FROM ORPHANHOOD
TO TRAFFICKED:
EXAMINING CHILD TRAFFICKING
FOR THE PURPOSE OF ORPHANAGES

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ABSTRACT

There are an estimated eight million children residing in orphanages, or residential care institutions, globally, however it is estimated that at least four out of five of these children are not orphans. It is well documented that many children in developing States are recruited from their families into orphanages for the purpose of exploitation and profit, a process known as ‘paper orphaning’ or ‘orphanage trafficking’. Paper orphaning involves the recruitment of a child from their family by a child finder or orphanage operator; the manipulation of gatekeeping procedures to admit the child to an orphanage; the construction of fraudulent documentation to attest to the child’s orphaned status; and the maintenance of the child in ongoing institutionalisation for the purpose of profit through donor funding and orphanage tourism.

Since 2005, paper orphaning has been anecdotally referred to as ‘trafficking’ but without a legal basis given for the assertion. More recently, the trafficking of children into orphanages was included in the United States Department of State Trafficking in Persons Reports of 2017 and 2018, and considered by the Australian Government as part of its Inquiry into whether Australia should have a Modern Slavery Act in 2017. This thesis provides the legal argument that underpins this recognition, establishing that the recruitment of children into orphanages for the purpose of exploitation and profit is a form of child trafficking under international law.

A comprehensive analysis of paper orphaning as a form of child trafficking is presented in this thesis. It details the process of paper orphaning, and demonstrates the prevalence of paper orphaning in developing States by analysing eight representative States across four regions in the developing world where there is evidence that the rising number of children in institutional care is in part due to the presence of donor funding and orphanage tourism. The prevalence of paper orphaning globally establishes the need for a consistent international response and provides a rationale for the application of international law.

Paper orphaning is facilitated by an enabling environment where the utility of the orphan child in aid and development is manipulated by governments and non-government organisations in part to profit from donor funding and orphanage tourism. Orphanage
tourism, where people pay to visit or volunteer with orphans, has become an increasingly popular tourist activity over the past decade. The increasing demand for orphanage tourism has created a demand for the maintenance of an orphan population to visit and volunteer with. Paper orphaning meets this demand by recruiting children under the guise of providing an education, and forcing them to pretend to be orphans.

Paper orphaning is a form of child trafficking under the definition found in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000* (‘Trafficking Protocol’). To meet the requirements of the definition of child trafficking in the *Trafficking Protocol*, both the act and purpose elements of that definition must be satisfied. Previously, the major point of contention for paper orphaning being regarded as child trafficking is that it did not meet the purpose element. This thesis argues that there are two ways the purpose element is satisfied in paper orphaning. The first is that paper orphans are subjected to forms of exploitation that are listed in the *Trafficking Protocol*. The second is that where paper orphans experience forms of exploitation that are not listed in the *Trafficking Protocol*, the ‘purpose element’ can be satisfied in situations where the conduct exhibits that an unfair advantage is present and a threshold of seriousness is met. Paper orphans commonly experience two forms of exploitation that meet the purpose element: ongoing institutionalisation for profit and orphanage tourism. Thus, in many, and perhaps most, cases, paper orphaning can be interpreted as a form of child trafficking under international law.

To combat paper orphaning as a form of child trafficking, a comprehensive multi-sector framework focusing on both anti-trafficking and child protection mechanisms should be implemented. This framework entails the criminalisation and prosecution of paper orphaning as child trafficking; the prevention of paper orphaning through addressing vulnerability, demand, corruption and complicity; and the provision of protection and assistance for child victims of paper orphaning focusing on identification, reintegration, and access to remedies.
STATEMENT OF ORIGINALITY

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

Kathryn Elizabeth van Doore
17 October 2018
ACKNOWLEDGEMENTS

Sometimes life takes an unexpected turn, and you end up in place you never thought you would be. Such is the story of this thesis, which really began when I co-founded an orphanage in Kathmandu called ‘Forget Me Not’. Some six years into that journey, and with Forget Me Not operating two orphanages in Nepal and Uganda, we discovered that the resident children had been recruited from their loving families into orphanages for the purpose of our international funding. In that moment of discovery, when everyone we asked, and every fibre of my being, said to run, we chose to stay. This thesis represents the culmination of that journey. It stands as testament to the twenty children in Nepal and thirty-nine children in Uganda who went home to their loving families, and the hundreds more that Forget Me Not has since safely reintegrated, that when we know better, we must do better.

I could not have contemplated completing this journey without the ardent support, patience and commitment of my amazing Ande, and our little girls, Anouk and Saskia. Ande, the generosity of spirit you have shown in providing time and space for this research has been immense. Thank you for choosing me every day; I couldn’t, and wouldn’t, do life with anyone else. For my darling Anouk and Saskia, you imbue a sense of wonder and pride in me every day. I have persisted with this research, in standing and telling this truth, because it is important that we acknowledge and learn from the mistakes we make, and try our best to fix them. I hope you will always know the power of your own truth, and never be afraid to speak it, even if your voice shakes.

I am greatly indebted to my principal supervisor, Professor Mary Keyes, for her advice, patience, attention to detail, and many cups of coffee. I came to your tutelage very much a student, but I leave feeling like a scholar who has something worth saying. Thank you for your warmth and wisdom. I also owe my associate supervisor, Dr Patricia Fronek, a great deal of gratitude for talking me through the hard times and always offering encouragement. I have learnt so much from working with both of you, and I feel very grateful to have had such a supportive supervisory team.

I acknowledge and thank the external examiner at the confirmation stage of my thesis, Dr Anne Gallagher, AO. Your work is inspiring, and I continually draw on words you once said
in closing a speech, ‘I urge you to be brave, to be visionary, but to be in this for the long haul’. Thank you for your continued interest in this research, and I guarantee that I am this for the long haul.

For the Forget Me Not team, Andrea Nave, Emmalene Travers, Craig and Mel Manley, Greg and Robyn Biggs, Mel Faulkner, Pete Mackay, Michelle Hay and Matt Brice, and all who supported Forget Me Not in our transition from running orphanages to finding families, great people are forged in the fire and it has been a privilege being the ‘(wo)man in the arena’ with you all. It is an honour to work with our Nepal team, led by Anju Pun and DB Lama, who ensure that over 500 children are safe at home with their families; our Ugandan team, led by Patrick Ruhweza, who ensure that over 60 children are safe, and our Indian partners, led by Dipthesh Singh and Puja Srivastava Singh, who provide innovative solutions to make sure over 2000 children are safe. Thank you for your passion and the daily work you do to ensure that so many children are vibrant, thriving and connected to family, community and opportunity. We must never forget that ‘we were made for these times’.

I acknowledge the amazing advocates that work tirelessly to ensure that children are safe, loved and grow up at home, particularly my ReThink Orphanages Australia colleagues, Rebecca Nhep, Karen Flanagan AM, Leigh Matthews, Liz Manning, Andrea Nave and Tara Winkler, and the broader ReThink Orphanages global group (formerly Better Volunteering, Better Care), particularly Florence Martin, Rebecca Smith, Emmanuelle Werner, Dr Delia Pop and Michelle Oliel. Your commitment to this cause is inspirational and our shared drive motivates me to keep going. In addition, I acknowledge the Honourable Senator Linda Reynolds for her passion and work on the issue of orphanage trafficking. I believe that together we are really making a difference to millions of children who are currently residing in orphanages, but long to be safe at home.

I am fortunate to work with many amazing colleagues and friends at Griffith Law School, all of whom have been unfailingly supportive of both me and my research. I express special thanks to Associate Professor Therese Wilson, Dr Kylie Burns, Professor Pene Mathew, Zoe Rathus, Emma Robinson, Associate Professor Susan Harris-Rimmer, Wendy Lawton, Susan Powe and Suzanne Marshall for always offering encouraging words when they were most needed.
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CHAPTER ONE: OVERVIEW

I  INTRODUCTION

There are between 2.7\textsuperscript{1} and 8 million\textsuperscript{2} children living in orphanages, or residential care institutions, globally.\textsuperscript{3} At least 80 percent of these children are not orphans, having one or both parents alive who could care for them with support.\textsuperscript{4} In some situations, poverty stricken families are coerced into giving up their children to unscrupulous institutions which aim to profit from the residence of the children.\textsuperscript{5} I call this process ‘paper orphaning’, and it is the focal point of this thesis.

I define ‘paper orphaning’ as the active recruitment of a child into an orphanage or residential care institution for the purpose of exploitation and profit.\textsuperscript{6} Paper orphaning begins with the active recruitment of children from their biological families into orphanages predicated on fraudulent promises made to the child’s families, usually concerning entering the children into formal education. The child is then removed to an orphanage and has new identity documents forged (often including a new birth certificate and/or death certificates of parents) which formalises their status as an orphan. These children are known as ‘paper orphans’ as they are orphans only by virtue of the fraudulent paperwork or documentation. Paper orphans are then held in orphanages and used in order to attract foreign aid and orphanage tourism. The same process of paper orphaning has been identified in Nepal, Cambodia, Ghana, Uganda, Guatemala, Haiti, Kenya and many other countries,\textsuperscript{7} some of

\textsuperscript{1} Nicole Petrowski, Claudia Cappa and Peter Gross, ‘Estimating the number of children in formal alternative care: Challenges and results’ (2017) 70 Child Abuse & Neglect 7.
\textsuperscript{3} The actual figures are estimated to be much higher but a lack of data on vulnerable children and the proliferation of unregistered institutions in developing States makes it difficult to ascertain exact numbers. See, eg, Corinna Csáky, ‘Keeping children out of harmful institutions: Why we should be investing in family-based care’, (Report, Save the Children, 2009) 3; Patrice L Engle et al, ‘VIII. The situation for children without parental care and strategies for policy change’ (2011) 76(4) Monographs of the Society for Research in Child Development 190, Evie Browne, ‘Children in care institutions’, (Report, Institute of Development Studies, 2017) 1.
\textsuperscript{4} Csáky above n 3, vii.
\textsuperscript{5} Ibid 5.
\textsuperscript{7} Better Care Network, ‘Collected Viewpoints on International Volunteering in Residential Care Centres: An overview’, (Report, Better Volunteering, Better Care, 2014); Lumos, ‘Children in Institutions: The Global
which are explored in this thesis. This thesis establishes that paper orphaning is a form of child trafficking under international law.

The catalyst for this research is my own experience. In 2006, I co-founded an orphanage in Nepal, with operations expanding to Uganda in 2010. I was celebrated as a volunteer for founding, funding and operating best practice orphanages in developing States. In 2011, it was revealed that the children cared for in the orphanages in both Nepal and Uganda were not orphans at all, but had been removed from their families and constructed as orphans for the benefit of international funding and orphanage tourism. Norman Denzin argues that authors should be visible in their text to ‘concentrate on producing meaningful, accessible, and evocative research’. Denzin also suggests that research narratives should ‘begin with the sting of memory, epiphanies, and existential crises’. These epiphanies are often remembered moments which are perceived to have a profound impact on the trajectory of a person’s life and the ensuing existential crisis forces the researcher to analyse their lived experience. My involvement in the journey from orphanhood to trafficked is part of my lived experience; and this thesis emerges from the crisis of discovering that the children in

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\(^8\) I co-founded the *Australian Association of the Forget Me Not Children’s Home Inc* in 2005 and we opened our first orphanage in Nepal in 2006. In 2012, the organisation became Forget Me Not Australia, an international non-government organisation focused on reunifying displaced children with their families <www.fmn.org.au>.


\(^13\) Denzin, above n 11, 404.

\(^14\) Ellis, Adams and Bochner, above n 12, 275.
our care were paper orphans who had been recruited into our orphanages for exploitation and profit.

Acknowledging the catalyst of this research is not without controversy, as law is traditionally viewed as a form of logic without personal interference, and the doctrinal methodology favoured in legal research consummates that view. However, it would be remiss to fail to acknowledge that this research was instigated by the experience of a pragmatic lawyer working in the field who has an intimate knowledge of how the law operates from a practical standpoint. My experience caused me to question why the process of paper orphaning was not regarded legally as a form of child trafficking, and what access to remedies and other practical interventions might be available for paper orphans if they were considered trafficked rather than orphaned or vulnerable children deprived of parental care. Informed by the research in this thesis, I have been heavily involved in advocating for the recognition and inclusion of paper orphaning as a form of child trafficking in several forums including the annual Trafficking in Persons Report conducted by the United States Department of State, the Australian government and the United Kingdom government.

Since 2005, the process of paper orphaning has been referred to in many non-government organisation reports, some of which suggest that it could be a form of trafficking, but do not provide a legal basis for the assertion. For example, a report by Next Generation Nepal (NGN) regarding the implications of orphanage volunteering for the displacement of children noted:

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16 This acknowledgement serves as recognition of the catalyst of the thesis only, as my experience does not extend into the thesis itself; nor is it utilised as a reference point or as evidence.


NGN uses the terms ‘trafficked’ and ‘trafficking’ throughout this report to refer to situations where children have been fraudulently displaced from their families by brokers and harbored in orphanages to be used for commercial purposes...We recognize that whether or not such cases are legally considered to be ‘trafficking’ is contested.¹⁹

There has also been extensive media coverage of the construction of children as ‘paper orphans’ being recruited by orphanages to take advantage of the orphanage tourism business where tourists from developed nations pay to volunteer with orphans.²⁰ In these accounts, a link between the displacement of children into orphanages and child trafficking has been made anecdotally, but again without legal basis.

In this thesis, I argue that paper orphaning is a form of child trafficking under international law as it meets the requirements of the definition of child trafficking found in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.²¹ I first made this legal argument in ‘Paper Orphans: Examining Child Trafficking for the purpose of orphanages’, an article based on Chapters Five and Six of this thesis, which was published in the International Journal of Children’s Rights in 2016. Prior to that publication, there was no academic research providing a legal argument that the recruitment of children into orphanages for the purpose of exploitation met the definition of child trafficking under international law. This thesis expands on that article to provide a comprehensive analysis of paper orphaning as a form of child trafficking under international law, and to recommend a framework to combat it. To do this, the thesis details the process and prevalence of paper orphaning in developing States;

¹⁹ Ibid.
²² van Doore, above n 6.
the enabling environment for paper orphaning; the demand of orphanage tourism for paper orphaning; and the legal argument that paper orphaning should be regarded as a form of child trafficking under international law. Finally, it makes recommendations regarding how to tackle paper orphaning as a form of child trafficking.

The thesis begins with examining how in many developing States, the number of children who legitimately require alternative care has fallen, while the number of orphanages and children resident in them has risen. Orphanages are not being established because there are orphans, but rather, orphans are being manufactured because there are orphanages. The thesis draws a connection between this proliferation of orphanages and paper orphaning, and the demand for orphanage tourism experiences. Orphanage tourism is where tourists, often with good intentions ‘hoping to ameliorate the circumstances of orphanhood’, include both visits and volunteering in orphanages as part of their travel. Orphanage tourism includes the ‘donation of money and goods, attending performances, or volunteering on a short-term basis at orphanages as part of one’s holiday’. Many orphanages are established in locations popular with tourists to increase the appeal of volunteering and to meet the demand for orphanage tourism.

The paper orphaning business model has developed to capitalise on the demand for orphanage tourism, leading to the active recruitment of children into orphanages to pose as orphans by unscrupulous orphanage operators. Some orphanage operators have been

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23 Alternative care is care provided to children outside of parental care. It can include kinship care, foster care, residential care, supervised independent living arrangements and other forms of family based care. For the definition of alternative care, see Guidelines for the Alternative Care of Children, GA Res 64/142, UN GAOR, 64th sess, 65th plen mtg, agenda item 64, supp no 49, UN Doc A/RES/64/142, (18 December 2009, adopted 24 February 2010) (‘Alternative Care Guidelines’) guideline 29(c).


documented as deliberately withholding food and proper living environments in an effort to keep resident children malnourished to attract more sympathy and funding from visitors and volunteers.\textsuperscript{29} Some babies in orphanages have died as a result being kept malnourished to attract donations.\textsuperscript{30} There are many reports of children in orphanages being forced to perform traditional dance shows for tourists to garner donations, or sent begging in the evenings at tourist hot spots.\textsuperscript{31} This thesis argues that orphanage tourism is both a demand driver for paper orphaning and a form of exploitation that meets the requirements of the definition of child trafficking under international law.

Part II of this chapter explains the common terminology utilised throughout the thesis. Part III establishes the originality and significance of the thesis, and its contribution to the existing literature. In Part IV, the research questions that this thesis responds to are set out. Part V describes the structure of the thesis and provides an overview of the central arguments presented in it.

II TERMINOLOGY

This part provides a brief definition of common terms used in this thesis. I use the terms ‘orphanages’ and ‘residential care institutions’ interchangeably. A residential care institution is defined as ‘a group living arrangement for more than ten children, without parents or surrogate parents, in which care is provided by a much smaller number of paid adult carers’.\textsuperscript{32} Residential care is ‘care provided in any non-family-based group setting, such as places of safety for emergency care, transit centres in emergency situations, and all other short- and long-term residential care facilities, including group homes’.\textsuperscript{33} It ‘implies an organised, routine and impersonal structure to the living arrangements for children (e.g., all children sleep, eat and toilet at the same time) and a professional relationship, rather than parental relationship, between the adults and children’.\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{31} UNICEF, above n 17.
\item \textsuperscript{32} Kevin Browne, ‘The Risk of Harm to Young Children in Institutional Care’, (Report, Save the Children and Better Care Network, 2009) 1.
\item \textsuperscript{33} Alternative Care Guidelines, UN Doc A/RES/64/142 guideline 29(b)(iv).
\item \textsuperscript{34} Browne, above n 32.
\end{itemize}
Residential care institutions are often referred to as orphanages, children’s homes, children’s villages, babies’ homes, infant homes, shelters, childcare homes or institutions. I have chosen to utilise the term ‘orphanages’ throughout this thesis as this is the organisational identity most commonly used by the organisations themselves, particularly for the purpose of orphanage tourism.

The term ‘paper orphans’ is not my invention and is frequently used in research regarding potential trafficking practices in intercountry adoption, specifically regarding the production of fraudulent documentation created to meet the requirements for intercountry adoption. The term was coined by Terre des Hommes in their documentary Paper Orphans produced in 2010 by Image Ark. I have chosen to use the term paper orphans, as this is the best description for children who have been fraudulently constructed as orphans for the purpose of exploitation and profit.

I use the term ‘paper orphaning’ to identify the process of the recruitment of the child from their family, the creation of fraudulent documentation, often including death certificates of parents and new identity registration documents, and placement in an orphanage. This process is explained in depth in Chapter Two. I have limited my use of the term ‘orphanage trafficking’ due to an inherent assumption within that term that trafficking has occurred, which begs the question that this thesis addresses. Given my argument that paper orphaning is a form of child trafficking, I have preferentially used the term ‘paper orphaning’. However, where orphanage trafficking appears it may be regarded as interchangeable with paper orphaning.

Finally, the term ‘orphanage tourism’ is used to encapsulate both visiting and volunteering in orphanages for short or long periods of time in developing States. For the purpose of this

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thesis, I do not differentiate between volunteering and visiting as my central argument is that both volunteering and visiting contribute to the paper orphaning business.

III RESEARCH QUESTIONS

The central research question to which this thesis responds is whether the recruitment of a child into an orphanage or residential care institution for the purpose of exploitation and profit is a form of child trafficking under international law. To comprehensively respond to this central question, I address six related questions:

1. What is the process and prevalence of paper orphanning?
2. What is the enabling environment for paper orphanning?
3. Can the relationship between the desire to assist orphans through volunteering at and visiting orphanages, and the paper orphanning process, be regarded as a demand driver for trafficking?
4. Does the definition of ‘child trafficking’ provided in international instruments include trafficking for the purpose of exploitation and profit in orphanages?
5. Can ‘a purpose of exploitation’ in the definition of child trafficking be interpreted as including the forms of exploitation that paper orphans experience?
6. How should States tackle paper orphanning as a form of child trafficking?

Whilst the focus of the thesis is on establishing the legal argument that paper orphanning is a form of child trafficking, the central legal inquiry in the thesis is enhanced through interrogating a number of interrelated areas including development aid, child protection, tourism, and trafficking. This thesis makes a contribution to each of these areas.

IV SIGNIFICANCE OF THE RESEARCH

The significance of this thesis lies in establishing that the process of paper orphanning is a form of child trafficking under international law. In doing so, this thesis establishes the

37 Chapter Three explores how the rhetoric of the orphan child is utilised by developing States to cultivate development aid agendas.
38 Chapter Three examines how the failure of child protection mechanisms, particularly alternative care frameworks, provide an enabling environment for paper orphanning to occur.
39 Chapter Three examines how the orphan addiction is cultivated through orphanage tourism; whilst Chapter Four explains the demand of orphanage tourism as a driver for paper orphanning.
40 Chapters Five and Six argue that paper orphanning is a form of child trafficking under international law; and Chapter Seven provides recommendations for tackling paper orphanning as a form of child trafficking, rather than just as a child protection issue.
method and prevalence of paper orphaning as a global issue, reconceptualises the activity of orphange tourism as a demand driver for child trafficking and form of exploitation, and makes recommendations for how both countries where paper orphaning occurs, and countries that contribute to paper orphaning via funding and volunteers, should tackle the issue.

In undertaking this research initially, one of my major aims was to successfully establish that paper orphaning was a form of child trafficking so that it could be reported in the relevant country narratives of the Trafficking in Persons Report. Undertaken annually by the United States Department of State, the Trafficking in Persons Report is considered a comprehensive resource for anti-human trafficking efforts internationally, and the de facto treaty monitoring report of the Trafficking Protocol. It has been perhaps the most successful ‘single initiative in exposing the breadth and extent of contemporary exploitation of individuals for private profit’ and has compelled governments to take action where otherwise they would not have done so. It was my belief that a legal analysis which successfully established that paper orphans are trafficked under international law would have a critical impact on the inclusion of such a practice in the Trafficking in Persons Reports and other associated international reporting, which may then see a resultant response in governments addressing the issue.

The Trafficking in Persons Report limits inclusion of trafficking practice to those that meet the definition of trafficking provided in the Trafficking Victims Protection Act 2000 (United States) listed as ‘the act of recruiting, harboring, transporting, providing, or obtaining a person for compelled labor or commercial sex acts through the use of force, fraud, or coercion’. ‘Compelled service’ includes involuntary servitude, slavery or practices similar to slavery, debt bondage, and forced labour. The publication of my article in 2016, which

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41 The United States of America Department of State Trafficking in Persons Report is produced every year and ranks all countries on how they are addressing trafficking in persons using a tier system.
47 Ibid.
forms part of this thesis, argued that paper orphaning should be considered a form of slavery or practice similar to slavery that satisfies the exploitation requirement of both the Trafficking Protocol and the Trafficking Victims Protection Act 2000 (United States). Following this legal argument, I undertook extensive advocacy in partnership with non-government organisations and networks such as ReThink Orphanages Australia and the global ReThink Orphanages Network (formerly Better Care, Better Volunteering initiative). As a result of the legal analysis in the article and this advocacy, the Trafficking in Persons Report first made reference to the link between tourists’ desire to visit and volunteer with orphans and the recruitment of children to pose as orphans in its Nepal narrative in 2017 where it stated:

Under false promises of education and work opportunities, Nepali parents give their children to brokers who instead take them to frequently unregistered children’s homes in urban locations, where they are forced to pretend to be orphans to garner donations from tourists and volunteers; some of the children are also forced to beg on the street.

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48 van Doore, above n 6. See also Chapters Five and Six of this thesis which establishes the legal argument that paper orphaning is a form of child trafficking.


