi Arabia, Qatar USE etc.), Malaysia, South Korea. During the first six months period of this fiscal year the countrywide distribution of Nepali employed in foreign country is as follows (Table No. 2):

His Majesty Government has opened 16 countries, for foreign employment through approved manpower agencies. There is also the provision to open new countries, after obtaining necessary information from Embassy, for foreign employment.

There are altogether 208 valid companies working as manpower agency. There are records of 96 workers who died in course of their employment in the foreign country. 53, 39 & 4 workers have died in Saudi Arabia, Qatar & Malaysia respectively.

E) Women Workers

It is the provision of the Foreign Employment (Second Amendment) Act, 1998 that foreign employment should not be provided to the women workers without permission of the Government or guardian. As the Government argues, for the protection of the rights of the women worker & keeping in mind the incident of physical & mental exploitation of the women workers in foreign country, HMG had put a complete restriction on

Annual Data of Foreign Employment

Table No. 2 : Fiscal Year 2058/059

Month	Saudi Arabia	Kuwait	Qatar	UAE	Bahrain	Hong Kong	Jordan	Kosovo	Malaysia	Maldives	Israel	Macao	Others	Total
Shrawan	1720	8	1718	953	42	47	20	1	5391				14	9914
Bhadra	1800	65	1508	573	29	44	93		5377		7		30	9526
Ashoj	2135	15	1621	522	58	42	1		5273	24			28	9719
Kartik	847	24	1448	605	34	70		6	3903	5		1	28	6971
Mansir	1953	13	1656	690	66	60		10	4248				48	8744
Poush	1075	42	948	536	53	22		16	2484			40	44	5260
Total	9530	167	8899	3879	282	285	114	33	26676	29	7	41	192	50134

Source: Trade & Employment Promotion Department

sending of woman workers to the Gulf countries. As per the decision of HMG dated 2054/2/9, women can participate in employment in foreign countries, except Gulf. However, the prior approval of HMG or guardian is condition precedent. Moreover, the employment for women under this condition is opened only in organized sector like Hotel, Hospital etc. The decision absolutely restricted employment in domestic sector. A decision of HMG dated 2057/8/11 mentions that women could be sent as workers to any country, except gulf, for employment. The decision further mentions that, while sending women workers, concerned Nepalese Diplomatic Mission have to recommend the remuneration, facilities, nature of work etc. which a Nepalese women worker is expected to get.

Furthermore, if any woman wants to go abroad for any purpose, she has to take passport from the Government. While submitting the form for passport, husband in case of married woman and father for unmarried woman, has to give undertaking for the responsibility of the woman, whose seeks to have passport. This provision equally violates the article 11(1) of the Constitution of the Kingdom of Nepal.)

Civil Rights Act, 2012

According to S. 6 of the Act, Under the current Nepal Law, Nepalese citizens are provided with the following rights.

- to travel any where within the Kingdom of Nepal without any restriction
- to reside live in family in any part of the Kingdom of Nepal
- to acquire possess and dispose of property
- to carry on any occupation, trade or industry

Mechanism developed in order to address the problem of safe migration

Birth, Death and other Personal Incident (Registration) Act, 2033 (1976), & Regulation, 2034 (1977) mentions for the registration of migration incident. These provisions are mandatory. But it seems these provisions for registration are very rarely followed in practice.

The prescribed form of migration has to be filled by the main person of the family. In the form, the place of origin and the place of destination should be clearly stated. The Act and rule are not clear whether the migration has to be recorded in the place of origin or in the place of destination or in both.

In the prescribed form, the total number of persons and the reasons for migration has to be mentioned.

F. There are several advantages of safe (Registered) migration:

- (a) Several legal rights could be enjoyed like right to vote, right to be the candidate in the election, to get facilities from local community forest etc.
- (b) It will provide the important information relating to the individual and family. (For e.g., whether it is a permanent or temporary migration, person's place of destination will be known, how many persons of the family or the whole family has migrated or not will be known etc.)
- (c) Various types of social security will be available (like availability of food and other necessary commodities in case of scarcity and natural disaster)

The above mentioned advantages and facilities will not be available to those who have not registered the migration incident.

Labour Force & Employment Promotion

At the end of the Eighth Plan, the size of labour force in Nepal stood at 11.669 million. Of the total economically active labour force, 4.9 percent remained fully unemployed. Such manpower which is unskilled and minimally educated is joining the labour market day by day, on the other hand, the kind of manpower capable of engaging in productive works, equipped with high

intellectual caliber, skilled, capable, healthy and dutiful is conspicuously lacking. Therefore balance between employment opportunities and manpower development has to be established.

Review of Eighth Plan

While reviewing the eighth plan the planning commission feels that there has not been any appropriate institutional as well as administrative mechanism to send Nepalese labourers to the labour market abroad. It states institutional arrangement would be made to produce quality manpower as per requirement within the country and to dispatch surplus labour abroad.

Objectives of Ninth Plan

- (a) To increase national production by providing job opportunities to the labour force in the country and abroad, to preserve justifiable rights and social safety of the labors.
- (b) The unemployment number will be reduced maintaining balance on the basis of demand and supply of labour.
- (c) Foreign employment will be competitively developed and made reliable creating the situation for the Nepalese labors to get opportunities in foreign labour market.

Policy and Implementation Strategy :

The policy and implementation strategy highlights the following:

- (a) Necessary steps will be taken to establish an autonomous institution for promoting foreign employment and making it reliable. Nepalese diplomatic missions will be mobilize for expanding the scope of foreign employment market, for enhancing its reliability and for protecting the rights, welfare and safety of Nepalese workers abroad.
- (b) Arrangements will be made to strictly enforce legal provisions.
- (c) To promote foreign employment regular and make it systematic. Peoples awareness will be raised for not to go for foreign employment through the unauthorized agencies and individuals.
- (d) Identifying the probable countries for foreign

employment. Arrangements will be made to send Nepali laborers through diplomatic channel.

- There is no specific law in Nepal related to the migrant labours and their rights. The Constitution of the Kingdom of Nepal 1990, Civil Rights Act, The Labour Act, and the Foreign Employment Act provide in general the provisions of citizen's rights as well as rights of migrant labour including women and children.
- The legislative framework against trafficking is stringent. The prevailing Trafficking in Human Beings (Control) Act, 1986 has certain flaws and drawbacks and the Bill presented in the parliament tries to address the problems. The Act has criminalized prostitution. It is quite interesting to note that the other countries, which had prohibited prostitution, are decriminalizing it but in Nepal we are proposing to criminalize prostitution. Trafficking and prostitution are different as a single phenomenon. If dealt as a single problem voluntary prostitution may create voluminous job to law enforcement officials and forced trafficking may go unnoticed.
- The proposed Bill has incorporated a provision of proceeding in camera of the trial of offences punishable under the Act. It states, if the victim party of the case wants the hearing court may conduct proceeding in camera. The nature of the offences punishable under the Act themselves demand proceeding in camera. Not only the interest of the victim party but the interest of public in general also requires proceeding in camera. It is not necessary to grant discretion to the court in a matter where there is no point of making a decision on a rational basis.
- Section 14 of the proposed Bill has made a provision of presumption of commission of offence of trafficking of human beings. From the criminal law point of view these conditions except the condition mentioned in 14(b) are different stages of crime and are punishable for either attempting or abetting

or assisting as defined under Section 13.

