

# **ALTERNATIVE REPORT**

**on**

## **Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000)**

**Child Rights NGO Report Prepared by:**

**CRC Sub-committee**

**Human Rights Treaty Monitoring Coordination Committee (HRTMCC)**

**Secretariat: Child Nepal (CN)**

**Nepal**

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**THE LIST OF ORGANIZATIONS CONTRIBUTING TO THE PREPARATION OF THIS REPORT**

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3. CWIN, Member

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5. Education Journalists Group (EJG), Member



6. Kathmandu School of Law (KSL), Member



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**B. Supporting Organizations in preparing the Report**



Save the Children International



PLAN Nepal



World Vision International

## EXECUTIVE SUMMARY

The Nepalese government does not have actual statistics of child victims of trafficking and sexual exploitation. The data Nepal presents in its report is based on studies carried out by NGOs many years ago. Thus Nepal does not have up-to-date figures for the number of cases and child victims of the acts prohibited by the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC).

Where domestic law contradicts treaty provisions, the ratified international treaty prevails. Yet without the help of domestic substantive and procedural law, these treaty provisions cannot be invoked in courts of law. Many Nepalese laws are inconsistent with the provisions of the CRC and other treaties.

Despite the establishment of various agencies, departments, offices, centers and focal points, coordination between them is not satisfactory. Awareness of the OPSC and government initiatives to combat child sexual exploitation is not adequate. Despite government efforts to strengthen children's rights in Nepal, the sale of children for labour (the practice of *Kamalari* in *Tharu* Community in Mid-Western Region) and adoption remains a large problem in Nepal.

The laws on child prostitution and child pornography are not clear or adequate. Because of insufficient government rehabilitative programs, the *Badi* community still practices their traditional sex work whereby the men in a family finds clients for their female family members. Girls as young as 10 have been found forced into sex work.

The law does not protect the sexual exploitation of boys and girls from the ages of sixteen and below eighteen. There is no specific law for the protection of boys from sexual exploitation. Provisions regarding 'unnatural sex' and involving children in 'immoral professions' need to be made clearer.

Laws defining what constitutes child pornography need to be amended or made clearer to conform with the OPSC.

There is no separate and comprehensive victim protection law in Nepal. Though Human Trafficking and Transportation Control Act 2007 mentions compensation to the victim of trafficking, no fund has been established. If the offender is fined, up to 50 percent of such fine may be paid to the victim, but if the offender is unable to pay the fine, the victim gets no compensation.

There is a lack of infrastructure, a lack of sensitivity among law enforcers, prosecutors, and adjudicators, and problems enforcing *in camera* hearings.

Due to lack of proper training and resources, there are problems in investigation and the collection of evidence. Cases have been reported of police mediating cases out of court. Service seekers, lawyers and NGO workers claim that it is not easy to get the police to register cases of

human trafficking and commercial sexual exploitation. If the alleged offender absconds, the case remains pending. The police are accused of not taking such cases seriously, and lacking sensitivity, accountability, and transparency in investigation.

Police say that because the law gives them only twenty-five days to carry out an investigation they are not able to investigate effectively.

No social recovery centers are available. There are some transit homes and rehabilitation centers run by NGOs but many are unable to provide proper service due to inadequate funding.

### **LIST OF KEY RECOMMENDATIONS**

Amend Nepalese laws that are inconsistent with the CRC and its optional protocols.

Amend the Children Act 1992 to incorporate and define child prostitution and child pornography.

Reform and strengthen mechanisms to work in a coordinated way and to minimize acts prohibited by the OPSC.

Carry out a comprehensive study on acts prohibited by the OPSC, compile statistics of child victims of sale, prostitution and pornography.

Strengthen rehabilitation and reintegration programmes and ensure adequate compensation to the victims of trafficking.

Develop mechanisms and technology to track and curb child pornography.

Provide specific training among the investigators and prosecutors to deal with the cases of sale of children, child prostitution and child pornography.

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## Acronyms and Abbreviations

CCC	-	Child Correction Center
CCAT	-	Central Committee Against Trafficking
CCWB	-	Central Child Welfare Board
CEDAW	-	Convention on the Elimination of all forms of Discrimination Against Women
CRC	-	The Convention on the Rights of the Child
CSEC	-	Commercial Sexual Exploitation of Children
DCWB	-	District Child Welfare Board
HRDS	-	Human Rights Defender System
HRTMCC	-	Human Rights Treaty Monitoring Coordination Committee
MoES	-	Ministry of Education and Sports
MoFA	-	Ministry of Foreign Affairs
MoHA	-	Ministry of Home Affairs
MoHP	-	Ministry of Health and Populations
MoLD	-	Ministry of Local Development
MoLJPA	-	Ministry of Law, Justice and Parliamentary Affairs
MoLTM	-	Ministry of Labour and Transport Management
MoWCSW	-	The Ministry of Women, Children and Social Welfare
NGO	-	Non-Governmental Organization
NHRC	-	National Human Rights Commission
NKP	-	<i>Nepal Kanoon Patrika</i> (Nepal Law Journal)
NPC	-	National Planning Commission
NWC	-	National Women's Commission
OPSC	-	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
SAARC	-	South Asian Association for Regional Cooperation
SWC	-	Social Welfare Council
WCSC	-	Women and Children Service Center
WDO	-	Women Development Office

## Glossary

<i>Muluki Ain</i>	-	National Code
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## 1. INTRODUCTION

This report has been prepared by the civil society organizations of Nepal to complement the initial report of Nepal on the implementation of the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (OPSC) submitted to the Committee on the Rights of the Child (hereinafter referred as the Committee) in April 2008.

This report attempts to reflect the situation on the sale of children, child prostitution and child pornography in Nepal evaluating the constitutional and legal arrangements, government initiatives, programmes, policies, mechanisms and actions to combat activities prohibited by the OPSC. Each section concludes with the civil society's recommendations to the Government of Nepal.

The reporting format has been followed as provided in '*Reporting on the OPSC and OPAC: A Guide for Non-Governmental Organizations-2010*' prepared by NGO Group for the Convention on the Rights of the Child, Geneva.

### **Report Preparation Process**

A CRC Sub-committee was formed in 2006 under the Human Rights Treaty Monitoring Coordination Committee (HRTMCC) to monitor the treaty obligations of Nepal regarding child rights. NGOs working in the sector of child rights were invited to join the report preparation process. A series of meetings were held to initiate a shadow report preparation process. An independent consultant was hired to identify the gaps in the OPSC report submitted by Nepal and to prepare a draft shadow report. A presentation on the gaps in that report followed by interaction was given and the form of the shadow report finalized.

***Review of National Legal Framework:*** A review of the existing national legal framework and other legal arrangements regarding children seeking conformity with the CRC and OPSC and other relevant international standards was conducted. Nepal's plans, policies, commitments and initiatives to combat the sale of children, child prostitution and child pornography, were also reviewed.

***Data Collection:*** As far as possible primary as well as secondary data was collected. Focus Group Discussions and consultations were held with stakeholders, child rights activists, children and victims to gather primary data, secondary data from published and unpublished sources was collected from various organizations, government agencies and stakeholders. Data collected from various sources were used to describe the situation regarding the sale of children, child prostitution and child pornography.

***Consultation with various stakeholders:*** Four consultative meetings were held in three development regions with concerned stakeholders to receive feedback and suggestions and to develop future strategies. Consultations were also held with representatives of various human rights and children’s organizations with experience in the field, as well as with children. Altogether 193 adults and 87 children were consulted.

***Review of government programmes and activities:*** Government programmes to address the sale of children, child prostitution and child pornography were reviewed to check whether they met international obligations. The implementation of these programmes was verified through interaction with stakeholders in consultation meetings.

***Case Study:*** Relevant case studies were compiled from consultation meetings.

## **2. GENERAL MEASURES TAKEN FOR THE IMPLEMENTATION OF THE OPTIONAL PROTOCOL**

### ***Legal Status of OPSC in Domestic Law and its Applicability in Domestic Jurisdiction***

After Nepal ratified the Convention on the Rights of the Child (CRC) on 14th September 1990, on the Sale of Children, Child Prostitution and Child Pornography on the date of January 20, 2006, and the optional protocol to the CRC on the Involvement of Children in Armed Conflict on September 19, 2007, the provisions of these treaties became part of the domestic law of Nepal.