This inclusion was a watershed moment for the legal research and advocacy that had its genesis in work completed for this thesis. In early 2018, I was consulted by the Office to Monitor and Combat Trafficking in Persons of the United States Department of State regarding the links between child trafficking and institutionalisation. Following this, the Trafficking in Persons Report 2018 included a special interest topic of ‘Child Institutionalization and Human Trafficking’ which acknowledged that children were being trafficked into orphanages for the purpose of exploitation by espousing that:

Voluntourism not only has unintended consequences for the children, but also the profits made through volunteer-paid program fees or donations to orphanages from tourists incentivize nefarious orphanage owners to increase revenue by expanding child recruitment operations in order to open more facilities. These orphanages facilitate child trafficking rings by using false promises to recruit children and exploit them to profit from donations. This practice has been well-documented in several countries, including Nepal, Cambodia, and Haiti.

Including this Special Interest section is an acknowledgement that the recruitment of children into orphanages for the purpose of exploitation can meet the criteria for trafficking found in the Trafficking Victims Protection Act 2000 (United States) and highlighted the link between orphanages and trafficking. The Trafficking in Persons Report did not provide a comprehensive analysis as to how paper orphaning occurs, or why it is a form of trafficking under international law, both of which are addressed in this thesis.

In addition to the Trafficking in Persons Report, there have been other recent major breakthroughs in the recognition of paper orphaning and orphanage trafficking based on the arguments contained in this thesis. In particular, the Australian Parliament became the first government to formally consider paper orphaning and orphanage trafficking, as part of its Inquiry into whether Australia should have a Modern Slavery Act in 2017. The Inquiry received many submissions on the issue of orphanage trafficking which utilised my 2016 article as a foundation argument for why Australia should recognise paper orphaning as a

54 Conversation between Office to Monitor and Combat Trafficking in Persons, United States Department of State and Kathryn van Doore, 2 February 2018.
56 Ibid.
57 van Doore and Nhep, above n 49.
form of modern slavery. The resulting report, ‘Hidden in Plain Sight’, utilised the definition of paper orphaning put forward in this thesis:

ReThink Orphanages member Ms Kathryn van Doore, an academic and global authority on orphanage trafficking, defines ‘paper orphaning’, as:

… the active recruitment of children into orphanages or residential care institutions in developing States for the purpose of ongoing exploitation, particularly through orphanage tourism.

On the basis of the evidence submitted, the Committee undertaking the Inquiry concluded that orphanage trafficking should be recognised as a form of modern slavery:

The Committee agrees that orphanage trafficking should be recognised as a form of modern slavery in Australia’s legislative and policy frameworks, and under the proposed Modern Slavery Act. The Committee agrees that this formal recognition would assist in raising awareness of orphanage trafficking and assist in the implementation of policies to combat it.

The subsequent Modern Slavery Bill 2018 (Cth) presented to the Australian Parliament on the 28th June 2018, recognised the trafficking and/or exploitation of children in orphanages as a reportable form of modern slavery in the Explanatory Memorandum to the Bill. In a press release regarding the Modern Slavery Bill 2018 (Cth) passing the House of

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58 See, eg, ReThink Orphanages, Submission 23 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry to establish a Modern Slavery Act in Australia, (2017); Cambodian Children’s Trust, Submission 25 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry to establish a Modern Slavery Act in Australia, (2017); Kathryn E. van Doore, Submission 52 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry to establish a Modern Slavery Act in Australia, (2017); ACFID Child Rights Community of Practice, Submission 55 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry to establish a Modern Slavery Act in Australia, (2017); Save the Children, Submission 97 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry to establish a Modern Slavery Act in Australia, (2017); Andrea Nave and Forget Me Not, Submission 114 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry to establish a Modern Slavery Act in Australia, (2017); ACC international, Submission 140 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry to establish a Modern Slavery Act in Australia, (2017); Forget Me Not Nepal The Himalayan Innovative Society, Adara Development, Submission 155 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry to establish a Modern Slavery Act in Australia, (2017).


60 Ibid.

61 A comprehensive analysis of the Parliamentary Inquiry into whether Australia should have a Modern Slavery Act as it related to orphanage trafficking is considered in Chapter Seven, Part III.

62 Modern Slavery Bill 2018 (Cth), Explanatory Memorandum, 8, [50].
Representatives in September 2018, Assistant Minister Senator the Honourable Linda Reynolds stated:

As a result of this legislation, Australia will also be the first nation in the world to recognise orphanage trafficking as a form of modern slavery. This means that a reporting entity with activities or supply chains which involve orphanages will need to assess and report on any risks relating to modern slavery in these operations.63

Paper orphaning was also included as an ‘emerging form of exploitation’ in the ‘Modern Slavery Research: The United Kingdom’ Report64 which mapped the current evidence base on how modern slavery occurs in the United Kingdom, modern slavery research that is currently being undertaken, and responses to modern slavery. In August 2018, the United Kingdom announced a review into its Modern Slavery Act 2015 (England and Wales) particularly noting that the review would consider how to ‘future-proof’ the Act given the ‘evolving understanding of the nature of modern slavery offences’ including the ‘recent and emerging’ issue of orphanage trafficking.65 A further report released in September 2018 summarising the United Kingdom response to the prevention of trafficking cited my research and stated that orphanage trafficking is a ‘lesser-known form of exploitation’ that is receiving increasing attention.66

These are examples of the significant practical contribution that the arguments contained in this thesis have already made. Whilst paper orphaning has thus far been regarded as a domestic child protection issue for developing States, I argue that in order to effectively tackle paper orphaning as a form of child trafficking, a cooperative approach is needed both by countries where paper orphaning occurs, and countries that inadvertently contribute to the issue through sending funding and volunteers to orphanages. The recognition of the need

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66 Anna Sereni and Catherine Baker, ‘Before the harm is done: Examining the UK response to the prevention of trafficking’, (Report, Anti-Trafficking Monitoring Group, 2018) 70.
for such an approach by Australia, and potentially the United Kingdom, is the first step in this direction.

This thesis also makes a contribution regarding the conceptualisation of paper orphaining. Paper orphaining has predominantly been regarded as a child protection issue, but this thesis argues that criminal liability is a necessary component in combating paper orphaining. To establish criminal liability, paper orphaining must be regarded as an offence. This thesis argues that the most appropriate offence for the process of paper orphaining is trafficking in children. To establish paper orphaining as an offence of child trafficking is to recognise the systemic nature of how paper orphaining occurs and to provide recourse to remedies for paper orphans as trafficking survivors. Without recognition of the process of paper orphaining as being one of child trafficking in international law, States parties are not obligated to criminalise the process of paper orphaining, prosecute offenders under trafficking laws, or provide any assistance to survivors. In practical terms, the recognition of paper orphans as survivors of child trafficking will provide impetus for States parties to perform the obligations provided in the United Nations Principles and Guidelines on Human Trafficking.67

The thesis contributes to the research on the over-institutionalisation of vulnerable children in developing States. Whilst there has been no preceding research on the legal status of paper orphaining, there is extensive research on the over-use of residential care in developing countries to address vulnerability68 and the harms of residential care for children.69 The number of children residing in orphanages has increased rapidly in countries that ‘receive extensive foreign assistance and charity donations to orphanages’.70 In addition, the relative ease and lower cost of traveling globally, along with a ‘shift in tourism consumption’ from travelling to ‘see things’ to travelling to ‘do things’,71 has facilitated the rise in popularity of

69 See, eg, Csáky, above n 3; Evie Browne, above n 3; Kevin Browne, above n 32.
70 Csáky, above n 3.
orphanage tourism.\textsuperscript{72} The business of volunteering in orphanages is a billion-dollar trade, leading to ‘a major new infusion of funding into these facilities’.\textsuperscript{73}

The link between orphanage tourism and the commodification of children has been examined in a social work context,\textsuperscript{74} but not previously as a demand driver for child trafficking. This thesis extends that research by examining how part of the rationale for the over-use of residential care stems from the demand of orphanage tourism which drives the production of paper orphans and exploits children. However, I do not argue that paper orphaning is the sole reason for the proliferation of residential care institutions or the over-use of residential care for children in developing States, as there are many complex reasons for this. In the same vein, I do not argue that institutionalisation is synonymous with exploitation. Instead, I argue that in some circumstances, institutionalisation is used as a mechanism to exploit. To ignore or fail to account for paper orphaning as a contributing factor to the inappropriate use of residential care would be remiss.

It is necessary to distinguish this thesis from other academic research on paper orphans which centres on intercountry adoption. Many scholars have argued that paper orphaning is for the purpose of intercountry adoption, and that intercountry adoption should be regarded as a form of child trafficking.\textsuperscript{75} The focus of these scholars is predominantly on the movement of the child over borders as constituting the trafficking. The challenge for intercountry adoption being regarded as a form of child trafficking is the requirement of a purpose of exploitation. This is because even where a child has been displaced from their biological family on fraudulent grounds for a purpose of intercountry adoption, these


\textsuperscript{74} Cheney and Rotabi, above n 26.

children are not regarded as experiencing exploitation as required by the *Trafficking Protocol* because adoption itself is not regarded as exploitative.\(^{76}\)

This thesis offers a new perspective to this debate by refocusing where the trafficking act occurs and the purpose for which it is undertaken. It does this by focusing on the initial movement of the child from their family to the orphanage and by focusing on the orphanage as the site of exploitation; whereas intercountry adoption focuses on the movement across international borders and views the adoption process itself as often exploitative. My assertion is that paper orphaning is a discrete trafficking act that is not necessarily, or always, connected to intercountry adoption. This is not to suggest that paper orphaning does not occur for the purpose of intercountry adoption, but rather to clarify that the purpose of paper orphaning can instead be for exploitation in an orphanage, with no intention of a child being placed for intercountry adoption.

Finally, the significance of the thesis goes beyond a legal argument for paper orphaning as a form of trafficking. This thesis offers a voice to paper orphans and the potential for a paradigm shift in how we view orphanhood and aid. By acknowledging and recognising that the developed world plays a role in the production of paper orphans, the thesis provides an insight into how we can affect change for children who are paper orphans. The significance of the research also lies in its ability to inform governments and non-governmental institutions alike on the global issue of paper orphans, and to be a catalyst for legislative, policy and programming intervention. Indeed, throughout this research I worked and collaborated with a number of child protection agencies on the issue of paper orphaning.\(^{77}\) Their interest in this research stems from the current lack of legal academic research on paper orphaning and its potential to achieve practical change for survivors of paper orphaning, as well as children residing in institutional care.

\(^{76}\) Smolin, ‘Intercountry adoption as child trafficking’, above n 35, 297.

\(^{77}\) The agencies I have engaged with on this issue include ReThink Orphanages Global Network, ReThink Orphanages Australia, Save the Children Australia, Better Care Network, Australian Christian Churches International Relief, Friends International, Forget Me Not Australia, Cambodian Children’s Trust, Stahili Foundation, Lumos and many others.
V OVERVIEW OF CENTRAL ARGUMENTS

This thesis is divided into eight chapters. This introductory chapter provides a brief overview of the research questions to which this thesis responds to, details the original contribution of this thesis, and outlines the central arguments put forward by the thesis.

Chapter Two articulates the process and prevalence of paper orphaning in developing States. In describing the process of paper orphaning, the chapter first explains how the recruitment of a child into an orphanage occurs. It describes how the process of paper orphaning manipulates the procedural aspects of gatekeeping into alternative care by claiming children are abandoned or orphaned rather than relinquished. The rationale for this is that the evidentiary standard required to prove abandonment or orphanhood is less than what is required to prove relinquishment. Fraudulent documents are often constructed to support the claims of abandonment or orphanhood as part of the paper orphaning process. This manipulation is critical in the paper orphaning process as it indicates an intent by the involved orphanage operators to utilise the alternative care framework to justify the admission of children into care. The final part of the paper orphaning process is the maintenance of the child in institutionalisation for the purpose of exploitation and profit through donor funding and orphanage tourism.

Chapter Two then turns to establishing the prevalence of paper orphaning in developing States across the world. To do this, it focuses on four regions where there is evidence that the rising number of children in institutional care is in part due to the presence of donor funding and orphanage tourism: Sub-Saharan Africa, South Asia, South East Asia, and Latin America and the Caribbean. In these regions, the focus is narrowed to developing States where paper orphanning is prevalent: Liberia, Uganda and Ghana in the Sub-Saharan African region; Nepal in the South Asian region; Cambodia and Indonesia in the South East Asian region; and Guatemala and Haiti in the Latin American and Caribbean region. Demonstrating the prevalence of paper orphaning globally provides a rationale for the application of international law to the issue and establishes the need for a coordinated international response.

Chapter Three describes the enabling environment for paper orphaning. It examines how the utility of the orphan child for aid and development is manipulated for the purpose of the
paper orphaning business model in order to profit from donor funding and orphanage tourism. Chapter Three demonstrates how governments and non-governmental organisations utilise the orphan child as a focal point to increase aid and tourism, leading to a financial dependence on the orphan child. This utility is manipulated and exploited by both governments and non-government organisations to encourage what has been termed an ‘orphan addiction’. Orphanage tourism, where tourists visit or volunteer at orphanages, is one result of the orphan addiction. This chapter describes the political and social imperative behind the creation, encouragement and maintenance of this orphan addiction, which in turn drives orphanage tourism and the production of paper orphans. The increasing demand for orphanage tourism creates a demand for the maintenance of an orphan population to visit and volunteer with, which is achieved through paper orphaning.

Finally, Chapter Three explains the financial incentives of paper orphaning for developing nation governments. In order to maintain the financial benefits of orphanage tourism and aid aimed at orphans, developing nation governments become complicit in the paper orphaning process. This occurs through a reliance of States on non-government organisations to provide alternative care; an inability and reluctance to enforce the regulation of orphanage standards; and corruption and complicity by government officials particularly in relation to policing how the legal status of orphanhood is attained. This complicity creates the political conditions in which paper orphaning thrives.

Chapter Four establishes that orphanage tourism is a demand driver for paper orphaning. Orphanage tourism has increased in popularity in the last decade which, in combination with the enabling environment detailed in Chapter Three, has led to a proliferation of orphanages being established in developing States and the emergence of paper orphaning. Whilst there is extensive research on the interaction between tourists and orphanages, this thesis makes an original contribution in establishing that orphanage tourism is a demand driver for child trafficking into orphanages.

Chapter Four also examines the interrelationship between supply and demand in paper orphaning and argues that in order to understand how paper orphaning functions, a re-

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78 Cheney and Rotabi, above n 26.
conceptualisation of demand is required. Demand in trafficking is generally regarded as the embodiment of consumer desire which may be illegal (for example, child sexual exploitation) or at other times morally challenging (for example, cheap goods and services). However, demand for orphanage tourism functions differently as it is not initially predicated on consumer desire, but instead on a perceived supply of orphans who require assistance. It is this perceived supply, in combination with the construction of the orphan addiction examined in Chapter Three, to which orphanage tourism responds. To address the demand of orphanage tourism, the perception of the supply of vulnerable orphans must be countered. To do so, Chapter Four argues that orphanage tourism needs to be addressed bilaterally as both a threat to child protection and as a demand driver for child trafficking into orphanages.

Chapter Five situates the process of paper orphaning as a form of child trafficking under international law. The definition of child trafficking has two elements: the act element and the purpose element. Chapter Five applies the act element to paper orphaning, while Chapter Six focuses on the purpose element. Chapter Five begins by charting the history of child trafficking in international law, and particularly examines why child trafficking is the appropriate offence for paper orphaning. In doing so, it distinguishes the arguments advanced in this thesis from research on intercountry adoption as child trafficking. It then turns to applying the international framework on child trafficking to the process of paper orphaning beginning with the Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and argues that criminalisation of paper orphaning as a form of sale of children or abduction would fail to provide criminal accountability for the whole process of paper orphaning. To provide this accountability, Chapter Five argues that the process of paper orphaning should be recognised as a form of child trafficking under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. Chapter Five then turns to

82 Trafficking Protocol art 3(a).
applying the definition of child trafficking found in article 3 of the *Trafficking Protocol* to the process of paper orphaning, establishing that the act element is present.

Chapter Six establishes that the purpose element required to meet the definition of child trafficking is present in the paper orphaning process. This chapter demonstrates how the exploitation that paper orphans experience meets the purpose element of the child trafficking definition in the *Trafficking Protocol*. The definition of trafficking found in the *Trafficking Protocol* provides a non-exhaustive list of what ‘exploitation shall include’, namely *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* sexual exploitation, forced labour or services, slavery or practices similar to slavery and servitude, or the removal or organs.\(^{83}\) Chapter Six details how paper orphans are often subject to these forms of exploitation. The list of forms of exploitation in the definition of trafficking is prefaced with the statement ‘exploitation shall include, at a minimum’,\(^{84}\) therefore I argue that other forms of exploitation that paper orphans experience should be considered as meeting the ‘for a purpose of exploitation’ element. Specifically, I argue that where paper orphans are held in ongoing institutionalisation for profit, and/or where paper orphans are subjected to orphanage tourism, this should be regarded as meeting the purpose of exploitation element. Having established both the act element, in Chapter Five, and the purpose element, in Chapter Six, it follows that paper orphaning is a form of child trafficking under international law.

Chapter Seven articulates recommendations for tackling paper orphaning as a form of child trafficking. As this thesis definitively establishes that paper orphaning is a form of child trafficking, this chapter advocates for a comprehensive multi-sector framework that focuses on both anti-trafficking and child protection mechanisms to combat paper orphaning. The chapter utilises the three pillars for addressing human trafficking that are found in the *Trafficking Protocol*: prosecution,\(^{85}\) prevention\(^{86}\) and protection.\(^{87}\) Taking these pillars as a framework, Chapter Seven recommends that countries tackle paper orphaning through criminalising and prosecuting paper orphaning as a form of child trafficking; preventing

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83 Ibid.
84 Ibid.
85 Ibid art 5.
86 Ibid art 9.
87 Ibid art 6.
paper orphaning through addressing vulnerability, demand, corruption and complicity; and providing protection and assistance for child victims of paper orphaning focusing on identification and reintegration, and access to remedies. Chapter Seven advocates that a child rights based approach with a focus on prevention and protection, as opposed to just prosecution, must be at the centre of implementation of this framework.

Finally, Chapter Eight draws together the major contributions that the thesis makes and provides insight into how further research on paper orphaning is required to ensure that the momentum of practical impact achieved in the past two years is maintained.
CHAPTER TWO: THE PREVALENCE OF PAPER ORPHANING IN DEVELOPING STATES

I INTRODUCTION

This chapter explains the process, and details the prevalence, of paper orphaning in developing States. The problem of children being manufactured as orphans and used to generate profit in orphanages is global. Statistical data on the displacement of children to, and exploitation in, orphanages is scarce, however a growing body of evidence suggests that it is widespread, generating increasing concern. In 2009, a pivotal international report by Save the Children found that at least four out of five children residing in orphanages globally were not orphans and stated that some poor families were coerced into giving up their children in exchange for money by unscrupulous institutions hoping to profit from either the residence or trafficking of children. Since 2014, it has been reported that between 50 per cent and 90 per cent of children in residential care in many developing States are not orphans.

In 2014, the Better Care Network reported that the issue existed in Cambodia, Nepal, Thailand, Indonesia, Kenya, Ghana, and Guatemala. They noted that research findings in Nepal and Cambodia from a range of actors, including the government of Cambodia, UNICEF, and non-governmental organisations working in the region, demonstrated that operators set up orphanages to be run as businesses after ‘witnessing the creation of residential care centres by wealthy foreigners, and seeing the volume of visitors and tourists willing to donate time, money, and resources’. These reports elucidate both the prevalence of institutionalisation of children, and the burgeoning business of paper orphaning.

3 Ibid 5.
6 Ibid.
Part II of this chapter describes the process of paper orphaning. Paper orphaning is where children are actively recruited from their biological families into orphanages for the purpose of exploitation and profit. Paper orphaning commences with the recruitment of a child into an orphanage. Recruitment can be through inducing parents to relinquish their child, or by claiming a child has been abandoned and is in need of care. Orphanages involved in paper orphaning often manipulate gatekeeping standards by claiming that children have been abandoned or orphaned rather than relinquished, due to the lower standard of documentation required. This process is supported by the creation of fraudulent documentation, often of death certificates for parents, producing the child as a paper orphan. The final element of paper orphaning is the maintenance of the child in institutionalisation for the purpose of exploitation and profit.

Part III details the occurrence of paper orphaning in developing States across the world. It focuses on four regions where the evidence confirms that the number of children subjected to institutionalisation has increased due to the presence of international funding and orphanage tourism. The regions examined are Sub-Saharan Africa, by reviewing evidence from Liberia, Uganda and Ghana; South Asia with a focus on Nepal; South East Asia by examining Cambodia and Indonesia; and Latin America and the Caribbean with a particular focus on Guatemala and Haiti. These countries have been chosen as they exhibit typical features of paper orphaning in their region.

In conducting these examinations, it should be noted that there are significant challenges with collecting reliable data on children outside of familial care and residing in informal or alternative care. The number of children that are institutionalised in residential care, or orphanages, globally is estimated to be between 2.7 and 8 million. The exact figure of how many children are institutionalised globally is difficult to ascertain as existing data is very weak in many countries due to ‘poor administrative records or non-functional systems for capturing and recording the number and characteristics of children in care, inconsistent implementation of data quality assurance processes, and a lack of resources or investment in

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collecting reliable data’. Even where official figures are obtained, they do not include the many children residing in unregistered institutions. The difficulties in quantifying the number of children in alternative care globally mean that it is presently impossible to accurately quantify the number of paper orphans.

As there is currently a scarcity of academic research in this area, the evidence that this chapter relies on is primarily reports by domestic and international non-government organisations and governments on the number of children institutionalised, the process of child displacement from their biological family and the move towards deinstitutionalisation. This is supported by evidence found in investigative media reports including newspapers, documentaries and online media.

This chapter establishes that the issue of paper orphaning is prevalent throughout developing States. The discussion of the prevalence of paper orphaning in this chapter leads to an examination of the enabling environment in which paper orphaning flourishes in Chapter Three.

II THE PRODUCTION OF PAPER ORPHANS

One major concern is the manner in which families, especially from remote rural areas, are being persuaded to relinquish their children, often with a request for a financial donation. The children are then removed far away from their communities often to Kathmandu and other large urban areas where the promises made to parents are not necessarily fulfilled, documents are being falsified and, some children are being subjected to exploitation and abuse.

This Part begins by describing the process of commodification of the child as a paper orphan. ‘Paper orphan’ is a term that was coined by Terre des Hommes in their documentary Paper Orphans, which explored a series of intercountry adoptions from Nepal to Europe where the adoptees had living parents who had not given consent to their adoptions. These children were termed ‘paper orphans’ as they were orphans on paper only, having biological

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10 Petrowski, Cappa and Gross, above n 8.
11 Ibid 8.
families that may have technically given consent to their adoption, but did not understand the content of the documents they signed due to illiteracy or other fraud; or had not given consent in any form to the adoption but had placed their children in an orphanage to access education. My use of the term ‘paper orphans’ is consistent with this use until the point of adoption, although adoption is beyond the scope of this thesis.

The paper orphaning process comprises four related activities: active recruitment into an orphanage, the manipulation of gatekeeping procedures, the formalisation of orphanhood, and the ongoing maintenance of institutionalisation of the child. The first activity is the active recruitment by ‘child finders’\textsuperscript{14} of children from biological families into orphanages, usually facilitated by fraudulent promises made to the family. The second activity is manipulation of gatekeeping procedures through claiming that the child was abandoned, or that parental relinquishment or death has taken place. The third activity is the formalisation of the orphanhood of the child by the orphanage. In some cases, this process will include the forgery of new identity documentation by the orphanage to ensure that the child is untraceable by their biological family and anyone who may search for them, and also as a form of documentation to support the child’s ‘orphaned’ status. The final activity in the paper orphaning process is the maintenance of the child in the orphanage through institutionalisation, making them available for orphanage tourism and international funding.