- Similarly the above-mentioned section states the conditions mentioned in Section 14(a) to (d) shall be presumed as commission of offence of trafficking of human beings. But it has not been co-related with Sections 4(2) and 13 of the Act. Section 4(2) defines trafficking of human beings in different categories according to the nature of offences and Section 13 provides different punishment for these different types of offences. There is no specific provision for providing punishment to such presumed offences. It is quite difficult to further presume (there is no such provision under the Bill) that the court will fit the presumptive offence in appropriate category of punishable act and then punish. There is higher degree of possibility of being no-punishment to the presumed offences.
- Nepal has not still ratified ILO Conventions No. 97 and 143 related to migrant labour rights and there is no specific commitment of the government to ratify in near future. Similarly UN Convention on Protection of the Rights of All Migrant Workers and Member of Their Families, 1997 has neither been ratified nor there is plan to ratify it.
- There is no provision in Labour Act, 1991 that provides right to migrant labours. It has only certain protection to women and children worker regarding time and age for working in any enterprise.
- Birth, Death and Other Vital Event Registration Act, 2033 (1976) provides for registration of the migration incident by senior member of the family, within 35 days of happening of the incident. But it does not clearly mention whether the migration incident has to be registered in the place of origin or place of destination or in both places. The details of prescribed forms for recording the migration incident states it has to be registered in both places. There is a necessity to co-relate the data of outgoing the incoming migrants in different parts of the country. When one incident of migration has to be registered in two places, then it will cause duplication of recording of migration incident. There is no mechanism available to check this duplication.
- The recordings of the vital event have began from 2035 BS. But there are no records of

migration incident till 2039 BS. If we look into registered migration data from 2040 BS to 2058 BS; 4,24,717 incidents of migration have been registered. It has not been clear from the registered data, whether family has been registered as single unit or individual has been registered as one unit.

- From 2035 BS to 2058 BS total 8,66,735 incident of marriage has been registered. It is clear from the data that marriage incident, through which generally women are displaced from their place of origin, are not included or registered as migrant individual. So that the present system of registration does not present accurate picture of internal migration.
- Foreign Employment Act, 2042 (with Second Amendment, 2054) restricts manpower agencies to provide foreign employment to minors and prescribes tough regulatory measures to women. The agencies may provide foreign employment to women after getting necessary permission from His Majesty's Government and guardian of the woman. This provision was enacted to safeguard women from exploitation. But this provision is not transparent and clear. There are no parameters or circumstances mentioned under which HMG and guardian may give permission for foreign employment. It has adversely affected the freedom of movement of women on one hand and in the other hand those women who has got permission for foreign employment are not protected from exploitation. Rather these women are being abused, maltreated and exploited. (See case of Chandra Kumari Gurung, The Kathmandu Post, August 7, 2000; Editorial, Himalaya Times, 2057/3/25; Six Nepali Girls Rescued, The Kathmandu Post, 17/11/2000, Latvian Company Incident; Gorkhapatra, 2057-3-23)
- H.M.G. has opened 16 countries for foreign employment through approved manpower agencies. The destinations of Nepalese workers are mainly Gulf countries and Malaysia. According to available data of first six months of fiscal year 2058/59 in Saudi Arabia & Malaysia 9530 and 26676 people had gone for foreign employment respectively.
- Every now and then we can hear the sufferings of the Nepalese workers working abroad. Several news has been reported about cheating, abuse & maltreatment of Nepalese workers

abroad (see, Gorkhapatra 057/3/24, Himalaya Times 057/4/11). There is lack of initiatives on the part of the government and Trade Union of Nepal, to protect Nepalese workers abroad. Official record shows 43, 39 & 4; migrant Nepalese workers have been died in course of their employment in Saudi Arabia, Qatar & Malaysia respectively. These numbers could be higher because these are the numbers of the legal migrant worker who had gone through registered manpower agencies. There is trend of huge number of workers going abroad irregularly (without paper registration).

- It is believed that many Nepalese go to the U.S. and European countries as a student and tourist and later on they stay over there working legally/illegally. Condition of leaving, amount of earnings of the workers working in the U.S. and European countries are far better than Asian countries. Basic Human Rights including workers rights are respected in the U.S. and European countries. But in Gulf and Malaysia there are no respects for democracy and basic human rights. Foreign workers are not treated fairly and equally.
- There are three conventions, namely; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (UN Convention), ILO Convention 97 on migrants, ILO Convention 143 on Migrant Workers. Among these, UN Convention prescribes for basic human rights to the migrant workers and their families. It restricts torture, cruel, inhuman treatment or punishment to migrant worker and their family. These provisions are applicable to all migrant workers and their family members. Similarly, ILO Convention 143 obliges signatory states to respect the basic human rights of all migrant workers, irrespective of whether they are legal or illegal migrants.
- ILO Convention 97 has only minimal application to irregular migrants. ILO Convention 143 is clearly concerned with irregular migration too. Part I, Article 1 of this convention obliges states parties to respect the basic rights of all migrant workers.
- The explicit application of ILO convention 143 and the UN convention to irregular migrants is seen as a substantial obstacle by

many governments to the ratification of both instruments. Interestingly, neither Nepal has ratified these international instruments nor the Gulf countries, where Nepal send majority of migrant labor. Malaysia is the only country in the Asia Pacific region, which has ratified one of the ILO conventions.

- Planning Commission while reviewing the Eight Plan, felt that there has not been any appropriate institutional as well as administrative mechanism to send Nepalese labors to the labor market abroad. The planning commission states that institutional arrangement would be made to produce quality manpower as per requirement within the country and to dispatch surplus labor abroad. This commitment remains in the paper only. Nothing worth mentioning was done for the promotion of foreign employment.
- One of the objectives of the Ninth Plan was to increase national production by providing job opportunities to the labor force in the country and abroad, to preserve justifiable rights and social safety of the labor. Similarly, it was mentioned that foreign employment would be competitively developed and made reliable creating the situation for the Nepalese labors to get opportunities in foreign labor market. To obtain the objectives the strategy of the government would be to identifying the probable countries for foreign employment. The other strategy was to make arrangements to send Nepali laborers through diplomatic channel.
- According to a recent UN report, at the present rate of decline in births and with the ageing of the population, Europe will need some 160 million foreign workers over the next 25 years to compensate for labour shortage and to be able to maintain its current standard of living. (cf Council of Europe 16th October 2000). There is better opportunity for the Nepalese labor to tap the European market. HMG should mobilize its Diplomatic Missions to grab this opportunity.
- The above-mentioned points clearly show that

there is no specific law that deals with migration and the protection of the rights of migrant labourers. The Labour Act, 1991 which is the basis of labour law too is silent about the issues of migrant labourers both inside and outside Nepal. Lack of specific provision for protection under the labour law has made women and children vulnerable to trafficking. The provision of quarters for the labourers as mentioned under Section 41 of the Act has not been implemented properly. It is therefore necessary to make provisions of quarters mandatory for migrant labour to safeguard them from danger. This provision should be implemented rigidly. Labour Act must also make provisions for medical treatments, should take the initiative to bring about literacy program to educate the labourer's children and ensure other security systems that should be available to the migrant labours.

Nepal has signed many international instruments about the rights shall be secured according to the standard passed by International Labour Organization, and it further states priority shall be given to ratify the important conventions amongst the conventions passed by the International Labour Organization. U.N. Convention, 1990 on protection of Migrant Workers, ILO Convention 97 and ILO Convention 143 shall need to be ratified to protect the rights of migrant labour.

