

SUBMISSION BY REPRIEVE ON THE TRAFFICKING OF PERSONS (PREVENTION, PROTECTION AND REHABILITATION) BILL, 2018

Reprieve is an international legal action charity based in London, which provides legal and investigative support to persons facing the death penalty around the world. This submission to The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018, is based on the experience of working on cases involving foreign nationals facing death sentences around the world for almost two decades, and highlights India's international human rights obligations. This submission focuses on victims of human trafficking who have been trafficked out of India, but are not being protected as such, and might be facing criminal sanctions in foreign courts for unlawful acts that they were compelled to commit.

MIGRANT WORKERS, DEATH PENALTY AND HUMAN TRAFFICKING

Reprieve's work indicates that South Asian migrant workers may be disproportionately sentenced to death in the Gulf following patently unfair trials, in violation of international law and domestic safeguards. For instance, since 2014, 37% of the persons executed in Saudi Arabia were foreign nationals, a large number of who were South Asian nationals.

There are indicators suggesting that a number of foreign nationals either executed or facing execution may have been victims of human trafficking, who were compelled to commit crimes. There is consensus in the international community that victims of human trafficking should not be punished in any form – including prosecution, detention or imprisonment - for crimes related to their trafficking, i.e., the non-punishment principle. However, despite wide recognition of the non-punishment principle, the status of these foreign nationals as victims of human trafficking has not been investigated into by the sending or the detaining state, leading to arbitrary deprivation of life and imposition of capital punishment on individuals who have reduced moral culpability and penalizing a victim for crimes related to their status as a trafficked person.

Our work in the region suggests that migrant workers are disproportionately targeted in the application of the death penalty for drug offences in several jurisdictions. For instance, since 2014, 67% of the persons executed for drug offences in Saudi Arabia have been foreign nationals. As on September 2017, 20 of the 25 Indian nationals on death row in Kuwait had been convicted for drug trafficking.

First, there is widespread consensus that drug offences do not meet the "most serious crimes" threshold mandated under international law.¹ Further, it appears that there is a nexus between human trafficking practices, the exploitation of persons as forced drugs mules, and the application of the death penalty for drug offences. There are indicators to suggest that a

¹ U.N. Human Rights Committee, Concluding observations: Thailand, 8 July 2005, CCPR/CO/84/THA para 14; U.N. Human Rights Committee, Concluding observations: Sudan, 29 August 2007, CCPR/C/SDN/CO/3, para 119. U.N. Office on Drugs and Crime, Note by the Executive Director, Commission on Narcotic Drugs, Drug control, crime prevention and criminal justice: a human rights perspective, Fifty-third session, Vienna, E/CN.7/2010/CRP.6–E/CN.15/2010/CRP.1(8–12 March 2010), para 25. U.N. Commission on Human Rights, Extrajudicial, summary or arbitrary execution, Report by the Special Rapporteur, submitted pursuant to Commission on Human Rights Resolution 1996/74, 24 December 1996 E/CN.4/1997/60; U.N. Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 29 January 2007, A/HRC/4/20, paras 51–52; U.N. Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum: Communications to and from governments, 18 June 2010, A/HRC/14/24/Add.1, pp. 45–46. U.N. Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 14 January 2009, A/HRC/10/44, para 66. U.N. Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 6 August 2010, A/65/255, para 17

number of migrant workers facing the death penalty for drug offences may have been victims of human trafficking, who were vulnerable people who were forced to act as ‘drug mules’ to transport drugs across the border.

In some cases, people were forced into smuggling drugs in their intestines. In at least 10 cases identified by Reprieve in 2017, South Asian nationals were executed for smuggling narcotics or psychotropic substances that were ingested. In similar cases, the UN has raised concerns with the Kingdom of Saudi Arabia that such practices may be indicators that the defendants were subject to human trafficking, calling on the Kingdom to immediately conduct a review of such death sentences.

There have also been a number of cases where domestic workers have been sentenced to death for committing murders of their employer or employer’s family members. We are concerned that in some instances, these domestic workers might have been victims of human trafficking, who were compelled to commit the crime under deeply abusive and exploitative working conditions that amount to forced labour. There are indicators that some of these women were unwitting victims of recruitment agencies who act as a front for human trafficking.

