



Policy Brief: Vulnerability of Migrant Workers and their Right to Return to the Country of Origin

This policy brief (brief) has been prepared in relation to migrant workers' right to return. The brief is centered to Nepali migrants' right to return to Nepal during the existing COVID-19 crisis. The brief finds that there is an absence of legal framework in Nepal to help address and facilitate the return of Nepali migrant workers at the time of crisis in a country of destination. The brief aims to present the Government of Nepal with recommendations on two issues. Firstly, in relation to the immediate measures that need to be undertaken in response to the COVID-19 crisis and secondly, in relation to the formulation of a framework to address and facilitate the right to return of migrant workers.

The brief begins by presenting the legal position of the right to return in international law, both in general and also specific to migrant workers, followed by Nepal's legal position on migrant workers' right to return. Next, the brief shows the vulnerability faced by migrant workers and how this is exacerbated during times of crisis such as the COVID-19 pandemic. The brief explores the various past state practices during times of crisis. This is followed by an analysis of the current status of migrant workers' and their return in Nepal. Finally, the brief provides a list of recommendations to the Government of Nepal.

The Right to Return

The right to return is the right of individuals that entitles them to return to the country of their origin or nationality. It acknowledges "the special relationship of a person to the country they belong to".¹ In this sense, the link to the county of origin is much broader than a person simply holding the formal citizenship of a country either through nationality acquired at birth or by conferral, it also includes persons with "special ties to or claims in relation to a given country" and ones who "cannot be considered to be a mere alien".² Therefore, while holding the citizenship of a country is a proof of a

¹ Human Rights Committee, CCPR General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, para 19, available at <https://undocs.org/CCPR/C/21/Rev.1/Add.9>, accessed on 18 May 2020.

² Ibid, para 20.

person's link with that country, it is not an essential requirement for a person to exercise its right to return, as long as they have special ties with the country in question.

The right to return to one's own country is a widely and freely exercised right across the world. Due to its commonplace and uncontroversial character, the concept of the right to return is considered to be free from "diplomatic and juridical contention".³ The significance of this right is perceptible, however, when persons' ability to return is hampered in cases such as those of refugees, asylum seekers, displaced persons, or migrants in countries affected by crises, which necessitates immediate return.

Further, the importance of the right to return also lies in its interdependence with numerous other human rights. The right to return is directly related to the right to hold a nationality. It also shares ties with fundamental rights such as "the right to life, liberty and security of person; the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; the right not to be subjected to arbitrary arrest or detention or exile and the right to freedom of movement".⁴

Right to Return under International Law

The right to return is firmly established under international law. International law guarantees freedom of movement⁵ which constitutes the "right to move freely within a country where one is lawfully resident, the freedom to leave any state, including one's country of origin, and the right to return to one's own country".⁶

The origin of the modern iteration of this right in international law can be traced back to the Universal Declaration of Human Rights (UDHR). Article 13 (2) of UDHR states that, "Everyone has the right to leave any country, including his own, and to return to his country."⁷

The UDHR provision has largely inspired article 12 (4) of the International Covenant on Civil and Political Rights 1966 (ICCPR) which also recognizes the right to return of a person. Article 12 (4) provides that, "No one shall be arbitrarily deprived of the right to enter his own country."⁸

³ W. Thomas Mallison & Sally V. Mallison, 'The Right of Return', Vol. 9, No. 3, Journal of Palestine Studies, 1980, p. 125.

⁴ UN High Commissioner for Refugees, Voluntary Repatriation: International Protection, Geneva, 1996, s. 2.1.

⁵ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), art 13; International Covenant on Civil and Political Rights (16 December 1966), 999 UNTS 171, art 12, acceded to by Nepal on 15 May 1991.

⁶ Inter-Parliamentary Union, Migration, Human Rights and Governance, Inter-Parliamentary Union, ILO & UNOHCHR, 2015, p. 123.

⁷ UDHR (n 5).

⁸ ICCPR (n 5).

The right to return as enshrined in the ICCPR is binding upon its 173 State parties (subject to reservation, if any). To this end, article 12 of the ICCPR was extensively interpreted in General Comment no. 27 (GC 27) adopted by the Human Rights Committee (HRC), the body responsible for the monitoring of ICCPR implementation.⁹

In GC 27, the HRC sets out the various facets associated with article 12 (4) of the ICCPR, which includes the right to remain in one's own country and therefore prohibition on enforced transfers and expulsions to other countries, right to return after having left one's own country as well as the right of citizen to come to the country for the very first time even if the person was born elsewhere.¹⁰ The Committee also recognizes the right to return as being of utmost importance for refugees seeking voluntary repatriation.¹¹

The right to return has also been recognized in other international instruments binding upon concerned state parties, such as the International Convention on the Elimination of All Forms of Racial Discrimination 1965;¹² Convention on the Rights of the Child 1989;¹³ and Migrant Workers (Supplementary Provisions) Convention 1975 (ILO C143).¹⁴ In addition, some regional human rights instruments have included provisions guaranteeing the right to return. These include the African Charter on Human and People's Rights 1981;¹⁵ the American Convention on Human Rights 1969;¹⁶ and Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms to those already included in the Convention and in the first Protocol thereto 1963.¹⁷

⁹ 'Human Rights Committee', United Nations Human Rights Office of the High Commissioner available at <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx>, accessed on 9 May 2020.