- It has been found out that the Nepalese workers, especially women are the victims of abuse and maltreatment in the Gulf countries. HMG has opened these countries for foreign employment but there has been no effort on their part to identify the pathetic condition of the Nepalese migrant workers and similarly there has been no move to ensure their security. To protect the Nepalese citizens abroad, HMG should not open these countries for recruitment of Nepalese labour where minimum rights of the migrant labours are not guaranteed.
- According to the available data (Sec. 3.2), it has been found that from the fiscal year 2049 to 2058/59, the total number of Nepalese migrant employees going abroad has reached up to 1,87,398. Approximately, one third of the total migrants i.e. 50134 people have gone for foreign employment during the first half

of this year itself. The rate of flow of the workers is going on at a rapid pace. Their contribution can be marked in the foreign currency reserve of the country, which is very high. It is difficult to estimate the number of migrant workers according to their age and sex due to the unavailability of adequate data, but the number of women has certainly increased. Concerning women workers, there should be certain facilitative measures present rather than restrictive ones. In addition to this, foreign employment agencies should be compelled to send women in selected field of work where their security can be safeguarded, unlike those, where they might be the victims of trafficking and other inhuman acts. Similarly, the agencies should be made to submit periodical records of the women employees to the Government and their respective families. Hence, special protective measures are required for women foreign employee.

- It is a better option, if the Manpower Agencies familiarize or educate the migrant workers about their rights, working condition, labour laws & regulation of the employers country prior to the recruitment.
- Migration registration law [Vital Incident (Registration) Act 1976] is an old one but has failed to be implemented in a proper manner. The Act is in an ambiguous form sans the mention of whether a married woman is required to register as a migrant woman in both the place of origin and the place of destination. The clarity in the above mentioned point would help in its effectiveness. Its effective implementation is required not only to check trafficking of women and children but for other necessary purposes as well.
- The migration law should be able to present the updated picture of population distribution in the country. It is difficult to register the rapidly increasing urban population comprising of a large number of migrant women and children workers through the coercive measures. Thus there should be an incentive to register them at the actual place of origin and time, so as to make them socially secured.
- The proposed Trafficking on Human Beings (Control) Bill is intended to address the flaws and drawbacks of the prevailing Act. But the Bill also needs to be amended before it is

enacted. Firstly, it has made prostitution punishable and condemns an individual indulging in sexual intercourse with a prostitute. Whether the term criminal offence should be attached to prostitution is a policy of the state. But this policy must be implemented in a proper way. To treat prostitution and trafficking in the same Act or a platform is not appropriate. This may lead to ignoring trafficking in the name of prostitution. So that the part related to prostitution and having sexual intercourse with prostitutes be taken away from anti-trafficking law.

- The proposed Bill states, if the victim party of the case wants, the hearing court may conduct proceeding in camera. The nature of the offences punishable under the Act themselves demand proceeding in camera. It would be in the interest of the victim party as well as interest of the public in general, the proceeding takes place in camera. It is not necessary to make it optional on the request of victim party. It is necessary to conduct proceeding in camera as mandatory.
- Provision of generating rehabilitation fund and establishing rehabilitation center is one-step ahead of its predecessor under the Trafficking Control Bill. HMG is not under an obligation to establish such a center but the necessity of the hour requires HMG to give a serious thought to its involvement in the activities of funding and establishment of rehabilitation centers. Furthermore, there is a provision of providing fund for operation and management of the center. There are three categories of sources for fund generation i.e.: the amount appropriated by HMG, amounts confiscated from the offender and the penalty imposed on the offender and appropriated by national and foreign organizations and individuals. Certainly the rehabilitation centers cannot be managed without appropriate financial resources. There must be a provision requiring the Government to generate fund through annual budget appropriation depending upon the number and financial loads of the rehabilitation centers.
- Trafficking problem, and migration nexus have not been identified in the policy and Plan of Action against trafficking. The plan of action must include finding out the causes of

trafficking .One cause of trafficking being migration; regulated or unregulated. Hence there

- must be an improved legislative framework for safe migration.
- Similarly, National Labour Policy is not formulated in consonance with plan of action against trafficking. Generally labours who migrate from one place to another are vulnerable to trafficking. Labour policy should try to safeguard migrant labours from the risk of being trafficked.
- Isolated plan of actions in different area are better if they have proper co-ordination to address the problems that are inter-related to each other. In this perspective labour policy and anti-trafficking policy must have a common agenda. Similarly, prevailing migration law, labour law and anti-trafficking laws need to be reviewed after detailed study of these laws.

The above mentioned Findings & Recommendations were disseminated in Nepalgunj, 21st September 2002 (059-6-5), Bhairahawa 30th October 2002 (059-6-15), Birgunj, on 9th November 2002 (059-7-23) and in Kathmandu on 29th November 2002 (059-8-13).

The feedbacks and recommendation, which were

collected in dissemination, are also included. The invitees in the dissemination meeting were from the officials of the Government Line Agencies as well as partnering NGOs and other NGOs.



6. Appendixes

A) C97 Migration for Employment Convention (Revised), 1949

Convention concerning Migration for Employment (Revised 1949) (Note: Date of coming into force: 22:01:1952.)

Convention	: C097
Place	: Geneva
Session of the Conference	: 32
Date of adoption	: 01:07:1949
Subject classification	: Migrant Workers

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Thirty-second Session on 8 June 1949, and

Having decided upon the adoption of certain proposals with regard to the revision of the Migration for Employment Convention, 1939, adopted by the Conference at its Twenty-fifth Session, which is included in the eleventh item on the agenda of the session, and

Considering that these proposals must take the form of an international Convention,

adopts the first day of July of the year one thousand nine hundred and forty-nine, the following Convention, which may be cited as the Migration for Employment Convention (Revised), 1949:

Article 1

Each Member of the International Labour Organisation for which this Convention is in force undertakes to make available on request to the International Labour Office and to other Members-

- (a) information on national policies, laws and regulations relating to emigration and immigration;
- (b) information on special provisions concerning migration for employment and the conditions of work and livelihood of migrants for employment;
- (c) information concerning general agreements and special arrangements on these questions concluded by the Member.

Article 2

Each Member for which this Convention is in force undertakes to maintain, or satisfy itself that there is maintained, an adequate and free service to assist migrants for employment, and in particular to provide them with accurate information.

Article 3

1. Each Member for which this Convention is in force undertakes that it will, so far as national laws and regulations permit, take all appropriate steps against misleading propaganda relating to emigration and immigration.
2. For this purpose, it will where appropriate act in co-operation with other Members concerned.

Article 4

Measures shall be taken as appropriate by each Member, within its jurisdiction, to facilitate the departure, journey and reception of migrants for employment.

Article 5

Each Member for which this Convention is in force undertakes to maintain, within its jurisdiction, appropriate medical services responsible for—

- (a) ascertaining, where necessary, both at the time of departure and on arrival, that migrants for employment and the members of their families authorised to accompany or join them are in reasonable health;
- (b) ensuring that migrants for employment and members of their families enjoy adequate medical attention and good hygienic conditions

at the time of departure, during the journey and on arrival in the territory of destination.

Article 6

1. Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters:
 - (a) in so far as such matters are regulated by law or regulations, or are subject to the control of administrative authorities—
 - (i) remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on homework, minimum age for employment, apprenticeship and training, women's work and the work of young persons;
 - (ii) membership of trade unions and enjoyment of the benefits of collective bargaining;
 - (iii) accommodation;
 - (b) social security (that is to say, legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:
 - (i) there may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;
 - (ii) national laws or regulations of immigration countries may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension;
 - (c) employment taxes, dues or contributions payable in respect of the person employed; and

(d) legal proceedings relating to the matters referred to in this Convention.