Paragraph 71 of the state report says that Nepal is committed to protect its people from all forms of abuse, exploitation, and discrimination. Despite Nepal's constitutional commitment to implementing treaties and agreements effectively, the study of the CRC Sub-Committee of the HRTMCC shows that Nepalese laws fail to accord with CRC, its Optional Protocol and other ratified treaties. Nepalese laws do not adequately protect the rights of the child and are unable to protect them from commercial sexual exploitation.

Paragraph 72 of the state report explains that the Treaty Act 1990 is special legislation governing the substantive and procedural matters of the ratification of, and accession, to treaties and conventions. Since the Treaty Act 1990 derives legitimacy directly from the Constitution, its authority is paramount in matters of international treaties and conventions. Section 9 (2) of that Act states that where there is a conflict between an international treaty or convention and any law of Nepal, international law is supreme. However, that provision contains the potential for confusion as it does not explicitly say

that international treaties and conventions are ratified or acceded to as part of the law of Nepal<sup>1</sup>. As a matter of fact, Nepal's position is not a clearly Monist one.

*Paragraph 73* of the state report agrees that some cases were filed in court quoting the principles and provisions of the conventions. Despite the fact that the courts have decided a number of cases in line with recognized human rights principles, amendments to the laws have not been made. Many provisions quashed or annulled by the courts are still to be amended and remain law for years<sup>2</sup>. As not all judgments are published and widely disseminated, law enforcement officials, lawyers and court staffs are sometimes found exercising as per the same old legal provisions.

Regardless of the constitutional and legal arrangements for the application of ratified treaty provisions in domestic level, without the help of domestic substantive and procedural law, these treaty provisions cannot be invoked in the courts of law in Nepal. Further, the decisions of the Supreme Court of Nepal do not show Nepal's consistent stand on the applicability of ratified treaty provisions.

*Dinesh Kumar Sharma v. Office of Prime Minister and Council of Ministers*<sup>3</sup>

"Treaties to which Nepal is party may be applied as laws but may not be called laws of Nepal."

"'Laws' and 'applicable as laws' are two different things. Though some provisions may be considered to be applicable as laws, such provisions may not be accepted in all contexts and for all purposes as the domestic laws promulgated by legislative procedure."

The judgment further reads: "It cannot be concluded under article 88(1)<sup>4</sup> whether treaty provision and domestic legal provision has contradicted in this case."

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<sup>1</sup> The provisions of Treaty Act suggest that ratified international treaties or conventions are not automatically enforceable in Nepal. It merely points out the obligation of the state to 'rationalize the laws in accordance with the international treaties and conventions ratified or acceded [to].'

<sup>2</sup> Section 8 of the Children Act, 'Beating of children by parents, guardians or teachers not to be considered as torture' is still law, despite it being regarded as torture and declared null and void by the Supreme court of Nepal: *Debendra Ale v. Secretariat of Council of Ministers and others*. Section 8 of the Human Trafficking and Transportation Act has also been declared null and void but the Act is still to be amended. Court personnel, lawyers, and law enforcement agencies need to be acquainted with court judgments, but they are seldom published in time. Generally, it takes years for the amended version of the Act to be promulgated.

<sup>3</sup> NKP 2063 Decision No. 7757 p. 1136

The Interim Constitution of Nepal 2007 enshrines provision for ratification or accession of international agreements or treaties. However, the scope of implementation of such treaties still remains unclear. On the one hand Article 33 (13) stipulates that the state has responsibility for implementing international treaties to which Nepal is a party, but, on the other hand, Article 36 of the same chapter of the Constitution limits the right to question the implementation of any provisions enshrined in Part IV (responsibilities, directive principles and policies of the state) of the Constitution in any court.

WE RECOMMEND THAT THE COMMITTEE ASK THE GOVERNMENT OF NEPAL THE FOLLOWING QUESTION:

What progress has been made in amending Nepalese laws related to child rights inconsistent or not in accordance with the CRC?

***Key ministries, departments and bodies and their coordination with regional and local authorities as well as civil society, the business sector and the media***

*Paragraphs 84–105* of the state report says that various ministries, departments and bodies at the central, regional and local level have the power to deal with the sale of children, child prostitution and child pornography. This includes the Ministry of Women, Children and Social Welfare (MoWCSW) as the focal ministry with responsibility to deal with these problems at the central level. The report mentions two Divisions and eight Sections at the Ministry level to deal with the issues of women and children. Some of the other bodies include the Central Committee, District Committees and District Task Forces at various levels. The report also mentions seven other ministries whose area of responsibility touches on issues concerning women and children in some way<sup>5</sup>.

The report further refers to the Central Child Welfare Board (CCWB), Social Welfare Council (SWC), National Women's Commission (NWC), National Human Rights Commission (NHRC), Central Committee against Trafficking (CCAT), Child Correction Center (CCC), Women and Children Service Center (WCSC) and various departments at national and district levels.

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<sup>4</sup> Extraordinary jurisdiction of Supreme Court to nullify a provision inconsistent with the constitution under the 1990 Constitution.

<sup>5</sup> The ministries involved are Ministry of Home Affairs (MoHA), Ministry of Education and Sports (MoES), Ministry of Health and Populations (MoHP), Ministry of Law, Justice and Parliamentary Affairs (MoLJPA), Ministry of Labour and Transport Management (MoLTM), Ministry of Foreign Affairs (MoFA), and Ministry of Local Development (MoLD).

There are Women's Development Offices (WDO) in 75 districts, District Child Welfare Boards (DCWB), four Child Care Centers and various government authorities at sub-national levels engaged in protection and promotion activities.

Civil society organizations have themselves established a community surveillance system against trafficking, Human Rights Defender System (HRDS), Local Women's Groups, Mother's Groups and other initiatives to combat trafficking in persons.

Despite a number of different institutions, offices, centers and initiatives, there is lack of coordination between them. Because the responsibilities of government institutions and offices overlap what work that is done has been ineffective. Some government offices lack a focal person with a clear mandate and responsibilities, others are unaware what the responsibilities prescribed by law and regulation are<sup>6</sup>. The CDO is the Chair and the Women's Development Officer is the Member-Secretary of many Committees. They are overloaded with responsibilities.

The programmes being run by various offices and centers are mostly donor-based and short-term. Due to lack of adequate financial support, these programmes are not being implemented throughout the country. Thus, results are not as expected. Since most programs are short-term projects, they have short-term and limited objectives.

Most policies and programmes of the Nepal Government and activities of civil society organizations are focused on human trafficking. There is no specific government program, or initiative, to combat child prostitution child pornography, or other forms of child sexual exploitation. Very few civil society organizations have launched programmes to combat child pornography in Nepal. The initiatives and programs established by the Nepal Government lack clear vision to eliminate the sale of children, child prostitution and child pornography.

**WE RECOMMEND THAT THE COMMITTEE ASK THE GOVERNMENT THE FOLLOWING**

**QUESTION:**

- How will the different mechanisms and offices be coordinated without overlap?

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<sup>6</sup> Regulation 6 of the Human Trafficking and Transportation Control Regulations of Nepal 2008 states that the CDO of the district is the chairperson of the District Committee against Trafficking. However, in the interaction programs organized by the NGOs, many CDOs did not know about the enactment of the TIP Act 2007, the 2008 regulations, and their responsibilities under those regulations.

***Dissemination of information regarding OPSC and training to all relevant professional groups***

Paragraph 106 of the state report states that the GoN has translated the OPSC into Nepali and published it. The report further claims that the document was widely circulated in all 75 districts.

Despite that claim, most children who participated in the consultation meetings had not heard of the OPSC<sup>7</sup>.

Similarly, many child rights NGOs do not know of the state report on OPSC. The Ministry's website contains very poor information about the government's policies and programmes. Neither has it posted state reports on the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), or on the CRC<sup>8</sup>.

Use of the internet is still not common among child rights activists. The difficulty they have in understanding English and the non-availability of documents in Nepali means that they don't properly understand issues concerning the sale of children, child prostitution and child pornography and to raise voice against sexual exploitation of children.