¹⁰ GC 27 (n 1), para. 19.

¹¹ Ibid.

¹² International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965), 660 UNTS 195, art 5 (d) (ii), acceded to by Nepal on 30 January 1971.

¹³ Convention on the Rights of the Child (20 November 1989), 1577 UNTS 3, art 10 (2), acceded to by Nepal on 14 September 1990.

¹⁴ Migrant Workers (Supplementary Provisions) Convention (24 June 1975), C 147, preamble.

¹⁵ African Commission on Human and Peoples' Rights (27 June 1981), 1520 UNTS 217, art 12 (2).

¹⁶ American Convention on Human Rights, (22 November 1969), 1144 UNTS 123, art 22 (5).

¹⁷ Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (16 November 1963), ETS 46, art 3.

The right to return has also been underscored in various UN General Assembly resolutions¹⁸ and UN Security Council resolutions,¹⁹ especially in the context of refugees and displaced persons.

The right to return for displaced persons has also been secured under the fourth Geneva Convention 1949.²⁰

The inclusion of the right to return in such widely ratified instruments and texts which have attained customary status (such as UDHR and Geneva Convention) has led to scholars making assertions that this right itself has attained the status of Customary International Law.²¹ Moreover, the return of displaced persons has been enumerated in the ICRC IHL Database as one of the Customary International Humanitarian Laws.²²

The Right to Return of Migrant Workers

The right to return (as outlined above) is applicable to all nationals residing outside of their own country irrespective of their status²³ in the foreign country as refugees, asylum seekers, displaced persons or migrant workers. While migrant workers enjoy the right to return generally under international law, the right to return specific to migrant workers has been recognized in the International Convention on the

¹⁸ UN General Assembly, Protection of Migrants, 20 December 2004, A/RES/59/194, preamble; UN General Assembly, Human Rights of Migrants: Mandate of the Special Rapporteur on the Human Rights of Migrants, 6 July 2011, A/HRC/RES/17/12, para 5.

¹⁹ UN Security Council, Resolution 1014, 15 September 1995, S/RES/1014 (1995); UN Security Council, Resolution 1100 the Situation in Liberia, 27 March 1997, S/RES/1100 (1997); UN Security Council, Resolution 1145 the Situation in Croatia, 19 December 1997, S/RES/1145 (1997).

²⁰ Geneva Convention relative to the Protection of Civilian Persons in time of War (12 August 1949), 75 UNTS 287, art 49 para 2.

²¹ See, Kathleen Lawand, 'The Right to Return of Palestinians in International Law', Vol. 8, No. 4, International Journal of Refugee Law, 1996, p. 544; John Quigley, 'Family Reunion and the Right to Return to Occupied Territory', Vol. 6, No. 223, Georgetown Immigration Law Journal, 1992; Loius B. Sohn & Thomas Buergenthal (eds), The Movement of Persons Across Borders (Studies in Transnational Legal Policy, No. 23), The American Society of International Law, Washington DC, 1992, p. 7; Alfred de Zayas, 'The Illegality of Population Transfers and the Application of Emerging International Norms in the Palestinian Context', Vol. 6, No. 17, The Palestine Yearbook of International Law, 1990/91; Hurst Hannum, The Right to Leave and Return in International Law and Practice (International Studies in Human Rights), Nijhoff, 1987, pp. 7-16; Stig Jagerskiold, 'The Freedom of Movement', in Louis Henkin (ed), The International Bill of Rights: the Covenant on Civil and Political Rights, Columbia University Press, New York, 1981, p. 180; cited in Eric Rosand, 'The Right to Return Under International Law Following Mass Dislocation: the Bosnia Precedent?', Vol. 19, No. 4, Michigan Journal of International Law p. 1091, 1998, p. 1121.

²² ICRC, 'Rule 132. Return of Displaced Persons', IHL Database available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule132, accessed on 9 May 2020.

²³ 'Human Rights Watch Policy on the Right to Return', Human Rights Watch available at <https://www.hrw.org/legacy/campaigns/israel/return/iccpr-rtr.htm>, accessed on 18 May 2020.

Protection of the Rights of All Migrant Workers and Members of Their Families of 1990 (CMW), one of the nine UN core conventions.

Article 8 (2) of CMW recognizes the right of migrant workers and the members of their families “to enter and remain in their State of origin” at any time.²⁴ The Convention defines a ‘migrant worker’ as a person who “is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”²⁵

The Convention is applicable during the entire migration process of the migrant workers and their families and imposes various obligations upon the State of origin, State of transit and State of employment, including on the matter of orderly return of migrant workers to the State of origin.²⁶

While the afore-mentioned human rights instruments recognize the right to return, there is an apparent vacuum in defining the modalities of return.” The Global Compact for the Safe, Orderly and Regular Migration (GCM)²⁷ formulated in 2016 as an outcome of intergovernmental consultations and negotiations, provides comprehensive guidelines on modalities of return.

Although non-binding, the adoption of the GCM on 10 December 2018 by the UN General Assembly with 152 votes in favor²⁸ and only five against is viewed as a “historical moment”²⁹ and a “significant achievement”³⁰. The GCM was endorsed by countries that send and receive the majority of migrant workers from South and South East Asia.

Objective 21 of the GCM commits states to ‘cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration’, under Objectives for Safe, Orderly and Regular Migration, is particularly significant in facilitating State cooperation. It states:

²⁴ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (18 December 1990), 2220 UNTS 3, art 8 (2).