\textbf{A \textit{The Active Recruitment of the Child into the Orphanage}}

Some people came and said they could provide a good education. So, I gave my daughter to Dobsang, my husband’s cousin. We went to Kathmandu together. I was completely lost, I did not know the language. I don’t know how to read. It has been almost nine years.\textsuperscript{15}

The first stage of the production of a paper orphan is their recruitment into an orphanage. Active recruitment into the orphanage takes place in order to ensure adequate numbers of


children are resident to secure funding, sometimes through a per child mandate from the domestic government, but usually for the purpose of private international funding.\textsuperscript{16} In a typical instance of paper orphaning, child finders or recruiters approach families, who often possess limited literacy, to offer their children access to education that would otherwise be unobtainable. The importance of education as a pull factor that encourages parents to allow their children to leave with a recruiter cannot be underestimated. A report in Nepal found that 100 per cent of parents surveyed said that the promise of a good education was a reason for allowing their children to be recruited.\textsuperscript{17} Orphanages in the Kathmandu Valley have reported having ‘field staff’ whose job it is to ‘explore the villages and bring in children’.\textsuperscript{18} In Ghana, it has been reported that ‘orphanage recruiters entice parents to give up their children, with promises of quality education, food, and clothing that will lead to brighter futures for their children’.\textsuperscript{19} Just as in Nepal, a report found that in Ghana recruiters were promoting orphanages as boarding schools and there were many reports of cash transactions for children taking place and being labelled as ‘donations’ to the family.\textsuperscript{20} In Kenya, there are reports of ‘child finders’ moving through villages offering free education, board and medical care.\textsuperscript{21} In Haiti, reports note that children may be ‘actively recruited from poor families or parents may willingly send them to orphanages during hard times, with the hope of bringing them back home when the family’s financial situation improves’.\textsuperscript{22} The primary reasons for children being admitted into orphanages in Haiti are poverty and a lack of access to basic

\textsuperscript{18} Ibid 22.
health, education and social services.\(^2\) In their 2016 Submission by Lumos concerning the Republic of Haiti for consideration during the 26th session of the Universal Periodic Review Working Group in the Human Rights Council, Lumos reported that they possessed information that one orphanage in Haiti was paying ‘child-finders’ to go into the slums of Port-au-Prince to recruit babies and paying up to $100 per child recruited.\(^3\)

Active recruitment into orphanages has also been reported in Malawi where a comprehensive national survey of 104 orphanages stated that 52 percent of the facilities were actively involved in recruiting children from communities.\(^4\) In Liberia, a comprehensive report on orphanages in the country revealed that children were actively sought from communities by recruiters who went looking for children and who received reward or money from the orphanage operators in exchange for placement.\(^5\) Children in these orphanages reported that members of churches that were owned by the orphanage operators brought them to the orphanage, or the orphanage operators recruited them.\(^6\) The report indicated that the ‘placement of children in these orphanages was unilaterally done by the proprietors’ with no involvement from government bodies or authorities.\(^7\) An alarming 95 percent of children residing in orphanages had been recruited by staff of the orphanage and did not meet the ‘basic criteria for placement’.\(^8\)

There are two main commonalities found in these active recruitment practices. The first is a manipulation of the parental desire for their child to be educated, and the second is poverty and a lack of access to social services, which forms the rationale for parents allowing their children to be recruited. In many instances, recruiters prey on both of these vulnerabilities targeting poverty stricken families to offer their children an education that they could not otherwise access. For example, in Cambodia it was noted that:

\(^6\) Ibid.
\(^7\) Ibid 11.
\(^8\) Ibid 15.
Some residential care facilities exploit the problem of poverty by actively recruiting children in poor families by convincing, coercing or even paying parents to give their children away. Through this kind of recruiting, many parents believe their children would be better off in care, unaware of the risks involved for children in terms of abuse, sexual and labour exploitation and even trafficking.30

The United Nations General Assembly, Guidelines for the Appropriate Use and Conditions of Alternative Care of Children 200931 make it clear that ‘financial and material poverty, or conditions directly and uniquely imputable to such poverty should never be the only justification for removal of a child from parental care’.32 While the active recruitment of children into orphanages is in direct contravention of these international guidelines, it remains the precipitating activity in paper orphaning and illustrates the very beginning of the paper orphaning business model.

**B THE MANIPULATION OF GATEKEEPING PROCEDURES**

The second stage of the paper orphaning business is where orphanages manipulate the admission of a recruited child into care by claiming abandonment, relinquishment or orphanhood. This section describes the advantages for orphanages involved in paper orphaning to manipulate the gatekeeping procedures for entry into alternative care by claiming a child is abandoned rather than recruited or relinquished. The Special Rapporteur of the Human Rights Council on the sale of children, child prostitution and child pornography reports that the ‘designation of children as having been abandoned or the relinquishment of parental rights on the child can be irregularly or illegally obtained’.33 Orphanages involved in paper orphaning do not openly report active recruitment, but instead seek to validate the recruited child as either abandoned, relinquished or orphaned.

Orphanages involved in paper orphaning often prefer to report that a child has been abandoned, as it requires less evidentiary proof than parental relinquishment. Further, where

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31 Guidelines for the Alternative Care of Children, GA Res 64/142, UN GAOR, 64th sess, 65th plen mtg, agenda item 64, supp no 49, UN Doc A/RES/64/142, (18 December 2009, adopted 24 February 2010) (’Alternative Care Guidelines’).
32 Ibid.
orphanages are actively recruiting and families believe that children will be attending educational facilities, it is easier to report the children as abandoned due to the inherent risk that the family may attempt to reclaim the child and any fraudulent documentation that was created to support a relinquishment may be discovered. As there are no identity documents required to prove abandonment, it does not pose as much of a risk. For example, in Nepal, there are a higher number of children reported as abandoned in the Kathmandu valley than in regional areas. This is because it is ‘much more expedient for a centre to declare a child as abandoned than to go through the relinquishment process’ due to the ‘legal framework and the prevailing practices’. When a child is relinquished, a formal process must be adhered to involving both the approval of the biological parents and the local government, usually the Village Development Committee or similar. The local government body must then submit a recommendation providing the financial, cultural and social circumstances of the relinquishment of the child, in addition to the biological parents authorising the relinquishment.

However, where a child is declared abandoned, there is no requirement for the Village Development Committee, or even the Central Child Welfare Board, the main government agency responsible for the alternative care for children, to be involved. The process for proving abandonment that the orphanage must undertake usually requires simply a police report and certificate detailing the circumstances the child was found in, or a letter from a hospital. In 2011, the Nepal Government Ministry of Women, Children and Social Welfare announced that children who were declared abandoned would not be eligible for intercountry adoption indicating that the requirements to be declared abandoned lacked the rigour necessary to ensure a child had actually been abandoned. However, as this only applies to intercountry adoption; there is nothing to prevent a child being declared abandoned for the purpose of ongoing institutionalisation, a key part of the paper orphaning process addressed below in Part II(C).

34 UNICEF and Terre Des Hommes, above n 17, 21.
35 Ibid.
36 Ibid.
37 Ibid.
The more relaxed procedural requirements for abandonment as opposed to relinquishment are also found in other countries. Patricia Meier describes how an orphanage worker in China who was on trial for buying babies, stated, ‘We would just randomly choose some place to say that we had picked up the abandoned infant from, and then we would say that we had been informed about the infant from the public hot-line. The police and notary office didn’t find anything unusual.’\textsuperscript{39} In India, when children are abandoned, orphanages place advertisements of photographs of the child in newspapers but they are often placed in newspapers that are limited geographically and the advertisements give little information about the child except that they have been abandoned. Where no one claims the child, the police issue a document declaring the child to be an orphan.\textsuperscript{40}

The overall rationale for the preference of an orphanage engaged in the paper orphaning business to declare a child abandoned rather than relinquished is that if the child is later located by their family, the evidence of fraud is limited and it is therefore difficult to prosecute. The declaration of abandonment still leads to the legal status of orphanhood; but involves less legal risk in the paper orphaning process than attempting to declare relinquishment. This provides a clear legal impetus for orphanages to manipulate gatekeeping procedures by preferencing declarations of abandonment over relinquishment. In either process, the opportunity for public official involvement in corruption is rife as evidenced by the next section discussing the creation of fraudulent documentation.

\textbf{C \textit{THE CREATION OF FRAUDULENT DOCUMENTATION}}

The third stage of the production of a paper orphan is the manufacture of fraudulent documentation to support the ongoing institutionalisation of the child. This is intrinsically linked to whether the child is declared as abandoned or relinquished, as seen above. In the case of abandonment, a child’s identity is easily re-created as there is little reliance on their actual identity to make the claim of orphanhood. However, the situation is more complicated if a child is declared as relinquished due to required documentation to prove this. In both situations, police and government officials may be complicit in the creation of such


The Special Rapporteur of the Human Rights Council on the sale of children, child prostitution and child pornography states that there is ‘no reliable data on the number of children who have been or are being adopted as a result of being sold, trafficked or subjected to other illegal acts and illicit practices’. She further states that the ‘falsification of documents (e.g. birth and medical certificates, the identification documents of the biological mother, DNA test results and relinquishment or abandonment declarations) and the bypassing of regulations’ in inherent in this process.

In the paper orphaining process, many children have their names changed and new identification documentation created including birth certificates for the child and death certificates for the parents. In the abovementioned report on Liberia, children reported that their names were changed when they were admitted to the orphanage, and that they usually were given the name of the orphanage operator or caregivers. Notably the children only gave information about their social history when the orphanage operator and caregivers were absent, indicating that they were aware that the information was sensitive.

In an orphanage in India, it was found that girls were recruited from Humla, Nepal where the parents paid 10,000 rupees to agents believing their children would be taken to school in Kathmandu. Instead, they were taken to South Tamil, India and admitted to a Christian orphanage. They were declared to be ‘orphans’ of Christian martyrs that had been killed by Maoists in the Nepali civil war, or abandoned by parents who did not want the cost of raising them, and were subsequently given Christian names. In a case in Nepal, Ms Bhujel, a mother, discovered her daughter had been adopted internationally. As part of the documentation for her case, there was a copy of the advertisement placed by the orphanage in the newspaper picturing the child and stating that she had been abandoned along with a

42 Ibid.
43 Ibid.
44 Parwon, above n 26, 11.
47 Ibid.
copy of the police letter certifying her as an orphan. Upon investigation, the police stated that there was an irregularity with the serial number of document proving that it was either created fraudulently by the orphanage itself or by a member of the police department. This is a common story in intercountry adoption and one explored by David Smolin in depth.

Smolin uses the term ‘child laundering’ to describe how traffickers use the official processes of adoption to create new identities for children including the manufacturing of fraudulent documentation. He states that the recruiting practice includes abducting or coercing parents to sell their children, or alternatively tricking birth parents into giving their children to recruiters. His argument is that, much like money laundering where illegally obtained money is laundered through a legitimate business, in intercountry adoption, the legitimate legal process of adoption effectively ‘launders’ children into legal orphans. This accords with the example of Nepal where it has been reported that often children are not declared officially abandoned until an intercountry adoption has been arranged, and the formal orphan documentation is only obtained once a monetary deposit has been received from the adopting parents in order that orphanages can ensure their costs will be covered.

In either case, the attainment of the status of orphanhood takes place when a child is declared a legal orphan for state purposes due to either abandonment or relinquishment. This happens before the legal process of adoption takes place. In this respect, the ‘laundering’ process to which Smolin refers extends to both the declaration of orphanhood by the state which enables the child to be adopted, and the adoption itself. It is the first that my argument is concerned with, as it provides the legal legitimacy required to maintain the child in the orphanage as an ‘orphan’.

48 Bell, above n 40, 42.
49 Ibid.
50 The concept of child laundering is considered in more detail in Chapter Five, Part III.
52 UNICEF and Terre Des Hommes, above n 17, 22.
The final stage of paper orphaning is the maintenance of institutionalisation for the purpose of exploitation and profit. This stage is where paper orphaning becomes a business model and a lucrative enterprise. Whilst parents may have paid recruiters a significant sum initially in the belief that their children were being taken to school, this is a one-off payment. The attraction of paper orphaning comes from the ability to exploit children in an ongoing manner to elicit profit. This profit comes from the formation of a business model structured around the maintenance of institutionalisation enabling foreign sponsorship, donations and orphanage tourism.

Many children are touted as orphans on websites seeking sponsorship for orphanages. In the case of the Michael Job Centre in South Tamil, where children were recruited from Nepal into India with fraudulent documentation created to support their orphaned status, the children were ‘advertised globally as orphans on the centre’s website’ with images and profiles for international sponsors to choose from. This depiction of the children as orphans for the purpose of gaining international funding when they had families prompted a reporter to state that ‘there is not a shred of doubt that the Humla girls were trafficked to India to make money for the Michael Job Centre’. In many respects, institutionalisation has potential to be more profitable than intercountry adoption where payment is finalised upon the completion of the adoption as where children are institutionalised as paper orphans, the sponsorship and orphanage tourism models promise ongoing lucrative sources of income. In the report Funding Haitian Orphanages at the Cost of Children’s Rights, it was found that orphanages needed to house children to raise funds to sustain the orphanage which ‘incentivized the unnecessary separation of children from their families, where orphanages actively seek out children simply to continue operating’ and that ‘the orphanage operates as a business, where children are the commodity’.

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53 Nelson, above n 46.
55 Ibid.
To maintain the profit from institutionalisation, orphanage operators will often not release children even where they have been requested to do so by parents. There have been cases where parents have located their children in an orphanage and the orphanage operators have required the parents to repay them for the costs of having the child institutionalised within the orphanage. In one case in Nepal, an orphanage operator created a system of bonded labour for a mother who had located her two children residing at an orphanage when she had believed them to be at school. Instead of releasing the children to her, the orphanage operator insisted she repay the debt for maintaining her children at the sum of 144,000 rupees (USD$1,440) for the expenses of maintaining the children in the orphanage for two years at the cost of 6,000 rupees per month. This was impossible for the mother who was employed as a family servant earning 4,000 rupees per month. In the same orphanage, another mother stated that she was asked to pay 30,000 rupees to release her child. It was reported that the owner of the orphanage asked the parents not to reveal that they were being charged to release their children, but rather told them to say that they were making a donation to the organisation.

This final act of the paper orphaning process is what distinguishes this thesis from previous research on how paper orphans are produced for intercountry adoption purposes. In my argument, paper orphans are maintained in orphanages for the purpose of exploitation and profit, whereas for intercountry adoption, the purpose of the paper orphaning process is to secure children for the purpose of adoption. My argument is that the ability to utilise paper orphans as commodities for orphanage tourism and to attract foreign sponsorship and funding has replaced the former profitability of intercountry adoption, particularly in developing States who have closed down, or restricted, their intercountry adoption programs as a result of corruption. This is detailed in relation to specific instances in the country narratives below.

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58 Ibid.
59 Ibid.
III DEMONSTRATING THE PREVALENCE OF PAPER ORPHANING

Having established how paper orphans are produced for the purpose of profit and exploitation, this part demonstrates the prevalence of paper orphaning in developing States. For ease of reference and to demonstrate that this is a widespread practice internationally, the examined countries are separated into regional areas. The regions that are examined are Sub-Saharan Africa, South Asia, South East Asia, and Latin America and the Caribbean. These regions have been chosen because they exhibit the enabling environment that allows paper orphaning to flourish.⁶¹

A PAPER ORPHANING IN THE SUB-SAHARAN AFRICAN REGION

The issue of paper orphaning has been widely reported across the African region with specific instances reported in Liberia, Uganda, Ghana, South Africa,⁶² Botswana,⁶³ Kenya,⁶⁴ Malawi⁶⁵ and Zimbabwe.⁶⁶ Studies show a substantial increase in both the number of orphanages and the number of children in care in the Sub-Saharan region.⁶⁷ This analysis focuses on Liberia, Uganda and Ghana within the Sub-Saharan African region in relation to paper orphaning.

1 Liberia

The example of Liberia has already been discussed above regarding the active recruitment of children into orphanages.⁶⁸ A primary indication of paper orphaning in Liberia was the rapid rise in both the numbers of orphanages in the country and the increased institutionalisation of children. In 1989, there were 10 orphanages in Liberia. This increased rapidly due to civil

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⁶¹ Chapter Three describes the enabling environment for paper orphaning.
⁶⁷ Faith to Action, above n 4.
⁶⁸ See the discussion on the active recruitment of children into orphanages in Liberia in Part II.
war and unrest, and by 1991, the number of orphanages had reached 121. By 2006, a report indicated that the number of orphanages had reduced in the three years following the end of the civil war only marginally to 111 housing 4840 children indicating that even without the rationale of civil unrest, children continued to be separated from their families for the purpose of institutionalisation. As a result of irregularities and a four-fold increase in numbers of children being adopted internationally between 2004 and 2006, Liberia placed a moratorium on its intercountry adoption program from 2009-2015.

Orphanhood is not the main driving factor for the high incidence of children living in alternative care arrangements in Liberia. The major pull factor is poverty, with orphanages being viewed as providing access to a better education. Families were ‘induced to surrender their children to orphanages with unfulfilled promises of better education and nutrition’. Orphanage operators themselves unilaterally recruit children into orphanages and it has been reported that 95 percent of children do not meet the basic criteria for placement. In addition, state subsidies are given to orphanages for every child in care, which incentivises the recruitment of children from birth families ‘for orphanage owners to house more children than they can accommodate’.

The closure of sub-standard orphanages has been difficult due to heavy interference by the government and politicians. Most orphanages are not operated for humanitarian reasons but rather as income generating businesses focused on the financial needs of the orphanage

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69 Parwon, above n 26, 4.
70 Ibid 2.
72 Ibid 13.
74 Ibid 7.
76 Parwon, above n 26 11.
78 Parwon, above n 26.
operators with ‘almost all of the orphanage institutions in Liberia act(ing) as though they are only responsible and accountable to their donor parties and not the government of Liberia’.

2 Uganda

Uganda has also experienced a sharp rise in the number of orphanages and children institutionalised. The number of orphanages in Uganda went from 30 in late 1992 to an estimated 800 in 2013 with more than 95 percent of the facilities not registered by the government to operate as residential care institutions. In 2003, Save the Children reported that 85 percent of children in residential care in Uganda had identifiable and traceable family. The active recruitment of children into orphanages has also been reported.

Intercountry adoption is Uganda was regulated by the Children’s Act 1997 (Uganda) which required foreigners to reside in Uganda for a period of 36 months in order to be eligible to adopt. However, a loophole was regularly utilised that allowed foreigners to take ‘guardianship’ of a child and return to their country of origin where the adoption could subsequently be completed. This loophole was utilised as a mechanism to obtain guardianship of children from Uganda by foreigners, thereby avoiding the perceived onerous conditions of residing in the country. The loophole was closed by the Ugandan parliament through an amendment to the Children’s Act 1997 (Uganda) in 2016, with the residence requirement also being decreased to twelve months to adopt.

A Baseline Study of institutions in Uganda conducted in 2012 found that most children residing in orphanages had been recruited in ‘line with a vision rather than the needs of the

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79 Ibid 16.
80 Neil Boothby et al, ‘What are the most effective early response strategies and interventions to assess and address the immediate needs of children outside of family care?’ (2012) 36(10) Child Abuse & Neglect 711, 713.
85 Ibid.
86 Ibid 32.
community’ and that where child sponsorship was involved, there was very little will to resettle children back with their families.\textsuperscript{87} It has been strongly argued that the increase in orphanages and residential care for children is the direct result of foreign sponsorship and donations, mission trips and orphanage voluntourism\textsuperscript{88} with over 80 percent of orphanages funded by foreign predominantly faith based non-government organisations\textsuperscript{89} and through child sponsorship by individuals and churches.\textsuperscript{90}

3 Ghana

In Ghana, the number of orphanages grew significantly from five in the 1990s, to over 110 in 2008.\textsuperscript{91} A report in 2009 found that out of 148 known orphanages, only eight orphanages were licenced with the government.\textsuperscript{92} Active recruitment has been reported with orphanages scouting communities for children, offering education and health.\textsuperscript{93} The majority of children in orphanages are placed through ‘informal channels such as admissions influenced by senior state officials and politicians’.\textsuperscript{94} It was also reported that up to 90 percent of children in orphanages had family that could care for them if provided some support.\textsuperscript{95}

A Country Focus report on Ghanaian residential care described that ‘western donors and volunteers, including those from faith-based communities’ had contributed to the growth,\textsuperscript{96} with examples of former volunteers returning to their home countries and fundraising and establishing charities which offer further volunteer placements to support the orphanages in

\textsuperscript{89} Chaitkin et al, above n 16, 20.
\textsuperscript{92} Csáky, above n 2, 3.
\textsuperscript{95} Frimpong-Manso, above n 93.
which they initially volunteered. In the same report, one interviewee stated, ‘for reasons that I am struggling to understand, it became a fad in Western giving circles to create and sponsor orphanages in Ghana and in many parts of Africa without asking if that was even needed’. 

News articles reported that ‘running an orphanage in Ghana has become a business enterprise, a highly lucrative and profitable venture’ and that ‘children’s welfare at these orphanages has become secondary to the profit motive’. In 2017, it was noted that there was ‘a sharp increase in the number of charlatan orphanages and children’s homes across the country’ due to the demand of ‘profit motives and personal gains [that] have taken precedence over the welfare of the children’. The failure of the Department of Social Work of Ghana to properly monitor or supervise orphanages led to many orphanages operating unlicensed with the ‘sole aim of making money from donors’.

The findings in these three countries in Sub-Saharan Africa are that the majority of orphanages are established as ‘a means to acquire funds from donors and orphanage tourism’, illustrating that active recruitment into orphanages for the purpose of profit is commonplace.

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97 Ibid 9.
98 Ibid 4.
E  PAPER ORPHANING IN THE SOUTH ASIAN REGION

There are reports of paper orphaning throughout the South Asian region including in Nepal, India, Bangladesh, and Sri Lanka. Here, the focus is on Nepal.

1  Nepal

Paper orphaning in the South Asian region is illustrated by the situation of Nepal where the government contributes no funding to residential care thereby essentially privatising the system. Between 2001 and 2005, there were 81 new orphanages established in 11 of the 75 districts of Nepal. In a 2005 report on 335 children’s homes in Nepal, it was found that only 56 percent of children were single orphans (where one parent had died) or double orphans (where both parents had died) and that one-fifth of children’s homes were not registered. The report noted that most homes were reliant on charities and international non-government organisations for funding, and that funding was scarce. Children recruited into orphanages were touted as ‘anath’ or ‘tuhuro’ meaning ‘orphan’, with a view to ‘obtaining donations, receiving international volunteers, obtaining funds through international sponsorships or intercountry adoption’.