In light of these concerns, , it is imperative for the Indian law to clearly enunciate the non-punishment principle for victims of human trafficking and introduce mechanisms to identify and protect victims of human trafficking, in consonance with international human rights standards. The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018, in its current form, falls short of these obligations and lacks provisions to prevent trafficking, identify and protect victims, and ensure that they are not punished in any form for crimes related to their trafficking.

INTERNATIONAL ANTI-TRAFFICKING FRAMEWORK

i. What constitutes ‘trafficking in persons’

The international framework for the protection of victims of trafficking derives from the Palermo Protocol – the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. The Palermo Protocol supplements, and is interpreted together with, the United Nations Convention against Transnational Organized Crime.² India ratified the Palermo Protocol in 2011,³ and as such, is under the obligation to “protect and assist the victims of such trafficking, with full respect for their human rights”.⁴ The Palermo Protocol provides the following definition for trafficking in persons:

“the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, or deception, or the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.”⁵

² Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/45/49 (Vol. I) (2001) [hereinafter the “Palermo Protocol”].

³ https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en

⁴ Palermo Protocol, see above note 2 at art. 1(b).

⁵ Palermo Protocol, see above note 2 at art. 3 (a).

The Palermo Protocol also provides that the consent of the trafficked person to the intended exploitation is irrelevant where any of the means set out in the definition of trafficking have been used.⁶ It also provides that the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in the definition of “trafficking in persons” provided in the instrument.⁷

ii. Non-punishment principle for victims of human trafficking

Following from the concept of trafficking in persons outlined in the Palermo Protocol, and keeping in view the purpose of the instrument, several bodies have subsequently affirmed the importance of identification of victims of trafficking in persons and the non-punishment principle. The Working Group on Trafficking in Persons, recommended in 2009, that

*“State parties should (a) Establish appropriate procedures for identifying victims of trafficking in persons and for giving such victims support; (b) Consider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts...”*⁸

In 2010, the Working Group reaffirmed its recommendation.⁹

Further, the ‘Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking’ background paper prepared by the Secretariat for the 2010 Working Group meeting advocated establishing the principle of non-liability of illegal acts committed by victims of trafficking:¹⁰ through a “duress” based provision whereby a trafficked person is compelled to commit the offence; or through a “causation” based provision whereby offence committed by the trafficked person is directly connected or related to the trafficking; relationship, if any, between non-liability of a victim and their cooperation with the criminal justice process.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) issued Recommended Principles and Guidelines on Human Rights and Trafficking in 2002 to provide practical policy guidance, within the broader Protocol framework, on the prevention of trafficking and the protection of trafficked persons.¹¹ Recommendation principle No. 7,¹²

⁶ Palermo Protocol, see above note 2 at art. 3 (b).

⁷ Palermo Protocol, see above note 2 at art. 3 (c).

⁸ U.N. Working Group on Trafficking in Persons, Report on the Meeting of the Working Group on Trafficking in Persons Held in Vienna on 14 and 15 April 2009, 21 April 2009, CTOC/COP/WG.4/2009/2, para 12, http://www.unodc.org/documents/treaties/organized_crime/Final_report_English_TIP.pdf.

⁹ U.N. Working Group on Trafficking in Persons, Report on the Meeting of the Working Group on Trafficking in Persons Held in Vienna from 27 to 29 January 2010, 17 February 2010, CTOC/COP/WG.4/2010/6, paras 50-51, http://www.unodc.org/documents/treaties/organized_crime/2010_CTOC_COP_WG4/CTOC_COP_WG4_2010_final_report_E.pdf.

¹⁰ U.N. Working Group on Trafficking in Persons, Non-punishment and Non-prosecution of Victims of Trafficking in Persons: Administrative and Judicial Approaches to Offences Committed in the Process of Such Trafficking, 2010, CTOC/COP/WG.4/2010/4.

¹¹ OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking, <http://www.ohchr.org/Documents/Publications/Traffickingeng.pdf>. [hereinafter, “Recommended Principles and Guidelines”].