²⁵ Ibid, art 2 (1).

²⁶ Ibid, art 67 (1).

²⁷ UN General Assembly, Global Compact for Safe, Orderly and Regular Migration, 10 December 2018.

²⁸ ‘General Assembly officially adopts roadmap for migrants to improve safety, ease suffering’, 19 December 2018, UN news available at <https://news.un.org/en/story/2018/12/1028941>, accessed on 14 May 2020.

²⁹ ‘Historic moment’ for people on the move, as UN agrees first-ever Global Compact on migration’, 13 July 2018, UN news available at <https://news.un.org/en/story/2018/07/1014632>, accessed on 14 May 2020.

³⁰ ‘Statement attributable to the Spokesman for the Secretary-General on the end of the negotiations of the Global Compact for Safe, Orderly and Regular Migration’, 13 July 2018, UN news available at <https://www.un.org/sg/en/content/sg/statement/2018-07-13/statement-attributable-spokesman-secretary-general-end-negotiations>, accessed on 14 May 2020.

“ We (the States) commit to facilitate and cooperate for safe and dignified return and to guarantee due process, individual assessment and effective remedy, by upholding the prohibition of collective expulsion and of returning migrants when there is a real and foreseeable risk of death, torture, and other cruel, inhuman, and degrading treatment or punishment, or other irreparable harm, in accordance with our obligations under international human rights law. We further commit to ensure that our nationals are duly received and readmitted, in full respect for the human right to return to one’s own country and the obligation of States to readmit their own nationals. We also commit to create conducive conditions for personal safety, economic empowerment, inclusion and social cohesion in communities, in order to ensure that reintegration of migrants upon return to their countries of origin is sustainable.³¹ **”**

Protection Framework for Migrant Workers from Nepal

The domestic laws of Nepal do not have explicit provisions recognizing the right to return for its citizens. However, the Constitution of Nepal guarantees its citizen the freedom of movement in Nepal³² and the right against exile³³ as fundamental rights. These guarantees cover some aspects of article 12 (4) of ICCPR as observed by the HRC and is thus indicative of an implicit recognition by Nepal of the right to return for Nepali migrant workers.

Nepal is also obligated as per the Nepal Treaty Act 1990 to respect the right to return of migrant workers under various international conventions it has ratified including the ICERD and the ICCPR impose an obligation on Nepal to allow the return of its nationals, which would include migrant workers. The significance of these international obligations is even greater when it is considered that there are very few exceptions to the right to return. However, the CMW is not binding on Nepal as it is not a state party to it.

The HRC has observed that there are only a “few, if any, circumstances” in which individual can reasonably be deprived of their right to return or enter their own country.³⁴ Although the General Comment 27 does not elaborate upon such circumstances, it is accepted that the right to return is

³¹ GCM (n 27), para 37.

³² Constitution of Nepal, 2015, art 17 (2) (e).

³³ Constitution of Nepal (n 32), art 45.

³⁴ GC 27 (n 1), para 21.

not subject to the restriction of article 12 (3) ICCPR, which is only applicable to freedom of movement in articles 12 (1) and 12 (2) of the ICCPR.³⁵ Legal literature has identified an officially proclaimed state of public emergency as being the only exception to the right to return.³⁶ Therefore, Nepal will only be able to restrict the right to return of its nationals upon formally proclaiming a state of emergency.

Domestically, the primary obligation of Nepal to facilitate the return of its migrant workers stems from the Foreign Employment Act 2007. Section 75 (2) of the Act obligates the Government of Nepal to arrange for the return of Nepali migrant workers immediately from countries suffering from war, epidemic or natural calamity through diplomatic mission or labour attaché.³⁷

Increased Vulnerabilities Migrant Workers Confront

Migrant workers can be vulnerable due to two key reasons. Firstly, due to the very nature of their work. Migrant workers leave their country of origin and families to go work in an unfamiliar circumstances often experiencing severe culture shock, loneliness, and emotional trauma accentuated by lack of access to relevant information resulting communication barriers, which makes them more vulnerable to abuse. Migrant workers, including undocumented workers, involved in low skill jobs with poor pay in poorly regulated sectors are exposed to added vulnerability.³⁸

Secondly, the attitude of concerned States and State officials is concerning. The country of origin tends to consider that all the responsibilities towards migrant workers have shifted to the country of destination and therefore has no obligation to protect them.³⁹ Even where political will exists, their capacities to address issues of migrant workers in a foreign land are limited. On the other hand, the destination countries are reluctant to provide migrant workers the same protection as they do to their nationals. In the case of Nepal, countries in Gulf Cooperation Council (GCC) and Malaysia are top

³⁵ Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary, 2nd edition, N.P. Engel, Arlington, 2005, p. 282; Human Rights Watch (n 23); UN General Assembly, Third Committee, 259th Meeting, 17 November 1959, A/C.3/SR.959, para. 31.

³⁶ ICCPR (n 5), art 4; Ronald Bayer et al. (eds), Public Health Ethics: Theory, Policy and Practice, Oxford University Press, 2005, p.272; Howard Adelman & Elazar Barkan, No Return, No Refuge: Rites and Rights in Minority Repatriation, Columbia University Press, New York, 2011, p. 4; Roberta Cohen & Francis M. Deng, Masses in Flight: The Global Crisis of Internal Displacement, Brookings Institution Press, Washington D.C., 1998, p. 90; Eyal Benvenisti, Chaim Gans & Sari Hanafi (eds), Israel and the Palestinian Refugees, Springer, Berlin, 2007, p. 203.