Section 12 of the Treaty Act 1990 compels the GoN to publish attested copies of any treaty which it ratifies, and thinks important, in the Nepal Gazette. The section further states that such publication must be within sixty days of ratification<sup>9</sup>, but it is not clear whether the treaty, when published in Nepal Gazette, is to be translated into Nepali.

In a country like Nepal, where there is massive illiteracy, where the most people cannot read and understand English, publishing few copies of Nepal Gazette is insufficient to inform most people about treaty provisions.

Compared to the need, training on combating the sale of children, child prostitution and child pornography is not sufficient. Dissemination and training on OPSC is largely carried out by NGOs in support of donor agencies and INGOs. The consultation meetings showed that training on those subjects by the GoN is nominal. Training by civil society organizations and NGOs have focused more on human trafficking and child sexual abuse but not on the commercial sexual exploitation of children

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<sup>7</sup> Out of 61 child participants, none of them knew about the government programmes regarding OPSC dissemination, none of them had heard about the OPSC from government sources.

<sup>8</sup> A questionnaire was sent to sixty Nepali child rights NGOs. None of the leading child rights NGOs were informed about the OPSC through government sources. Rather it was through formal education or self-study or via NGO and INGO programmes that the respondents learnt about the OPSC.

<sup>9</sup> *Ibid.*

**WE RECOMMEND THAT THE COMMITTEE ASK THE GOVERNMENT THE FOLLOWING**

**QUESTION:**

1. How many copies of the translated OPSC were printed and distributed?
2. Where and how were those copies disseminated?

**WE RECOMMEND THAT THE GOVERNMENT OF NEPAL:**

1. Compile all national legislation relating to women and children, especially laws relating to commercial sexual exploitation of children, and print an adequate number of copies.
2. Translate all UN instruments relating to women and children, including the OPSC, and disseminate them through government and non-government agencies.
3. Publish the following on the website of the Ministry of Women, Children and Social Welfare:
  - a. national and international legal standards relating to women and children, especially, commercial sexual exploitation
  - b. key ministries, responsible bodies, departments, centers at national, regional and local levels
  - c. programs and policies and activities
  - d. reports and achievements on program implementation.

**3. PROHIBITION ON THE SALE OF CHILDREN, CHILD PORNOGRAPHY, AND CHILD PROSTITUTION**

The rights of the child and provisions for the welfare of children are scattered in many Acts, Rules and Regulations in Nepal. The *Interim Constitution (Article 22)*, *Consumer Protection Act 1998*, *Press and Publication Act 1992*, *National Broadcasting Act 1993*, *Some Public Crime and Punishment Act 1970*, *Child Labour (Prohibition and Regulation) Act 2000*, *Electronic Transaction Act 2008*, *Foreign Employment Act 2007*, *Human Body Organ Transplantation (Regulation and Prohibition) Act 1998*, *General Code (Muluki Ain) 1963*, *Human Trafficking and Transportation (Control) Act 2007*, and the *Children Act 1992* are all relevant to combating the sale of children, child prostitution and child pornography in Nepal. However, not all these Acts explicitly address the issues that fall under OPSC.

Nepal is abided by various international and regional human rights treaties and commitments concerning combating CSEC, namely, *CRC*, *CRC OPSC*, *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, *SAARC*

*Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, SAARC Convention on Child Welfare, and Declaration and Agenda for Action against Commercial Sexual Exploitation of Children (Stockholm Agenda for Action -1996)*<sup>10</sup> as well as the *Rio de Janeiro Declaration and Call for Action to Prevent and Stop Sexual Exploitation of Children and Adolescents, 2008*. The *Slavery Convention 1953, Supplementary Convention on the Abolition of Slavery 1956, Slave Trade and Institution and Practices similar to Slavery 1956, Convention on the Suppression of Immoral Trafficking 1949, Forced Labor Convention 1930 and Abolition of Forced Labour Convention 1957* are other important instruments to which Nepal is a party, and relevant to discussing CSEC in Nepal. Nepal has ratified the *Convention against Transnational Organised Crime* but has not yet ratified the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially, Women and Children*<sup>11</sup>.

Paragraph 162 of the state report notes that the Interim Constitution ensures protection of the rights of children and women against any form of abuse or exploitation. Though Nepal has tried to comply with international standards regarding child rights, many of its laws are incompatible with recognized standards<sup>12</sup>. Many statutes leave those with the responsibility for implementing its provisions with considerable discretionary power. The provisions of many Acts cannot be claimed by children as of right. They leave unclear whether the rights are guaranteed or are at the discretion of the person in authority. Most provisions use the word ‘may’, rather than ‘should’<sup>13</sup>.

Paragraphs 164 and 165 of the state report discuss the age of children and the minimum age of criminal responsibility. The report makes clear that Nepal's position on the age of maturity is confused. In Nepal the age of maturity for work, and for criminal liability is complex. Despite the adoption of different legislation, non-compliance with ratified conventions, as well as impunity, is widespread. Criminal liability of every person above 10 years of age<sup>14</sup> and consideration of a person below the age of 16 as child has confused the definition of ‘child’. The Human Trafficking and Transportation Control Act 2007 defines a person below the age of 18 as a child, yet a person aged 16 (and above) is

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<sup>10</sup> Nepal adopted the *Stockholm Declaration and Agenda for Action* in 1996 and reaffirmed its commitment at Yokohama in 2001.

<sup>11</sup> Parliament ratified the two UN Conventions (*UN Convention on Suppression of Terrorism Financing* and *UN Convention against Transnational Organized Crime*) with a simple majority when Deputy Prime Minister and Finance Minister Bharat Mohan Adhikari tabled the proposals, on 24th June, 2011. <http://www.nepalrus.com/2011/06/25/nepal-ratifies-un-convention-against-money-laundering/> last visited on July 29, 2011

<sup>12</sup> Legislative Review: Comparative Study of Nepalese Laws Concerning Child Rights with CRC, HRTMCC 2008.

<sup>13</sup> For example, Section 24 of the Juvenile Justice Procedure Regulation 2007 provides that during a proceeding ‘a translator may be provided’ in case of need. It is very difficult to say that that is a ‘right.’

<sup>14</sup> This provision has been continued by the Draft Criminal Code of Nepal 2010.

subject to criminal liability<sup>15</sup>. The Labour and Child Labour Prohibition Acts recognize any person over 14 years of age as capable of working.<sup>16</sup> However the same Act defines a person under 16 as a child.<sup>17</sup> On reaching the age of 16 a Nepali can get Nepalese citizenship but he or she can vote only after reaching the age of 18. Ironically, to marry, if the consent of a guardian is lacking, the young man and young woman must be aged 20 or more, if there is consent, persons aged 18 may marry<sup>18</sup>.

Section 14 of the Civil Rights Act 1954, and Rule 3(1) of the Tea Garden Labour Regulations 1994 are two provisions that recognize a person aged 14 as being eligible for work. However, while giving benefits, the Smallpox Control Act 1963 defines a child as someone under 12. The Contract Act 2000 recognizes the age a person aged 16 as having the capacity to make a contract. Nepal has made its legal provisions to accord with the Convention concerning Minimum Age for Admission to Employment (Convention No. C138) that allows countries like Nepal to engage children in work.<sup>19</sup> Though the Nepalese position on child rights is not contrary to the international position, Nepal shows no sign of reducing child labour.

### ***Laws and Penal Sanctions against the Sale of Children and Child Trafficking***

Paragraphs 166-199 of the state report discuss the laws, penal sanctions and other relevant legal provisions. The Interim Constitution ensures rights against exploitation<sup>20</sup> and provides that exploitation, including traffic in human beings, slavery or serfdom, on the basis of custom, tradition and convention, in any manner, and forced labour in any form, is prohibited.

The *Human Trafficking and Transportation Control Act 2007* has been adopted explicitly to deal with the problems of trafficking in persons. The Act defines trafficking and transportation separately. The Act defines trafficking broadly, as selling or purchasing a person, using someone in prostitution with or without financial benefit, extracting human organ[s] except [as] otherwise determined by ... law and going for in prostitution [sic]<sup>21</sup>. However, the Act does not contain any provision specifically addressing the trafficking of children.

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<sup>15</sup> The Draft Criminal Code of Nepal 2010 regards a person below 18 as a child.

<sup>16</sup> S. 3, Child Labour Prohibition and Regulation Act 2003.