In 2008, a report by UNICEF and Terre Des Hommes detailed the case of 1,000 children being transported from the mountain districts of Humla and Jumla, in west Nepal, to orphanages in Kathmandu, the capital city of Nepal. The agents recruiting the children from families convinced the parents that their children would receive a good education in Kathmandu. The parents paid between NPR 10,000 and NPR 20,000 to the agents to take

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104 Committee on the Rights of the Child, Concluding observations on the fifth periodic report of Bangladesh, UN CRC, 70th sess, 2052nd mtg, UN Doc CRC/C/BGD/CO/5, (30 October 2015).
106 Chaitkin et al, above n 16, 20.
108 Ibid xi.
109 Ibid xii.
110 Ibid 43.
112 UNICEF and Terre Des Hommes, above n 17, 13.
the children to school on the understanding that the children would return home in holidays, and that the families would be able to visit. The report revealed that the children were never admitted to school. Their names were often changed, and they were entirely lost to their searching families.\footnote{Basant Basnet et al, ‘Fact-finding Mission on Displacement of Children from Humla 29 December 2004 – 1 January 2005’, (Report, UNICEF and Forum for Women, Law and Development, Nepal, 2005).} It was eventually found that most children were sent to unregistered and illegal orphanages, and were residing in terrible conditions in Kathmandu. After two years, an investigation was launched after a child was admitted to hospital suffering from severe malnutrition.\footnote{UNICEF and Terre Des Hommes, above n 17, 13.} The report determined that, upon advice from the Central Child Welfare Board of Nepal, only 400 of the 1,000 children could be traced. Those 400 children were either returned to their families or sent to other orphanages.\footnote{Ibid.}

Further evidence of paper orphaning is found in project agreements between non-governmental organisations attempting to counter the issue. One example is the Programme Cooperation Agreement 2011-2012 (‘the Agreement’) formalised between Terre des Hommes and UNICEF, which states that families seeking a better education for their children were deceived by a ‘network of traffickers who strategically convinced parents to turn over relatively large sums of money or exchange of precious goods or land in return for taking their children to Kathmandu or India’.\footnote{Save the Children, above n 111, 6.} The Agreement further states that the network then falsified death certificates of the parents, and had the children declared as orphans, subsequently placing the children in horrific living conditions in institutions.\footnote{Ibid.}

These practices were rampant from 1996 until 2007.\footnote{Ibid.}

In 2009, a Study of Children’s Homes in Nepal found that 11 percent of orphanages were admitting children referred by a ‘broker’.\footnote{CPCS International Belgium and Central Child Welfare Board Nepal, ‘A Study of Children’s Homes in Nepal’, (Report, CPCS International, Belgium and Central Child Welfare Board, Nepal, 2009) 20.} In 2011, the United States Department of State’s Trafficking in Persons Report stated that ‘there were reports of traffickers in the remote Karnali region who deceive families into sending their children to urban areas with false
promises of schooling’. Whilst the report stated that many of the children were not admitted to educational facilities as intended, it did not link the trafficking to an end point of institutionalisation.

In 2012, the Committee on the Rights of the Child reported that families were ‘reportedly relinquishing their children as a consequence of soliciting, coercion or inducement’ and that ‘cases of children being abused by foreign paedophiles who run so-called orphanages and street shelters’ were an issue for Nepal. Following the earthquakes in Nepal in April 2015, reports emerged of children being removed from families by recruiters looking to place them in orphanages. Nepal undertook several measures to halt the admission of new children into orphanages through both an intercountry adoption moratorium and also a ban on new orphanages being registered. Despite these measures, the numbers of children institutionalised increased from 2015 to 2016. The post-2015 earthquake situation was not surprising given the context of orphanages and intercountry adoptions. In 2008, the Nepali government issued a ban on all intercountry adoptions for an eighteen-month period due to corruption that was rife in the adoption processes, particularly in the recruitment of children and corruption involving the payment of thousands of dollars in fees and donations to the orphanages and government officials. The moratorium was undertaken in the ‘wake of press reports of corruption and rampant exploitation of children’ including cases of the bypassing of regulations by agents ‘to illegally procure babies for potential parents for large amounts’. This was in addition to the non-government organisation Terre des Hommes documenting cases of children being trafficked by two district based political party members. At the same time, the Nepali government’s National Action Plan for Children


121 Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Concluding observations: Nepal, UN CRC, 60th Sess, 1725th mg, UN Doc CRC/C/OPSC/NPL/CO/1, (11 July 2012) [23].


124 Bell, above n 40.


126 Save the Children, above n 111, 6.
stated that the number of orphanages should be ‘increased’ and that Child Care Homes should be ‘promoted’. 127

The actions of the government in placing a moratorium on intercountry adoptions, whilst at the same time seeking to promote and increase the number of orphanages, can be construed in two ways. It could be argued that the ban on intercountry adoption directly resulted in more children being resident in orphanages and thus the government’s promotion of orphanages as a form of alternative care was an appropriate response. Alternatively, it could be argued that given that the political impetus to close intercountry adoptions was only due to extreme international pressure, the original political will to profit from intercountry adoptions based on fraud simply adapted to the new emerging cultural economy. That is, when the product became unsellable to the specific intercountry adoption market, a new market developed in profiteering from orphanages. Indeed, the United States Department of State still ‘continues to strongly recommend that prospective adoptive parents refrain from adopting children from Nepal due to grave concerns about the reliability of Nepal’s adoption system and credible reports that children have been stolen from birth parents, who did not intend to irrevocably relinquish parental rights’. 128 This argument is supported by the fact that when intercountry adoption was limited, there was a ‘sudden spurt in orphanages’ with 90 per cent of orphanages being located in the five top tourist districts: Kathmandu, Lalitpur, Bhaktapur, Kaski and Chitwan ‘where foreign visitors see the poor condition of children and donate generously’. 129

By 2016, there were 16,886 children residing in orphanages 130 and statistics reflected that up to 80 percent of children living in those orphanages could be raised by at least one of their parents. 131 One report stated that ‘residential facilities in Nepal are primarily supported by donors in industrialised countries – both individuals and associations – as well as by “volountourists”’. 132 Also in 2016, the Committee on the Rights of the Child noted in their

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127 Ibid 5.
129 Rai, above n 122.
131 UNICEF and Terre Des Hommes, above n 17, 19.
132 Chaitkin et al, above n 16, 20.
Concluding Observations on Nepal that children were being placed in residential care unnecessarily due to an ‘absence of an assessment system based on necessity and appropriateness’ and that there was a lack of government oversight of private institutions.133

The issue of paper orphaning was highlighted again in another 2016 report which noted that the major reason for children being institutionalised in Nepal was because parents believed that orphanages would offer access to better standards of education, and further stated:

One major concern is the manner in which families, especially from remote rural areas, are being persuaded to relinquish their children, often with a request for a financial donation. The children are then removed far away from their communities often to Kathmandu and other large urban areas where the promises made to parents are not necessarily fulfilled, documents are being falsified and, some children are being subjected to exploitation and abuse.134

It also stated that ‘very few children in residential facilities are orphans, or those that are have been subject to abuse and exploitation’.135

In 2017, the United States Trafficking in Persons Report included the process of paper orphaning as a form of trafficking in the Nepal narrative stating that:

under false promises of education and work opportunities, Nepali parents give their children to brokers who instead take them to frequently unregistered children’s homes in urban locations, where they are forced to pretend to be orphans to garner donations from tourists and volunteers; some of the children are also forced to beg on the street.136

After years of advocacy, Nepal is the first country to have this form of trafficking included in the annual Trafficking in Persons Report.137 The explicit link between orphanage tourism

133 Committee on the Rights of the Child, Concluding observations on the combined third to fifth periodic reports of Nepal, UN CRC, 72nd session, 2137th mtg, UN Doc CRC/C/NPL/CO/3-5, (7 July 2016) (‘Concluding observations Nepal 2016’) [28].
134 Gale and Khatiwada, above n 12.
135 Ibid.
and the recruitment of children was the first official acknowledgement that paper orphaning was a form of trafficking, and it paved the way for the Special Interest section on ‘Child Institutionalisation and Trafficking’ in the 2018 Trafficking in Persons Report.  

F Paper Orphaning in the South East Asian Region

Paper orphaning is reported as occurring across the South East Asian region including in Cambodia, Indonesia, the Philippines, Viet Nam, Laos, Myanmar, Malaysia, and Thailand. This analysis focuses on Cambodia and Indonesia.

1 Cambodia

Non-government and government reports have highlighted the issue of paper orphaning in Cambodia since 2011. In Cambodia, the Khmer word for orphan is ‘kmeng kamprea’, which loosely translates to ‘child without parental care’. Contrary to western social constructions of orphanhood, the usage of kmeng kamprea does not require the death of both parents which may help to explain the increasing prevalence of orphanage care for children who have living parents. The intercountry adoption program in Cambodia was recognised as ‘the best

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145 How differing constructions of orphanhood are utilised to attract aid is examined in Chapter Three, Part II.
documented instance of large-scale child laundering within the intercountry adoption system’. As a result, some receiving countries suspended their programs with Cambodia in 2001.

Despite this, there was a 75 percent increase in the number of orphanages in Cambodia from 2005 to 2010. A UNICEF report conducted in 2011 particularised the increasing number of residential childcare institutions in Cambodia. The key findings of the report were that foreign donors were the main funders of residential care. In addition, it was found that orphanages had started offering volunteer placements and having children solicit for funding through orphanage tourism to attract funders. In doing so, it was reported that they were putting children at risk. Despite the number of orphans decreasing over the last decade, and estimates that nearly three out of every four children in the country’s orphanages have at least one living parent, the number of orphanages doubled from 2011 to 2016. The report drew a direct correlation between these statistics and tourists donating time and money.

Further research shows that most orphanages in Cambodia rely on foreign volunteers and donors. In 2013, it was reported that two orphanages in Phnom Penh were closed due to deliberately keeping the resident children in ‘shoddy conditions to inspire more donations’. The same report expounded that most orphanages were established near tourist attractions giving them ready access to foreign volunteers, which was one of the

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147 Smolin, above n 51, 135.
150 Ibid.
151 Ibid.
152 Ibid.
153 Ibid.
155 Carpenter, above n 146, 132.
‘biggest pull factors in the growth of orphanages’. The significant rise in both the number of orphanages and children institutionalised is credited to the potential to make financial profit. There are currently seven times more children residing in orphanages than in 1983, four years after the Khmer Rouge rule ended in 1979. Currently, it is estimated that one per cent of the total population of children in Cambodia are living in orphanages.

Paper orphaining in Cambodia has been highlighted by several campaigns targeted at the issue. For example, in 2015, the non-governmental organisation Friends International ran a campaign aimed at the tourism sector entitled ‘Children are not Tourist Attractions’. The campaign featured children in glass boxes with white tourists taking photographs of them. The aim of the campaign was to highlight that tourist visits to orphanages caused more harm than good despite the tourists’ best intentions, and that orphanage tourism was responsible for separating families. Subsequently, experiences of volunteers in Cambodian orphanages have emerged where volunteers have uncovered the industry for themselves. An Australian, Tara Winkler, founder of the non-governmental organisation, Cambodian Children’s Trust, published a book on her experiences of being a volunteer in an orphanage who discovered that the resident children were not orphans. Thus far, this advocacy has seemingly done little to subdue the paper orphaining business in Cambodia with the 2017 report discussed above showing a further increase in the number of children institutionalised in the country.

In 2018, the Cambodian narrative in the Trafficking in Persons Report noted the issue of paper orphaining stating that:

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157 Carpenter, above n 146, 130.
162 Tara Winkler and Lyndsey Delacey, How (not) to start an orphanage...by a woman who did (Allen & Unwin, 2016).
some Cambodian orphanages purchase local children from economically disadvantaged families and subject them to malnutrition and unclean living conditions in their facilities for the purpose of attracting and profiting from charitable donations.\textsuperscript{164}

In 2017, the Cambodian Government committed to tackling the issue by adopting a mandate to deinstitutionalise 30\% of children residing in orphanages by the end of 2018, and banning children under three years old from being institutionalised.\textsuperscript{165}

2 Indonesia

The issue of paper orphanning is also highly prevalent in Indonesia where there are an estimated 500,000 children institutionalised with 94 percent of them having one or more parents alive.\textsuperscript{166} It is estimated that there are more than 8000 institutions in Indonesia\textsuperscript{167} and children spend on average twelve years in the institution once placed.\textsuperscript{168} Over 90 percent of these institutions are operated by private organisations which may receive some government subsidy.\textsuperscript{169} In a Rapid Assessment Report of Orphanages in Aceh it was found none of the orphanages studied had any mechanism in place for resettlement of children back to their families.\textsuperscript{170} Instead, orphanages were seen as a permanent placement in direct contravention of the United Nations \textit{Guidelines for the Alternative Care of Children.}\textsuperscript{171}

It has been reported that children reside in orphanages in Indonesia because tourists are willing to pay for their education and the tourist demand for orphans to sponsor creates an industry ‘that works to make children available for foreigners who wish to help’.\textsuperscript{172} The same

\textsuperscript{166} Florence Martin and Tata Sudrajat, ‘Someone that Matters: The quality of care in childcare institutions in Indonesia’, (Report, Save the Children, 2007) 19.
\textsuperscript{167} Chaitkin et al, above n 16, 19.
\textsuperscript{169} Chaitkin et al, above n 16, 19.
\textsuperscript{171} Ibid 70.
\textsuperscript{172} John Allen Gay, ‘White Messiah Complex’ (Jul/Aug 2014) 13(4) \textit{American Conservative} 18.
report states that ‘these children essentially work as orphans because their parents cannot afford to send them to school’. This correlates with research that suggests that active recruitment into orphanages peaks just prior to the commencement of the academic school year.

Attempts to address the rising number of orphanages and institutionalisation in Indonesia led to many orphanages undergoing a technical change in terminology to ‘child care centres’ in order that they would not fall afoul of regulations pertaining to residential care institutions and orphanages. In 2004, the Family and Community-Based Social Services for Neglected Children Guidelines issued by the Ministry of Social Affairs Indonesia declared that residential childcare institutions should be the main mechanism for providing outreach services to vulnerable children in the community. This was partially rectified in a 2008 version of the Guidelines, which called for an emphasis on family support, however ‘service institutions; either social organizations or NGOs, or orphanages’ were still charged with the main responsibility of community outreach in this area. Another report recommended that ‘financial incentives that encourage the placement of children (especially very young children) in institutional or residential care should be eliminated’.

**G PAPER ORPHANING IN THE LATIN AMERICA AND THE CARIBBEAN REGION**

There are currently at least 240,000 children residing in institutions in the Latin America and the Caribbean region. Research across thirteen countries in the region shows that inequality

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173 Ibid.
177 Ibid.
and poverty are the main drivers of institutionalisation and that excessive use of institutionalisation as a protective measure for vulnerable children is a problem.

Across the countries of Latin America and the Caribbean, there are high numbers of children residing in orphanages who have parents. In Paraguay, there are 5,000 children in orphanages and 90 percent have a parent that could care for them. In Argentina, there are 17,063 children spread across 642 institutions while in Mexico there were 29,310 children in 703 institutions in 2007. Two countries that provide an indicative illustration of the issue of institutionalisation in region are Guatemala and Haiti.

1 Guatemala

In 2000, the Special Rapporteur on the sale of children, child prostitution and child pornography highlighted the problem of intercountry adoption in Guatemala. Instead of being utilised as a measure of last resort, intercountry adoption had become rampant against a backdrop of a thirty-year civil war. The Special Rapporteur stated that children were more often sent to privately run institutions, some of which only existed in order to facilitate intercountry adoption, rather than state run institutions. She further stated that due to the ‘huge profits’ to be made, the child had ‘become an object of commerce rather than the focus of the law’. In the context of Guatemala at the time, she stated that intercountry adoption involved ‘a variety of criminal offences including the buying and selling of children, the falsifying of documents, the kidnapping of children, and the housing of babies awaiting private adoption in homes and nurseries set up for that purpose’. This provides the context for the paper orphaning business in Guatemala.

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181 Ibid 78.
182 Ibid 16.
183 Ibid.
185 Ibid.
186 Ibid.
A 2008 report found that there were 33 orphanages in Guatemala with 5600 children institutionalised. Ninety-five percent of the orphanages were funded by international non-government organisations and faith-based groups, and just five percent by the state. By 2013, a report estimated that while the number of children institutionalised had remained relatively stable at 5566, the number of orphanages had risen dramatically to 141. The report’s authors cautioned that the figures may not be accurate due to failures to maintain the registration of orphanages or the record keeping of children institutionalised in a timely manner. The authors confirmed that 131 of the 141 orphanages (93 percent) were privately funded, confirming the previous findings from 2008. In Guatemala, it was found that once children had been admitted to an orphanage, they usually remained institutionalised for the remainder of their childhood. This is in direct contravention of the Children’s Law of Guatemala, which provides that placement in an orphanage should only be temporary.

Orphanages in Guatemala have also suffered from a lack of oversight and regulation, which ‘coupled with financial incentives, has resulted in cases of coercion and bribery of young, often poor, rural women’ to relinquish their children. The lack of regulation and oversight have been blamed for the devastating fire at a large orphanage in Guatemala which killed 36 children in 2017 with a non-government organisation stating ‘this was just the worst possible consequence of the weak rights policies imposed by a State to an aloof and indifferent society’ and that the situation was ‘not unique to this country, and hopelessly replicated throughout the whole region’.

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188 Pérez, above n 187, 34.
189 Palummo, above n 179, 21.
190 Ibid.
192 Ley de Protección Integral de la Niñez y Adolescencia, Decreto No 27-2003 (Guatemala) art 18.
193 Faith to Action, above n 4, 12.
In Guatemala, the paper orphaning business was established to fuel the supply of children for intercountry adoption. The Public Prosecutor’s Office has successfully proven the existence of an organised criminal structure for the purpose of child trafficking through intercountry adoption established by owners of orphanages with the complicity of judges, government officials and registrars.\textsuperscript{196} However, with sanctions placed on intercountry adoption, the business of orphanage tourism has soared. A report in 2018 found that several institutions were receiving up to USD$10 million annually from fees that they charge volunteers.\textsuperscript{197} This explains why, despite the implementation of a moratorium on intercountry adoption which caused adoption rates to plummet,\textsuperscript{198} the number of children institutionalised and the number of orphanages in Guatemala remains high.

2 \textit{Haiti}

In Haiti, a report in 2009 found that four percent of the total child population was residing in institutions.\textsuperscript{199} Haiti has a strong intercountry adoption programme. Following the earthquake in 2010, it was reported that ‘desperately poor families have often felt compelled to place children in residential care facilities, only to return later and find that they have been given away for adoption’.\textsuperscript{200} Post-earthquake, in 2012, there were an estimated 30,000 children living in more than 722 orphanages in Haiti\textsuperscript{201} and a temporary moratorium was placed on new intercountry adoptions.\textsuperscript{202} By 2016, this had increased to 32,000 children residing in more than 760 orphanages;\textsuperscript{203} more than 80 percent of those children had a living biological parent.\textsuperscript{204} As for the countries described above, the same issues with government regulation and monitoring were found, with only 15 percent of orphanages registered and


\textsuperscript{198} Cheney and Rotabi, above n 88, 96.

\textsuperscript{199} Red Latinoamericano de Acogimiento Familiar, above n 180, 17.


\textsuperscript{202} Peter Selman, ‘Intercountry adoption after the Haiti earthquake: rescue or robbery?’ 35(4) (2011) \textit{Adoption \\& Fostering} 41. This is further discussed in Chapter Three, Part III(B).


\textsuperscript{204} Mulheir and Cavanagh, above n 14, 12.
no official admission or exiting procedures for children.  

Extensive research into the situation of Haitian orphanages has found that international funding has led to ‘an “orphanage” not an “orphan” crisis in Haiti’. There have been many reported instances of children being utilised by orphanages for profit in Haiti. Heeding a call for assistance following the 2010 post-earthquake, a volunteer from the United States discovered that the orphanage she was working at was utilising the 75 resident children who were living in squalor to request donations and church assistance. She found that donations of goods were on-sold by staff and the children did not benefit.

In 2016, the Committee on the Rights of the Child reported their concern at the ‘high number of children…in alternative care institutions [in Haiti] despite having one or both parents alive’ and that:

the vast majority of alternative care institutions are privately run, often operate without authorization and are insufficiently monitored and that many of these institutions are profit motivated, using donor funds as a source of revenue, and actively look for children to host while refraining from promoting family reunification.

The Committee called on Haiti to support and facilitate family based care; to establish adequate safeguards for the admission of children into institutions; and to increase the number of publicly run institutions ‘to ensure that all privately run institutions are non-profit, officially registered and subject to regular control and monitoring’.

In 2018, a pilot study on institutionalisation practices following Hurricane Matthew acknowledged that ‘tens of millions of dollars go towards Haitian residential care facilities on

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205 Ibid 5.
206 Vernaelde, above n 56, 15.
207 Ibid 6.
208 Mulheir and Cavanagh, above n 14, 15.
209 Ibid.
210 Committee on the Rights of the Child, Concluding observations on the combined second and third periodic reports of Haiti, UN CRC, 71st sess, 2104th mtg, UN Doc CRC/C/HTI/CO/2-3, (24 February 2016) (‘Concluding observations on Haiti. 2016’) 42(b).
211 Ibid.
an annual basis, which is driving the establishment of facilities on a purely for-profit basis212 and that ‘unregulated and unscrupulous institutions were recruiting children to profit from international adoption and child trafficking’ through paper orphaning.213

IV CONCLUSION

This chapter examined the production of paper orphans through the process of active recruitment of children into orphanages; the manipulation of the admission of children to care by recording abandonment or orphanhood rather than relinquishment; the creation of fraudulent documentation; and finally, the maintenance of institutionalisation for the purpose of obtaining funding through orphanage tourism and foreign sponsorship.

The main commonality of the paper orphaning business globally is the recruitment of children into orphanages due to the pressure of poverty and lack of access to social services. This, along with the creation of fraudulent documentation, results in orphanage operators manipulating the recruitment process so that children are legally registered as abandoned or orphaned rather than relinquished in order to minimise legal risk. For the paper orphaning business, the ongoing maintenance of institutionalisation is crucial as it creates a business model for both funding and orphanage tourism.

To illustrate the prevalence of paper orphaning, this chapter then summarised the situations in the Sub-Saharan Africa, South and South East Asia, and Latin America and the Caribbean regions through describing the experience in countries that have exhibited an increase in institutional care for children. In examining each region, it was found that the impetuses of civil war or natural disaster, combined with the ongoing issue of poverty, a lack of access to social services and a lack of gatekeeping enforcement for admission into orphanages, are the common factors that provide the conditions for paper orphaning to flourish. It was also found that many of the countries analysed, including Uganda, Nepal, Cambodia, Guatemala and Haiti, have been documented as experiencing exploitative intercountry adoption programmes motivated by profit. Once the intercountry adoption regulations were tightened or programs were closed, it is argued that the paper orphaning business has shifted to focus

213 Ibid 22.
on profit-making institutionalisation through orphanage tourism and foreign funding. This is facilitated by governments’ abrogation of their child protection responsibilities in relation to alternative care for children and the high prevalence of foreign funding of institutions, often between 95-100 percent. This results in active recruitment by orphanages to elicit more funding and a sharp increase in the number of children being institutionalised unnecessarily.

If paper orphaning were a standalone issue in one or two countries, solutions focused solely on domestic law and regulation would be sufficient. However, the prevalence of paper orphaning, in combination with the commonalities found in the way that paper orphaning emerges around the world, means that consistent international efforts are required to abate it. This provides the rationale for an international response, as this thesis argues and promotes. Having established the prevalence of paper orphaning globally, Chapter Three describes the enabling environment for paper orphaning.
CHAPTER THREE: THE ENABLING ENVIRONMENT FOR PAPER ORPHANING

I  INTRODUCTION

This chapter establishes the enabling environment for paper orphaning, and that the purpose of the paper orphaning business model is ultimately to profit from donor funding and orphanage tourism. In developing States, orphans are made highly visible in attracting both aid and tourism, leading to a social and political dependency on the utility of the orphan child. This chapter explains how orphanhood is cultivated and promoted to garner aid and tourism in developing States. This chapter contextualises the prevalence of paper orphaning described in Chapter Two and situates the paper orphaning business as being incentivised and entrenched by social and political factors which form the enabling environment for paper orphaning.

The chapter begins in Part II with an examination of the social and legal status of the terms ‘orphan’ and ‘orphanhood’ and how they are utilised. Orphanhood is predominantly a social status assumed when a child is abandoned or their parents die; and becomes a formalised legal status when the state assumes responsibility for the child and certain rights are attributed on the basis of the child’s status as an orphan. Because orphans have tended to be perceived socially as objects of mercy, the legal formalisation of orphan status can bring value and privilege in developing States due to aid and tourism targeted at ameliorating their situation. The status of orphanhood can be contrasted with the definition of orphan used by non-governmental organisations when determining their beneficiaries. This chapter illustrates how governments and non-governmental organisations utilise both the status of orphanhood and the definition of orphan employed by aid agencies to increase aid and tourism that is focused on the orphan child, leading to a financial dependence on the orphan child.