2. In the case of a federal State the provisions of this Article shall apply in so far as the matters dealt with are regulated by federal law or regulations or are subject to the control of federal administrative authorities. The extent to which and manner in which these provisions shall be applied in respect of matters regulated by the law or regulations of the constituent States, provinces or cantons, or subject to the control of the administrative authorities thereof, shall be determined by each Member. The Member shall indicate in its annual report upon the application of the Convention the extent to which the matters dealt with in this Article are regulated by federal law or regulations or are subject to the control of federal administrative authorities. In respect of matters which are regulated by the law or regulations of the constituent States, provinces or cantons, or are subject to the control of the administrative authorities thereof, the Member shall take the steps provided for in paragraph 7 (b) of article 19 of the Constitution of the International Labour Organisation.

Article 7

1. Each Member for which this Convention is in force undertakes that its employment service and other services connected with migration will co-operate in appropriate cases with the corresponding services of other Members.
2. Each Member for which this Convention is in force undertakes to ensure that the services rendered by its public employment service to migrants for employment are rendered free.

Article 8

1. A migrant for employment who has been admitted on a permanent basis and the members of his family who have been authorised to accompany or join him shall not be returned to their territory of origin or the territory from which they emigrated because the migrant is unable to follow his occupation by reason of illness contracted or injury sustained subsequent to entry, unless the person concerned so desires or an international agreement to which the Member is a party so provides.
2. When migrants for employment are admitted on a permanent basis upon arrival in the

country of immigration the competent authority of that country may determine that the provisions of paragraph 1 of this Article shall take effect only after a reasonable period which shall in no case exceed five years from the date of admission of such migrants.

Article 9

Each Member for which this Convention is in force undertakes to permit, taking into account the limits allowed by national laws and regulations concerning export and import of currency, the transfer of such part of the earnings and savings of the migrant for employment as the migrant may desire.

Article 10

In cases where the number of migrants going from the territory of one Member to that of another is sufficiently large, the competent authorities of the territories concerned shall, whenever necessary or desirable, enter into agreements for the purpose of regulating matters of common concern arising in connection with the application of the provisions of this Convention.

Article 11

1. For the purpose of this Convention the term migrant for employment means a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment.
2. This Convention does not apply to—
 - (a) frontier workers;
 - (b) short-term entry of members of the liberal professions and artistes; and
 - (c) seamen.

Article 12

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 13

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratifications has been registered.

Article 14

1. Each Member ratifying this Convention may, by a declaration appended to its ratification, exclude from its ratification any or all of the Annexes to the Convention.
2. Subject to the terms of any such declaration, the provisions of the Annexes shall have the same effect as the provisions of the Convention.
3. Any Member which makes such a declaration may subsequently by a new declaration notify the Director-General that it accepts any or all of the Annexes mentioned in the declaration; as from the date of the registration of such notification by the Director-General the provisions of such Annexes shall be applicable to the Member in question.
4. While a declaration made under paragraph 1 of this Article remains in force in respect of any Annex, the Member may declare its willingness to accept that Annexes having the force of a Recommendation.

Article 15

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 2 of article 35 of the Constitution of the International Labour Organisation shall indicate—
 - a) the territories in respect of which the Member concerned undertakes that the provisions of the Convention shall be applied without modification;
 - b) the territories in respect of which it undertakes that the provisions of the Convention shall be applied subject to modifications, together with details of the said modifications;
 - c) the territories in respect of which the Convention is inapplicable and in such cases the grounds on which it is inapplicable;
 - d) the territories in respect of which it reserves its decision pending further consideration of the position.
2. The undertakings referred to in subparagraphs (a) and (b) of paragraph 1 of this Article shall be

- deemed to be an integral part of the ratification and shall have the force of ratification.
3. Any Member may at any time by a subsequent declaration cancel in whole or in part any reservation made in its original declaration in virtue of subparagraph (b), (c) or (d) of paragraph 1 of this Article.
 4. Any Member may, at any time at which the Convention is subject to denunciation in accordance with the provisions of Article 17, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of such territories as it may specify.
2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.
 3. At any time at which this Convention is subject to denunciation in accordance with the provisions of the preceding paragraphs any Member which does not so denounce it may communicate to the Director-General a declaration denouncing separately any Annex to the Convention which is in force for that Member.
 4. The denunciation of this Convention or of any or all of the Annexes shall not affect the rights granted thereunder to a migrant or to 1400 other members of his family if he immigrated while the Convention or the relevant Annex was in force in respect of the territory where the question of the continued validity of these rights arises.

Article 16

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 4 or 5 of article 35 of the Constitution of the International Labour Organisation shall indicate whether the provisions of the Convention will be applied in the territory concerned without modification or subject to modifications; when the declaration indicates that the provisions of the Convention will be applied subject to modifications, it shall give details of the said modifications.
2. The Member, Members or international authority concerned may at any time by a subsequent declaration renounce in whole or in part the right to have recourse to any modification indicated in any former declaration.
3. The Member, Members or international authority concerned may, at any time at which the Convention is subject to denunciation in accordance with the provisions of Article 17, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of the application of the Convention.

Article 17

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an Act communicated to the Director-General of the International Labour Office for registration. Such denunciation should not take effect until one year after the date on which it is registered.

Article 18

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.
2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 19

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 20

At the expiration of each period of ten years after the coming into force of this Convention, the Governing Body of the International Labour Office shall present to the General Conference a report on the working

of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 21

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:
 - a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 17 above, if and when the new revising Convention shall have come into force;
 - b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.
2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 22

1. The International Labour Conference may, at any session at which the matter is included in its agenda, adopt by a two-thirds majority a revised text of any one or more of the Annexes to this Convention.
2. Each Member for which this Convention is in force shall, within the period of one year, or, in exceptional circumstances, of eighteen months, from the closing of the session of the Conference, submit any such revised text to the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.
3. Any such revised text shall become effective for each Member for which this Convention is in force on communication by that Member to the Director-General of the International Labour Office of a declaration notifying its acceptance of the revised text.
4. As from the date of the adoption of the revised text of the Annex by the Conference, only the revised text shall be open to acceptance by Members.

Article 23

The English and French versions of the text of this Convention are equally authoritative.

ANNEX

ANNEX I

Recruitment, placing and conditions of labour of migrants for employment recruited otherwise than under government-sponsored arrangements for group transfer.

Article 1

This Annex applies to migrants for employment who are recruited otherwise than under Government-sponsored arrangements for group transfer.

Article 2

For the purpose of this Annex :

- (a) the term recruitment means :
 - (i) the engagement of a person in one territory on behalf of an employer in another territory, or
 - (ii) the giving of an undertaking to a person in one territory to provide him with employment in another territory, together with the making of any arrangements in connection with the operations mentioned in (i) and (ii) including the seeking for and selection of emigrants and the preparation for departure of the emigrants;
- (b) the term introduction means any operations for ensuring or facilitating the arrival in or admission to a territory of persons who have been recruited within the meaning of paragraph (a) of this Article; and
- (c) the term placing means any operations for the purpose of ensuring or facilitating the employment of persons who have been introduced within the meaning of paragraph (b) of this Article.