<sup>17</sup> *Ibid* S. 2(a).

<sup>18</sup> Muluki Ain Chapter on Marriage S. 2(b).

<sup>19</sup> Convention concerning Minimum Age for Admission to Employment Convention No. C138 Article 2 (4) reads “Notwithstanding the provisions of paragraph 3 of this Article, a Member whose economy and educational facilities are insufficiently developed may, after consultation with the organisations of employers and workers concerned, where such exist, initially specify a minimum age of 14 years.”

<sup>20</sup> Interim Constitution 2007, Article 29.

<sup>21</sup> Human Trafficking and Transportation Control Act, Article 4

Punishment for trafficking may be from one to three months imprisonment and a fine of two thousand to five thousand rupees,<sup>22</sup> up to 20 years imprisonment and a fine of up to two hundred thousand rupees.<sup>23</sup> A person convicted of the offence of transportation of a person for the purpose of buying, selling, or engaging someone into prostitution, may be punished by a sentence of between ten and fifteen years imprisonment and a fine of between fifty and one hundred thousand rupees.<sup>24</sup> Additional punishment is imposed if the offence is committed against children<sup>25</sup>. The Act puts the burden of proof of one's innocence on the alleged offender. The Act also has provisions for the protection of victims and witnesses, compensation and rehabilitation of victims<sup>26</sup>.

Despite the fact that the new Act has been adopted, the Chapter on Human Trafficking in the *Muluki Ain* (General Code) still exists as a supplementary provision. The provisions of this chapter concern only cross-border trafficking and are silent on trafficking within the country. Section 2 of the Chapter prescribes less punishment than the Human Trafficking and Transportation Control Act does if a child or insane person is alleged to have been taken from a guardian's custody<sup>27</sup>. However, the provisions of this chapter is important in addressing using or forcing any person into slavery, servitude, and bonded labour, a crime<sup>28</sup>, on which the Human Trafficking and Transportation Control Act is silent.

With increased instances of child abduction for ransom, legal provisions on abduction have been adopted by the new amendment to the *Muluki Ain* (General code)<sup>29</sup>. Section 1 of Chapter on 'abduction and taking person into custody' defines 'abduction'<sup>30</sup>. The chapter penalizes the offence of abduction or taking persons into control with imprisonment ranging from seven to 15 years and a fine of fifty thousand to two hundred thousand rupees for taking persons into custody or control for the purpose of killing, harming, raping or unnatural sex, selling, pushing into slavery or in forced labour, torture, forced prostitution, or for ransom<sup>31</sup>.

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<sup>22</sup> For the offence of “going for in prostitution”

<sup>23</sup> For selling or buying a person

<sup>24</sup> Article 15(1)-15(6) of Human Trafficking and Transportation Control Act 2007

<sup>25</sup> *Ibid.*

<sup>26</sup> Human Trafficking and Transportation Control Act, ss. 13, 17, and 26.

<sup>27</sup> Fine of five hundred rupees or three years of imprisonment or both

<sup>28</sup> *Muluki Ain*, Chapter on Human Trafficking , Section 3, Three to Ten Years imprisonment and compensation to the victim, if convicted.

<sup>29</sup> Added by the 12<sup>th</sup> Amendment to the *Muluki Ain*.

<sup>30</sup> ...Taking away of any person or taking into custody by the use of force, threat, coercion, deception, use of narcotics, alcoholic liquor, control of vehicle ... children or person with mental illness should not be taken away except without the consent of guardian for the benefit of children ...

<sup>31</sup> Section 3, Chapter on abduction and taking .

Despite the acceptance of various international obligations and commitments, many Nepalese laws fail to conform to international standards. Even if domestic legal provisions provide sufficiently stringent penalties, very few have been convicted.

***Human Trafficking Cases Represented by the Attorney General's Office:***

Year	Detail			Cleared				Conviction in percentage
	Last Year's remaining cases	Current cases	Total	Convicted	Acquitted	Total	Ongoing	
2003/04	64	70	134	11	17	28	106	39.29
04/05	106	25	131	17	13	30	101	56.67
05/06	101	16	117	16	13	29	88	55.17
06/07	88	14	102	4	9	13	89	30.77
07/08	89	23	112	8	19	27	85	29.63
08/09	85	8	93	14	20	34	59	41.17
09/10	50	13	63	9	15	24	39	37.5

*Source: Report of the Attorney General Office of 2010*

The state report is silent on the lengthy court proceedings, corruption at all levels and breakdown of the rule of law, resulting in the ordinary person's low level of faith in the criminal justice system of Nepal<sup>32</sup>.

***Sale of children for organ transfer, child labour, adoption, and temporary, early and/or forced marriage***

As mentioned earlier, even though the Government of Nepal has ratified the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, the Trafficking Protocol to Prevent, Suppress and Punish Trafficking in

<sup>32</sup> The statement is supported by Para 15 and 33 to 40 of the report of the UN High Commissioner for Human Rights on the human rights situation and the activities of her office, including technical cooperation in Nepal , 3 March 2009.

*Persons, especially Women and Children* has not yet been signed and ratified. This is a major gap that needs to be urgently addressed by the Government of Nepal.

**Organ transfer:** In Hokse V.D.C. of Kavre District, most people have sold a kidney. They don't even know to whom they have sold it<sup>33</sup>. However, there is no authoritative information about the sale of children for organ removal. Considering the involvement of organ smugglers and the ease of travel to India, there is a real risk of the sale of children for organ transfer.

**Child labour:** The Child Labour Report 2010 based on NLFS 2008 survey, estimates the number of children in Nepal aged 5-17 years in 2008 as 7.77 million, which would have been about 33 per cent of the population. Child labour remains a major economic and social phenomenon in Nepal. According to the National Child Labour Survey undertaken in 1997<sup>34</sup>, 1.66 million children (26.6 per cent) of a total of 6.225 million children in the country aged between 5 and 14 are economically active<sup>35</sup>. Though the government claims to be implementing the National Master Plan for Child Labour 2004-14, little progress has been made. The majority of children work in the informal sector and child labour is often considered better than living without food. If caught employing a child, such people are very often let off any criminal charges in return for payment of some amount to the child<sup>36</sup>. Investigators and prosecutors never link forced labour and labour exploitation of children to the sale of children.

**Adoption:** Forty-seven child centres arrange adoptions, and between 2000 and 2007, 2,161 adoptions were arranged. Nepal does not have a centralized system to plan, manage, authorize, and monitor inter-country adoption. The lack of transparency and accountability leaves those managing or working in child centres with the power to identify and arrange children for adoption<sup>37</sup>. Adoption without following substantive and procedural legal provisions may fall within the definition of sale of children. Cases have been reported of unethical and illegal practices by child homes and orphanages<sup>38</sup>.

According to research conducted by UNICEF NEPAL, TDH: *Adopting the Rights of the Child 2008*, instances of soliciting, coercion, inducement were found, resulting in

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<sup>33</sup> 'Selling Kidneys for a Few Rupees More' available at <http://grluite.com/byroad.?p=618>

<sup>34</sup> Central Department of Population Studies, Tribhuvan University: *Child labour situation in Nepal — Report from migration and employment survey, 1995/96* (Kathmandu, 1997).

<sup>35</sup> 'Economic activity' includes both paid and unpaid, casual and illegal work, as well as work in the informal sector, but excludes unpaid domestic services within own household.

<sup>36</sup> Information based on interviews with children and lawyers working in the field.

<sup>37</sup> Information provided by the Ministry of Women, Children and Social Welfare, and the Draft State Report to the CRC.

<sup>38</sup> Information provided by officer of Central Child Welfare Board (name confidential)

families relinquishing a child. Parents were misinformed about adoption, and misled, deceived or offered money as a financial inducements. They were led to believe that their children would be sent abroad for a period of time only in order to obtain a good education and upbringing. They were led to believe that their children would return to Nepal when they reached the age of 16 or 18. The legal consequences of inter-country adoption were either not explained at all or not explained fully. As a result, biological parents were unaware that once the inter-country adoption procedure was finalised they would lose custody of their child forever. They were also unaware that their child would lose his or her Nepali citizenship. In other cases, biological parents were not informed that their child had been sent abroad for adoption.