³⁷ Foreign Employment Act, Nepal, 2007, (Baideshik Rojgaar Ain 2064), s 75 (2).

³⁸ Asia Pacific Forum, Promoting and Protecting the Rights of Migrant Workers, Asia Pacific Forum of National Human Rights Institutions, Australia, 2012, p. 67.

³⁹ Raluca Dimitriu, 'Responsibilities of the Origin State in the Protection of Migrant Workers. The Case of Romania', vol. 12, Cahiers de l'Urmis, 2009, p. 1.

destination countries for a large number of Nepali migrant workers and their rights and welfare in these countries are massively violated.

Migrant workers are prone to being exploited not only after they reach the destination countries, they face challenges in the transit State and even during the pre-departure stage by the officials of the country of origin.⁴⁰ Upon arrival in destination countries, migrants are often in debt and without their identity/travel documents. They are compelled to sign new contracts in certain cases, even when a contract was already signed, under duress with less pay and unfavorable conditions than what was agreed upon. As a result they are subjected to terrible working conditions,⁴¹ making them vulnerable to abuse at the hands of the employers and Government officials. They are further subjected to such abuse as discrimination, unsafe work environment, arbitrary detention, deportation, along with various other human rights and labour laws violations.⁴²

The severity of vulnerability varies based on gender, sectors of employment as well as the status of migration, For instance, women and children are more prone to exploitation and cumulative discrimination. Women migrant workers are subjected to multiple discrimination and intersectional discrimination.⁴³ They generally work as domestic workers, a field typically not covered by the labour laws of most receiving States. Likewise, children are exposed to a situation of double vulnerability.⁴⁴

The vulnerability is further exposed during the time of crises, caused due to economic reasons, armed conflicts or natural disasters. In the past, concerned states have taken various measures to address situation of crises and help migrant workers, both by way of evacuation and rehabilitation after return. Few such instances have been presented in the next section of the brief.

⁴⁰ Asia Pacific Forum (n 38), p 53.

⁴¹ Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families, General Comment No. 1 on migrant domestic workers, 23 February 2011, CMW/C/GC/1, paras 11-13.

⁴² Asia Pacific Forum (n 38), p 15.

⁴³ Ibid, p. 43.

⁴⁴ Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families & Committee on the Rights of the Child, Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, para 3.

A Comparative Analysis of the Practices Adopted During Various Crisis

Economic crisis

Migrant workers are generally “the last to be hired and the first to be fired”,⁴⁵ making them especially vulnerable to losing their jobs during an economic crisis. This was apparent during the global recession of 2008 when the migrant workers were badly affected. This vulnerability of losing one’s job is compounded by limited access of migrant workers to social safety nets. This results in migrant workers accepting unfair deals to work for a substandard pay in abusive conditions.⁴⁶

It should be noted that, generally, the number of returnees is not as great during an economic crisis is lesser in comparison to the number of returnees during armed conflicts or natural disasters.⁴⁷ Migrants with strong social networks tend to stay and maneuver through the hard times.⁴⁸ It is usually the migrants who are faced with a high cost of living in the country of employment or even unemployment that choose to return home.⁴⁹

The Nepali migrant workers tend to belong to the second category, i.e. those who lack a social networks and are prone to be laid off, as most of them are seen as dispensable unskilled labor. In a situation of economic crisis, it is likely a good number of Nepali migrant workers will return back home.

During the 2008 recession, many countries of origin adopted policies of assisting returning nationals as a crisis responses, including Moldova and Nepal offering reintegration and skills training; Mexico and Kerala, India initiating loan programs for returnees to set up businesses and Philippines providing legal assistance to workers seeking refunds.⁵⁰

Armed conflict and natural disasters

Situations of armed conflict and natural disaster are particularly alarming concerns for migrant workers. We have witnessed the appalling plight of migrant workers has been witnessed in recent crises such as the 2004 Indian Ocean tsunami; the earthquake, tsunami and nuclear accident in Japan

⁴⁵ Inter-Parliamentary Union (n 6), p. 26.

⁴⁶ Ibid.

⁴⁷ International Labour Organization, ‘The Global and Economic Crisis and Migrant Workers: Impact and Response’, p. 2.

⁴⁸ International Organization for Migration, ‘Fact-Sheet on the Impact of the Economic Crisis on Return Migration’, May 2010, p. 1.

⁴⁹ Jackline Wahba, ‘Who benefits from Return Migration to Developing Countries’, IZA World of Labor, 2015, p. 5.