Article 3

1. Each Member for which this Annex is in force, the laws and regulations of which permit the operations of recruitment, introduction and placing as defined in Article 2, shall regulate such of the said operations as are permitted by its laws and regulations in accordance with the provisions of this Article.
2. Subject to the provisions of the following paragraph, the right to engage in the operations of recruitment, introduction and placing shall be restricted to :

- (a) public employment offices or other public bodies of the territory in which the operations take place;
 - (b) public bodies of a territory other than that in which the operations take place which are authorised to operate in that territory by agreement between the Governments concerned;
 - (c) any body established in accordance with the terms of an international instrument.
3. In so far as national laws and regulations or a bilateral arrangement permit, the operations of recruitment, introduction and placing may be undertaken by :
 - (a) the prospective employer or a person in his service acting on his behalf, subject, if necessary in the interest of the migrant, to the approval and supervision of the competent authority;
 - (b) a private agency, if given prior authorisation so to do by the competent authority of the territory where the said operations are to take place, in such cases and under such conditions as may be prescribed by :
 - (i) the laws and regulations of that territory, or
 - (ii) agreement between the competent authority of the territory of emigration or any body established in accordance with the terms of an international instrument and the competent authority of the territory of immigration.
 4. The competent authority of the territory where the operations take place shall supervise the activities of bodies and persons to whom authorisations have been issued in pursuance of paragraph 3 (b), other than any body established in accordance with the terms of an international instrument, the position of which shall continue to be governed by the terms of the said instrument or by any agreement made between the body and the competent authority concerned.
 5. Nothing in this Article shall be deemed to permit the acceptance of a migrant for employment for admission to the territory of any Member by any person or body other than the competent authority of the territory of immigration.

Article 4

Each Member for which this Annex is in force undertakes to ensure that the services rendered by its public employment service in connection with the recruitment, introduction or placing of migrants for employment are rendered free.

Article 5

1. Each Member for which this Annex is in force which maintains a system of supervision of contracts of employment between an employer, or a person acting on his behalf, and a migrant for employment undertakes to require :
 - (a) that a copy of the contract of employment shall be delivered to the migrant before departure or, if the Governments concerned so agree, in a reception centre on arrival in the territory of immigration;
 - (b) that the contract shall contain provisions indicating the conditions of work and particularly the remuneration offered to the migrant;
 - (c) that the migrant shall receive in writing before departure, by a document which relates either to him individually or to a group of migrants of which he is a member, information concerning the general conditions of life and work applicable to him in the territory of immigration.
2. Where a copy of the contract is to be delivered to the migrant on arrival in the territory of immigration, he shall be informed in writing before departure, by a document which relates either to him individually or to a group of migrants of which he is a member, of the occupational category for which he is engaged and the other conditions of work, in particular the minimum wage which is guaranteed to him.
3. The competent authority shall ensure that the provisions of the preceding paragraphs are enforced and that appropriate penalties are applied in respect of violations thereof.

Article 6

The measures taken under Article 4 of the Convention shall, as appropriate, include :

- (a) the simplification of administrative formalities;
- (b) the provision of interpretation services;
- (c) any necessary assistance during an initial period in the settlement of the migrants and

members of their families authorised to accompany or join them; and

- (d) the safeguarding of the welfare, during the journey and in particular on board ship, of migrants and members of their families authorised to accompany or join them.

Article 7

1. In cases where the number of migrants for employment going from the territory of one Member to that of another is sufficiently large, the competent authorities of the territories concerned shall, whenever necessary or desirable, enter into agreements for the purpose of regulating matters of common concern arising in connection with the application of the provisions of this Annex.
2. Where the members maintain a system of supervision over contracts of employment, such agreements shall indicate the methods by which the contractual obligations of the employers shall be enforced.

Article 8

Any person who promotes clandestine or illegal immigration shall be subject to appropriate penalties.

ANNEX II

recruitment, placing and conditions of labour of migrants for employment recruited under government-sponsored arrangements for group transfer

Article 1

This Annex applies to migrants for employment who are recruited under Government-sponsored arrangements for group transfer.

Article 2

For the purpose of this Annex :

- (a) the term recruitment means :
- (i) the engagement of a person in one territory on behalf of an employer in another territory under a Government-sponsored arrangement for group transfer, or
 - (ii) the giving of an undertaking to a person in one territory to provide him with employment in another territory under a Government-sponsored arrangement for

group transfer, together with the making of any arrangements in connection with the operations mentioned in (i) and (ii) including the seeking for and selection of emigrants and the preparation for departure of the emigrants;

- (b) the term introduction means any operations for ensuring or facilitating the arrival in or admission to a territory of persons who have been recruited under a Government-sponsored arrangement for group transfer within the meaning of subparagraph (a) of this paragraph; and
- (c) the term placing means any operations for the purpose of ensuring or facilitating the employment of persons who have been introduced under a Government-sponsored arrangement for group transfer within the meaning of subparagraph (b) of this paragraph.

Article 3

1. Each Member for which this Annex is in force, the laws and regulations of which permit the operations of recruitment, introduction and placing as defined in Article 2, shall regulate such of the said operations as are permitted by its laws and regulations in accordance with the provisions of this Article.
2. Subject to the provisions of the following paragraph, the right to engage in the operations of recruitment, introduction and placing shall be restricted to :
 - (a) public employment offices or other public bodies of the territory in which the operations take place;
 - (b) public bodies of a territory other than that in which the operations take place which are authorised to operate in that territory by agreement between the Governments concerned;
 - (c) any body established in accordance with the terms of an international instrument.
3. In so far as national laws and regulations or a bilateral arrangement permit, and subject, if necessary in the interest of the migrant, to the approval and supervision of the competent authority, the operations of recruitment, introduction and placing may be undertaken by:
 - (a) the prospective employer or a person in his service acting on his behalf;
 - (b) private agencies.

4. The right to engage in the operations of recruitment, introduction and placing shall be subject to the prior authorisation of the competent authority of the territory where the said operations are to take place in such cases and under such conditions as may be prescribed by :
 - (a) the laws and regulations of that territory, or
 - (b) agreement between the competent authority of the territory of emigration or any body established in accordance with the terms of an international instrument and the competent authority of the territory of immigration.
5. The competent authority of the territory where the operations take place shall, in accordance with any agreements made between the competent authorities concerned, supervise the activities of bodies and persons to whom authorisations have been issued in pursuance of the preceding paragraph, other than any body established in accordance with the terms of an international instrument, the position of which shall continue to be governed by the terms of the said instrument or by any agreement made between the body and the competent authority concerned.
6. Before authorising the introduction of migrants for employment the competent authority of the territory of immigration shall ascertain whether there is not a sufficient number of persons already available capable of doing the work in question.
7. Nothing in this Article shall be deemed to permit the acceptance of a migrant for employment for admission to the territory of any Member by any person or body other than the competent authority of the territory of immigration.

Article 4

1. Each Member for which this Annex is in force undertakes to ensure that the services rendered by its public employment service in connection with the recruitment, introduction or placing of migrants for employment are rendered free.
2. The administrative costs of recruitment, introduction and placing shall not be borne by the migrants.

Article 5

In the case of collective transport of migrants from one country to another necessitating passage in

transit through a third country, the competent authority of the territory of transit shall take measures for expediting the passage, to avoid delays and administrative difficulties.

Article 6

1. Each Member for which this Annex is in force which maintains a system of supervision of contracts of employment between an employer, or a person acting on his behalf, and a migrant for employment undertakes to require :
 - (a) that a copy of the contract of employment shall be delivered to the migrant before departure or, if the Governments concerned so agree, in a reception centre on arrival in the territory of immigration;
 - (b) that the contract shall contain provisions indicating the conditions of work and particularly the remuneration offered to the migrant;
 - (c) that the migrant shall receive in writing before departure, by a document which relates either to him individually or to a group of migrants of which he is a member, information concerning the general conditions of life and work applicable to him in the territory of immigration.
2. Where a copy of the contract is to be delivered to the migrant on arrival in the territory of immigration, he shall be informed in writing before departure, by a document which relates either to him individually or to a group of migrants of which he is a member, of the occupational category for which he is engaged and the other conditions of work, in particular the minimum wage which is guaranteed to him.
3. The competent authority shall ensure that the provisions of the preceding paragraphs are enforced and that appropriate penalties are applied in respect of violations thereof.