**Temporary, early and/or forced marriage:** Sale of children for temporary marriage is not common in Nepal. However, soliciting, enticing and arranging early and forced marriage is common. Though 'consent' is an important element for a legal marriage, in general parents arrange marriage for their children. Early and child marriage in Nepal has cultural and religious acceptance but there is no reliable authority to link this phenomenon with the sale of children.

Most people, including law enforcement agencies, link human trafficking with prostitution. The victim's role in the investigation process has not been ensured by the law. Though the Human Trafficking and Transportation Control Act provides for protection of the victim, from the very beginning such protection is ignored. NGO workers and lawyers claim that merely getting the FIR registered with the police is a tough task. The study revealed that the legal requirement that the case be lodged on the charge sheet in court within 25 days of registration with the police is the major reason they do not register the case immediately. If the accused is not apprehended, the case is unlikely to go ahead<sup>39</sup>. Hostile victim and witness, out-of-court settlement, inability to arrest the suspect, are some of the reasons for low conviction rates in TIP cases. The legal provision of the burden of proof on the alleged offender is against constitutional and recognized standards.

Chapter II of the state report provides data relating to CSEC. Paragraph 55 cites some estimated data from various NGOs and INGOs, paragraph 56 some reported cases of human trafficking. GoN does not have accurate statistics on human trafficking, and the government report does not provide disaggregated data on child trafficking and CSEC. In the absence of such data, it's likely that policies are not properly formulated and unrealistic to expect better results.

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<sup>39</sup> Information based on interviews with lawyers and NGO workers in Makawanpur and Morang districts.

Forced labour and instances where parents send their children to work as domestic workers is often ignored. The excuse is that poor children would at least be given food for themselves. In Nepal such practices are not counted as human trafficking.

**WE RECOMMEND THAT THE COMMITTEE ASK THE GOVERNMENT THE FOLLOWING**

**QUESTIONS:**

- Does Nepal intend to rationalize the different definitions of a child as to age?
- Does Nepal have any plan to maintain disaggregated data on child trafficking? If it does what progress has it made?
- What progress has Nepal made to strengthen the protection of victims of human trafficking? Of witnesses in such cases?
- Does Nepal have any plan to provide psycho-social counseling to such victims?
- What progress has been made regarding the rehabilitation and reintegration into society of such victims?

**WE RECOMMEND THAT THE GOVERNMENT OF NEPAL:**

- Amend all necessary laws so as to set the age of maturity at 18.
- Provide disaggregated data on child trafficking
- Amend the law so as to ensure the protection of the victim throughout a trial.
- Sign and ratify the *Trafficking Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* as a matter of urgency.
- Amend the *Human Trafficking and Transportation (Control) Act 2007*, to define and criminalise child trafficking in compliance with the provisions of the Trafficking Protocol
- Ensure that the scope of laws addressing trafficking includes boys as well as girls as frequently boys are not recognised as potential victims of trafficking. This would permit the establishment of better preventative and protective measures for both genders (e.g, specialised services for support, recovery and social rehabilitation)
- Encode in law a provision ensuring that for every unaccompanied child victim of trafficking, a guardian is appointed without delay
- Encourage victims to file cases against the perpetrators.
- Effectively enforce in camera hearings
- Effectively protect privacy throughout the process of investigation and judicial procedure
- Develop a mechanism to provide psycho-social counseling to the victims of human trafficking
- Provide specific rehabilitation and reintegration programs tailored to meet the needs and rights of child victims of trafficking

### ***Laws and Penal Sanction relating to Child Prostitution***

Nepalese society thinks that only girls are sexually exploited. Sexual exploitation may be of both boys and girls, but in general, in Nepal, girls are pushed into prostitution. Male prostitution is clandestine in Nepal. The information provided here is according to the general Nepalese context.

Paragraphs 162 and 163 of the state report describe the constitutional and domestic legal provisions against any form of abuse or exploitation, and note that the issues of sale, prostitution and pornography in relation to children also fall within the ambit of abuse and exploitation. However Nepal has no law specifically prohibiting the prostitution of children. Section 4(b) of the Human Trafficking and Transportation Control Act 2007 prescribes that no one should engage another person in prostitution whether or not there is any financial gain. The Act does not define 'prostitution'. As a result, the pimp or intermediary may claim that s/he just introduced the persons. Whatever happened between them was of their free will.

Paragraph 164 of the state report mentions the age of children in Nepal. Considering the age of maturity as 16, except in the case of incest, no law in Nepal prohibits consensual sexual intercourse between a male and a female over the age of 16, but intercourse with a girl below the age of 16 is a crime regardless of whether the girl consented or not. Thus where a girl is under 16, even so-called 'voluntary prostitution' is statutory rape<sup>40</sup>. The *Muluki Ain (General Code) Chapter on Rape* also defines sex with a child as unnatural sexual intercourse<sup>41</sup> and as an aggravated form of statutory rape, with additional imprisonment of up to one year, and, depending upon the minor's age and the harm caused, requires monetary compensation to be paid by the offender to the minor<sup>42</sup>. However the term 'unnatural sexual intercourse' is a vague term, so such cases are not easily registered, investigated, or prosecuted.

The law implies that 'natural' sexual intercourse with a minor is only a type of rape, not paedophilia, contrary to the common definition, a phenomenon where adults seek to have sex with minors<sup>43</sup>.

Recent research conducted by CWIN and Save the Children showed that, of 110 boys living on the street, 73.8% of them had had non-consensual sex<sup>44</sup>, 32.7% of them had

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<sup>40</sup> Muluki Ain (General Code), Chapter on Rape, No. 1

<sup>41</sup> *Ibid* No. 9(a)

<sup>42</sup> *Id.*

<sup>43</sup> Global monitoring Report on the Status of Action against Commercial Sexual Exploitation of Children, ECPAT International 2006, p. 22.

<sup>44</sup> A Study on the Sexual Abuse of Street boys in Kathmandu, CWIN and Save the Children, 2010 Kathmandu, p. 30.

sexual relations with adults including foreigners and persons of third gender<sup>45</sup>, 31.4 % had had sex with adults several times, 11.4% of them had such relations for more than a month, 5.7% for more than a year, and 17.1% are currently having sexual relations with an adult<sup>46</sup>. Nepalese laws do not treat such conduct as child prostitution nor does it come within the definition of rape.

There are reports of an increasing trend of sexual exploitation of children, particularly working in cabins and dance restaurants, including domestic work. A study conducted by the ILO estimated that about 5,000 children under 16, mainly girls, are working as commercial sexual workers in the major cities in Nepal. Mostly adolescent girls become the victims of sexual abuse and, in a few cases, teachers have been involved. Action has been taken against those involved<sup>47</sup>.

Nepalese laws<sup>48</sup> prohibit prostitution only if there is coercion or force. If a girl offers herself for sex work of her own free will, it is difficult to prosecute any person, whether pimp or intermediary. Though the Act considers every person below the age of 18 as a child, it is not able to protect a person below that age but above the age of 16 from sexual exploitation.

The Act decriminalizes prostitution, by punishing only the client, not the sex worker. However, following a long-practiced crime-control model, police frequently raid restaurants, dance bars and night clubs, exposing the girls in the media. Girls working in such places are often presumed to be prostitutes and treated as criminals. They are taken into custody, detained overnight and only released on bail. Verbal abuse, flirting and requests for monetary and other payments are common in urban police stations<sup>49</sup>. In Nepal, as all persons above the age of 10 are liable to criminal sanctions, they are charged under *Some Public Crime and Punishment Act 1970* for disturbing public order and safety. The right to privacy of these girls is ignored and not protected.

None of the laws discussed here define or specifically prohibit child prostitution. The provision that punishes arranging prostitution is limited to the involvement of females in prostitution. It offers no protection to boys. Nepal's law on '*Intention of Sex*' protects young girls from a person touching, showing or forcing to touch a person's private parts,

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<sup>45</sup> *Ibid.*

<sup>46</sup> *Id.* p. 49.

<sup>47</sup> Nepal's State Party Report to the CRC (DRAFT), Third, Fourth and Fifth Consolidated Reports, para 344.