⁵⁰ IOM (n 47).

in 2011; Hurricane Sandy in the United States in 2012; as well as conflicts, such as the civil wars in Libya, the Syrian Arab Republic and Yemen.⁵¹

The disproportionate effect conflicts and natural disasters have on migrant workers is unfortunately a mere extension of the preexisting disadvantages that migrants face in comparison to nationals. From a public health perspective, the host State actors may be uninitiated about the special needs of migrants or the host state's emergency and humanitarian response frameworks may be inadequate. Similarly, for the country of origin, it may lack required information about the number, location or needs of its migrant citizens to deliver adequate and effective assistance.⁵²

As noted above, instances of armed conflict and natural calamities see a greater number of returns. The State of origin and the host State need to ensure proper coordination and genuine efforts towards safe and dignified return of the migrant workers.⁵³ In situations of crisis such as this, it is the obligation of the State of origin to assist its citizens abroad. Addressing the situation of migrants in countries in crisis is an integral component in the Sustainable Development Goals 2030 Agenda and directly relates to goals 1, 8, 10, 11 and 16.⁵⁴ However, it may not always be feasible for the State of origin to fulfill its obligation for the want of, financial resources and/or and technical expertise.

Economic support for the States can be managed through one of the three sources. Firstly, through migrant welfare funds; secondly, through donor financing; and thirdly through employers and civil society.⁵⁵

To aid inexperienced States handling migrant workers' crises to ensure proper management of their efforts in a concerted manner, a number of non-binding texts have been produced by international organizations. This includes, International Organization for Migration's (IOM) Migration Crisis Operational Framework (MCOF); the Inter Agency Standing Committee (IASC) Operational Guidelines on the Protection of Persons in Situations of Natural Disasters (Guidelines); the Comprehensive Guide for Planning Mass Evacuations in Natural Disasters (MEND Guide) prepared by the UNHCR, IOM, and Internal Displacement Monitoring Centre (IDMC); as well as the Guidelines to Protect Migrants in Countries Experiencing Conflict or Natural Disaster (MICIC Guidelines). A comparable effort has been made by Regional Consultative Process on Overseas Employment and Contractual Labor for Countries of Origin in Asia (formerly called the Ministerial **Consultation on Overseas** Employment and

⁵¹ International Organization for Migration, 'Addressing the Situation of Migrants in Countries in Crisis', p. 3.

⁵² Ibid, p. 4.

⁵³ Piyasiri Wickramasekara, Effective return and reintegration of migrant workers with special focus on ASEAN Member States, ILO, Thailand, 2019, p. 4.

⁵⁴ IOM (n 48), pp. 2-3.

⁵⁵ Briana Mawby & Susan Martin, 'Evacuation and Repatriation of Migrants in Countries Experiencing Conflict or Natural Disaster', Migrants in Countries in Crisis Initiative, 2016, p. 2.

Contractual Labor for Countries of Origin in Asia) or the Colombo Process in the form of the Kathmandu Declaration⁵⁶ at its sixth Ministerial Consultations in 2018.⁵⁷

Often times, the States of origins have undertaken evacuations of migrants as a last resort during situations of conflict and natural disasters in the host State. In the past, Bangladesh repatriated around 30,000 of its nationals from Libya in 2011. Likewise, Pakistani migrant workers were also evacuated from Kuwait and Iraq following Iraq's invasion of Kuwait in 1991. The returnee workers were provided reliefs from Overseas Pakistanis Fund, a migrant workers fund in Pakistan.⁵⁸

Migrant Workers Grappling with COVID-19 crisis

The current COVID-19 pandemic has the potential to cause the kind of immediate effects similar to those caused by an armed conflict or a natural disaster. Further, it seems increasingly likely that COVID-19 crisis will also have a long-term impact akin to that of an economic crisis. The COVID-19 pandemic is potentially more harmful to migrant workers as they often work in unsafe and unhealthy conditions and live in crowded settlements with poor sanitation and poor access to health services. The access to health facilities is particularly challenging due to language and cultural barriers, associated costs, lack of proper information, discrimination and xenophobia.⁵⁹ The receiving countries are reluctant to provide the migrants the same health facilities as that of their own citizens.⁶⁰ The vulnerability is exacerbated by fears of stigma and discrimination. They can be excluded in law, policy and practice from access to rights, including in the context of the public health and recovery response to COVID-19.⁶¹

As per the ILO, an estimated 68% of the global workforce is currently situated in countries with recommended or required workplace closures.⁶² Among them, migrant workers are most vulnerable as they are usually the first to be laid-off and the last ones to receive testing or treatment.⁶³ They are

⁵⁶ Colombo Process Ministerial Declaration, Sixth Ministerial Consultation on Overseas Employment and Contractual Labour for Countries of Origin in Asia (Colombo Process), 16 November 2018.

⁵⁷ 'Sixth Ministerial Consultation', Colombo Process available at <https://www.colomboprocess.org/cp-meetings/detail/kathmandu-consultation-2018>, accessed on 9 May 2020.

⁵⁸ Mawby & Martin (n 55), p. 4.

⁵⁹ Ibid.

⁶⁰ Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 31 the Right to Health, p. 19.

⁶¹ UN Human Rights Office of the High Commissioner, 'COVID-19 and the Human Rights of Migrants: Guidance', p. 1.

⁶² International Labour Organization, 'ILO Monitor: COVID-19 and the world of work', 29 April 2020, p. 13.

⁶³ International Labour Organization, 'Protecting Migrant Workers during the COVID-19 Pandemic', April 2020, p. 2.

often excluded from the COVID-19 response policies of the host State and imposition of travel bans means they are stranded with possibly no employment and expired visas and work permits.⁶⁴

In such a scenario, ILO suggests three areas of action: “migrant workers’ inclusion in national COVID-19 responses; bilateral cooperation between countries of origin and destination; and social dialogue and full involvement of employers’ and workers’ organizations in the development of COVID-19 responses.”⁶⁵ Further, international and regional human rights mechanisms and instruments and other non-binding normative instruments could be helpful in assembling policy considerations and undertaking actions related to migrant workers where the concerned States would typically lack experience or expertise on the matter.