¹² Recommended Principles and Guidelines, see above note 11 at Recommended Principle No. 7

Recommended Principle No. 7 states “Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons”

Guideline No. 2,¹³ and Guideline No. 4,¹⁴ all provide that States should consider legislation that ensures that trafficked persons are not be criminally charged or prosecuted for crimes committed as a direct consequence of their situation as trafficked persons. Additionally, the UN General Assembly issued a resolution that requires States to ensure that victims of trafficking are treated as victims of crime, and urges Governments to ensure that trafficked persons are not penalised for having been trafficked.¹⁵

The Council of Europe’s Convention on Action against Trafficking in Human Beings,¹⁶ builds on the Palermo Protocol, and reiterates the possibility of not imposing penalties for victims in Article 26. The Explanatory Report clarifies that, “*Each Party can comply with the obligation established in Article 26, by providing for a substantive criminal or procedural criminal law provision, or any other measure allowing for the possibility of not punishing victims when [...] legal requirements are met [...].*”¹⁷

The Group of Experts on Action against Trafficking in Human Beings (GRETA), the monitoring body of the Council of Europe Convention on Action against Trafficking in Human Beings also published reports, which provide that “*Article 26 of the Council of Europe Convention, read in conjunction with the Explanatory Report, establishes a positive obligation on Parties to adopt measures that specifically deal with the non-liability of victims of trafficking.*”¹⁸ Significantly, the Council of Europe’s Convention on Action against Trafficking in Human Beings also provides for the identification of victims of human trafficking.¹⁹

The 2011 European Union Directive 2011/26/EU on preventing and combating trafficking in human beings and protecting its victims makes provisions for non-punishment for victims of

¹³ Recommended Principles and Guidelines, see above note 11 at Recommended Guideline No. 2.

Recommended Guideline No. 2 includes the following provision: “States...should consider... [e]nsuring that trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons.

¹⁴ Recommended Principles and Guidelines, see above note 11 at Recommended Guideline No. 4.

Recommended Guideline No. 4 includes the following provision: “States should consider... [e]nsuring that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons”.

¹⁵ U.N. General Assembly, Resolution on Traffic in Women and Girls, 31 January 2001, A/RES/55/67, para 6.

The resolution requires States to “[e]nsure that victims of trafficking in persons are treated as victims of crime and that national legislation effectively criminalizes all forms of trafficking” and urges “[g]overnments to take all appropriate measures to ensure that identified victims of trafficking in persons are not penalized for having been trafficked and that they do not suffer from victimization as a result of actions taken by Government authorities.”

¹⁶ Council of Europe, Convention on Action against Trafficking in Human Beings, Warsaw, 16.V.2005, art. 26, <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197>.

Article 26 provides that, “Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so”

¹⁷ Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, 16.V.2005, para 274, <https://rm.coe.int/16800d3812>.

¹⁸ Meeting Report of the Committee of the Parties, Council of Europe, Convention on Action against Trafficking in Human Beings, Seventh meeting of the Committee of the Parties, Strasbourg, THB-CP(2012)RAP7 (30 January 2011), p. 12, <https://rm.coe.int/16805ab673>.

¹⁹ Council of Europe, Convention on Action against Trafficking in Human Beings, Warsaw, 16.V.2005, art. 10, <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197>.

trafficking,²⁰ and states that exploitation of persons shall include the “*exploitation of criminal activities.*”²¹

iii. Identification and protection of victims of human trafficking

The Organization for Security and Co-operation in Europe (OSCE), in consultation with the Alliance against Trafficking in Persons Expert Co-ordination Team, released a Guidance in 2013 that explains that the rationale for non-punishment of victims of trafficking is based on the notion that because trafficked persons²² It provides that “*have no, or limited, free will because of the degree of control exercised over them and the methods used by traffickers . . . they are not responsible for the commission of the offence and should not therefore be considered accountable for the unlawful act committed.*”²³

It highlights the need to identify victim of trafficking to effectively apply the non-punishment principle, and consequently protect the victims. It further states that “*the vulnerable situation of the trafficked person becomes worse where the State fails to identify such a person as a victim of trafficking, as a consequence of which they may be denied their right to safety and assistance as a trafficked person and instead be treated as an ordinary criminal suspect.*”²⁴

The OSCE Guidance also outlines that the non-punishment principle may be violated both directly and indirectly. It provides that:

*“Indirect violation results from a failure of the State authorities to identify a person as a victim of trafficking, which, consequently, leads to an incomplete picture of the circumstances of a committed offence and criminal accountability. The direct violation of the non-punishment principle arises from situations where State authorities dealing with an offence committed by the victim of trafficking “ought to have been aware” of her/his status as a victim of trafficking but fail to attach appropriate significance to this fact when deciding upon her/his responsibility.”*²⁵