Article 7

1. The measures taken under Article 4 of this Convention shall, as appropriate, include :
 - (a) the simplification of administrative formalities;
 - (b) the provision of interpretation services;
 - (c) any necessary assistance, during an initial period in the settlement of the migrants and members of their families authorised

to accompany or join them;

- (d) the safeguarding of the welfare, during the journey and in particular on board ship, of migrants and members of their families authorised to accompany or join them; and
- (e) permission for the liquidation and transfer of the property of migrants for employment admitted on a permanent basis.

Article 8

Appropriate measures shall be taken by the competent authority to assist migrants for employment, during an initial period, in regard to matters concerning their conditions of employment; where appropriate, such measures may be taken in co-operation with approved voluntary organisations.

Article 9

If a migrant for employment introduced into the territory of a Member in accordance with the provisions of Article 3 of this Annex fails, for a reason for which he is not responsible, to secure the employment for which he has been recruited or other suitable employment, the cost of his return and that of the members of his family who have been authorised to accompany or join him, including administrative fees, transport and maintenance charges to the final destination, and charges for the transport of household belongings, shall not fall upon the migrant.

Article 10

If the competent authority of the territory of immigration considers that the employment for which a migrant for employment was recruited under Article 3 of this Annex has been found to be unsuitable, it shall take appropriate measures to assist him in finding suitable employment which does not prejudice national workers and shall take such steps as will ensure his maintenance pending placing in such employment, or his return to the area of recruitment if the migrant is willing or agreed to such return at the time of his recruitment, or his resettlement elsewhere.

Article 11

If a migrant for employment who is a refugee or a displaced person and who has entered a territory of immigration in accordance with Article 3 of this Annex becomes redundant in any employment in that territory, the competent authority of that territory shall use its best endeavours to enable

him to obtain suitable employment which does not prejudice national workers, and shall take such steps as will ensure his maintenance pending placing in suitable employment or his resettlement elsewhere.

Article 12

1. The competent authorities of the territories concerned shall enter into agreements for the purpose of regulating matters of common concern arising in connection with the application of the provisions of this Annex.
2. Where the Members maintain a system of supervision over contracts of employment, such agreements shall indicate the methods by which the contractual obligations of the employer shall be enforced.
3. Such agreements shall provide, where appropriate, for co-operation between the competent authority of the territory of emigration or a body established in accordance with the terms of an international instrument and the competent authority of the territory of immigration, in respect of the assistance to be given to migrants concerning their conditions of employment in virtue of the provision of Article 8.

Article 13

Any person who promotes clandestine or illegal immigration shall be subject to appropriate penalties.

ANNEX III

importation of the personal effects, tools and equipment of migrants for employment

Article 1

1. Personal effects belonging to recruited migrants for employment and members of their families who have been authorised to accompany or join them shall be exempt from customs duties on arrival in the territory of immigration.
2. Portable hand-tools and portable equipment of the kind normally owned by workers for the carrying out of their particular trades belonging to recruited migrants for employment and members of their families who have been authorised to accompany or join them shall be

exempt from customs duties on arrival in the territory of immigration if such tools and equipment can be shown at the time of importation to be in their actual ownership or possession, to have been in their possession and use for an appreciable time, and to be intended to be used by them in the course of their occupation.

Article 2

1. Personal effects belonging to migrants for employment and members of their families who have been authorised to accompany or join them shall be exempt from customs duties on the return of the said persons to their country of origin if such persons have retained the nationality of that country at the time of their return there.
2. Portable hand-tools and portable equipment of the kind normally owned by workers for the carrying out of their particular trades belonging to migrants for employment and members of their families who have been authorised to accompany or join them shall be exempt from customs duties on return of the said persons to their country of origin if such persons have retained the nationality of that country at the time of their return there and if such tools and equipment can be shown at the time of importation to be in their actual ownership or possession, to have been in their possession and use for an appreciable time, and to be intended to be used by them in the course of their occupation.

Cross references

Revised: C066 This Convention revises the Migration for Employment Convention, 1939

Constitution: 19:article 19 of the Constitution of the International Labour Organisation

Constitution: 35:article 35 of the Constitution of the International Labour Organisation

Supplemented: C143 complemented by Migration for Employment Recommendation, 1949

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Convention No. C097 was ratified by 42 countries.

Country	Ratification date	Status
Algeria	19:10:1962	ratified
Bahamas	25:05:1976	ratified
Barbados	08:05:1967	ratified
Belgium	27:07:1953	ratified
Belize	15:12:1983	ratified
Bosnia and Herzegovina	02:06:1993	ratified
Brazil	18:06:1965	ratified
Burkina Faso	09:06:1961	ratified
Cameroon	03:09:1962	ratified
Cuba	29:04:1952	ratified
Cyprus	23:09:1960	ratified
Dominica	28:02:1983	ratified
Ecuador	05:04:1978	ratified
France	29:03:1954	ratified
Germany	22:06:1959	ratified
Grenada	09:07:1979	ratified
Guatemala	13:02:1952	ratified
Guyana	08:06:1966	ratified
Israel	30:03:1953	ratified
Italy	22:10:1952	ratified
Jamaica	26:12:1962	ratified
Kenya	30:11:1965	ratified
The former Yugoslav Republic of Macedonia	17:11:1991	ratified
Madagascar	14:06:2001	ratified
Malawi	22:03:1965	ratified
Malaysia Sabah	03:03:1964	ratified
Mauritius	02:12:1969	ratified
Netherlands	20:05:1952	ratified
New Zealand	10:11:1950	ratified
Nigeria	17:10:1960	ratified
Norway	17:02:1955	ratified
Portugal	12:12:1978	ratified
Saint Lucia	14:05:1980	ratified
Slovenia	29:02:1992	ratified
Spain	21:03:1967	ratified
Tanzania Zanzibar	22:06:1964	ratified
Trinidad and Tobago	24:05:1963	ratified
United Kingdom	22:01:1951	ratified
Uruguay	18:03:1954	ratified
Venezuela	09:06:1983	ratified
Yugoslavia	24:11:2000	ratified
Zambia	02:12:1964	ratified



B) C143 Migration Workers (Supplementary Provisions) Convention, 1975

Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (Note: Date of coming into force: 09:12:1978.)

Convention	: C143
Place	: Geneva
Session of the Conference	: 60
Date of adoption	: 24:06:1975
Subject classification	: Migrant Workers

Display the document in: French Spanish
Status: Other instrument

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixtieth Session on 4 June 1975, and

Considering that the Preamble of the Constitution of the International Labour Organisation assigns to it the task of protecting the interests of workers when employed in countries other than their own, and

Considering that the Declaration of Philadelphia reaffirms, among the principles on which the Organisation is based, that labour is not a commodity, and that poverty anywhere constitutes a danger to prosperity everywhere, and recognises the solemn obligation of the ILO to further programmes which will achieve in particular full employment through the transfer of labour, including for employment...,

Considering the ILO World Employment Programme and the Employment Policy Convention and Recommendation, 1964, and emphasising the need to avoid the excessive and uncontrolled or unassisted increase of migratory movements because of their negative social and human consequences, and

Considering that in order to overcome underdevelopment and structural and chronic unemployment, the governments of many countries increasingly stress the desirability of encouraging the transfer of capital and technology rather than the transfer of workers in accordance

with the needs and requests of these countries in the reciprocal interest of the countries of origin and the countries of employment, and

Considering the right of everyone to leave any country, including his own, and to enter his own country, as set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and