This utility of orphanhood is heavily promoted by developing States through the ‘iconography of emergency’ which is examined in Part III. Government and non-government organisations readily use depictions and images of the lone child, apparently

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orphaned, and with no adult assistance available, completely removed from their familial or cultural context, to seek aid and development assistance. This imagery conveys a sense of emergency and engenders identification by the west of being rescuers and saving children. In recent years, a common response to this identification has been to found or support orphanages whether an immediate emergency context exists or not. As orphans and orphanhood are promoted as a primary object of aid, in Part IV, I argue that this utility is manipulated and exploited by both governments and non-government organisations alike to encourage what has been termed an ‘orphan addiction’. This orphan addiction is emblematic of the iconography of emergency and is the impetus for orphanage tourism.

In Part V, I argue that the orphan addiction is encouraged and nurtured to promote aid and tourism through orphanages. Orphanage tourism, where tourists visit or volunteer at orphanages, is a classic example of donor-driven aid. This chapter describes the political and social imperative behind the creation, encouragement and maintenance of this orphan addiction, which in turn drives orphanage tourism and the production of paper orphans. The increasing demand for orphanage tourism creates a demand for the maintenance of an orphan population to visit and volunteer with, which is achieved through paper orphaning.

Finally, Part VI illustrates the financial incentives for developing nation governments of paper orphaning. In order to maintain the orphan population and the financial resources that such a population attracts through aid and tourism, developing nation governments become complicit in the paper orphaning process. This is seen in the reliance of states on non-government organisations to provide alternative care; the failure to enforce minimum standards of care in orphanages; an inability and reluctance to enforce the regulation of orphanage standards, and corruption by government officials particularly in relation to policing how the legal status of orphanhood is attained. This complicity creates the political conditions in which paper orphaning thrives.

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The ultimate purpose of this chapter is to establish the contextual landscape both socially and politically in developing States, which forms an enabling environment in which paper orphaning thrives.

II CONSTRUCTING ORPHANHOOD

This section describes how the social and legal statuses of orphanhood, in combination with the definition of orphanhood for the purpose of aid, contributes to ambiguity that is utilised by governments and non-government organisations in developing countries to attract aid and tourism. Judith Ennew argues that there is no universally accepted definition of ‘orphan’. The term ‘orphan’ is defined in the Oxford Dictionary as ‘a child whose parents are dead’. It is generally understood that a child is categorised as an orphan when their parents die, abandon or relinquish them. Orphanhood is ‘a social category and/or status, and a situational and/or structural condition that can either be heightened and highlighted or suppressed, depending on the material and social conditions of the wider society of which orphans are a part’. For a child to have the legal status of an orphan, state formalisation is required.

A THE SOCIAL STATUS OF ORPHANHOOD

As a social status, orphanhood is often regarded as ‘an example of an antithesis of dignified life or vulnerability’. The social status of orphanhood is assumed where a parentless child is socially and materially dependent on wider society for their safe passage through childhood. In western society, a lack of parents is central to understanding orphanhood. Parents are ‘viewed as indispensable to the successful raising of children’ and orphanhood is a ‘significant marker of disadvantage’. Orphanhood has long been mythologised and pathologised through stories of orphans residing in orphanages and their inherent disadvantage. It is this

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7 Ennew, above n 3.
8 Nicola Ansell, “Once upon a time …’: Orphanhood, childhood studies and the depoliticisation of childhood poverty in southern Africa’ (2016) 23(2) Childhood 162, 167.
social status of orphanhood in developed countries that is at the forefront of the utility of the orphan child for aid and tourism in developing countries.

The social status of orphanhood differs between developed countries and developing countries. Tatek Abebe defines the social status of orphanhood as a ‘generic characterisation’ that involves both parental deprivation and the social-economic condition of the child.\(^9\) Patricia Henderson states that in the African context generally, the status of orphanhood ‘embraces existential dimensions, and has more to do with destitution, alienation and a lack of belongingness’ than a loss of parents per se.\(^10\) For example, in South Africa, the loss of both parents does not necessarily invoke the social status of orphanhood due to the ‘non-nuclear nature of South African household relationships’.\(^11\) The social status of orphanhood is ‘synonymous with being unloved, uncared for and destitute’ and orphans are the object of both pity and stigma.\(^12\) The social status of orphanhood as children who are materially deprived results in children being relinquished to orphanages to access better opportunities rather than due to the loss of parents or abandonment. The use of the term ‘OVC’ (Orphans and Vulnerable Children) in aid contexts adds to the confusion about whether children residing in orphanages are actually orphans. This term is an amalgamation of parentless children with the materially deprived or vulnerable, and aid intervention, including orphanage care, is directed at this category as a whole.

The contextualisation of the social status of orphanhood provides a rationale for the institutionalisation of children in orphanages who are materially deprived but do not lack parents. It also illustrates the juxtaposition upon which paper orphaning flourishes. That is, western donors, volunteers and tourists believe that children residing in orphanages are orphans according to their own social understanding of orphanhood, thus believing that the children are parentless or abandoned,\(^13\) which engenders a desire to assist. This is in contrast

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\(^12\) Ibid, 422.

to the social status of orphanhood in developing States being regarded as a socio-economic condition of material deprivation rather than a lack of parents. Paper orphaning takes advantage of this ambiguity.

B THE LEGAL STATUS OF ORPHANHOOD

In contrast to the social status of orphanhood, for a child to be regarded as a legal orphan universally, either parental rights must be actively relinquished, or there must be a formalisation of the status of the child through the state assuming responsibility for the child. This legal formalisation may be through a guardianship or court order which results in the child becoming a ward of the state.\(^\text{14}\) As discussed in Chapter Two, the legal status of orphanhood in developing States is most often claimed through parental abandonment\(^\text{15}\) with a recent analysis of 77 countries across five regions showing that the death of both parents is ‘a relatively rare occurrence for children under 15’.\(^\text{16}\)

The process of formalisation of the legal status of orphanhood is important as it confers certain rights upon a child and a fundamental rationale for the paper orphaning business. Article 20 of the Convention on the Rights of the Child states that where a child is ‘temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment’, they shall be ‘entitled to special protection and assistance provided by the State’.\(^\text{17}\) It further provides that states are to ensure alternative care is provided for the child\(^\text{18}\) which can include ‘foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children’.\(^\text{19}\)

The United Nations Guidelines on the Appropriate Use of Alternative Care further state that:


\(^{18}\) Ibid, art 20(2).

\(^{19}\) Ibid, art 20(3).
where the child’s own family is unable, even with appropriate support, to provide adequate care for the child, or abandons or relinquishes the child, the State is responsible for protecting the rights of the child and ensuring appropriate alternative care, with or through competent local authorities and duly authorized civil society organizations. It is the role of the State, through its competent authorities, to ensure the supervision of the safety, well-being and development of any child placed in alternative care and the regular review of the appropriateness of the care arrangement provided. 20

As such, in most countries, the status of orphanhood includes an obligation on the state to ensure a child’s welfare, including ensuring the child’s right to have a guardian appointed. A court or an executive body usually grants a guardianship order to effect this. Such an order means that the ‘panoply of legal and social welfare measures’ 21 associated with orphanhood will be assumed by the child’s guardian. In practical terms this results in social welfare entitlements from the government, in addition to qualification for non-government organisation programs and funds that focus on orphaned children.

Due to this, the legal status of orphanhood has become a valued identity in many developing States as it attracts privileges such as education and material resources. 22 Children residing in orphanages are often educated, have access to vocational opportunities and the ability to learn English. To gain access to these opportunities, impoverished families may consent to admitting their children to orphanages as a ‘mechanism for coping with their economic situation and as a means of accessing services, such as food, or better material conditions for the children in their care’ 23 not realising that their legal parental rights may be revoked as part of the process.

The formalisation of the legal status of orphanhood grants guardianship to the orphanage. There is a direct correlation between the number of ‘orphans’ an institution has, and the

21 Burman, above n 1, 241.
23 Neil Boothby et al, ‘What are the most effective early response strategies and interventions to assess and address the immediate needs of children outside of family care?’ (2012) 36(10) Child Abuse & Neglect 711.
amount of funding it is likely to be entitled to, or attract. To achieve this status and the rights it entails, the formalisation of orphanhood may be falsified as described in Chapter Two. Thus, the formalisation of orphanhood forms an important aspect of the paper orphaning process, with the legal status of orphanhood becoming commoditised.

C CONSTRUCTING ORPHANHOOD FOR AID

In contrast to both the social and legal status of orphans, many non-government organisations operating in developing States have constructed their own definition of ‘orphan’ for the purpose of determining beneficiaries of their programs. For example, UNICEF defines an orphan as a child who has lost one, or both parents.24 According to the UNICEF definition, there are 153 million orphans globally with 17.8 million children being double orphans (having lost both their parents).25 UNICEF also states that ‘evidence clearly shows that the vast majority of orphans are living with a surviving parent, grandparent or other family member’ demonstrating the social resilience mechanism of kinship care.26

UNICEF acknowledges that its definition, according to which there are 153 million orphans, is often utilised as a call to action for aid in programming and policies.27 In advocacy work, ‘statistics can be rhetorically persuasive and important’28 and are utilised to full effect in aid and development. A definitional distortion inflating the number of ‘orphans’ creates a call to aid that emphasises the aspect of vulnerability of orphanhood over any social resilience that may have previously been attributed to orphanhood.29 UNICEF acknowledges that ‘this misunderstanding may then lead to responses that focus on providing care for individual children rather than supporting the families and communities that care for orphans and are in need of support’.30 Many governments and non-government organisations have adopted

26 UNICEF, above n 24.
27 Ibid.
28 Meintjes and Giese, above n 11, 410.
30 UNICEF, above n 24.
UNICEF’s definition and utilise it in their programming.\textsuperscript{31} This may be due to the way in which this particular definition ‘captures the western imagination and has proven to be effective in spurring donor support’\textsuperscript{32} which is further examined in the next section.

The result of the construction of orphanhood according to the UNICEF definition is the constant focus and priority of the international aid community on the provision of individual care for the orphan child,\textsuperscript{33} an issue that UNICEF themselves acknowledge.\textsuperscript{34} There are between 2 million and 8 million children institutionalised globally,\textsuperscript{35} however there is little correlation between these figures and the estimated 17.8 million double orphans because, as outlined above, the majority of double orphans are cared for in kinship situations. Further, it is estimated that four out of five children residing in orphanages or residential care centres have one or both parents living who are capable of caring for them.\textsuperscript{36} Despite this, the term utilised for children residing in orphanages, or residential care centres, is ‘orphans’. This is because children living in these contexts are either socially regarded as orphans or hold the legal status of orphans for the purpose of their institutionalisation.

Given the ‘varying interpretations of orphans’\textsuperscript{37} seen between the social status of an orphan as a child who has lost both parents or is materially deprived; the legal status of orphanhood entailing rights and privileges; and the UNICEF definition resulting in a figure of 153 million orphans, it is little wonder that the business model of paper orphaning has developed. These differing conceptualisations of orphanhood are ‘ambiguous, analytically unhelpful, stigmatising for the children and manipulated to serve socio-political agendas’\textsuperscript{38} and illustrate

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\textsuperscript{31} See, eg, the Malawian government and many Faith Based Organisations in Malawi have adopted this definition: “Saving” Malawi: faithful responses to orphans and vulnerable children’ (2010) \textit{33}(1) \textit{NAPA Bulletin} 50, 54.

\textsuperscript{32} Ibid 54.

\textsuperscript{33} Ennew, above n 3, 128.

\textsuperscript{34} UNICEF, above n 24.


\textsuperscript{36} Corinna Csáky, ‘Keeping children out of harmful institutions: Why we should be investing in family-based care’, (Report, Save the Children, 2009) 3.

\textsuperscript{37} Csáky, above n 35.

\textsuperscript{38} Kathie Carpenter, ‘Continuity, Complexity and Reciprocity in a Cambodian Orphanage’ (2015) 29(2) \textit{Children \\& Society} 85, 93.

the necessity for a ‘clear definition of which children should qualify for adoption/legal guardianship and under what circumstances such qualification should be evoked’.  

The inherent contradiction of differing statuses and constructions of orphanhood, and the manner in which they are utilised, incentivise the process of paper orphaning. This is especially so when orphanhood becomes a ‘globally circulated commodity’ which is crucial to garnering aid and tourism. It is the way in which these statuses and constructions are utilised that leads us to examine the role that orphans and orphanhood play in aid and tourism.

III THE UTILITY OF ORPHANHOOD FOR AID AND DEVELOPMENT IN DEVELOPING STATES

From the above section, we can see that the differing statuses and constructions of orphanhood have potential implications for the utility of orphanhood for governments and non-government organisations. Governments are often reliant on the support of non-government organisations, the private sector, and international donors to assist with the requirements of orphaned and vulnerable children in their countries. This section explores how orphanhood is utilised as a call for aid by developing States. To understand the utility of orphanhood in this context, we must first examine how the international aid community is persuaded to concentrate their support on orphans and from there, how the symbiotic relationship of orphanhood and aid emerges.

It is widely acknowledged that the utility of orphanhood has contributed to an increase in development assistance and commitments by western nations to developing States. Where vulnerability is predicated on orphanhood, reliance grows on the depiction of the orphan child. It is the manner in which this depiction is utilised that is investigated in this chapter as it is essential to understanding the context of paper orphaning. If governments and non-government organisations alike rely on the depiction of the orphan child in fundraising for

40 Meintjes and Giese, above n 11, 425.
42 Kamchedzera, above n 6, 1.
aid and development, pressure grows to maintain a population of orphans which creates the conditions for paper orphaning to emerge and thrive.

**A Privileging Orphanhood in Aid**

In his research, Abebe explores the conceptualisations of orphanhood, the care dilemma orphans create for societies, and the opportunities for aid that they represent. He states that the international aid community is often more concerned with selectively supporting orphans than addressing the structural causes of poverty and marginality. This view is echoed by Meintjes and Giese, who state that the focus on caring for orphans can be so extreme that it actively excludes support for other vulnerabilities. The cultivation of orphanhood as a specific form of vulnerability has led the international community to prioritise resources to protect orphans. For the communities involved, the focus on orphan care to the exclusion of other vulnerabilities can result in relinquishment of children to orphanages where other non-government services could have aided but are not provided due to the focus on orphan care. Investments in renovating or improving orphanages can also incentivise orphanages to increase the number of children in their care. Further, the concentration on funding and maintaining orphanages by governments can undermine the creation and funding of new community services. Geoff Foster states that this form of ‘deficiency-oriented model of social service’ causes potential beneficiaries to position themselves in order to qualify for aid. This positioning is seen where children are posed as orphans in order to garner aid through the paper orphaning business.

Where non-government organisations assume responsibility for orphan care through their benevolent mandate of aid and development, it leads to an obfuscation of the traditional kinship method of caring for orphans and a focus on establishing orphanages. This is in part due to the philanthropic interests being ‘mitigated by vested material benefits’ for orphanage

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44 Abebe, above n 9, 70.
45 Meintjes and Giese, above n 11, 408.
46 Ennew, above n 3, 128.
48 Ibid.
operators. Chirwa recognises that the operators of orphanages receive many material and social benefits including ‘publicity, higher socio-political status and honour’ enabling them to access ‘economic facilities and support provided by donors, governments and other development agencies’. Further, whilst orphans under the care of non-government organisations may be elevated to comparative privilege through receiving education and housing, a symbiotic relationship emerges when non-government organisations utilise the depiction of orphanhood in their fundraising endeavours to encourage donations.

Within the development and aid paradigm, children hold a crucial position as ‘indicators of development progress, illustrations of the need for change, and objects of policy interventions’. Children appearing alone, without visible adult input or family, and in need of support and assistance are commonly used to fundraise for child development and protection programs. As Erica Burman states, ‘children are figured heavily in aid appeals: they plead, they suffer, and their apparent need calls forth help in the form of donations’. She argues that this imagery creates both subjectivity of the child, and identification for the donor. The child, as the subject, is alone and in need of help; and we, in the west, identify as the competent donors who are able to help. However, the help that we offer them is always on our terms only. Burman refers to this subjectivity and identification as the ‘iconography of emergency’ and argues that its use creates conditional, donor-selected and donor defined aid.

Cheney states that the depiction of the orphan lifts children out of their social and family context and creates the ‘orphan identity’ that is homogenised, pathologised, and situated

50 Chirwa, above n 5, 107.
51 Ibid.
52 Ansell, above n 8.
54 Burman, above n 1, 241.
55 Ibid.
56 Ibid.
58 Burman, ‘Innocents abroad: Western fantasies of childhood and the iconography of emergencies’, above n 1, 246.
59 Cheney, above n 29, 155.
60 Henderson, above n 10, 304.
for benevolent humanitarian intervention.\textsuperscript{61} This removal from societal context abstracts orphanhood and creates a visibility and profile where the international community only wants to support orphans to the exclusion of all others. The abstraction of orphanhood through these depictions along with the differing definitions of orphanhood and how they are utilised, ‘invites the application of inappropriately homogenised or culturally chauvinistic development models’.\textsuperscript{62} Development models such as orphanages and residential care facilities, opened and run by foreigners who heed the call to aid and engage in ‘rescue fantasies of childhood as well as actual children in this enterprise’.\textsuperscript{63} For Chirwa, the use of orphanhood in this manner constitutes ‘banking on the poor and the vulnerable, and exploiting their plight’.\textsuperscript{64} This is found not only in the aid and tourism context of developing States, but is often predicated on contexts of emergency such as natural disasters.

\textbf{B \textit{Natural Disasters and the Iconography of Emergency}}

Natural disasters provide the epitome of how the iconography of emergency operates in the context of the orphan child in relation to both governments and non-government organisations. Recent history shows us two prevalent responses to natural disasters for orphaned children. The first is intercountry adoption and the second is establishing orphanages.

Much has been written about the use and abuse of intercountry adoption as a form of aid specifically targeting children being utilised after natural disasters\textsuperscript{65} and war.\textsuperscript{66} Intercountry adoption is a transnational response to attempt to alleviate orphanhood. In 2010, following

\begin{footnotesize}
\textsuperscript{61} Freidus, ‘Unanticipated outcomes of voluntourism among Malawi’s orphans’, above n 13, 13.
\textsuperscript{62} Burman, ‘Innocents abroad: Western fantasies of childhood and the iconography of emergencies’, above n 1, 243.
\textsuperscript{63} Ibid 245.
\textsuperscript{64} Chirwa, above n 5, 108.
\end{footnotesize}
a massive earthquake in Haiti, the situational potential of ‘disaster adoption’ was experienced. As part of the earthquake response, the Haitian government expedited intercountry adoptions that were already underway. Within ten days of the earthquake occurring, a United States based Christian charity flew 80 Haitian children with adoption documentation that had been signed prior to the earthquake, to the United States.67

The Haitian government temporarily suspended new adoptions in order to prevent child trafficking.68 Despite this measure, scandal in Haiti soon erupted when ten missionaries were charged with child abduction after trying to take 33 children who were not orphans out of the country without permission.69 Another 54 children were airlifted for adoptions to be arranged by the United States Governor for Pennsylvania, Edward G Rendall, only to discover that 12 of them were not in fact orphans.70 The Haitian situation revealed the complex issues associated with intercountry adoption as an emergency relief mechanism. Whilst there was a ban on intercountry adoptions being commenced, there was no ban on orphanages opening and taking in children, which they did at a rapid rate. The ultimate legacy of the 2010 earthquake was an estimated 32,000 children residing in orphanages, around 80 percent of whom had at least one living parent.71

The proliferation of orphanages was also seen in the aftermath of the tsunami in Aceh, Indonesia in 2004. In Aceh, it was found that the perceived privilege of orphanhood in combination with an international community keen to support orphaned children culminated in 97.5 percent of children residing in orphanages having been actively placed by their families in order to receive an education.72

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68 Selman, above n 65, 41.
Following the earthquakes in Nepal in April and May 2015, the government issued a moratorium on all intercountry adoptions, not just a suspension on new adoption proceedings, in addition to a ban on any new orphanages being registered. Existing orphanages were also prohibited from receiving new children without government approval.\textsuperscript{73} However, even following these stricter measures, 245 children were intercepted from being trafficked either to illegal orphanages or for other illicit purposes in the first two months after the earthquakes. In a press release pertaining to the post-earthquake trafficking, UNICEF stated ‘in some cases children are deliberately separated from their families and placed in orphanages so they can be used to attract adoptive families, fee-paying volunteers and donors’.\textsuperscript{74} It was also reported that there was a proliferation of ‘pop up’ orphanages that were not registered officially but had been established to capitalise on the aid pouring into the country\textsuperscript{75} and an increase of 486 children institutionalised in orphanages.\textsuperscript{76}

In the context of a natural disaster, images of a single child alone and in desperate need are utilised by both governments and non-government organisations to encourage donations. Following the Nepal earthquake, a widely-utilised photograph of two children, a boy of about four years old sheltering his baby sister, huddled together on rubble, bereft and alone became a ‘social media emblem’.\textsuperscript{77} The image portrays utter vulnerability in the face of the aftermath of the 7.8 magnitude earthquake and was employed by many media agencies and non-government organisations. The photographer, Na-Son Nguyen clarified on Twitter\textsuperscript{78} that it was not a photo of the Nepal earthquake, but rather a photo originally taken in Vietnam.\textsuperscript{79}


\textsuperscript{78} Na-Son Nguyen, ‘This is my photo about two Vietnamese Hmong ethnic children taken in 2007 in Ha Giang province, it’s not about Nepal’, Na-Son Nguyen, Twitter, 2 May 2015 <https://twitter.com/nasonnguyen/status/594543607782051840?lang=en>.

\textsuperscript{79} Bennett, above n 77.
The use of a stock photo rather than a photo from the actual disaster exemplifies how images are utilised to compel feelings of sympathy and pity in line with Burman’s iconography of emergency. As Mary Mostafanezhad states ‘these images continue to be key signifiers in the development industry, primarily because they have the desired effect on targeted donors’.

With increased scrutiny on both sending and receiving countries in relation to intercountry adoption due to extensive documentation of what David Smolin refers to as ‘child laundering’, the manner in which the west is encouraged to aid orphaned children has evolved. Rather than removing children from their native countries, the emphasis is on maintaining them in their own countries through the provision of education, food and housing. Thus, the standard response following a natural disaster where the west is flooded with images of alone and vulnerable children is now to found, build and support orphanages.

Through this examination, we can see how the iconography of emergency functions as a mechanism to enhance the utility of orphanhood. It is a tactic employed by both governments and non-government organisations, and it does not require a current emergency context to flourish. For example, whilst civil war and unrest are often the impetus for a humanitarian response of mass institutionalisation of children, there is a continued prevalence of institutionalisation following the cessation of such unrest. In a time of emergency, orphanages proliferate yet are ‘frequently understaffed, poorly organized, and unable to meet minimum standards’. There are many orphanages still relying on civil wars that were resolved decades ago as a continued imperative for the intervention of orphanage care.

An example of the continued proliferation of orphanages is found in Cambodia where the civil war was resolved in 1975 and the Khmer Rouge regime overturned in 1979. Many non-

81 David M. Smolin, ‘Child laundering: How the intercountry adoption system legitimizes and incentivizes the practices of buying, trafficking, kidnapping, and stealing children’ (2006) 52 Wayne Law Review 113. This concept will be discussed in depth in Chapter Five, Part III.
82 Bennett, above n 77.
83 Boothby et al, above n 23, 713.
84 Ibid 715.
government organisations in Cambodia are still reliant on the civil war narrative for their fundraising. One example is an Australian non-government organisation operating in Cambodia that continues to utilise the civil war as the basis for their continued running of orphanages today which house over 400 children. Illustrating other aspects of the utility of orphanhood for aid and development, the same organisation has been heavily critiqued for their use of alone, dirty children in their fundraising campaigns. Such critique appears to have had little impact on their fundraising with over AUD$4.6 million raised in 2015-2016. In Cambodia, a study published in early 2017 estimated that 48,775 children were living in orphanages equating to one percent of the entire population of children. Over 80 percent of these children have one or more living parents. The study found that the children were usually placed in the orphanage due to poverty and to access education, once again illustrating the importance of the privileged status of orphanhood. Would these same children be supported outside of an institution whilst remaining with their families? Given the emphasis in fundraising and aid on the orphaned child, the inference is that they would not be, as it appears easier to raise funds to support orphans than it is to maintain children in their own familial environment. Indeed, if this international support were provided to support immediate or extended families in maintaining their children, orphanage placements could be avoided.