<sup>48</sup> Human Trafficking and Transportation Control Act 2007, Section 4 and *Muluki Ain* Chapter on '*Intention of Sex*' No.5

<sup>49</sup> Information based on media reports and from discussion with stakeholders and children.

undressing, and other sexual harassment.<sup>50</sup> Where an offence is proved to have been committed, the offender may be punished with imprisonment up to one year and a fine of ten thousand rupees<sup>51</sup> but there is no such protection for boys.

The Children Act 1992 prohibits the use of children in an 'immoral professions' which is again vague and not defined. Violators may be punished by imprisonment of up to one year and a fine of ten thousand rupees<sup>52</sup>.

**WE RECOMMEND THAT THE COMMITTEE ASK THE GOVERNMENT THE FOLLOWING QUESTIONS:**

- Does Nepal intend to rationalize the definition of a child as to age to protect children from sexual exploitation?
- Does Nepal have any plan to maintain disaggregated data on child prostitution? If it does what progress has it made?
- Does Nepal have any plan to provide psycho-social counseling to the child victim of prostitution?
- What progress has been made regarding the rehabilitation and reintegration into society of such victims?
- Does Nepal have any plan to provide alternatives to prostitution and life skill training to sexually-abused children?

**WE RECOMMEND THAT THE GOVERNMENT OF NEPAL:**

- Amend domestic legislation to define prostitution and specifically prohibit child prostitution, in compliance with the OPSC. The acts of obtaining, procuring or providing a child for prostitution must also be criminalised.
- Amend the law so even when an adult is unaware of the child's age, the purchase of sex or any form of transaction to obtain sexual services from a child is a criminal offense,.
- Amend all necessary laws to protect all children, including children between the ages of 16 to 18 from prostitution,
- Provide statistics of child victims of prostitution as well as of the perpetrators
- Provide psycho-social counseling to the child victims of prostitution
- Develop programmes and plans for rehabilitation and reintegration of child victims
- Provide alternatives and life skill training for sexually-exploited children
- Strengthen law enforcement for the protection of children of both sexes.

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<sup>50</sup> *Muluki Ain* Chapter on 'Intention of Sex' No. 1

<sup>51</sup> *Ibid.*

<sup>52</sup> Children Act 1992, Section 16.

## ***Laws and Penal Sanctions Relating to Child Pornography***

The *Interim Constitution 2007 (Article 22)*, the *Consumer Protection Act 1998*, *Press and Publication Act 1992*, *Some Public Crime and Punishment Act 1970*, *Children Act 1992*, *Cinema (production, show and distribution) Act 1969*, *National Broadcasting Act 1993*, *Hotel Management and Alcoholic Liquor Sale and Distribution (Control) Act 1966* and *Electronic Transaction Act 2008* are relevant to any discussion of the sexual exploitation of children, especially child pornography. However, not a single Nepalese law explicitly addresses child pornography.

The law of Nepal provides that no one should engage children in immoral activities<sup>53</sup>. Taking photos with the intention of using them for immoral purposes, or distributing or exhibiting them<sup>54</sup>, and printing and publishing such materials is also prohibited<sup>55</sup>. *Some Public Crime and Punishment Act 1970* specifies other acts that are prohibited<sup>56</sup>. Among them, disturbing the peace by voice, language, sign, or symbol, or exposing vulgarity in a public place<sup>57</sup>, using or publishing words that signify vulgarity, or printing or publishing vulgar pictures or exhibiting such materials in public, are all prohibited<sup>58</sup>.

But the wording of these laws is vague and ambiguous, and unable to prohibit or control pornography. The provisions do not define what activities constitute ‘immoral activities’. An amendment to the Children Act is necessary to address various forms of sexual exploitation against both male and female children. In the absence of proper law, it is difficult to prepare a proper charge sheet. The general trend is to prepare a charge in accordance with *Some Public Crime and Punishment Act 1970*.

The nature and gravity of child sexual abuse is different from public offences. The nature and consequence of sexual abuse against male and female children is different. Thus, any amendment should ensure that it addresses this problem.

With Nepali’s increased access to cyberspace, the possibility of misuse of the internet has increased. Viewing and downloading pornographic images and materials, the sharing of personal details including personal images, online fraud, exposure to inappropriate materials, to potentially dangerous contacts, ‘cyber bullying’, file sharing, and downloading which violates copyright law, are some of the dangers and of unfettered internet use.

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<sup>53</sup> Children Act 1992, Section 16.

<sup>54</sup> *Ibid* Section 16(2).

<sup>55</sup> *Id.* Section 16(3).

<sup>56</sup> Some Public Crime and Punishment Act 1970, Section 2.

<sup>57</sup> *Ibid.* Section 2 (c ).

<sup>58</sup> *Id.* Section 2 (c )(1).

Many parents are ignorant of internet misuse. Children can take advantage of parents who are either illiterate or ignorant of computer technology.

The findings of focus group discussions with children conducted by CWIN shows the following<sup>59</sup>:

- Sharing of personal details (name, age, sex, address, phone number etc.) without hesitation with strangers is common.
- Pornographic images are viewed by many who use the internet (both intentionally and accidentally)
- Younger boys with no internet experience have viewed pornographic images on mobile phones and on the pen drives of friends/brothers.
- Sexual advances and use of foul language are encountered by many.
- Generally there is no hesitation about and no understanding of the possible risks in meeting 'friends' made online.
- Parents are usually not informed about their children's online 'friends' or experiences.

The problem of exposure to pornographic materials, images, and movies in early ages is increasing. Internet available on mobile phones, large numbers of cyber shops, the widespread availability of porn movies, affordable and easy access to internet at home have had both a positive as well as negative impact on Nepalese children.

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<sup>59</sup> A leaflet on *Protecting Children Online in Nepal: A campaign* initiated by CWIN-Nepal.

In the regional consultation meetings, out of 61 children, 25 of them revealed that they had watched pornographic material on computer, mobile phone, video, or in a magazine. 31 of them disclosed that their friend(s) had also watched such material.

The majority of children who took part in the consultation were not acquainted with e-mail and internet technology. Many children who have viewed pornographic images saw them on CDs, which are readily available, or on mobile phones. One of them had gone to a cyber café to ‘surf’ porn sites.

The Nepal government's response to cyber crime has not been very effective. There are neither adequate laws nor is law enforcement or capacity- building efficient. In Nepal, unless a person disseminates or publishes pornographic materials and images, viewing and downloading such material is not caught by any provision of the law. *Electronic Transaction Act 2008* prohibits only the dissemination of pornographic materials through electronic means. Even if an image is of a child, there is no law to address such activities. Nepal's laws do not meet the available and internationally recognized standards of combating CSEC. Nepal needs to harmonize its legal framework to respond to recent trends in the production and dissemination of pornography and to address the transnational dimension of cybercrime.

In Nepal Internet Service Providers (ISPs) have no legal responsibility to track whether their clients are viewing child pornography.

*One day I was cleaning all rooms. While I was cleaning my brother's room, I found a CD hidden in a corner of the bed. After I finished cleaning all rooms, I had nothing to do and I was also curious about the CD. I thought it was a new film. But when I played the CD, it was all dirty things the man and woman were doing. I was afraid whether anyone sees me watching this dirty film. So, I stopped and hid the CD in the same place.*

- A participant girl, aged 13

**WE RECOMMEND THAT THE COMMITTEE ASK THE GOVERNMENT THE FOLLOWING QUESTIONS:**

- Could the government provide measures and technology to curb child pornography in Nepal?
- Could the government make public the number of investigations, prosecutions, and convictions, in cases of child pornography?

## **WE RECOMMEND THAT THE GOVERNMENT OF NEPAL:**

- Amend laws addressing activities and materials to define and criminalise child pornography in compliance with the OPSC. The revised laws should specifically ensure that possession of ‘virtual’ as well as actual child pornography, and knowingly accessing and viewing child pornography through the use of information and communication technology is prohibited.
- Incorporate in relevant laws provisions that require ISPs, mobile phone companies, and search engines to report and block access to/remove child pornography websites and child sexual abuse images.
- Regulations should be promulgated requiring cyber cafés to ban cabins and cubicles and prevent children below the age of 18 from accessing pornography. Regulations should also be adopted requiring ISPs to block access to images of child abuse and to establish a ‘take-down’ procedure.
- Incorporate legal provisions defining and criminalising the proposal, through information and communication technologies, of an adult to meet a child with the intention of sexually abusing him or her (grooming)
- Incorporate provisions in law to address and control all trends of child pornography (cartoon, depiction of young as children, etc.)
- Provide statistics on the numbers of investigations, prosecutions and convictions in cases of child pornography.
- Develop mechanisms and technologies to track and to curb child pornography.