The onus is not only limited to States. Increasingly, businesses and employers have been called upon to better the protection of migrant workers amid the COVID-19 pandemic. International Recruitment Integrity System (IRIS), in collaboration with IOM, has developed a living document, ‘COVID-19: Guidance for employers and business to enhance migrant worker protection during the current health crisis’. The document urges employers to take various measures with special emphasis on the needs of migrant workers, including seeking support of relevant trade, employer and business associations to address the crisis; conducting rapid assessments of existing healthy facilities; mitigating risk of exposure of employees; promoting good respiratory hygiene and; implementing temperature screening; helping migrant workers access health facilities; ensuring that migrant workers have access to their identity and travel documents at all times; helping migrants access government social protection measures, if available; providing training, awareness and information to prevent and address discrimination, xenophobia and/or exclusion related to migrant workers; ensuring ethical recruitment of migrant workers; facilitating the return of migrant workers, including coordinating with labour recruiters, civil society organizations and paying fully or partially the cost of travel.⁶⁶ Similar guidelines have been adopted in other documents including Novartis COVID-19 Good Practice Guidance for Third Parties.⁶⁷

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ International Recruitment Integrity System, COVID-19: Guidance for employers and business to enhance migrant worker protection during the current health crisis, Version 1.0, 7 April 2020.

⁶⁷ Ethics, Risk & Compliance (ERC) – Human Rights & Third Party Risk Management, Novartis COVID-19 Good Practice Guidance for Third Parties, Version 1, April 2020; Emi Omura, Akiko Sato & Daisuke Takahashi, ‘COVID 19 Impacts on Human Rights and Guidance on Japanese Business Response’, Japan COVID-19 & BHR Research Project, BHR Lawyers Working Paper, 1st edition, Business and Human Rights Lawyers Network, 2020, p. 2.

COVID-19 crisis and Nepal's response in relation to Nepali migrant workers

For Nepal, the fact that a high proportion of Nepali migrant workers are concentrated in a few destination countries (a total of approximately 500,000 in Malaysia; 400,000 in Qatar; 335,000 in Saudi Arabia; and 225,000 in United Arab Emirates according to 2018/19 figures⁶⁸) means a lack of diversity and higher likelihood of greater impact on migrant workers should any or all of these destinations be faced with a crisis.⁶⁹ By the same token, the spread of COVID-19 in these countries is likely to cause significant impact on the migrant workers.

The five major destination countries of Malaysia, Qatar, Saudi Arabia, UAE and Kuwait (which accounted for 88.8 percent⁷⁰ of all outbound Nepali labour migration in 2018/19) have adopted some form of lockdown measures to face Covid -19.⁷¹ These measures taken in response to COVID-19 have the same kind of disproportionate effect on migrant workers as presented above.

Like the countries of destination, Nepal has also resorted to lockdown measures in its territory and closed its international borders. Currently, Nepal does not have a plan aimed at facilitating the return of Nepali migrants abroad. Instead, the GoN is adamant at preventing the return of Nepali nationals, even those who have already made their way up to the border. This position of Nepal is contradictory to its obligation to respect migrant workers' right to return (including active facilitation), which derives as a correlation of various fundamental rights enshrined in the Constitution of Nepal and the Foreign Employment Act. Along these lines, the Supreme Court of Nepal has issued two separate but related orders concerning the entry of Nepali migrant workers stranded in foreign countries or at the borders due to the closing of international borders as a response to the COVID 19 pandemic.

In the first petition⁷², the Court ordered the Office of Prime Minister and Council of Ministers (OPMCM) to take the following measures in relation to the return of migrant workers:

⁶⁸ UN Migration, Migration in Nepal A Country Profile 2019, International Organization for Migration, Kathmandu, 2019, pp. 39-40.

⁶⁹ Ministry of Labour, Employment and Social Security, Nepal Labour Migration Report 2020, Government of Nepal, Kathmandu, 2020, p. 13.

⁷⁰ Ibid, p. 13.

⁷¹ Suswopna Rimal, 'Nepal Labor Migrants, Covid-19 and the State', The Asia Foundation (1 April 2020) available at <https://asiafoundation.org/2020/04/01/nepali-labor-migrants-covid-19-and-the-state/>, accessed on 9 May 2020.

⁷² Mina Khadka Basnet and others v OPMCM and others, 2077 (2020), 076-WO-0932.

- ◆ To identify Nepali citizens exposed to lack of food, living space and health treatment or crisis and arrange for the repatriation of such citizens through diplomatic channels if they so wish. If not possible to do so immediately then to make arrangements for providing food, living space and health treatment in their respective locations.
- ◆ To allow return of citizens only after obtaining an updated record of the returnees and imposing mandatory quarantine.
- ◆ To bring back the Nepali citizens stranded at the Nepal-India border and quarantine them for mandatory period. If not possible to do so, to then immediately make arrangements for food, living space and medical treatment in coordination with the Government of India.
- ◆ To operate quarantine facilities in an organized manner in compliance with WHO health services' standards.
- ◆ To retain the Nepali citizens stranded in foreign countries with expired visas and passports as regular documented migrants in coordination with the concerned countries.