Significantly, the OSCE Guidance provides that non-punishment principle should apply in cases of forced criminality, i.e., when the victim has been compelled to carry out an offence, such as drug trafficking using means outlined in the definition of trafficking in human beings. The Guidance states that:

“The SR takes the view that the non-punishment provision should be interpreted in light of the definition of trafficking in human beings, especially with regard to a comprehensive understanding of compulsion, i.e., inclusive of all means foreseen in the international definition of trafficking in human beings. Being “compelled” to commit a crime thus includes the full array of factual circumstances in which victims of trafficking act without autonomy because traffickers exercise control over them through

²⁰ European Union: Council of the European Union, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L. 101/1-101/11, 2011/36/EU (15 April, 2011), art. 8, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0036&from=en> [hereinafter, “EU Directive 2011/36/EU”].

Article 8 provides that, “Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts [i.e., offences concerning trafficking in human beings] referred to in Article 2.”

²¹ EU Directive 2011/36/EU, see above note 20 at art. 2.

²² OSCE, Policy and Legislative Recommendations towards the Effective Implementation of the Non-Punishment Provision with Regard to Victims of Trafficking, <http://www.osce.org/secretariat/101002?download=true> [hereinafter “OSCE Guidance”].

²³ OSCE Guidance, see above note 22 at para 5.

²⁴ OSCE Guidance, see above note 22 at para 9.

²⁵ OSCE Guidance, see above note 22 at para 28.

abusive, coercive and illicit means, including abuse of power or a position of vulnerability. Such circumstances are typical of a trafficking situations: victims may act under compulsion and may be compelled to commit offences. Thus the non-punishment provision applies to all of these factual scenarios which are linked to the trafficking of victims.”²⁶

The non-punishment principle has also been affirmed in the Brussels Declaration on Preventing and Combating Trafficking in Human Beings,²⁷ and the Miami Declaration of Principles of Human Trafficking.²⁸

DRAWBACKS IN THE TRAFFICKING OF PERSONS (PREVENTION, PROTECTION AND REHABILITATION) BILL 2018

The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 [hereinafter, the Bill] proposed by the Ministry of Women and Child Development fails to meet India’s obligations under the Palermo Protocol outlined above, and has, amongst others, the following drawbacks:

i. Failure to incorporate the non-punishment principle

The Palermo framework mandates that a trafficked person must not be punished in any form for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts, and as such, India is under an obligation to incorporate the same. However, the Bill falls short of meeting this obligation.

Although the Bill incorporates a non-criminality provision in Clause 45, it restricts the scope of the provision by adding requirements that victims of human trafficking must meet to be eligible for the protection provided by the non-criminality provision – this is in stark contrast to the non-punishment principle provided under the international framework, and undermines the objective of the Palermo protocol of protecting victims of human trafficking.

Clause 45 of the Bill is as follows:²⁹

45. Nothing is an offence which is committed or attempted to have been committed by a victim, punishable with death or imprisonment for life or for imprisonment for ten years, if the offence is committed or attempted to have been committed, under coercion or compulsion or intimidation or threat or undue influence by any person and where, at the time of committing the offence, the victim is subjected to reasonable apprehension of his death, grievous hurt or any other injury to him, or to any other person whom he is interested in.

It is submitted that the non-criminality provision in Clause 45 provides inadequate protection to victims of human trafficking by including criteria relating to the kind of offences and the conditions under which the offence is committed or is attempted for the non-punishment

²⁶ OSCE Guidance, see above note 22 at para 70.

²⁷ E.U., Brussels Declaration on Preventing and Combating Trafficking in Human Beings, 14981/02 (29 November 2002), para 7, <http://www.unhcr.org/refworld/docid/4693ac222.html>.

It provides that, “Trafficked victims must be recognized as victims of serious crime. Therefore, they should not be re-victimized, further stigmatized, criminalized, prosecuted or held in detention centers for offences that may have been committed by the victim as part of the trafficking process.”

²⁸ The Miami Declaration of Principles on Human Trafficking, 1 INTERCULTURAL HUMAN RIGHTS L. REV. 11 (2006) (10 February 2005), para 28, <http://hrlibrary.umn.edu/instreet/miami-declaration2006.html>.