## **4. PENAL/CRIMINAL PROCEDURE**

### **Overview of Criminal Proceedings Framework**

In general, criminal proceedings in Nepal is largely based on the Chapter on Court Management in the *Muluki Ain* (General Code) 1963, *Government Cases Act 1992* and its *Regulations 1999*. There are also other Acts and Regulations those provide a procedural basis for criminal proceedings. The *Human Trafficking and Transportation Control (TIP) Act 2007*, *Espionage Act 1962*, *Corruption Control Act 1960*, *Juvenile Justice Procedural Regulation 2007* are examples of such legislation.

In Nepal the crimes of the sale of children, child prostitution and child pornography are not covered or addressed by any single piece of legislation. The Sale of children comes under the definition of human trafficking under TIP Act 2007. To go for in prostitution is also a punishable offence<sup>60</sup>. However, this provision does not adequately address the crime of 'child prostitution.' On the issue of child pornography, there is no comprehensive law. Thus, various Acts and Regulations are relevant to criminal proceedings in the crimes

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<sup>60</sup> Human Trafficking and Transportation Control Act 2007 section 4 (d).

of the sale of children, child prostitution and child pornography, including other forms of CSEC.

Nepalese legislation contains provisions under which foreign child sex offenders can be prosecuted by Nepalese courts for the sexual exploitation of children in Nepal. However, prosecution of any foreign child sex offender who flees the country to escape prosecution is problematic as Nepal lacks bilateral extradition treaties with other countries. (Only one bilateral extradition treaty has been signed, with India).

Nepalese legislation also provides for the extraterritorial application of its laws, enabling Nepalese courts to prosecute Nepalese citizens. However, the scope of Nepal's extraterritorial legislation is limited to trafficking and does not appear to cover other forms of CSEC<sup>61</sup>.

Primary data collected from 37 District Police Offices of Nepal<sup>62</sup> by the Child Rights Center of Kathmandu School of Law shows that the reporting of cases of CSEC lacks any uniform practice. Violations of the rights mentioned in OPSC are not reported in the category of CSEC or other similar category. So gathering exact number of cases of CSEC was not possible. Very few investigation officers understand the rights mentioned in, and the issues that fall under, CSEC. They are given no specific training to combat CSEC. Thus, the level of understanding among them varies, as does the practice of case reporting in many police stations.

Except in the case of human trafficking, other forms of CSEC may be registered under the category of Public Offence, or as miscellaneous. There are instances of charges of public offence being registered against girls working in cabin restaurants, massage parlors, dance bars, night clubs, and against girls practicing prostitution. In cases of paedophilia, there is an absence of clear law. Thus the offender may be charged with a violation of the *Children Act 1992* or under *Some Public Crime and Punishment Act 1970*.

If anyone knows that an offence under the TIP Act 2007 is being or may be committed, s/he may report it to the nearest police office<sup>63</sup>. Any person reporting such case may request to remain unnamed and to maintain his/her confidentiality.

So as to respect the 'right to privacy' mentioned in the Interim Constitution 2007 and the Directives issued by the Supreme Court<sup>64</sup>, in cases where children are the victim or

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<sup>61</sup> *Ibid 1(3)* This Act shall remain in operation throughout the country and anyone committing an offence against a Nepali citizen under this Act from a foreign land shall also remain within the purview of this Act.

<sup>62</sup> Data were gathered from the District Police Offices of Ilam, Jhapa, Sunsari, Dhanusha, Morang, Bara, Parsa, Mahottari, Sharlahi, Sindhuli, Rautahat, Kathmandu, Lalitpur, Bhaktapur, Dhading, Nuwakot, Gorkha, Rupandehi, Nawalparasi, Kaski, Parbat, Gulmi, Palpa, Baglung, Tanahu, Syangjha, Lamjung, Banke, Dang, Surkhet, Salyan, Bardiya, Kailali, Kanchanpur.

<sup>63</sup> Human Trafficking and Transportation Control Act 2007 Section 5(1).

<sup>64</sup> Supreme Court Directives on maintaining confidentiality where the victims are women and children, 2007

offender, their identity is kept confidential. The child's name is not made public. Rather they are known by a code name. It is mandatory to maintain such confidentiality in the cases of sexual violence against women and children, and, under the Children Act, in cases of juvenile delinquency.

Paragraph 56 of the state report presents the numbers of reported cases of human trafficking during the past eight years (1999/2000 – 2006/2007). In 1999/2000, total reported cases were 120, in 2006/2007, 112. In the other years, numbers of reported cases were lower. The number of reported cases is far less than the number of alleged trafficking cases.

Weak mechanisms for victim and witness protection, lack of awareness among the ordinary person about law and legal procedures, lack of protection of privacy during the trial, an environment in the police station unsympathetic to the victim, lack of specific training among the investigators to deal with human trafficking cases, etc., are the causes of poor reporting and failure in prosecution.

**WE RECOMMEND THAT THE COMMITTEE ASK THE GOVERNMENT THE FOLLOWING**

**QUESTIONS:**

- What has Nepal done to increase reporting of the cases by the police?
- Does Nepal have any policy or program to reduce the gap between the number of investigations, prosecutions, and convictions?

**WE RECOMMEND THAT THE GOVERNMENT OF NEPAL:**

- Amend extraterritorial legislation to include all CSEC-related offences, not only human trafficking. Ensure that citizens of Nepal, as well as permanent residents, are covered by the law.
- Strengthen mechanisms for victim and witness protection,
- Raise awareness among the ordinary person about law and legal procedures,
- Ensure effective mechanism for the protection of privacy throughout a trial
- Ensure child victim-friendly environment in the police station,
- Provide specific training for investigators and prosecutors to enable them to deal with cases of the sale of children, child prostitution and child pornography

## 5. PROTECTION OF THE RIGHTS OF CHILD VICTIMS

### Laws, facts, figures, and cases of protection, compensation and restitution

Paragraph 200 of the state report says that, broadly, Nepal follows the adversarial model. However, paragraph 202 notes that human trafficking is a non-bailable offence, paragraph 203 that in Nepal, in cases of human trafficking, the burden of proof lies on the accused. These provisions contrary to the adversarial model. Section 8 of the Human Trafficking and Transportation Control Act 2007 was challenged by a lawyer in the Supreme Court and has been quashed.

Paragraph 206 notes that Section 11 of the TIP Act 2007 makes provision for a Translator or Interpreter, where needed. This provision is seldom used and in the case of Nepali citizens, ignored, as many Nepalis more or less speak and understand Nepali. However that might cause difficulty to those whose mother tongue is not Nepali.

Paragraphs 207–209 describe provisions prohibiting the publication of information detrimental to a victim. However, some media personnel still lack of sensitivity as to the need to protect the privacy of victims. Newspapers are found printing the name and photo of the victim.

Paragraph 210 refer to *in-camera* proceedings under Section 27 of TIP Act. However, the provision has been unable to protect the privacy and identity of victims. Many of the courts do not have proper infrastructure to conduct trials *in-camera*. To ensure victims' privacy and protection of their identity, an *in-camera* hearing is not sufficient. Privacy should be protected from the start of an investigation, throughout the trial, through to final judgment.

The state's carrying out of its obligation to ensure rehabilitative care to child victims of exploitation is ineffective. Such victims do not receive appropriate treatment for their recovery and social re-integration as there is no such explicit law or proper mechanism.

The Interim Constitution on the Responsibility of the State, Directive Principles and Policies, partly covers the rehabilitative care of child victims of armed conflicts, torture, neglect, maltreatment or exploitation, and stipulates that they should receive appropriate treatment for their recovery and social re-integration. Section 35 of the Children Act 1992 provides that abandoned child should be kept in a Child Welfare Home. But the provision is not sufficient to ensure rehabilitative care for child victims of human trafficking, prostitution and pornography.