In the second petition⁷³, the Court directed the OPMCM to take the following measures:

- ◆ To immediately prepare health reports of Nepali migrant workers in COVID-19 affected countries through embassies and labor attachés and provide WHO standard health services to them without discrimination through diplomatic communication and coordination by the Ministry of Foreign Affairs.
- ◆ To make administrative, economic and managerial efforts to bring back and rescue Nepali migrant workers in compliance with regulatory and control conditions while maintaining a balance between the individual rights of citizens and the interest of the larger population and preventing additional risk caused by uncontrolled and unorganized entry of Nepali migrant workers at high risk.

In both cases, the petitioners had based their claims on fundamental rights of the migrant workers guaranteed in the Constitution of Nepal, including the right to live with dignity, right to freedom, right to equality and right relating to health as well as the obligations of the Government under the Foreign Employment Act.

The order of the Supreme Court to obligating the State to protect its citizens and their guaranteed rights is also consistent with Article 5 of the Constitution of Nepal which declares practices the safeguard of rights of Nepali citizens as a matter of national interest.

The Government of Nepal has failed to execute the above orders issued by the Supreme Court of Nepal. Although the situation is unforeseen and unprecedented, absence of policies and frameworks relating to the safeguarding and evacuation of Nepali migrants during a time of crisis has only made matters worse. The GoN has failed to respect the right of the migrant workers as well as fulfill its obligation by imposing restriction that the ICCPR, to which Nepal is a party, does not allow. It is worth noting that Nepal has not declared a state of emergency, therefore, it cannot restrict the right to return

⁷³ Shom Prasad Luitel and others v OPMCM and others, 2077 (2020), 076-WO-0940.

of Nepali migrant workers. It is imperative, therefore, for the GoN to take necessary measures to address the situation of migrant workers.

As observed by the Supreme Court of Nepal in its two orders (as detailed above), the GoN has to take urgent measures. This may come in the form of an active return of the migrant workers, which is particularly pertinent in the case of Nepali migrant workers stranded at border points with India, where there is no need for active facilitation. In this case, the GoN is obligated to take immediate measures to allow the entry of migrant workers stranded at the borders and quarantine them. Another strand to this argument is to facilitate a safe stay of migrants in their respective countries through diplomatic coordination and efforts.

Further, Nepal needs to formulate a framework to better tackle situations of crisis and better assist Nepali migrant workers in the long run. In order to develop a proper framework, Nepal can draw from already existing plans and policies that, although not directly related to but have a close nexus with the right to return of migrant workers. It is worth mentioning that the government has taken some notable initiatives to generally facilitate migrant workers who return home following their time abroad. For instance, the approach paper of the [fifteenth five-year plan of National Planning Commission](#) (fiscal year 2019-20 to 2023-24)⁷⁴ of Nepal envisions some policies on issues regarding returning migrant workers. The paper aims to establish and maintain digital records of the skills of returnee migrant workers in order to attract foreign direct investment more efficiently.

The five-year [National Strategic Action Plan](#) (2015-20) of the Ministry of Labour, Employment and Social Security (“MoLESS”) includes socio-economic reintegration of returned workers in the action plan and envisions using the returnee workers as resource persons for socio-economic reintegration-focused training events. MoLESS has recently introduced recruitment e-portal through Foreign Employment Information Management System (FEIMS) to monitor and keep the records of outbound and returnee migrants.

Similarly, the Local Governance Operations Act 2017 mandates local governments with the responsibility to collect and manage information and data of returnee migrant workers. The Act further provides for the social reintegration of the returnee migrant workers and utilizing the

knowledge, skills and entrepreneurship gained from foreign employment .⁷⁵ Nepal can build these existing legal tools in the formulation of a framework specifically dedicated to the facilitating the return of migrant workers during the time of crisis in country of destination.

⁷⁴ National Planning Commission, Fifteenth Plan (fiscal year 2019-20 to 2023-24) Approach Paper, Government of Nepal, Kathmandu, 2019.

⁷⁵ Local Government Operation Act, Nepal, 2017, (Sthaniya Sarkar Sanchalan Ain 2074), s. 11 (2) (1).

Best Practices on Migrant Worker' Rights Across the World:

There exist some key good practices that have been adopted by countries (both countries of origin and countries of destination) in matters related to the safe return and effective reintegration of migrant workers that can be used to build a contextual strategy for Nepal. For instance, in regards to facilitating the return of migrant workers by country of destination, the Regional Guidelines on the return and reintegration of migrant workers participating in the Employment Permit System (EPS) of Republic of Korea⁷⁶ is exemplary. Korea helps in preparing migrant workers working within its territory for a return to the country of origin through various programs conducted at various stages. These include a pre-departure orientation seminar, which underlines the need to return to the country of origin and presents available options upon return. On-site support includes regularly scheduled seminars by officials from embassies of the concerned country of origin on matters related to preparation of livelihood and starting business back home. The support also includes possible supplementary training programs and financial literacy extension seminars. Further, just before returning, there is a provision to avail free online competency assessment and certification by the technical vocational government agency of the country of origin and job matching with Korean companies and overseas employment agencies in the country of origin (also called, skills-to-job match). Finally, during return, there is a facility to enroll on the registration system for returned EPS workers through online channels or the government employment offices.