These examples demonstrate how the construction and image of orphanhood is utilised to encourage aid and development, and provides a platform to begin exploring how this utility is manipulated and exploited to create a system where paper orphaning can occur.

IV CULTIVATING THE ORPHAN ADDICTION

The evident contradiction in how ‘orphanhood’ is constructed, in combination with the utility of orphanhood for aid, has led to a perceived orphan crisis eliciting both charitable

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89 Ibid.
90 Rosenthal, above n 47, 195.
and humanitarian responses from the international community. This produces a privileging of orphanhood that in turn encourages the legal status of orphanhood as a commoditised entity. The way in which the government and non-government sectors have cultivated the depiction of orphanhood within the international community creates an obsession with providing aid to orphans to the exclusion of other vulnerabilities. This obsession is what Kristen Cheney terms the ‘orphan addiction’. 

A THE ORPHAN INDUSTRIAL COMPLEX

Cheney argues that the promotion of orphan rescue in developing States produces an ‘orphan industrial complex’ which in turn drives the production of ‘orphans as objects for particular kinds of intervention, counter to established international standards of child protection’. The utility of orphanhood for aid and development is clear; it is the manipulation and exploitation of that utility that leads to the orphan addiction. In the paper orphaning process, the manipulation of the utility of orphanhood has led to the development of a rescue narrative where westerners are encouraged to ‘rescue’ orphans through sponsoring, adopting or volunteering in orphanages. Cheney’s argument is that ‘orphan-addicted donors’ are driving a demand for the proliferation of orphanages. She labels this process the ‘orphan industrial complex’.

Cheney provides an example of this through an examination of the situation of institutionalisation of orphans in Uganda. In 1992, there were 1.3 million orphans in Uganda, accounting for 16 percent of the child-aged population, with 2,990 institutionalised in orphanages. By 2013, orphans accounted for 14 percent of the child population and there were 50,000 children residing in 800 institutions with 80 percent having living parents. In the period of 1992 – 2013, whilst the overall percentage of orphans in the child population had decreased by two percent, the rate of institutionalisation had increased by 1,624 percent. That is, the rate of institutionalisation was not connected to the actual numbers of orphans,

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91 Cheney and Rotabi, above n 78, 4.
92 Ibid.
93 Ibid 2.
94 Ibid.
95 Williamson and Greenberg, above n 35, 9.
96 Kristen Cheney, “‘Addicted to Orphans’: The Orphan Industrial Complex and Donor Influence in Uganda’s Child Protection System”, Children, Young People and Development Symposium (22 August 2014) (National University of Ireland, Galway).
but rather children were being ‘manufactured as orphans’ to meet the demand of child rescuers.97

Cheney states that the influx of international aid into Uganda specifically for ‘orphans’ drove the establishment of more institutions and orphanages.98 Foreign donors instruct local orphanages to increase their numbers of children regardless of whether they have been abandoned or are in need, ‘to please their supporters’.99 She labels this the ‘orphan industrial complex’.100 While Cheney addresses the concept of donor-driven orphanhood, she does not provide an account of the movement of the child from the family to the institution, or whether orphanage tourism can be a demand factor for trafficking. This thesis addresses these two critical issues.101

B THE BIBLICAL MANDATE TO CARE FOR ORPHANS

Other accounts of orphan addiction and rescue can be seen in faith-based responses to the perceived orphan crisis. Orphanages are not a traditional domestic community based response to the plight of orphans, but were established by missionaries with a paternalistic and colonial frame of reference to proselytise through providing for children outside of familial contexts.102 In doing so, the introduction of orphanages subverted the usual method of orphan care in developing States. Today, faith-based responses including Christian, Muslim and Buddhist organisations continue to participate in orphan care largely due to what they perceive as a spiritual calling.103

100 Ibid.
101 Ibid.
In her book, *The Child Catchers: Rescue, Trafficking and the New Gospel of Adoption*, Kathryn Joyce summarises the evangelical movement’s approach to intercountry adoption as answering a ‘biblical mandate to care for orphans’.\(^{104}\) She states that in responding to the perceived ‘orphan crisis’, and through fervent persuasion of their followers to adopt orphaned children as a manifestation of their faith, the Christian adoption movement has inspired the ‘creation of more orphans’.\(^{105}\) Just as the movement reached its peak, intercountry adoption began to decline due to fraud and corruption in various developing States’ adoption systems and corrupt adoption agencies seeking to profit.\(^{106}\) The problems included children coming into the adoption system due to false representations made to birth families about the permanent nature of adoption; implied offers of payment to birth families (both immediate and forthcoming from children once they were raised in a western country); the lack of consent to adoption from birth parents (whether fully informed or not); and that the majority of children were relinquished due to the socio-economic condition of the family.\(^{107}\) These are the same recruitment conditions we find in the paper orphaning process.

### C. The Emergence of Paper Orphaning

My argument is that orphanages that were a product of the adoption industry and existed solely to meet the demand for intercountry adoption\(^{108}\) have adjusted their modus operandi due to increasing government restrictions, and in some cases, bans, on intercountry adoption. In paper orphaning, the recruitment and trafficking process remain the same, however the end point of exploitation is found in the maintenance of a child in an orphanage for the purpose of profit and exploitation.\(^{109}\) Regardless, the orphan addiction remains the same, driven by the manipulation of the utility of orphanhood and, ‘as orphanages spring up around the country, so do orphans to fill them’.\(^{110}\) This provides further impetus for the argument that orphanages have adapted to a changing business environment and shifted the cultivation

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\(^{105}\) Ibid.

\(^{106}\) Ibid.

\(^{107}\) Ibid.


\(^{109}\) This argument is considered in depth in Chapter Six, Part IV.

\(^{110}\) Cheney, ‘Blood binds: Confronting the moral and political economies of orphanhood and adoption in Uganda’, above n 99, 197.
of the orphan addiction from promotion of intercountry adoption to the promotion of volunteering in and supporting orphanages.

For Christian faith based approaches, this has meant an increased focus on mission trips. Mission trips have evolved from the former approach where missionaries would be sent to live often permanently in a non-Christian nation to proselytise, to Christians taking trips to developing States to perform ‘service’ usually for a few weeks at a time.\textsuperscript{111} Many mission trips are centred on serving in orphanages. A 2012 national study in the United States found that 27 percent of religious congregations sent groups abroad to do international charity work.\textsuperscript{112}

In Uganda, for example, there were 150 mission trips visiting orphanages in 2016 with an average of USD$3,000 per person spent and twelve participants in each trip. It was calculated that more than USD$5 million was spent in Uganda alone on those trips.\textsuperscript{113} Given that the organisers of these trips generally have long standing donor relationships with the orphanages they visit, the combination of money received by Uganda in both donations and tourism for these mission trips is significant. In the same research, it was found that the cost of closing an orphanage of 30 children, reunifying them with family and supporting those families would cost $12,000.\textsuperscript{114} This obsession with personally providing aid to orphans through mission trips obfuscates the true purpose of the aid and exemplifies both donor-driven aid and the orphan addiction. As Burman states ‘the feel good factor is now more important than compassion’.\textsuperscript{115} It is this ‘feel good factor’ that orphanage tourism promulgates.

\textbf{V \hspace{1em} ORPHANAGE TOURISM AS A MECHANISM OF THE ORPHAN ADDICTION}

The outcome of the manipulation of the iconography of emergency and the orphan addiction that this thesis focuses on is orphanage tourism. Orphanage tourism is one exemplification


\textsuperscript{112} Mark Chaves, Shawna L. Anderson, and Alison Eagle, ‘National Congregations Study’, (Report, Department of Sociology, Duke University, 2015) 29.


\textsuperscript{114} Ibid.

\textsuperscript{115} Burman, ‘Innocents abroad: Western fantasies of childhood and the iconography of emergencies’, above n 1, 250.
of donor-driven aid. Orphanage tourism is defined as a ‘form of short term volunteer tourism that is undertaken at an orphanage and encourages international volunteer tourists to engage in care giving activities for orphaned children’.

Western tourists with good intentions ‘hoping to ameliorate the circumstances of orphanhood’ include both visits and volunteering in orphanages as part of their travel plans. The portrayal of orphans in developing States and the encouragement to engage with them through orphanage tourism means that orphans have become a fundamental part of the tourist narrative. Orphanages are frequently established in locations that are popular with western travellers to increase the appeal of volunteering. Even with a shift from aid to tourism, the utility of the iconography of emergency remains pertinent because donors and volunteers are motivated by developing States requiring intervention and ‘spurred into action by particular images, promotional materials, advertisements, news stories and personal accounts of volunteer work done by returning volunteers in churches, schools or other community events’.

Wilson states that in most voluntourism programs, the ‘project’ is usually dependent on payments made by volunteers to participate. It is often the “volunteer need” which is the driving force behind “project output” rather than a community driven need. That is, the projects are based upon what volunteers can achieve rather than what communities actually require. Kate Simpson states that the depiction of the ‘third world’ where there is a ‘need’ provides legitimacy for voluntourism development programs. The need is depicted through simple dualisms and homogenous stereotypes providing ‘evocative and recognisable images’. This same practice is found in the business of orphanage tourism where the demand for orphanage tourism by well-meaning volunteers and visitors requires a population of orphans to volunteer with and assist, and this demand leads to the emergence and

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117 Cheney and Rotabi, above n 78, 5.
119 Ibid.
120 Freidus, ‘Unanticipated outcomes of voluntourism among Malawi’s orphans’, above n 13, 2.
122 Ibid.
maintenance of the paper orphan business.\textsuperscript{124} Orphanage tourism becomes an enticement to continue requesting aid through asking that volunteers and visitors donate to maintain and support the orphanages. Unwitting tourists comply, not realising that they are contributing not only to the larger issue of keeping children institutionalised, but also to the recruitment and trafficking of children into orphanages.

While this chapter argues that the emergence of orphanage tourism is a result of the abstraction of the social and legal construction of orphanhood combined with the manipulation of the utility of orphanhood, Kathie Carpenter argues that orphanage tourism is a product of the social construction of childhood.\textsuperscript{125} There have long been contentious debates about the nature of childhood and its evolution, from children being seen as labour-based breadwinners for the family to a perception that children should be shielded from labour and their youth be protected through education and play.\textsuperscript{126} The role of orphanage volunteers is often seen as attempting to provide a western idealised version of childhood to children who the west perceives as suffering or having a ‘lesser’ childhood.\textsuperscript{127} The usual motivation for volunteering is to help and to alleviate this suffering. However, once in the institutional setting, volunteers often comment that caretakers do not play with the children and that becomes their function in an attempt to recreate an idealised western childhood.

Rather than agreeing that the motivation for orphanage tourism is an abstraction of childhood, I argue that it is the iconography of emergency that motivates volunteers in the first instance. That is, once orphanage volunteers arrive, they may find that the children in the orphanage are experiencing a vastly different childhood to the one they experienced. This results in the volunteers themselves reflecting upon their own childhood and attempting to replicate what they perceive to be the important factors involved. For example, there is a large concentration on volunteers seeing their role as providing fun and playing games with the children. This is in contrast to what drives their first desire to volunteer which is usually an attempt to ameliorate poverty and the lack of family that the orphans experience.

\textsuperscript{124} The demand of orphanage tourism as a driver for child trafficking into orphanages is examined in Chapter Four. The purpose of this section is to highlight how orphanage tourism operates as a mechanism of the iconography of emergency thereby establishing that development and aid are reliant upon it.
\textsuperscript{125} Kathie Carpenter, ‘Childhood studies and orphanage tourism in Cambodia’ (2015) 55 \textit{Annals of Tourism Research} 15, 18.
\textsuperscript{126} Ennew, above n 3, 131.
\textsuperscript{127} Tara Winkler, \textit{Why we need to end the era of orphanages}, TedX Sydney (25 May 2016) (Sydney, Australia).
Once volunteers and visitors are present at the orphanage, children are often deliberately kept in very poor conditions to elicit concern and donations from visitors and volunteers, further maintaining the iconography of emergency.\textsuperscript{128} The importance of volunteers liking them and feeling sympathetic is impressed upon the children.\textsuperscript{129} Growing up in an orphanage in Kenya, Stephen Ucembe articulates his memory of the senior staff on duty standing at the centre of a circle of volunteers pronouncing how some of us had been abandoned by their parents, how others had been picked from the streets and others rejected by families. The majority of us often dropped our heads in shame and embarrassment during these introductions.\textsuperscript{130}

He states that the use of the term ‘orphan’ stole their dignity and individuality.\textsuperscript{131}

Child protection experts state that the constant rotation of volunteer caregivers contributes to attachment disorders in children without primary caregivers.\textsuperscript{132} Those participating in orphanage tourism rarely have appropriate credentials to work with vulnerable children and whether the focus on play by rotating volunteers is of any worth to the long term development of the children has not been established.\textsuperscript{133} Where the presence of volunteers does not benefit the children, it is argued that the purpose of orphanage tourism is profit driven.\textsuperscript{134}

As Reas succinctly summarises, ‘orphanage tourism locates and commodifies children as objects of rescue fantasies, objectified as adorable innocents, waiting to be loved by enthusiastic westerners’.\textsuperscript{135} The presence of volunteers and visitors does not ameliorate the conditions in which children in orphanages reside but rather causes both cognitive and

\begin{itemize}
  \item \textsuperscript{128} Tess Guiney and Mary Mostafanezhad, ‘The political economy of orphanage tourism in Cambodia’ (2014) 15(2) \textit{Tourist Studies} 132, 143.
  \item \textsuperscript{130} Ibid.
  \item \textsuperscript{131} Ibid.
  \item \textsuperscript{132} Linda M Richter and Amy Norman, ‘AIDS orphan tourism: A threat to young children in residential care’ (2010) 5(3) \textit{Vulnerable Children and Youth Studies} 217.
  \item \textsuperscript{133} Carpenter, ‘Childhood studies and orphanage tourism in Cambodia’, above n 125, 19.
  \item \textsuperscript{134} Guiney and Mostafanezhad, above n 128, 143.
  \item \textsuperscript{135} P Jane Reas, “Boy, have we got a vacation for you’: Orphanage Tourism in Cambodia and the Commodification and Objectification of the Orphaned Child’ (2013) 16(1) \textit{Thammasat Review} 121.
\end{itemize}
material detriment to the children. Where this occurs, paper orphans become the commodity in the orphanage tourism product.\textsuperscript{136} My argument is that rather than providing benefit to the children, the purpose of orphanage tourism is to provide profit to the orphanage operators, an influx of tourism and a follow on of aid money to the developing nation.

VI THE COMPLICIT ROLE OF GOVERNMENTS IN PAPER ORPHANING

In addition to utilising and manipulating orphanhood to attract aid and tourism, governments may be incentivised by the economic benefits associated with orphanage tourism to become complicit in the paper orphaning process. Developing States often allow the majority of orphan care to be privatised through non-government organisations. However, in doing so they often fail to enforce orphanage registration requirements, gatekeeping or monitoring standards. Corruption creates an additional revenue stream for often lowly paid government officials\textsuperscript{137} who work in child welfare departments tasked with regulating and monitoring orphanages. The complicity and corruption involved in paper orphaning takes place through a combination of inaction and action by governments.\textsuperscript{138} Actions and inactions that may result in complicity or corruption by government officials in paper orphaning include the reliance of the government on non-government organisations for the provision of alternative care without due enforcement of minimum standards, and corruption by government employees such as involvement in the creation of fraudulent documentation and accepting bribes from orphanage operators to avoid sanction.

A THE RELIANCE ON NON-GOVERNMENT ORGANISATIONS FOR THE PROVISION OF ALTERNATIVE CARE

Governments may become complicit in the paper orphaning process through a heavy reliance on non-government organisations for the provision of alternative care for children.\textsuperscript{139} Whilst it is common for non-government organisations to fill the 'gaps in

\textsuperscript{136} Reas, “’So, Child Protection, I’ll Make a Quick Point of It Now’”: Broadening the Notion of Child Abuse in Volunteering Vacations in Siem Reap, Cambodia', above n 118, 306.


governments’ provision of social services in Southern countries’, the Committee on the Rights of the Child has noted with concern the over-privatisation of the alternative care system. In many nations where paper orphaning is an issue, for example, Nepal, Cambodia and Uganda, non-government organisations provide the majority of alternative care for children in the country. Developing States argue that this reliance is necessary as they lack the required funds to maintain the numbers of children requiring care. There are inherent risks involved where governments relinquish this control to non-government organisations, particularly where there is a lack of enforcement of minimum standards regarding registration and monitoring mechanisms.

Ennew notes that it is common for orphans to ‘disappear from state records and controls by being handed over to unlicensed, unsupervised charitable institutions’. The privatisation of any social welfare provision opens the door to possible profiteering as non-government organisations assume the legal responsibilities of states. Given that government departments are often underfunded and understaffed, it can be difficult for ‘a ministry to change the status quo or resist the building of new orphanages’. Save the Children has stated that investment by non-government organisations into orphanages resulted in ‘the institutions business’ where cost-effective alternatives would be overlooked due to heavy investments in orphanages.

B THE FAILURE TO ENFORCE MINIMUM STANDARDS OF RESIDENTIAL CARE

Governments may become complicit in paper orphaning through a failure to ensure that minimum standards of residential care are enforced, by failing to ensure registration requirements are met and monitoring is undertaken. Generally, orphanages and residential

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140 Njeri Chege, ‘Children’s Personal Data: Discursive Legitimation Strategies of Private Residential Care Institutions on the Kenyan Coast’ (2018) 7(7) Social Services 114, 115.
141 Nigel Cantwell and Anna Holzscheiter, Article 20: Children deprived of their family environment (Brill, 2007) 2.
142 Nigel Cantwell and Emmanuelle Werner Gillioz, ‘The orphanage industry: Flourishing when it should be dying’ (2018) 17(1) Scottish Journal of Residential Child Care 1. See Chapter Two, Part III, where the country narratives detail that often the majority of alternative care in developing States is provided and funded by non-government organisations.
143 Williamson and Greenberg, above n 35, 12.
144 Ennew, above n 3, 135.
145 Williamson and Greenberg, above n 35, 12.
147 Chaitkin et al, above n 139, 19.
care centres must be registered or licenced by the government to operate; they operate illegally if they fail to do so.148 Registration requirements differ in each jurisdiction however they commonly require orphanages to register with the government body responsible for the welfare of children. This may take the form of a Memorandum of Understanding being signed between the government and non-government organisation, or a Project Agreement that is signed by the non-government organisation and the government providing the budgets and work plan of the organisation for a period of years.149 In addition to registration, governments should be monitoring orphanages periodically to ensure that they are meeting a minimum standard of care in accordance with their own alternative care provisions or in alignment with best practice.150

Whilst registration and monitoring is no panacea, the act of registration ensures that the institution is listed in government records. Most developing States have many unregistered institutions. This is either because orphanage operators are aware that there is not the funding or will to enforce registration requirements, or alternatively, orphanages are established by people who are unaware of the requirements. Either of these situations is of concern. A 2016 report estimated that 32 percent of orphanages in Cambodia were not registered through holding a Memorandum of Understanding between the orphanage and the Ministry of Social Affairs, Veterans and Youth Rehabilitation.151 In 2014, 70 percent of institutions were not inspected by the Ministry to ensure they met minimum standards.152 In Haiti, it is estimated

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152 Ibid.
that fewer than 15 percent of orphanages are registered with the government.\footnote{Lumos, ‘Universal Periodic Review - Republic of Haiti: Submission by Lumos concerning the Republic of Haiti for consideration during the 26th session of the Universal Periodic Review Working Group in the Human Rights Council’, (Submission, Lumos, 2016) 3.} In Malawi, the Committee on the Rights of the Child has previously stated that they ‘remained concerned at the increasing number of orphanages and children’s homes often operating without being registered and regulated by the government’.\footnote{Committee on the Rights of the Child, Consideration of Reports submitted by States parties under Article 44 of the Convention: Concluding observations: Malawi, 50th sess, UN Doc CRC/C/MWI/CO/2, (27 March 2009) 9.}

Cheney notes that a lack of regulation of registration requirements and subsequent enforcement ‘makes it easy for foreigners to set up orphanages in Uganda\footnote{Cheney, ‘Blood binds: Confronting the moral and political economies of orphanhood and adoption in Uganda’, above n 99, 195.} where there are an estimated 50,000 children residing in orphanages in over 800 orphanages,\footnote{Eddy J. Walakira, Ismael Ddumba-Nyanzi and Badru Bukenya, ‘Child Care Institutions in Selected Districts in Uganda and the Situation of Children in Care: A Baseline Survey Report for the Strong Beginnings Project’, (Report, Terre Des Hommes, 2015) 1.} but only 17 of those orphanages are registered.\footnote{Tausi Nakato, ‘Uganda: Most Children's Homes Illegal’, The Monitor - AllAfrica.com, 4 January 2017 <https://allafrica.com/stories/201701040009.html>.} Registering an orphanage in Uganda is a relatively easy process requiring a series of letters promoting the organisation to be provided to the government. In Ghana, almost all orphanages are unregulated as the legal requirements to establish orphanages are not enforced and many ‘small “one-man” churches set up illegal institutions for children’.\footnote{Mike Owusu Gyimah, ‘The illegal orphanage business in Ghana’, Ghanaweb, 5 October 2013 <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/The-illegal-orphanage-business-in-Ghana-287937>.} Once an orphanage is established, the issue with monitoring and enforcement continues as there is a further failure to ensure appropriate admission requirements for children into orphanages or standards of care in orphanages. The nature of unregistered orphanages resulting in a lack of monitoring allows ‘child abuse and exploitation to remain unexposed’.\footnote{UNICEF and Terre Des Hommes, ‘Adopting the rights of the child: A study on intercountry adoption and its influence on child protection in Nepal’, (Report, UNICEF & Terre Des Hommes, 2008) 16.} This lack of enforcement of registration requirements and monitoring of orphanages results in high levels of institutionalisation in direct contravention to global policy on appropriate alternative care for children.\footnote{Richter and Norman, above n 132, 222.} The failure to pursue enforcement of registration or monitoring is an example of the inaction of the government that allows paper orphaning to flourish.
C Corruption

A further form of complicity in paper orphaning is found in the corruption of public officials. Corruption is the ‘act of abusing public power for private benefit’.\textsuperscript{161} There is a direct correlation between corruption and trafficking, with corruption existing ‘at every stage of trafficking starting from transportation, recruitment to exploitation of trafficked victims’.\textsuperscript{162} Research has shown that the largest predictor of human trafficking is governmental corruption.\textsuperscript{163} Corruption is seen where governments fail to enforce laws, or where areas are deliberately left unprotected by law because governments are ‘reluctant to interfere with a system that brings economic benefit’.\textsuperscript{164}

In paper orphaning, corruption occurs ‘from the local to the national level’.\textsuperscript{165} Where illegal and illicit practices occur in relation to children, they are usually linked to deficiencies in the child protection system ‘which are exploited by criminal networks driven by the lucrative business of selling children’ often with the involvement of government officials.\textsuperscript{166} The Report further states that ‘when illegal acts and illicit practices are of a systemic nature, States bear responsibility for them by either omission or complicity’.\textsuperscript{167} Another issue arises where financial environments for non-government organisations receiving donor funds are unregulated, which can result in the inherent danger of losing ‘focus on the best interests of the child’.\textsuperscript{168}

There are many opportunities for corruption in the paper orphaning process.\textsuperscript{169} Public officials may provide fraudulent documentation for children to be declared as orphans, may

\textsuperscript{162} Ibid.
\textsuperscript{165} Cheney, ‘Giving Children a ‘Better Life?’ Reconsidering social reproduction and humanitarianism in intercountry adoption’, above n 98, 252.
\textsuperscript{167} Ibid 8.
\textsuperscript{168} Save the Children, above n 146, 1.
\textsuperscript{169} Uddin, above n 161, 21.
fail to enforce registration requirements or minimum standards, or may turn a blind eye to exploitation occurring within orphanages. There have been cases where birth registrations are corrupted and babies are illegally transferred to orphanages. The official paperwork from governments that is required to illustrate orphanhood often includes a police report, letter of recommendation from local/village governments and final orders from a central child welfare agency. Each part of this process is highly susceptible to corruption and fraud. In developing States where paper orphaning thrives, there are many instances of government officials providing this documentation for placement into an orphanage.