Figures for instances of protection, compensation, and restitution are not available as the police have no centralised system for collecting and recording data. The report published by the Attorney-General's Office does not provide disaggregated data on the sale of children, child prostitution and child pornography. Nor is accurate data available for the transfer of organs, numbers of children in forced labour, or child adoption.

**WE RECOMMEND THAT THE COMMITTEE ASK THE GOVERNMENT THE FOLLOWING QUESTION:**

- Can Nepal provide figures for instances of protection, compensation, and restitution to the victims of the sale of children, child prostitution and child pornography?
- Does Nepal have any programmes for compensation to, and rehabilitative care for, victims?

**WE RECOMMEND THAT THE GOVERNMENT OF NEPAL:**

- Provide figures for instances of protection, compensation, and restitution to the victims of the sale of children, child prostitution and child pornography
- Ensure effective protection for the victim and witness
- Provide psycho-social counseling and reparation
- Develop a mechanism to provide immediate medical service for the needy child victim of a sale, prostitution and pornography
- Provide shelter homes and rehabilitation centers as well as specialised services for the support, recovery, and social rehabilitation of, including skill training for, sexually-exploited children including boys.
- Introduce mandatory reporting by persons having responsibility for the welfare of children.
- Promote and enforce the standards for an institutional care system developed by the Central Child Welfare Board. In addition, ensure all relevant stakeholders receive training so that are sensitive to, and responsible about, CSEC issues.
- Establish rehabilitation centers and provide life skill training for the victims.

**6. PREVENTION OF THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY**

- Regional level initiatives by Gov

The state report lists a number of international and regional instruments ratified and the commitments made. However, the report is silent on the effectiveness and outcome of these commitments.

With support from the South Asia Coordinating Group on Violence Against Women and Children (SACG), to date the South Asia Forum for Ending Violence Against Children (SAF) has held four consultations to consolidate the work throughout the region and bring this agenda to the forefront of government debate. The consultations were held in Pakistan (2006), India (2007), and in Kathmandu in 2008 and on 21-22 January, 2010.

After taking stock of progress and the opportunities presented by this Forum, participants, in collaboration with SAARC and SACG, decided to create a new Institutional Framework for ending violence against children throughout the region. To this end participants endorsed the decision to change SAF into a South Asian Initiative to End Violence Against Children (SAIEVAC).

The 5th SAF Coordinators' Meeting again reviewed the decisions taken in January and made 10 recommendations to the Ministers for endorsement the next day. The Ministers endorsed the decision and created the SAIEVAC.

- Nationwide activities by Government

Paragraph 123 of the state report describes the nation-wide activities by the GoN to prevent human trafficking, paragraph 122 the establishment of the Special Rapporteur on Trafficking in Women and Children (OSRT). The OSRT publishes annual report on human trafficking. Better performance and results may be achieved if the role of the OSRT is strengthened.

Paragraph 124 describes the formulation and implementation of a National Plan of Action against Trafficking in Women and Children (NPA). However, the HRTMCC CRC Sub-Committee regards the dissemination of the OPSC, NPA, and other policies and programs of the GoN as unsatisfactory. Many of Nepali NGOs have not been able to read the NPA as it is not widely available. The NPA has not been properly implemented and the GoN has not publicised what progress the NPA has made<sup>65</sup>.

Paragraph 125 notes that the NPA considers various aspects, including maintaining effective coordination, strengthening economic and regional interventions, and conducting reliable studies and surveys. However, there has not been any study or surveys, or any effective coordination by the government or its agencies.

Paragraph 126 describes four cross-cutting issues, paragraph 127 eight major areas for intervention and detailed plan of actions mentioned in the NPA. However, coordination among government institutions has not been effective, there is no reliable information on resource mobilisation, dissemination of policies and programs has been inadequate,

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<sup>65</sup> Review of the *National Plan of Action against Trafficking in Children and Women for Sexual and Labor Exploitation*, Report by Sahabghahi 2010.

those state actors responsible for combating trafficking in human beings lack the sensitivity required, and the NPA has not been successfully implemented<sup>66</sup>.

*Paragraph 131* describes some of the action plans under the *Three-Year Interim Development Plan (2006/07-2009/10)* that are relevant to anti-trafficking initiatives. *Paragraph 144* describes the establishment of the National Rapporteur on Trafficking in Women and Children (now Special Rapporteur). Paragraph 146 describes the Nepal Police's Women and Children Service Center. However, the efficiency and performance of these establishments have yet to be reviewed.

- Preventative measures taken by NGOs/Civil Society Organizations

NGOs and Civil Society Organizations in Nepal have been very active in raising awareness among citizens as well as stakeholders. They have also provided training to law enforcement officials on human trafficking issues. There are more than one thousand NGOs in Nepal working in the sector of child rights. A few organizations have been remarkable in the preventative work they've done regarding CSEC, with activities such as:

Community orientation, multimedia campaigns, street dramas, songs, leaflet and booklet printing and distribution, training of law enforcement officials, interaction with Foreign Service Officials, research and dissemination, the sharing of experiences, legal aid, psycho-social counseling, child helpline services, and toll-free hunting phone number services, etc.

**WE RECOMMEND THAT THE COMMITTEE ASK THE GOVERNMENT THE FOLLOWING**

**QUESTION:**

- How far have the preventative measures launched by Nepal Government been effective?

**WE RECOMMEND THAT THE GOVERNMENT OF NEPAL:**

- Conduct further research, education, awareness campaign and training to help the public and concerned stakeholders learn about and better understanding CSEC.
- Promote the participation of children against trafficking and CSEC, by allocating resources to start children's clubs and peer support programmes in schools and communities in high-risk areas.

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<sup>66</sup> *Ibid.*

- Allocate adequate resources (both financial and technical) to implement the National Plan of Action against Trafficking of Women and Children for Commercial Sexual Exploitation and to build linkages and integration with the implementation of other NPAs and frameworks for children in Nepal, such as the Three-Year Interim Development Plan.
- Improve coordination and cooperation between state agencies and among civil society organisations, as well as increase partnerships with the private sector to effectively implement the National Plan of Action against Trafficking.
- In partnership with private companies operating in tourism, information and communication technologies, and media, develop initiatives aimed at preventing the sexual exploitation of children.
- Monitor programs effectively.

## **7. INTERNATIONAL ASSISTANCE AND COOPERATION AND OTHER LEGAL PROVISIONS**

There are more than 19 UN, bilateral, international non-governmental funding and other agencies or donors working on the issue of women's rights, including CESC, in Nepal. These agencies have been vital in providing financial and technical support to the government, as well as NGO sectors, to combat the sale of children, child prostitution and pornography.

In *paragraphs 225 and 226*, the CRC-Sub Committee acknowledges the information provided in the state report. *Paragraph 232* mentions the *Regional Task Force to Implement SAARC Conventions*, *Paragraph 233* mentions the *South Asia Forum on Violence against Children (SAF-VAC)*, *paragraphs 234 and 235* mention the formation of the *Technical Advisory Group for South Asia (TAGSA)* and the *South Asia Forum against Human Trafficking (SAFAHT)*. However, the state report is silent on the effectiveness of mechanisms established at the regional level.

The state report further mentions as cross-border initiatives programmes and events that were conducted many years back. But their effectiveness and performance is doubtful. They seem to have been one-off events.

The support of Plan Nepal, Save the Children, and World Vision International has been significant in the preparation of this report, as well as helping larger civil society and relevant office bearers to understand the concepts of, to combat the sale of children, child prostitution and child pornography in Nepal. Technical support from World Vision International was major to bring the report in this shape. ECPAT International and Plan International provided substantive comments and suggestions in the draft report.

**WE RECOMMEND THAT THE COMMITTEE ASK THE GOVERNMENT THE FOLLOWING QUESTION:**

- Can Nepal provide information on the effectiveness and performance of regional and international commitments and initiatives?

**WE RECOMMEND THAT THE GOVERNMENT OF NEPAL:**

- Develop bilateral agreements with other countries for child sex tourism to ensure the investigation and prosecution of sex offenders, regardless of their nationality, and establish effective police and judicial cooperation with countries who are the destination for Nepali victims of child trafficking (especially India)
- Effectively manage, coordinate, and monitor regional, international or bi-lateral programmes and initiatives.
- Provide information on the effectiveness and performance of regional and international commitments and initiatives and publicise the outcomes.