It provides that, “The trafficked person must be recognized as the victim of the crime of trafficking. States must not criminalize the status of the trafficked person and should not penalize the victim for illegal acts, such as illegal immigration or prostitution, incident or related to the trafficking act.”

²⁹ The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill 2018, Clause 45. [“The Bill”]

principle to apply. In doing so, the Bill leaves out a class of victims who are entitled to be protected by the State.

Although it is a positive step that Clause 45 acknowledges that victims of human trafficking should not be penalized for crimes that are punishable with death or imprisonment for life or for imprisonment for ten years, however, this rider has the effect of restricting the application of the non-punishment principle to a certain class of crimes, while the non-punishment principle under the Palermo framework applies to *all* unlawful acts that a victim is compelled to commit.

Further, the Palermo framework envisages that the protection of the non-punishment principle would be afforded to *all* victims who are compelled to commit unlawful acts – i.e. once it is proved that one is a victim of human trafficking, and the crime relates to their status as a trafficked person, the victim does not have the burden to show additional conditions under which the crime was committed. However, Clause 45 places the burden on victims to not only establish their status as a trafficked person, but also that the crime was committed or attempted to have been committed *under coercion or compulsion or intimidation or threat or undue influence by any person*. Significantly, these conditions i.e., “*coercion or compulsion or intimidation or threat or undue influence by any person*” are more restrictive than conditions under which a person is identified as a victim of human trafficking, thus, exposing a class of victims of trafficking to punishment.

Similarly, Clause 45 adds the condition that “*at the time of committing the offence, the victim is subjected to reasonable apprehension of his death, grievous hurt or any other injury to him, or to any other person whom he is interested in*” – this waters down the safeguards provided under the international framework by narrowing the scope of protection provided by the non-punishment principle and placing the burden on the victim to establish that the crime was committed under these conditions.

Significantly, even though the Bill alludes to the fact that there is cross-border trafficking, and regular instances of people being trafficked out of India to other States, it fails to specify how the non-punishment principle would apply to its nationals outside the country. Thus, it fails to provide how it would ensure that Indian nationals trafficked out of the country will be protected from being punished, in any form, in a foreign legal system, for crimes that they were compelled to commit. For instance, the Bill provides no guidance on how an Indian national in Saudi Arabia who was compelled to act as a drug mule but was not identified as such by the authorities in Saudi Arabia, will be protected from being punished in any form for a crime that he/she was compelled to commit as a consequence of his/her status as a trafficked person.

ii. Failure to incorporate identification and protection mechanisms

The Bill fails to provide identification and protection mechanisms for migrant workers being trafficked out of the country. Although Clause 4 of the Bill provides that the National Anti-Trafficking Bureau shall perform some functions that relate directly to persons being trafficked outside the country, it provides no guidance on how people being trafficked out of the country will be identified and protected.

Some of the relevant provisions of Clause 4 are as follows:³⁰

“4. The Bureau shall perform the following functions in relation to trafficking of persons, namely:-

- (i) co-ordinate and monitor surveillance and preventive efforts along with the known or probable routes;

³⁰ The Bill, see above note 29, Clause 4.

(ii) facilitate surveillance, enforcement and preventive steps at source, transit and destination points;

...

(v) increase international co-operation and co-ordination with concerned authorities in foreign countries and international organizations, in operations and long term intelligence in investigation, mutual legal assistance, to facilitate universal action for prevention and suppression and to implement any obligation under the various international conventions and protocols that are in force in respect of counter measures;

...

(xi) co-ordinate investigating activities among the Districts, States and with other countries in case of cross-border trafficking of persons;

(xii) co-ordinate the investigation, where international ramifications are reported or suspected;

....

(xvi) co-ordinate with any national or international investigating or law enforcement agencies and civil society organizations;

(xvii) facilitate inter-State and international transfer of evidence in investigation as well as video conferencing in judicial proceedings;

...