In Nepal, local government officials often recruit children into orphanages by persuading parents that they will be attending boarding school. In other cases, local government officials protect the trafficking networks. When the fraud is discovered, parents have little recourse because the same local government officials handle complaints. Another example is found in India where in March 2017, a politician was charged with conducting a baby trafficking business through an orphanage. It was alleged that the orphanage was utilising fraudulent documentation with fake stamps and birth certificates to sell at least a dozen babies at a cost of Rs100,000-200,000 (US$1,500-3,000) each. The case is yet to be tried. These are just two examples of how members of governments may not just be complicit, but actively involved in the paper orphaning process.

There have been many reports of government intervention where orphanages have been listed for closure on the basis of failing to meet registration or minimum standard requirements. Using a position of power to prevent an orphanage closure where the orphanage is sub-standard is a form of corruption. For example, in Liberia, there was ‘constant interference’ by members of the House of Parliament in preventing orphanage

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171 Smolin, ‘Child laundering: How the intercountry adoption system legitimizes and incentivizes the practices of buying, trafficking, kidnapping, and stealing children’, above n 81, 115-117.
closures from being effected\textsuperscript{175} to the extent that the closure of sub-standard orphanages had to be halted until a new government was elected.\textsuperscript{176}

\textbf{D Competing Priorities: The Revenue from Aid Funding and Orphanage Tourism}

Governments may be hesitant to monitor or close orphanages due to budgetary reliance on aid and orphanage tourism. Budgets of developing nation governments often rely heavily on aid funding. For example, donor funding through aid and development accounts for 50 percent of the total Ugandan government income\textsuperscript{177} and 80 percent of orphanages funded by foreign non-government organisations.\textsuperscript{178} In Uganda, very little of the funding received by the government for child welfare in orphanages ever leaves government offices, and thus it fails to ‘reach those who it is meant to assist’.\textsuperscript{179} The potential impact that any increased enforcement of orphanage regulation might have on aid funding is particularly pertinent for countries like Haiti where over \$70 million is being channelled into only one third of the orphanages annually from United States based sources alone.\textsuperscript{180}

In addition to this, orphanage tourism is a significant revenue stream for many developing States. Governments are hesitant to take action to halt orphanage tourism due to revenue associated with both international funding of orphanages and the number of tourists that specifically travel to the country to volunteer in, or visit, an orphanage. It is unclear exactly how much the orphanage industry is worth to governments. The voluntourism industry as a whole is worth up to an estimated \texteuro2.6 billion annually.\textsuperscript{181} Using Uganda as an example, tourism as a whole accounts for 38 percent of all exports and 5.6 percent of the GDP\textsuperscript{182} with

\begin{flushleft}
\textsuperscript{176} Ibid 15.
\textsuperscript{177} Kristen Cheney, ‘Expanding vulnerability, dwindling resources: Implications for orphaned futures in Uganda’ (2010) 2(1) \textit{Childhood in Africa} 8, 13.
\textsuperscript{178} Chaitkin et al, above n 139, 20.
\textsuperscript{179} Cheney, ‘Expanding vulnerability, dwindling resources: Implications for orphaned futures in Uganda’, above n 177, 13.
\end{flushleft}
12 percent of tourists coming to volunteer or work at non-government organisations.\footnote{Ibid 28.} It is estimated that Uganda receives US$250 million for issuing visas that allow volunteering in orphanages annually.\footnote{Tessa Boudrie and Uddhav Raj Poudyal, ‘Funding Stream Analysis of Residential Care in Nepal and Uganda’, (Report, Elevate for Children, 2018).} In addition, tourism funds and donations are often given to orphanages directly and do not pass through official channels.\footnote{Guiney and Mostafanezhad, above n 128, 141.} It is clear that orphanages are lucrative in terms of aid and tourism.

Where a state makes no attempt to deinstitutionalise children, or to halt the growing number of orphanages opening, it might be argued that they are actively choosing to profit from the institutionalisation of children. The complicity of the state creates a safe haven for paper orphaning to thrive and the exploitation of children to continue unabated. Where a state may be benefiting from children remaining institutionalised, for example, through both orphanage tourism and foreign funding, it creates a tension for the state in deciding whether to uphold the rights of the child, or to continue to gain financially. This was seen in Guatemala where an institution, Hogar Seguro Virgen de la Asunción, was opened in 2010 to care for trafficking and abuse victims despite heavy resistance from child protection experts and organisations.\footnote{Red Latinoamericano de Acogimiento Familiar, ‘RELAF Statement on the tragedy that took place on March 8th at the Hogar Seguro Virgen de la Asunción Guatemalan Orphanage’, RELAF Press Release, 18 March 2017, <https://drive.google.com/file/d/0Bynxgoh82KJ1dDQ2bEY2UlpY1U/view> 1-2.} In 2017, a fire devastated the institution which was licenced to house 400 children but at the time of the disaster was housing 748.\footnote{Por Redaccion La Hora, ‘Hogar Seguro Virgen de la Asunción: un reportaje que evidenció un grave problema (Virgen de la Asunción Safe Home: a report that showed a serious problem)’, La Hora, 3 November 2016 <http://lahora.gt/hogar-seguro-virgen-la-asuncion-reportaje-evidencia-grave-problema/>.} The fire killed 36 girls who had been demonstrating against the conditions of the shelter including grave sexual exploitation and reports of trafficking. The children had been placed in the institution through judge made orders on account of them being at risk at home, or in need of protection.\footnote{Ibid.}
Reporting on the issue, Lumos noted that ‘most institutions receive their funding “per child”, so there is a financial incentive to bring in as many children as possible’.\textsuperscript{189} This tension is perhaps precisely what keeps States from addressing this issue. The Guatemalan government had been under increasing pressure to reduce the number of children through utilising other forms of alternative care such as foster care, however it had made no commitment to do so when the event occurred. In a press release following the incident, UNICEF stated the confinement of children and adolescents for their ‘protection’ was invalid.\textsuperscript{190}

The combination of the outsourcing of alternative care for children to non-governmental organisations, and the failure to ensure effective regulation of the establishment and continued operation of orphanages, creates a political landscape rife for corruption. These are conditions in which the business of paper orphaning thrives.

\textbf{VII Conclusion}

This chapter has explained the way in which orphanhood interacts with aid and tourism for developing States. Through an examination of the inherent contradictions of the definitions of orphanhood, a space of ambiguity ripe for utilisation and manipulation by governments and non-governmental organisations arises. In taking advantage of this ambiguity, the depiction of the orphaned child is utilised to drive aid and orphanage tourism. This depiction creates an iconography of emergency and encourages donors to identify themselves as rescuers and the lonely orphaned child as in need of their intervention and support. Whether there is actually an emergency context or not matters little, the impetus to help lies with the depiction of the orphan child.

The support of orphaned children to the exclusion of others produces a privileging of orphanhood as a commoditised entity. Where traditionally the social status of orphanhood has been one of exclusion and abandonment, the legal status of orphanhood can lead to education and material gain. For some people, it may appear that the benefits of assuming

\textsuperscript{189} Georgette Mulheir, ‘I have seen many institutions, just like Virgen de la Asunción, where tragedy is inevitable’, Lumos, \textit{CEO Blog, Lumos}, 8 March 2017 <https://wearelumos.org/content/i-have-seen-many-institutions-just-virgen-de-la-asunc%C3%B3n-where-tragedy-inevitable>.

orphanhood to attain this privilege may outweigh the negative effects of institutionalisation. However, 60 years of research of the harmful cognitive effects of institutionalisation\textsuperscript{191} and personal accounts of growing up in an orphanage\textsuperscript{192} counter that argument.

Ultimately, the purpose of this chapter was to contextualise the enabling environment for paper orphaning. This chapter argued that this landscape is predicated by the iconography of emergency which cultivates and produces the orphan addiction. The orphan addiction is widely seen in non-government responses to development and aid where the orphaned child is provided for to the exclusion of other vulnerabilities. It also serves as the impetus for orphanage tourism where volunteers pay to interact with, and care for, children residing in orphanages. Orphanage tourism emerges as a result of how the utility of orphanhood has been manipulated and exploited by non-government organisations and governments to encourage the orphan addiction, and thus forms the aid and tourism imperatives that drive the production of paper orphans.

In addition to this, governments of developing States which benefit financially from the aid and tourism influx associated with caring for orphans may become complicit in the paper orphaning process. The complicity of governments emerges through a subrogation of their mandate to care for orphans to non-government organisations; a failure to properly enforce the registration or monitoring of orphanages; active corruption by public officials within the paper orphaning process, and a prioritisation of aid and tourism revenue streams. Having established the enabling environment, orphanage tourism is interrogated as a demand driver for paper orphaning in Chapter Four.

\textsuperscript{191} Richter and Norman, above n 132, 221.
\textsuperscript{192} Ucembe, above n 129.
CHAPTER FOUR: THE DEMAND OF ORPHANAGE TOURISM

I INTRODUCTION

This chapter argues that orphanage tourism is a demand driver for paper orphaning. Across media and reports by non-governmental organisations, there is a persistent message that ‘tourism and volunteering in orphanages is fuelling the demand for “orphans” and driving the unnecessary separation of children from their families’.¹ Orphanage tourism encourages orphanages to operate ‘more like opportunistic businesses than charities, intentionally subjecting children to poor conditions in order to entice unsuspecting volunteers to donate more money’.² This chapter argues that the desire of volunteers and visitors to assist orphans through orphanage tourism creates a demand for paper orphans fuelling ‘the active recruitment of children into residential centres’.³

The central purpose of this thesis is to establish that paper orphaning is a form of child trafficking. Thus far, this thesis has examined the social and political factors associated with recruitment of children into orphanages. Chapter Two established the method and prevalence of paper orphaning in developing States, and Chapter Three described the enabling environment for paper orphaning. This chapter extends the examination of why children are recruited into orphanages by arguing that orphanage tourism is a demand driver for child trafficking into orphanages.

Part II begins by discussing the advent of orphanage tourism. Orphanage tourism is where tourists either volunteer in orphanages (including short and long term volunteering), or visit orphanages as part of their tourist experience. Orphanage tourism incorporates both volunteer and poverty tourism and has become a popular activity for people travelling to developing States.⁴ Orphanages are frequently established in locations that are popular with western travellers to increase the appeal of volunteering and visiting, rather than being

¹ Benedicta Bywater, Orphanages: there is a better way to help, 28 April 2014, Tourism Concern, <https://www.tourismconcern.org.uk/orphanages-there-is-a-better-way-to-help/>.
located in places of greater child vulnerability or societal need. Orphanage tourism has proven increasingly popular in the last decade. Unscrupulous orphanage and travel operators have taken advantage of this popularity, which, in combination with the enabling environment of the increased reliance on non-government organisations for the provision of alternative care for children, ineffective regulation of minimum standards and potential for corruption, explained in Chapter Three, has led to a proliferation of orphanages being established in developing States and paper orphaning emerging.

Research exists on the interaction between tourists and orphanages, but there has been no published academic research on whether this may be considered a demand factor for the trafficking of children into orphanages. Chapter Three considered the reliance on the depiction of the orphaned child for aid funding, and how it is utilised by governments and non-government organisations. It argued that that the emergence of orphanage tourism was a result of the abstraction of the social and legal construction of orphanhood combined with a manipulation of the utility of orphanhood. This chapter extends that argument to provide an account of orphanage tourism and its interaction with paper orphaning. It particularly examines the interrelationship between supply and demand in paper orphaning and focuses on the humanitarian and profit motives present in the relationship.

Part III explains why the concept of demand in child trafficking is complex, and particularly so in the process of paper orphaning. In research on trafficking, the concept of demand is usually predicated on consumer desire driving the demand for the trafficking occurrence. The fulfilment of these consumer desires may be illegal, such as in the situation of child sexual exploitation; or they may be morally challenging, such as the consumer desire for cheap services and products. On the surface, orphanage tourism fits neither of these categories as the activity is legal and appears to be the embodiment of morality through the provision of assistance to vulnerable children.

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To understand how consumer desire drives demand in the context of paper orphaning, I argue in Part IV that the mechanism of demand requires a re-conceptualisation. It is usually argued that a market of consumers who wish to sexually exploit children drives the demand for child sexual exploitation and trafficking; and a market of consumers wanting to purchase inexpensive goods drives the demand for labour trafficking. Similarly, a market of consumers wishing to assist orphans through orphanage tourism drives the production of paper orphans. Unlike child sexual exploitation where the initial demand is predicated on the base sexual desires of consumers, or labour trafficking where the demand is predicated on the desire for inexpensive consumer goods or services; the demand for orphanage tourism is instead predicated on the perceived supply of orphans requiring assistance.

It is this perceived supply of orphans, in combination with a particular desire to volunteer with orphans, which leads to the examination in Part V of whether orphanage tourism might be regarded as a form of ‘embodied labour’.8 Embodied labour theories are associated with the desire of the consumer for a particular ‘type’ of person to enact their labour and thus drive demand for that industry. In sexual exploitation, consumers commonly possess a preference for those ‘particular qualities pertaining to sex, age, race, caste and ethnicity’ in their victims.9 This is also seen in labour trafficking contexts of home help/maids where employers possess a preference for women from certain countries. In the same vein, orphanage tourism is driven by the desire of tourists to volunteer with, or visit, a specific category of children – orphans. This chapter argues that embodied labour is integral to understanding the demand for orphanage tourism, and how it ultimately contributes to paper orphaning.

Finally, Part VI considers the implications of orphanage tourism being regarded as a demand driver for child trafficking. A typical response to counter demand for trafficking is to criminalise and prosecute the activity. In the context of orphanage tourism, a more holistic approach incorporating social, educational and cultural aspects to counter the demand of orphanage tourism is required.

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II WHAT IS ORPHANAGE TOURISM?

In truth, it’s a case of supply and demand. Many orphanages in Cambodia are profit-driven businesses that need tourists and ‘orphans’ to keep their operations going. By visiting and supporting these orphanages, well-meaning Australians have inadvertently fuelled an industry that is separating children from their families and putting kids at risk of abuse and exploitation.¹⁰

Orphanage tourism is a form of volunteer tourism, otherwise known as ‘voluntourism’. Voluntourism is where tourists pay to volunteer in projects, usually with a conservation or development focus.¹¹ Voluntourists are defined by Stephen Wearing as ‘those tourists who, for various reasons, volunteer in an organised way to undertake holidays that might involve aiding or alleviating the material poverty of some groups in society, the restoration of certain environments or research into aspects of society or the environment’.¹² Voluntourists are individuals who have the ‘discretionary time and income to travel out of the sphere of regular activity to assist others in need’.¹³ Estimated to be worth over USD$2 billion annually,¹⁴ voluntourism is one of the fastest growing tourism markets in the world and is ‘at the forefront of tourism-as-development agenda’.¹⁵

Driven by demand from empathetic consumers, voluntourism creates a ‘transnational immersions industry’ operating within the international humanitarian ‘compassion economy’.¹⁶ However, voluntourism is also viewed as ‘an economic activity driven by profit occurring within an unregulated industry and operating without any accreditation process’.¹⁷ This is because voluntourism ‘approaches the activity of development practice as a

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¹² Ibid 1.
¹⁵ Guiney and Mostafanezhad, above n 4, 133.
commodity to be bought and sold'. As a form of voluntourism, orphanage tourism is ‘lucrative for the travel industry, which targets faith-based groups, universities and students, and others who want a ‘voluntourism’ experience’. It is estimated that 4 million people from the United States alone volunteer in orphanages or with children every year.

Voluntourism is critiqued for entrenching the privilege of the volunteer in comparison to the host, or receiving, community. This results in a perpetuation and re-production of ‘existing power and social hierarchies between the rich and privileged, and the poor and less privileged’. Reflective of the focus on the iconography of emergency discussed in Chapter Three, ‘children are key signifiers’ in the voluntourism industry where orphans are particularly valued for their utility in attracting aid through embodying ‘a humanitarian social category’ that requires assistance. Orphanage tourism is a manifestation of children becoming subject to the ‘humanitarian gaze’ exemplifying the ‘implicit hierarchy between givers and receivers’ and illustrating the binary of tourism and development. This humanitarian gaze provides a motivation for assisting orphans and forms part of the demand for orphanage tourism and the production of paper orphans.

In 2010, Norman and Richter first described the advent of orphanage tourism as a form of voluntourism through focusing on AIDS orphan tourism. They described orphanage tourism as where ‘individuals travel to residential care facilities, volunteering for generally short periods of time as caregivers’. In that research, they stated that the desire to assist AIDS orphans was driven by western sentimentality intersecting with the global aid discourse. Since that initial research, the definition of orphanage tourism has developed to the ‘donation of money and goods, attending performances, or volunteering on a short-term basis’.  

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18 Ibid 406.
20 Ibid 21.
25 Mostafanezhad, above n 22, 490.
27 Ibid 217.
Orphanage tourism activities often comprise informal English practice, and can also include formal lessons, medical or other professional services, playing sports or games, participating in art or music activities or watching dance performances. This definition covers a wide range of activities, from short visits to orphanages to engage with the children; to structured activities held between tourists and orphans; to long term volunteer positions where tourists may stay onsite at the orphanage for a period of months.

Some long-term volunteers disagree with the broad term of ‘orphanage tourism’ encompassing all aspects of volunteering and visiting, as they feel that what they offer is more significant and meaningful than just visiting for a cultural performance and donating. For the purpose of this thesis, I draw no distinction between those who volunteer for long periods and those who visit orphanages on day trips, as my argument is that both contribute to the demand for paper orphans and therefore child trafficking into orphanages. I utilise the term ‘orphanage tourism’ to refer to both volunteering and visiting orphanages. I also use the terms volunteers, voluntourists and orphanage tourists interchangeably utilising the same terminology as research that is being cited.

The prevalence of orphanage tourism and its intersections with paper orphaning across Sub-Saharan Africa, the Caribbean, South Asia and South East Asia were examined in Chapter Two. Other developing States in those regions experiencing orphanage tourism as a demand driver for paper orphaning include Botswana, Kenya, Thailand, South Africa and Honduras.

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28 Guiney and Mostafanezhad, above n 4, 2.
33 Richter and Norman, above n 26.
Presently, the only legal academic research on orphanage tourism focuses on the situation of orphanages not enforcing appropriate screening of volunteers and potentially creating havens for child sex offenders.\textsuperscript{35} This research notes the frequency in which orphanage tourists are given free access to vulnerable children without any background checks or the orphanage having any connection or knowledge of the person apart from the potential of a donation.\textsuperscript{36} Other academic literature regarding orphanage tourism largely focuses on the tourist’s interaction with orphanages and examines how it is perceived and framed in terms of power relations.\textsuperscript{37} The literature presents as a binary either focusing on the motivations or experiences of volunteer tourists, or the attitudes of the local communities receiving the volunteers.\textsuperscript{38}

This thesis represents the first formal legal research describing orphanage tourism as a demand driver for child trafficking into orphanages. Supporting this argument are government and non-governmental organisation reports attesting to the effects of orphanage tourism and how it drives the recruitment of children into orphanages. In particular, there have been major research reports focused on describing this link in Cambodia and Nepal.

The UNICEF report, \textit{With the best intentions: A study of attitudes towards residential care in Cambodia} clearly articulates a link between foreign donors and the recruitment and ongoing institutionalisation of children in orphanages.\textsuperscript{39} This study drew on both qualitative and quantitative research from 2007-2010, surveying families, government officials, orphanage directors, overseas donors, volunteers, key informants from non-governmental agencies and the tourism industry, and adult care leavers (who were former orphanage residents as children). The research was conducted across three geographical areas in Cambodia illustrating that the problem was nation-wide. The report determined that many orphanages


\textsuperscript{37} Guiney, above n 6, 10.


in Cambodia were utilising orphanage tourism to attract more donors, and that almost all orphanages were funded by overseas donors.\textsuperscript{40} The report established a strong connection between foreign donors’ willingness to fund orphanages, the proliferation of orphanages and the recruitment of children into ongoing institutionalisation to fulfil that purpose.

A further strong link between orphanage tourism and the institutionalisation of children is found in Nepal where ‘all the traffickers have to do is ensure an ongoing supply of “destitute” children to attract the sympathetic tourist dollar’.\textsuperscript{41} Across the 75 districts of Nepal, over 90 percent of registered orphanages are located in the five main tourist districts which do not ‘necessarily match the high areas of population or need’.\textsuperscript{42} Research conducted in 2014 by Next Generation Nepal (a non-government organisation) describes the link between the recruitment of children into orphanages and the impact of orphanage tourism on children.\textsuperscript{43} It outlines how foreign fee-paying voluntourists witnessed children being forced to participate in activities such as dancing, sports and games against their will to please the voluntourists. Children were also allowed to accompany orphanage tourists back to their hotel rooms, and orphanage tourists were even encouraged to bathe the children.\textsuperscript{44} In these situations, the inherent vulnerability of the children was considered secondary to the desire of the orphanage tourist to interact with orphans. The report further notes that ‘children have become a lucrative commodity in Nepal, and the willingness of voluntourists and donors to provide funds ensures the ongoing demand for children to be unnecessarily displaced from their families’.\textsuperscript{45}

Orphanage tourism has become a popular activity in developing States driven through the humanitarian gaze and a desire to assist orphans. It is the exploitation of this desire that underpins the argument that orphanage tourism is a demand driver for the trafficking of children into orphanages.

\textsuperscript{40} Ibid 25.
\textsuperscript{42} Ibid 15.
\textsuperscript{43} Ibid.
\textsuperscript{44} Ibid.
\textsuperscript{45} Ibid 20.
III  UNDERSTANDING DEMAND

This section provides an overview of the relationship of demand to human trafficking, and argues that the concept of demand requires a re-conceptualisation when we consider orphanage tourism as a demand driver for paper orphanging. To explore demand is to interrogate both the:

individuals who exploit or consume the labour/services of trafficked persons, but also to question the way in which states – through a combination of action and inaction – construct conditions under which it is possible or profitable to consume or exploit such labour/services.\(^{46}\)

A complicating factor is that the literature on demand in relation to trafficking predominantly focuses on sex and labour trafficking. I utilise this literature as a starting point to construct an argument as to how the demand for orphanage tourism drives paper orphanging.

In constructing this argument, I undertake two investigations. The first is to establish how demand functions in relation to human trafficking; and the second is to establish the interrelationship between demand and supply in the specific context of orphanage tourism. These investigations provide a platform for interrogating the dialectic of demand in relation to orphanage tourism. I have termed this a dialectic due to the inherent contradiction of the demand/supply interrelationship in orphanage tourism and child trafficking. In a usual case of trafficking, demand drives supply. In paper orphanging, it is the perceived supply of orphans that drives the demand of orphanage tourism, which in turn drives the supply of paper orphans. This causative link between supply and demand is critical to understanding how orphanage tourism can be addressed as a demand driver for paper orphanging.

A  WHAT IS DEMAND?