Recalling the provisions contained in the Migration for Employment Convention and Recommendation (Revised), 1949, in the Protection of Migrant Workers (Underdeveloped Countries) Recommendation, 1955, in the Employment Policy Convention and Recommendation, 1964, in the Employment Service Convention and Recommendation, 1948, and in the Fee-Charging Employment Agencies Convention (Revised), 1949, which deal with such matters as the regulation of the recruitment, introduction and placing of migrant workers, the provision of accurate information relating to migration, the minimum conditions to be enjoyed by migrants in transit and on arrival, the adoption of an active employment policy and international collaboration in these matters, and

Considering that the migration of workers due to conditions in labour markets should take place under the responsibility of official agencies for employment or in accordance with the relevant bilateral or multilateral agreements, in particular those permitting free circulation of workers, and

Considering that evidence of the existence of illicit and clandestine trafficking in labour calls for further standards specifically aimed at eliminating

these abuses, and

Recalling the provisions of the Migration for Employment Convention (Revised), 1949, which require ratifying Members to apply to immigrants lawfully within their territory treatment not less favourable than that which they apply to their nationals in respect of a variety of matters which it enumerates, in so far as these are regulated by laws or regulations or subject to the control of administrative authorities, and

Recalling that the definition of the term “discrimination” in the Discrimination (Employment and Occupation) Convention, 1958, does not mandatorily include distinctions on the basis of nationality, and

Considering that further standards, covering also social security, are desirable in order to promote equality of opportunity and treatment of migrant workers and, with regard to matters regulated by laws or regulations or subject to the control of administrative authorities, ensure treatment at least equal to that of nationals, and

Noting that, for the full success of action regarding the very varied problems of migrant workers, it is essential that there be close co-operation with the United Nations and other specialised agencies, and

Noting that, in the framing of the following standards, account has been taken of the work of the United Nations and of other specialised agencies and that, with a view to avoiding duplication and to ensuring appropriate co-ordination, there will be continuing co-operation in promoting and securing the application of the standards, and

Having decided upon the adoption of certain proposals with regard to migrant workers, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention supplementing the Migration for Employment Convention (Revised), 1949, and the Discrimination (Employment and Occupation) Convention, 1958,

adopts the twenty-fourth day of June of the year one thousand nine hundred and seventy-five, the following Convention, which may be cited as the Migrant Workers (Supplementary Provisions) Convention, 1975:

Part I. Migrations in Abusive Conditions

Article 1

Each Member for which this Convention is in force undertakes to respect the basic human rights of all migrant workers.

Article 2

1. Each Member for which this Convention is in force shall systematically seek to determine whether there are illegally employed migrant workers on its territory and whether there depart from, pass through or arrive in its territory any movements of migrants for employment in which the migrants are subjected during their journey, on arrival or during their period of residence and employment to conditions contravening relevant international multilateral or bilateral instruments or agreements, or national laws or regulations.
2. The representative organisations of employers and workers shall be fully consulted and enabled to furnish any information in their possession on this subject.

Article 3

Each Member shall adopt all necessary and appropriate measures, both within its jurisdiction and in collaboration with other Members—

- (a) to suppress clandestine movements of migrants for employment and illegal employment of migrants, and
- (b) against the organisers of illicit or clandestine movements of migrants for employment departing from, passing through or arriving in its territory, and against those who employ workers who have immigrated in illegal conditions, in order to prevent and to eliminate the abuses referred to in Article 2 of this Convention.

Article 4

In particular, Members shall take such measures as are necessary, at the national and the international level, for systematic contact and exchange of information on the subject with other States, in consultation with representative organisations of employers and workers.

Article 5

One of the purposes of the measures taken under

Articles 3 and 4 of this Convention shall be that the authors of manpower trafficking can be prosecuted whatever the country from which they exercise their activities.

Article 6

1. Provision shall be made under national laws or regulations for the effective detection of the illegal employment of migrant workers and for the definition and the application of administrative, civil and penal sanctions, which include imprisonment in their range, in respect of the illegal employment of migrant workers, in respect of the organisation of movements of migrants for employment defined as involving the abuses referred to in Article 2 of this Convention, and in respect of knowing assistance to such movements, whether for profit or otherwise.
2. Where an employer is prosecuted by virtue of the provision made in pursuance of this Article, he shall have the right to furnish proof of his good faith.

Article 7

The representative organisations of employers and workers shall be consulted in regard to the laws and regulations and other measures provided for in this Convention and designed to prevent and eliminate the abuses referred to above, and the possibility of their taking initiatives for this purpose shall be recognised.

Article 8

1. On condition that he has resided legally in the territory for the purpose of employment, the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorisation of residence or, as the case may be, work permit.
2. Accordingly, he shall enjoy equality of treatment with nationals in respect in particular of guarantees of security of employment, the provision of alternative employment, relief work and retraining.

Article 9

1. Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to

employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.

2. In case of dispute about the rights referred to in the preceding paragraph, the worker shall have the possibility of presenting his case to a competent body, either himself or through a representative.
3. In case of expulsion of the worker or his family, the cost shall not be borne by them.
4. Nothing in this Convention shall prevent Members from giving persons who are illegally residing or working within the country the right to stay and to take up legal employment.

Part II. Equality of Opportunity and Treatment

Article 10

Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.

Article 11

1. For the purpose of this Part of this Convention, the term *migrant worker* means a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker.
2. This Part of this Convention does not apply to
 - (a) frontier workers;
 - (b) artistes and members of the liberal professions who have entered the country on a short-term basis;
 - (c) seamen;
 - (d) persons coming specifically for purposes

of training or education;

- (e) employees of organisations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments, for a limited and defined period of time, and who are required to leave that country on the completion of their duties or assignments.

Article 12

Each Member shall, by methods appropriate to national conditions and practice—

- (a) seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of the policy provided for in Article 10 of this Convention;
- (b) enact such legislation and promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;
- (c) take measures, encourage educational programmes and develop other activities aimed at acquainting migrant workers as fully as possible with the policy, with their rights and obligations and with activities designed to give effective assistance to migrant workers in the exercise of their rights and for their protection;
- (d) repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;
- (e) in consultation with representative organisations of employers and workers, formulate and apply a social policy appropriate to national conditions and practice which enables migrant workers and their families to share in advantages enjoyed by its nationals while taking account, without adversely affecting the principle of equality of opportunity and treatment, of such special needs as they may have until they are adapted to the society of the country of employment;
- (f) take all steps to assist and encourage the efforts of migrant workers and their families to preserve their national and ethnic identity and their cultural ties with their country of origin, including the possibility for children to be given some knowledge of their mother tongue;

- (g) guarantee equality of treatment, with regard to working conditions, for all migrant workers who perform the same activity whatever might be the particular conditions of their employment.

Article 13

1. A Member may take all necessary measures which fall within its competence and collaborate with other Members to facilitate the reunification of the families of all migrant workers legally residing in its territory.

2. The members of the family of the migrant worker to which this Article applies are the spouse and dependent children, father and mother.

Article 14

A Member may -

- (a) make the free choice of employment, while assuring migrant workers the right to geographical mobility, subject to the conditions that the migrant worker has resided lawfully in its territory for the purpose of employment for a prescribed period not exceeding two years or, if its laws or regulations provide for contracts for a fixed term of less than two years, that the worker has completed his first work contract;
- (b) after appropriate consultation with the representative organisations of employers and workers, make regulations concerning recognition of occupational qualifications acquired outside its territory, including certificates and diplomas;
- (c) restrict access to limited categories of employment or functions where this is necessary in the interests of the State.

Part III Final Provisions

Article 15

This Convention does not prevent Members from concluding multilateral or bilateral agreements with a view to resolving problems arising from its application.