(xxi) facilitate inter-State and trans-border transfer of evidence and materials, witnesses and others for expediting prosecution;

(xxiv) monitor and facilitate victim and witness protection protocols, rules and procedures including video conferencing during trial of offences which have ramifications across States and beyond borders; and

(xxv) develop minimum standards of care and advice for all concerned, in matters of compliance”

It is submitted that none of these sub-clauses or any other provision of the Bill provides any clear guidance on how identification of victims would be effected. It is unclear what “*international ramifications*” means, how the “*known or probable routes*” are being determined, what “*surveillance*” along such routes would achieve, how the National Anti-trafficking bureau can be approached, the basis on which investigating activities be co-ordinated or evidence be shared and the risks they pose, how victim and witness protection protocols can be facilitated when such victims and witnesses are in another country, especially if the victim himself/herself has been charged with an offence relating to their status as a trafficked person, as well as what “*minimum standards of care and advice*” means.

Although Clause 4(v) clearly reiterates that the Bureau shall implement any obligation under the various international conventions and protocols that are in force in respect of counter measures, the Bill fails to do so. The Bill does not provide any effective identification and protection mechanisms, or any guidance on the representations that the government would make for their nationals who are victims of human trafficking, and might be facing punishment in a foreign court for crimes that they were compelled to commit. Identification of such victims at the outset can ensure that appropriate charging decisions can be made and that victims can be provided with adequate support. However, lack of effective identification mechanisms places unidentified victims at risk of prosecution and criminalization.

Relatedly, Clause 47(3) provides that in trials related to any offence under the Bill, “subject to the provisions contained in section 301 of the Code of Criminal Procedure, 1973, the victim shall be entitled to the assistance of a legal counsel of his choice for any offence under this Act: Provided that if the victim is unable to afford a legal counsel, the Legal Services Authority shall provide a counsel to him.”³¹ However, the Bill lacks any such provisions for Indian nationals who might be victims of human trafficking and are embroiled in litigation related to their status as a trafficked person in foreign Courts. Although Indian consulates sometimes provide a list of empanelled lawyers to Indian nationals overseas, access to such legal assistance is not facilitated or financed – leaving these victims unrepresented and more vulnerable.

iii. Failure to incorporate adequate safeguards while trans-border sharing of evidence, materials, information or co-ordinating investigating activities with other countries

In an attempt to create a “*conducive legal, economic and social environment for the victims of trafficking*” and “*address the transnational nature of the crime*”,³² Clause 4 of the Bill has a number of provisions on mutual legal assistance, co-ordination of investigating activities and sharing of evidence and materials with other countries³³. However, the Bill fails to put in place adequate safeguards to ensure that such sharing and co-ordination does not put victims of human trafficking at risk, which may result in gross infringement of their rights.

It is submitted that although the Bill aims to protect victims of human trafficking and prosecute offenders, it ignores the many instances when human trafficking is coupled with another offence, that a victim was compelled to commit, and is then prosecuted for such acts. Reprieve’s work shows that a number of migrant workers either executed or facing execution for drug trafficking might have been victims of human trafficking who were used as drug mules, but were not identified or protected as such by the detaining state. In such situations, co-ordination of investigating activities or sharing of evidence, without adequate safeguards or assurances from the detaining state about the use of such information in a manner that is consistent with international human rights standards, can prejudicially affect the rights of victims of human trafficking.

There are concerns that the lack of safeguards or evaluation of risks of human rights abuses can lead to imposition of the death sentence on a victim of human trafficking for a related crime and contribute to unsafe convictions in countries where there is non-compliance with fair trial and due process guarantees.

For instance, it is well-documented that foreign nationals in the Gulf are sentenced to death following patently unfair trials, where they do not understand the language in which trials are conducted, lack legal representation, do not have consular access, are subjected to wide discretionary powers vested with the judges, and lack information about the appeals and pardon process. Further, Gulf States often rely on torture and other forms of ill-treatment to obtain confessions which are subsequently used to secure convictions. In this context, co-ordination of investigative activities and sharing of information about these migrant workers can contribute to such convictions, and death sentences, which constitutes an arbitrary deprivation of life, in violation of the right to fair trial under international and domestic law.³⁴

Relatedly, such co-ordination and sharing of information with countries who don’t have effective identification mechanisms, and/or well-codified and effective non-punishment provisions, would result in victims being penalized for crimes they have been compelled to

³¹ The Bill, see above note 29, Clause 47.

³² The Bill, see above note 29, Statement of Objects and Reasons, Clause 4(b).