The Philippines and Sri Lanka are amongst the few States who have established a robust policy framework for the county of origin. The Migrant Workers and Overseas Filipinos Act of 1995⁷⁷ contains elaborate provisions on the return, repatriation and reintegration of migrant workers which also includes the repatriation of underage migrant workers. Priority to return is afforded to those workers who have been employed as domestic helpers and entertainers. The law provides for the establishment of a Replacement and Monitoring Center in the Department of Labor and Employment; a Migrant Workers and Other Overseas Filipinos Resource Center; and an inter-agency committee. The two centers are responsible for effective reintegration of returnee migrants into the society. The committee is composed of representatives of several government departments that form a shared 'government information system for migration' for the management of a database related to migrant workers.

In Sri Lanka, Sub-Policy and National Action Plan on Return and Reintegration of Migrant Workers Sri Lanka 2015⁷⁸ adopts various principles regarding the safe return and reintegration of returnee migrant workers. Key provisions include ensuring the protection of the rights of all migrant workers; ensuring

⁷⁶ International Labour Organization, Regional guidelines on the return and reintegration of migrant workers participating in the Employment Permit System of the Republic of Korea, Bangkok, 2015.

⁷⁷ Migrant Workers and Overseas Filipinos Act, 1995, Philippines.

⁷⁸ Sub Policy and National Action Plan on Return and Reintegration of Migrant Workers, 2015, Sri Lanka.

a safe and dignified return and reintegration process; and ensuring the adoption of a rights-based approach to strategizing.

The Sub-Policy also provides for the involvement of both government agencies and international organizations in the development of a contingency plan for emergency evacuation of migrant workers. The contingency plan aims at facilitating an effective collaboration among the various agencies working for emergency evacuation of migrant workers.

Conclusion

The right to return to one's own country is an undisputed right. A state can restrict the exercise of this right only in situation of formally proclaimed state of emergency, through a clear legal framework, and to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.⁷⁹

The right to return is interdependent with a number of other rights. Although the right to return remains a right that is generally safely exercised throughout the world, there are situations where the implementation of this right poses a huge challenge especially for vulnerable communities including migrant workers. The challenges are paramount during times of crises in the country of destination. In such situations, it becomes imperative for the country of origin to respect, protect and fulfil the rights of migrant workers.

The States are obligated to cooperate, facilitate and secure the right to return of the migrant workers stranded in the midst of crises. Many States are faced with this obligation during the crises caused by COVID-19 pandemic. Nepal, being one of the major labour exporting countries, the government cannot oversee this obligation towards the migrant population. However, many factors hinder Nepal Government's response to this situation. Lack of an effective legal frameworks to undertake a rapid response in relation to crisis in the countries of destination is a glaring issue. Nepal should can build on the existing legal tools and learn from various international practices in this regard and follow through the commitment it has taken up through various international collectives. Nepal's endorsement of GCM and its participation in the Colombo Process underlines Nepal's commitment towards, inter alia, ensuring safe return of its migrant workers. This also provides it with the impetus to formulate a framework for the same. For example, Nepal can initiate the development a 'Collective Preparedness Mechanism' as recommended by the Sixth Ministerial Consultation on Overseas Employment and Contractual Labour for Countries of Origin in Asia (Colombo Process) in order to address any crisis situation. Likewise, practices in other countries including Korea, Sri Lanka and the Philippines can also be a reference point for Nepal to build a sustainable framework.

⁷⁹ ICCPR, Article 4 (1)

Recommendations to GoN

General Recommendations to the GoN in relation to the right to return of Nepali migrant workers:

- 1) Recognize Nepali migrant workers' right to return.
- 2) Initiate dialogue and negotiate with the host countries to ensure the safety and well-being of Nepali nationals who are stranded there and facilitate their safe and dignified return.
- 3) Include provision and procedure in the existing foreign employment laws regarding the repatriation or evacuation of Nepali migrant works.
- 4) Revise the policies and legislative frameworks vis-à-vis foreign employment, in line with international law
- 5) Include provisions in labour agreements with destination countries regarding cooperation between Nepal and the destination countries to repatriate or evacuate Nepali migrant workers during times of crisis.
- 6) Mobilize diplomatic missions to obtain and update the details of Nepalis working in relevant destination countries in close cooperation and collaboration with the migrants and diaspora communities.
- 7) Make better use of migrant workers' funds towards the benefit of the workers.
- 8) Improve the quality of return migration data collection with inclusion of information of the skills, knowledge, technology and capital they have acquired in the host country.
- 9) Engage and capacitate the local level in receiving migrant returnees and facilitating their social and economic reintegration.
- 10) Include migrant workers in disaster management strategy and planning.

Specific Recommendations to the GoN in relation to emergency response to COVID 19

- 1) Formulate rescue and evacuation plans and schemes on safe and dignified return of the workers (who consent to return).
- 2) Launch contingency schemes like building resources and infrastructure for quarantine and self-isolation immediately after return.
- 3) Preparing schemes regarding rapid testing including access to health and medical facilities.
- 4) Conduct psycho-social counselling and awareness programs against social stigma and creation of an enabling environment for workers to return to their community.

- 5) Establishment of a rapid response mechanism, including emergency schemes and emergency budgets.
- 6) Execute the orders, instructions and recommendations from the Supreme Court of Nepal, as well as implement the recommendations made by international organizations such as Amnesty International, Human Rights Watch, ILO and IOM.

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