Article 16

- 1. Any Member which ratifies this Convention may, by a declaration appended to its ratification, exclude either Part I or Part II from its acceptance of the Convention.
- 2. Any Member which has made such a declaration may at any time cancel that

declaration by a subsequent declaration.

3. Every Member for which a declaration made under paragraph 1 of this Article is in force shall indicate in its reports upon the application of this Convention the position of its law and practice in regard to the provisions of the Part excluded from its acceptance, the extent to which effect has been given, or is proposed to be given, to the said provision and the reasons for which it has not yet included them in its acceptance of the Convention.

Article 17

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 18

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.
3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratifications has been registered.

Article 19

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an Act communicated to the Director-General of the International Labour Office for registration. Such denunciation should not take effect until one year after the date on which it is registered.
2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 20

1. The Director-General of the International

Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 21

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 22

At such times as may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 23

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:
 - a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 19 above, if and when the new revising Convention shall have come into force;
 - b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.
2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 24

The English and French versions of the text of this Convention are equally authoritative.

Cross references

Constitution: P: Preamble of the Constitution of the International Labour Organisation

Recommendations: R086 Migration for Employment Recommendation Revised), 1949

Recommendations: R100 Protection of Migrant Workers (Underdeveloped Countries) Recommendation, 1955

Conventions: C122 Employment Policy Convention, 1964

Recommendations: R122 Employment Policy Recommendation, 1964

Conventions: C088 Employment Service Convention, 1948

Recommendations: R083 Employment Service Recommendation, 1948

Conventions: C096 Fee-Charging Employment Agencies Convention Revised), 1949

Conventions: C097 Migration for Employment Convention Revised), 1949

Conventions: C111 Discrimination (Employment and Occupation) Convention, 1958

Supplemented: C097 Complementary to

Migration for Employment Convention (Revised), 1949

Supplemented: C111 Complementary to Discrimination (Employment and Occupation) Convention, 1958

Convention No. C143 was ratified by 18 countries.

Country	Ratification date	Status
Benin	11:06:1980	ratified
Bosnia and Herzegovina	02:06:1993	ratified
Burkina Faso	09:12:1977	ratified
Cameroon	04:07:1978	ratified
Cyprus	28:06:1977	ratified
Guinea	05:06:1978	ratified
Italy	23:06:1981	ratified
Kenya	09:04:1979	ratified
The former Yugoslav Republic of Macedonia	17:11:1991	ratified
Norway	24:01:1979	ratified
Portugal	12:12:1978	ratified
San Marino	23:05:1985	ratified
Slovenia	29:05:1992	ratified
Sweden	28:12:1982	ratified
Togo	08:11:1983	ratified
Uganda	31:03:1978	ratified
Venezuela	17:08:1983	ratified
Yugoslavia	24:11:2000	ratified



7. Participant List

Nepalgunj

1. Yubaraj Dabadi Maiti Nepal, Regional Office, Banke
2. Bir Bahadur Singh Border Police, Nepalgunj
3. Damodar Sharma Immigration Office, Nepalgunj
4. Bindu Kunwar District Women Development Office, Nepalgunj
5. Keshav Raj Ghimire Cottage & Small Scale Industry Office
6. Jaya Kumar Sharma Statistic Branch Office
7. Ramesh Lal Karna District Agricultural Development Office
8. Badri Nath Koirala District Development Office
9. Lilaram Dhakal Malpot Office, Banke
10. Achyut Pd. Prasai Industrial Business Organization, Banke
11. Janak Giri Plan Nepal, Banke
12. Basu Pd. Koirala District Administration Office
13. Govinda Bandi Nepal Bar Association
14. Sailendra Kumar Pandit District Education Office, Banke
15. Bhola Mahat INSEC, Banke
16. Shashidevi Sharma District Police Office, Banke
17. Niraj Gautam Rastrya Samachar Samiti
18. Ganga Sharma Journalist, Today, Nepal
19. Krishna Adhikari Journalist, Spacetime
20. Jhabindra Poudel CLRC

Bhairahawa

1. Mohan Krishna Sapkota District Administration Office
2. Devi Pd. Nepal Siddhartha Municipality
3. Yagya Raj Koirala Immigration Office, Bhairahawa
4. Surendra Parajuli District Education Office, Bhairahawa
5. Netra Bd. Rawal Land Revenue Office, Bhairahawa
6. Sham Bd. Khadka Sub-Inspector, Border Police, Belhiya
7. Dhurba Pd. Pant Custom Office, Bhairahawa
8. Puspanjali Upadhyaya All Nepal National Womens Organization, Rupendahi
9. Janaki G.C. Women Development Branch Office
10. Chandra Bhandari Women Police Cell
11. Barsha Khanal Maiti Nepal
12. Arpana Nepal Phosad Nepal,
13. Rama Aryal Nepal Womens Organization, Rupendahi
14. Sirjana Ghimire Maiti Nepal,
15. Talita B.K. Sarv Nepal, Rupendahi
16. Lok Nath Panth Human Right Committee, Nepal Bar Association
17. Resham Bd. Chhetri Nepal Bar Association, Rupendahi
18. Durga Pd. Shrestha District Development Committee, Rupendahi

Parsa

1. Rameshwor Sedhai President, Parsa Bar
2. Mahesh Das Journalist, Spacetime, Channel Nepal
3. Amar Kumar K.C. Community Research Center, Parsa
4. Pramanath Sharma N.T.V. Birgunj, Parsa
5. Jakir Husin Khan District Education Office, Parsa
6. Tirtha Pd. Rijal A.B.C. Nepal, Parsa
7. Damodar Sharma District Development Committee, Parsa
8. Balananda Kafle District Administration Office, Parsa
9. Karna Bd. Khadka Cottage and Small Scale Industries Office, Parsa
10. Murari Karki Labor Office, Parsa
11. Surya Pd. Acharya Police Office, Parsa
12. Rajeshwor Tiwari Legal Research Center, Parsa
13. Thakur Pd. Acharya Legal Aid Program, Parsa
14. Murari Timlimsina Women Development Branch
15. Shreedhar K.C. Bhansar Pratinidhi
16. Ramanda Mishra Immigration Office
17. Himal Tiwari Himal Overseas Company
18. Arjun Pd. Sapkota Malpot Office
19. Bikash Nanda Jha Journalist, Kantipur
20. Dhurbadev Kurmi Advocate

Kathmandu

1. S.N. Vaidya Director, DOLEP
2. Binod Dhungel Executive Cultureal Manager
3. Janmuna Davi Lama Project Co-ordinator, NFN
4. Manju Adhikari Field Office, NFN
5. Rekha Upadhaya Project Officer, ABC, Nepal
6. Rasmi Shrestha W.D.O
7. Bal Ram Program Co-ordinator, WOREC
8. Janak Dhital Program Co-ordinator, CWIN
9. Naw Ran Bhattarai Labor Officer
10. Radha Krishna Shrestha Labor Officer
11. Bhoj Raj Bhatta Advocate
12. Narendra Man Shrestha Ministry of Law, Justice & Parliamentary Affairs
13. Ram Sharan Pokharel KSL, Student
14. Gita Uprity Women Cell, Nepal Police
15. Kailash Pd. Subedi Ministry of Law, Justice & Parliamentary Affairs
16. S.B. Dhungana Ministry of Local Development
17. Rajani Maharjan KSL
18. Mohanmani Lamsal Advocate
19. Rachana Shrestha Sociologist
20. Sudeep Gautam Advocate
21. Rajan Kumar K.C. Account Officer

8. Bibliography

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