³³ The Bill, see above note 29, Clause 4.

³⁴ International Covenant on Civil and Political Rights, Articles 6 and 14.

commit often under deception, threat or force, and not only violate the Palermo framework, but also the aims of the existing Bill.

Moreover, there is lack of clarity on whether such co-ordination and sharing of information will happen in accordance with the procedure laid out in India's Mutual Legal Assistance Treaties in criminal matters with other countries. However, even if this is the case, such treaties fail to incorporate the safeguards discussed above and have no procedure on acquiring assurances from the detaining state on the premise of which information can be shared.

Thus, it is submitted that the Bill fails to incorporate any safeguards that would ensure that victims of human trafficking are protected in accordance with international and domestic obligations, and carries the risk of contributing to victims being wrongly punished for crimes that they were compelled to commit, thus, undermining the very aim of the proposed legislation.

iv. Failure to incorporate adequate preventive measures

The Bill aims to prevent the trafficking in persons and incorporates some measures to this effect; however, it fails to address certain key issues that contribute to trafficking in persons.

Clause 20 focuses on preventive measures by State and District Anti-Trafficking Committees.³⁵ Clause 20(2)(iv) specifies that these measures include “*co-ordinating with corporate sector to implement various schemes, programmes for the prevention of trafficking of persons*”. It is unclear what the “corporate sector” refers to, or what the scope or intention behind this “co-ordination” is.

It is submitted that corporations can play an important role in preventing human trafficking by ensuring supply chain controls and transparency in recruitment practices. It is imperative for the Bill to incorporate measures that require companies to undertake activities to assess the risk of and eliminate human trafficking from their businesses and supply chains, have adequate reporting or disclosure requirements for such activities, and other provisions to enforce corporate liability in case of non-compliance - such as injunction, specific performance requiring compliance, and/or an unlimited fine.³⁶ Similarly, given that a large number of people are trafficked for labour, the Bill must incorporate provisions relating to regulation and recruitment agencies, who often act as a front for human trafficking.

Moreover, Clause 4(x) places the obligation on the National Anti-Trafficking Bureau to “*bring out resource material including education curriculum for children, Panchayat Raj institutions, enforcement agencies, judicial officers and other stakeholders.*” It is submitted that the Bill should also incorporate bringing out resource material and conducting mandatory trainings for migrant workers who seek to go overseas and might end up becoming unwitting victims of recruitment agencies in order to empower them.

³⁵ The Bill, see above note 29, Clause 4.

³⁶ United Nations Guiding Principles on Business and Human Rights, https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf ; United Nations The Corporate Responsibility to Respect Human Rights: An Interpretative Guide, https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf; United Nations Guiding Principles Reporting Framework Guidance, <https://www.ungpreporting.org/>; European Parliament resolution of 25 October 2016 on corporate liability for serious human rights abuses in third countries (2015/2315(INI)) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016IP0405&from=EN> ; United Kingdom, The Modern Slavery Act, 2015; United States of America, California Transparency in Supply Chains Act, 2010; France, Law relating to the Duty of Vigilance of the Parent Companies and the Companies giving Orders.



It is submitted that the Bill fails to invoke preventive measures that would address crucial areas of concern that contribute to trafficking in persons.

RECOMMENDATIONS

It is recommended that the Bill addresses the concerns outlined in this submission and ensures that it has adequate provisions that are in line with India's international obligations.

It is reiterated that the Bill must incorporate non-punishment provisions, as well as effective identification and protection mechanisms, in the context of Indian nationals who are trafficked out of the country, many of who might be facing criminal sanctions in foreign courts for related crimes that they were compelled to commit.

Further, it is imperative to incorporate adequate safeguards while providing mutual legal assistance, co-ordinating investigating activities or sharing evidence, material or other information to ensure that these activities do not contribute to unsafe convictions or a death sentence for a victim of human trafficking for a crime they were compelled to commit. The Bill must also include provisions aimed at corporations and recruitment agencies that would prevent human trafficking and enforce liability in case of breaches.

It is strongly recommended that the Ministry refers the Bill to the Parliamentary Standing Committee to incorporate the measures recommended above, and undertake a study on patterns of human trafficking and forced criminality both within and outside India, and ensure that the Bill has adequate mechanisms to identify and protect the victims of human trafficking.