In general use, the word ‘demand’ is defined as ‘an insistent and peremptory request, made as of right; as a pressing requirement; or as the desire of consumers, clients, employers, etc. for a particular commodity, service, or other item’.\(^{47}\) There is no legal definition of ‘demand’ in the Trafficking Protocol, nor is there any explicit working definition of demand in

\(^{46}\) Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010)433. The conditions/enabling environment for paper orphanging was outlined in Chapter Three.

international law. In the context of trafficking, demand is an ‘ideologically loaded term for which there is no precise agreed upon definition and understanding’.\(^48\) The mechanism of demand in relation to human trafficking embraces ‘a broad and diverse range of motivations and interests’\(^49\). Anderson and O’Connell-Davidson state that demand ‘can refer to an employer’s need for cheap and docile labour, or to consumer demand for cheap goods and/or services, or for household labour or subsistence labour, or to any or all of these’.\(^50\) Gallagher and Skrivankova add that the lack of understanding concerning what demand means is due to the complicated nature of how demand functions.\(^51\) They extend the concept of demand to include not only employer demand for cheap labour or consumer demand for cheap goods and services, but activities ‘generated by exploiters and others involved in the trafficking process such as recruiters, brokers and transporters who rely on trafficking and victims of trafficking to generate income’.\(^52\) Gallagher and Skrivankova emphasise that a distinction should be made between ‘the demand itself, and the causes and factors that can shape demand’.\(^53\) This distinction is drawn in paper orphanning between the causes and factors of the utility of orphanhood which create the enabling environment for the demand of orphanage tourism to flourish as explained in Chapter Three.

The only reference to demand made in the *Trafficking Protocol* is in article 9(5) which acknowledges that ‘educational, social or cultural measures’ should be adopted to discourage demand:

> States parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

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\(^49\) Anderson and O’Connell-Davidson, above n 8, 10.

\(^50\) Ibid.


\(^52\) Ibid.

\(^53\) Ibid.
The emphasis in Article 9 of States parties taking measures to discourage demand has resulted in questions regarding the demand for the labour or services of trafficked people being ‘a focus of attention in international policy circles’.54 The reference to ‘educational, social or cultural measures’ acknowledges that demand cannot be countered by law alone, but must be addressed as part of the wider context in which the trafficking is occurring. The use of the term ‘fosters’ highlights the premise that demand is not in itself the sole causative mechanism of exploitation and trafficking, and that social, cultural and political contexts contribute to trafficking. These factors were detailed in Chapter Three where it was shown that developing nation governments contribute to allowing the supply of paper orphans through lack of enforcement of the minimum standards for orphanages, the over-reliance on institutional care as a form of child protection, the prioritization of aid and tourism revenue over child protection, and complicity and corruption by government officials in the paper orphaning process. It is this enabling environment that contributes to the ready supply of paper orphans being available in orphanages, whilst simultaneously encouraging the demand of orphanage tourism. Demand in trafficking must be considered in combination with supply. This interrelationship between demand and supply is critical to understanding the paper orphaning process.

B THE INTERRELATIONSHIP BETWEEN DEMAND AND SUPPLY IN PAPER ORPHANING

This section describes how the demand and supply relationship functions in paper orphaning. It is often stated that ‘demand exists to meet supply’55 which is indicative of a symbiotic relationship where demand for a product drives supply. In paper orphaning, the demand and supply relationship functions differently from the usual trafficking contexts. Supply and demand are ‘shaped (often determined) by a complex and interlocking set of political, social, institutional and economic factors’.56 Many of these factors were explored in Chapter Three where the enabling environment in which paper orphaning emerges was detailed. To extend this discussion, this section explores two specific additional social and

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55 Turner and Kelly, above n 9, 195.
56 Anderson and O’Connell-Davidson, above n 8, 62.
economic factors that illustrate the supply/demand relationship in paper orphaning – those of humanitarianism and profit.⁵⁷

Reflecting on the relationship of supply and demand, Gallagher and Skrivankova state that ‘demand cannot be considered separately from supply not least because supply may well generate its own demand’.⁵⁸ This is indeed the case for demand and supply in the context of orphanage tourism and paper orphans. For example, the extensive number of volunteering opportunities available in orphanages is not a reflection of a critical requirement of care for vulnerable children, but rather a reflection of the desire and demand of volunteers for opportunities to work specifically with orphans to fulfil a humanitarian agenda.⁵⁹ In this manner, paper orphaning exhibits similarities to intercountry adoption, where research shows that children have been recruited to meet the demand of the international adoption market.

Like orphanage tourism, intercountry adoption has predominantly been viewed as a ‘humanitarian social practice’.⁶⁰ The demand for intercountry adoption often outweighs the supply of children available for adoption, creating a demand-based rather than a needs-based market.⁶¹ This has resulted in an ‘uneven supply and demand’ yielding ‘a highly lucrative adoption industry’.⁶² One of the persistent tensions for intercountry adoption has been whether the practice finds ‘families for children or children for families’.⁶³ The same arguments can be made for orphanage tourism. With increased regulation, and in some instances closure, of intercountry adoption programs, the uneven supply and demand is now also found in orphanage tourism where there are many more people desiring to volunteer

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⁵⁸ Gallagher and Skrivankova, above n 51, 47.
⁵⁹ Better Care Network, above n 3, 10.
with orphans than genuine orphans to volunteer with. The process of paper orphaning supplies ‘orphans’ to meet this demand.

The commodification of children for the purpose of profit is another commonality between intercountry adoption and orphanage tourism. In this respect, orphanage tourism has the potential to be far more lucrative than intercountry adoption due to the profit being ongoing rather than a once off lump sum payment at the point of adoption. As Shura states:

the demand for children through ICA (intercountry adoption), as well as the considerable amounts of money alleged to be involved in ICA transactions, point to important questions about potential profiteering, legitimacy, and adherence to social policy standards including human rights standards.\(^6^4\)

This same statement can be made about orphanage tourism. The legitimacy of orphanage tourism is called into question where there is evidence that children are being recruited for the purpose of profit by orphanages operating as businesses. Because of the legitimacy of perceived humanitarianism, both intercountry adoption and orphanage tourism can operate as high profit trafficking industries with low risks of prosecution.

The profit element is critical to the relationship between supply and demand in both intercountry adoption and orphanage tourism as it provides the impetus for the paper orphaning process to take place. In intercountry adoption, ‘orphanage gifts’ and ‘finder’s fees’ are common and often appear reasonable to prospective parents who are told to expect such charges as part of the adoption process.\(^6^5\) Similarly, paying to volunteer in an orphanage appears reasonable to relatively privileged foreigners wishing to assist orphaned children in developing States. People often prefer to donate to orphanages where they are able to ‘see the results over time and make spontaneous visits’.\(^6^6\)

The perception that intercountry adoption and orphanage tourism are humanitarian responses to the supply of orphans leads to a sense of legitimacy regarding these payments that create demand for paper orphans. It also provides the context of demand and supply in

\(^6^4\) Ibid.
\(^6^5\) Ibid 322.
\(^6^6\) Bornstein, above n 23, 89.
paper orphaning where the demand is driven by a perception of the supply of orphans. This apparent supply of orphans requiring assistance is what drove the initial development of intercountry adoption, and indeed it is now what drives orphanage tourism. This perceived supply, enabled by the differing definitions of orphanhood described in Chapter Three, creates a demand by people wishing to assist orphans, which drives paper orphaning to supply more orphans. Understanding the relationship between supply and demand in this manner allows us to question the legitimacy of orphanage tourism as a form of demand rather than as a humanitarian action.

IV THE DIALECTIC OF DEMAND IN PAPER ORPHANING

Orphanage tourism is largely regarded as an honourable activity undertaken to assist vulnerable orphaned children. Re-conceptualising orphanage tourism as a demand driver for child trafficking into orphanages is counter to this notion, and appears to be a contradiction to our usual understanding of how demand operates in relation to trafficking. This dialectic is seen in the struggle of child protection experts asserting research regarding the harm that orphanage tourism causes children; whilst simultaneously the public celebrates and rewards orphanage founders and volunteers. To reconceive orphanage tourism as an activity that drives the demand for child trafficking represents a challenge to the norm that orphanage tourism is to be celebrated and well regarded.

In 2016, the Special Rapporteur on the sale of children, child prostitution and child pornography acknowledged in their Annual Report to the Human Rights Council that orphanage tourism was forming a ‘fee based’ demand for the recruitment of children into orphanages:

Orphanage voluntourism has fed a system leading to the sale of children for the purpose of labor exploitation. Research has provided evidence of systems in which the owners of orphanages use intermediaries to get children who look poor to orphanages, in order to satisfy a fee-based volunteering demand, generating significant profits. Traffickers lure poverty-stricken families into giving away their children, under promises of good living conditions and education. Children are then

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67 Richter and Norman, above n 26, 222.
often left in poor conditions, in order to prompt foreign charity, and forced to perform activities to please foreign volunteers.\textsuperscript{68}

To establish that orphanage tourism is ‘demand driven by consumers’,\textsuperscript{69} it is necessary to investigate how consumer motivation and desire functions in orphanage tourism. In the human trafficking literature, there is extensive consideration given to the demand of the desire for commercial sex and the desire for cheap goods and services.\textsuperscript{70} In sexual exploitation, the consumer is motivated by sexual desire; and in forced labour, consumers are motivated by cheaper services or goods. These motivations might be viewed on a spectrum, with the most degrading of exploitation being motivated by the basest consumer desires. On one end of the spectrum, there are motivations that may not be willingly admitted to by consumers (for example, the desire for child sexual exploitation) to the other end of the spectrum where there are seemingly nebulous motivations (such as cheaper goods and services). In contrast to child sexual exploitation where the consumer is aware of their role as an exploiter, at the other end of the spectrum such as the desire for cheaper goods and services, the consumer is not always aware of their role in the exploitation. If placed on this spectrum, the majority of orphanage tourists would fall at this same end, where the participants are usually well intentioned and do not realise the harm that their desire to participate in orphanage tourism is causing. Rotabi et al describe this as a form of ‘altruistic exploitation’, where volunteers unwittingly may cause harm to the very children they are trying to assist.\textsuperscript{71}

There is also a difference in how the demand is constructed as part of the trafficking act itself:

Unlike the purchaser of consumer goods produced through trafficked labour, the prostitute-user is simultaneously both the demand-creator and (by virtue of his receipt of the trafficked person) part of the trafficking chain. We do not take receipt of the “trafficked” person and personally compel her to pick or process coffee beans.


\textsuperscript{70} Ibid.

when we buy coffee produced by “trafficked” labour, nor is the coffee we drink always or necessarily produced by “VoTs” (victims of trafficking). Thus, according to this line of reasoning, as unwitting consumers, our demand for coffee is not a necessary link in the chain that leads to people being “trafficked” onto coffee plantations. But without the men who provide demand for prostitution, there would be no “sex trafficking” and no “masters” to take receipt of “sex slaves”.72

It might be argued that without orphanage tourism and the associated funding, there would be no paper orphaning and no proliferation of orphanages in the business of recruiting paper orphans. The usual concept of demand as constructed around the consumer desire to exploit is in contrast to how we understand the demand for orphanage tourism. Orphanage tourism is predicated on the perceived supply of orphans requiring assistance. In this sense, the orphanage tourist is fully aware of the vulnerability of the target of their goodwill. In direct contradiction to the usual understanding of demand where the desire centres on exploitation of the vulnerability, in orphanage tourism the vulnerability is the source of the motivation to assist. This motivation to assist is what creates the demand. Thus, we can regard the demand for orphanage tourism as a consequence of the commodification of good intentions.

Examining how vulnerability gives rise to exploitation and trafficking is also relevant. Todres argues that ‘although vulnerability is a part of the human condition, certain individuals and communities are at heightened risk of exploitation’73 and that this vulnerability contributes to the supply aspect of trafficking. Many children who are recruited to be paper orphans are from poverty stricken families who are unable to provide an education. This creates a vulnerability to the paper orphaning process as child finders, recruiters and orphanage operators utilise this vulnerability as a rationale for recruitment into an orphanage to gain the sought-after education. The vulnerability of orphanhood itself is then manipulated to meet the motivations of the orphanage tourists who want to provide assistance.

Orphanage advocates often claim that children are better placed in orphanages where they can access education, medical needs and food, rather than staying with their impoverished family. Chapter Three explained that orphanhood is often regarded as a privileged status for this reason. The claim that children are able to access a better standard of living in orphanages

72 O’Connell-Davidson, above n 7, 157.
73 Todres, above n 69, 57.
is made as an assertion of child protection, however where they are also exposed to the harm of orphanage tourism, I argue that the primary motivation is exploitation and profit rather than child protection.

Anderson and O’Connell-Davidson state ‘we need to recognise that trafficked/unfree persons are very often exploited in contexts that are socially imagined to involve non-market relations, or that are viewed as occupying some twilight zone between market and non-market relations’. An orphanage is one such context. Orphanage tourism allows ‘wealthy westerners hoping to do a little good’ to gain ‘a story that places them in the ranks of the kind hearted and worldly wise’. The care of orphaned children is viewed as humanitarian and compassionate and therefore is subjected to only limited critique. Similarly, the desire to volunteer in an orphanage is praised and celebrated as an individual exhibition of these qualities. This ‘sentimentalization of children masks the market exchange as apolitical humanitarianism’ and any attempt to critique these actions is often met with social disdain.

Existing research with past volunteers reveals the overwhelming motivation to volunteer is based on an assumption of meeting the needs of orphaned children. Because most volunteers come from countries with developed child protection systems, they presume that orphanages are required and ‘do not understand the complexity of the issue and the industry developing around it’. As such, they connect with the perceived ‘needs and opportunities that are easy for them to understand’ such as ‘children seemingly in need of nourishment, education, and affection’. As seen in Chapter Three, non-government organisations and governments utilise this perception to encourage and nurture the desire to assist through aid and orphan tourism.

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74 Anderson and O’Connell-Davidson, above n 8, 62.
76 Cheney, above n 62, 255.
77 Better Care Network, above n 3, 11.
78 Ibid.
This desire leads to a commodification of good intentions, humanitarianism, sentimentality, and care and exemplifies how demand is ultimately the result of social, economic and political factors. This social production of demand for orphanage tourism is seen in the combination of policies that commoditise good intentions by promoting volunteering, in addition to a promulgation of the rhetoric that there is little assistance available in country from qualified caregivers. This commodification has two immediate outcomes. First, it leads to further entrenchment of the perceived responsibility of the developed world towards the developing world; and secondly it embeds the notion of unqualified volunteers from the developed world as ‘experts’. When people engage in orphanage tourism, they assume a ‘social identity and status’ producing what has been termed the ‘white saviour industrial complex’ which is fuelled by an emphasis on ‘good intentions over good outcomes’. The white industrial saviour complex places great value on the moral gratification of the volunteer regardless of the actual outcome of their engagement, that is at best nebulous and at worst harmful. Once the volunteer becomes aware that their ‘contribution is insufficient given the complexity and severity of the issues’, the value of their own experience as an ‘opportunity of learning and personal development’ is prioritised in place of the assistance they perceived they would render to orphaned children.

In the Better Volunteering, Better Care Report on International Volunteering in Residential Care Centres, informants working in child protection in government and non-government

79 Gay, above n 75.
80 Guiney and Mostafanezhad, above n 4, 150.
82 Sin, above n 21, 985.
83 Anderson and O’Connell-Davidson, above n 8, 52.
84 Ibid 52.
87 Anderson and O’Connell-Davidson, above n 8, 34.
88 Gay, above n 75.
90 Rebecca Tiessen and Barbara Heron, ‘Volunteering in the developing world: the perceived impacts of Canadian youth’ (2012) 22(1) Development in Practice 44, 54.
organisations across the developing world gave their viewpoints regarding the use of international volunteers in orphanages.\textsuperscript{91} The research provided many examples of ‘well-intentioned westerners’ returning from visiting developing States with a desire to ‘make a difference’ through fundraising and support for the orphanages they volunteered in.\textsuperscript{92} This desire to assist also resulted in returned volunteers founding their own orphanages.\textsuperscript{93}

The ‘uncritical portrayal of the western hero in the media’ reinforced and encouraged the establishment and funding of these orphanages.\textsuperscript{94} This notion of the western hero is reflective of the orphan addiction that was examined in Chapter Three. The veneration of orphanage tourists is not reserved for founders alone, but also for volunteers and visitors. Developing States allowing the establishment of orphanages by foreigners and the continuation of orphanage tourism, despite research proving the harm to children, actively privilege the consumer desire of orphanage tourists over the needs and safety of vulnerable children.

From the developed world perspective, it seems that society finds more ‘moral gratification in having good intentions than in producing good outcomes’ and accepts ‘mere symbols of being good’ as evidence of good outcomes\textsuperscript{95} rather than critically evaluating, or even appearing to have regard for, the research available. In this way, the consumption of orphanage tourism becomes ‘a form of display’\textsuperscript{96} and the corresponding growth in the number of orphanages is an ‘example of children being treated as a commodity to be used for financial gains’.\textsuperscript{97}

Orphanage tourists are usually unaware of how their goodwill and specific desire to volunteer with orphans encourages orphanages to operate ‘more like opportunistic businesses than charities, intentionally subjecting children to poor conditions in order to entice unsuspecting volunteers to donate more money’.\textsuperscript{98} This dialectic in demand drives the trafficking of

\begin{flushleft}
\textsuperscript{91} Better Care Network, above n 3, 26. \\
\textsuperscript{92} Ibid. \textsuperscript{93} Ibid. \textsuperscript{94} Ibid 10. \\
\textsuperscript{95} Gay, above n 75, 20. \textsuperscript{96} Anderson and O’Connell-Davidson, above n 8, 34. \\
\textsuperscript{97} Better Care Network, above n 3, 9. \textsuperscript{98} Kushner, above n 2.
\end{flushleft}
children into orphanages to create the supply necessary to sustain the orphanage tourism industry.

V \textbf{ORPHANAGE TOURISM AS A FORM OF ‘EMBODIED LABOUR’}

The demand of orphanage tourism is predicated on the desire to assist orphans. This preference to visit and volunteer directly with orphans, to the exclusion of other vulnerabilities, forms an important part of the production of paper orphans. If it were merely vulnerable children that tourists were interested in assisting, then there would be no impetus for children to be recruited into orphanages. The whole paper orphaning process is predicated upon the desire to assist orphans. The demand for paper orphaning as a form of embodied labour is encouraged by the normalisation of assisting children in developing States found throughout western culture.

This desire to assist orphans may be construed as a form of ‘embodied labour’.\textsuperscript{99} Embodied labour is where the ‘consumer’s demand for services in the destination country drives the supply for a particular gender, age, and or racial ethnic or national identity’\textsuperscript{100} This is seen in sexual exploitation where ‘the desire for a particular kind of sexual experience; the desire for particular kinds of sexual partners; the desire for control over when and how to have sex’\textsuperscript{101} drives the demand for sexual exploitation. In orphanage tourism, the volunteer has a desire for a particular kind of experience; the desire to assist particular kinds of vulnerable children (orphans); and the desire to control how they offer their contribution (through volunteering, visiting and funding). The enactment of those specific desires result in orphanage tourism driving demand for paper orphaning. Whilst there are other volunteering programs available in developing States, for example in construction projects, teaching English or working in communities, orphanage tourists actively seek to interact with, and assist, orphaned children. A shortfall of orphans to meet the demand of orphanage tourism ‘acts as a stimulus for criminal syndicates to provide this product via any means necessary’\textsuperscript{102}

\textsuperscript{99} Anderson and O’Connell-Davidson, above n 8, 33.
\textsuperscript{100} Ibid.
\textsuperscript{101} Ibid 37.
\textsuperscript{102} Ibid 25.
Once children are produced as paper orphans to meet the embodied labour demand, they are required to behave in a certain way towards orphanage tourists. Guiney asserts that orphanages that heavily promote orphanage tourism require children to interact in particular ways with the volunteers and visitors in order to engender emotional responses and garner donations.\textsuperscript{103} Guiney labels this pressure on resident children to form relationships with orphanage tourists as ‘emotional labour’.\textsuperscript{104} An example of this from Nepal is the Anath Bal Kalyan Nepal orphanage, where the orphanage operator changed the sign on the outside wall from ‘Hostel’ to ‘Orphanage’ and forced the resident children not to tell orphanage tourists that their parents were alive to engender sympathy and donations.\textsuperscript{105} Research in Thailand noted that strong relationships between volunteers, orphanage staff and children resulted in volunteers providing ongoing support after leaving the orphanage in ‘four major forms: donations of objects and money; fundraising activities on behalf of the orphanage; sponsoring orphanage projects; and promoting the volunteer tourism programme at the orphanage to other people.’\textsuperscript{106} An account from a care leaver in Kenya who grew up in an orphanage experiencing orphanage tourism states

> Often, the reason behind not wearing shoes was to show how impoverished we were, to persuade donors to donate more. The institution staff had taught us a routine. They paraded us, and as soon as the visitors arrived in tour vans we had to exude joy. Indeed, we jumped up and down, and raptured in union with song and dance that welcomed them. We knew that the only way to ensure they came back again to help the institution was by how much they smiled at our entertainment, and by the tears, sadness or sympathy that came when they were told that we were “orphans”.\textsuperscript{107}

There is a clear financial incentive for orphanage operators to encourage children to undertake this emotional labour in order to garner more donations. The impact of this emotional labour is also important to volunteers feeling that they have successfully assisted

\textsuperscript{104} Ibid.
\textsuperscript{105} Chahana Sigdel, ‘Not all is well with ‘orphanages’: Children’s homes come into limelight with a number of cases of abuse and trafficking’, Kathmandu Post, 16 September 2014 <http://kathmandupost.ekantipur.com/news/2014-09-16/not-all-is-well-with-orphanages.html>.
\textsuperscript{107} Ucembe, above n 31.
orphans. Volunteers have a more positive experience when they feel they have been ‘helpful’ through providing personal assistance to the children by supporting lessons or giving them attention. These ‘intimate embodied encounters’ form a major motivation in the decision of volunteers to volunteer. These encounters require children to perform emotional labour to fulfil their required role as the vulnerable ‘poor but happy’ orphan requiring assistance. This becomes a critical part of the orphanage tourists’ experience as it affirms their perception of the need for their presence and that their motivation to assist is well placed. Orphanage tourists do not realise that paper orphans are often being pressured by orphanage operators into performing these ‘particular stereotypes of vulnerability and emotion’ to incentivise donations to the orphanage.

Considering orphanage tourism as a form of embodied labour that drives the demand for paper orphans shifts the perception of orphanage tourism from being a humanitarian act to an act participating in child trafficking into orphanages.

VI IMPLICATIONS OF ORPHANAGE TOURISM AS A DEMAND DRIVER

This section describes the implications of orphanage tourism being regarded as a demand driver for child trafficking. The business of paper orphaning has developed to meet the demand of the orphanage tourists’ desire to assist orphaned children. These demand arguments are contingent upon paper orphaning being regarded as a form of trafficking, which is the central premise of this thesis and the focus of Chapters Five and Six. Regarding paper orphaning as a form of trafficking shifts the dynamic in addressing the demand of orphanage tourism from a child protection issue to an anti-trafficking mandate.

Research shows that the continual revolving door of volunteer caregivers and orphanage tourists causes harm to children through potentially escalating the development of attachment disorders. Where orphanages claim that they are removing children from poverty to protect them, only to continually expose them to orphanage tourism, it appears that the motivation of profit outweighs that of child protection. Experts have called for a

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109 Conran, above n 81, 1460.
111 Richter and Norman, above n 26, 222; UNICEF, above n 38, 120.
‘complete paradigm shift’\textsuperscript{112} in relation to how we understand both the context of vulnerable children and orphanage tourism. In particular, we need to shift the western mindset that orphanages in developing States are ‘a positive solution for vulnerable children’, and that ‘all well-intentioned volunteering has good outcomes’.\textsuperscript{113} This paradigm shift requires more than a mere re-education of would-be volunteers, but a reconceptualisation of orphanage tourism as a demand driver for trafficking. In doing so, the demand of orphanage tourism may be addressed through article 9(b) of the \textit{Trafficking Protocol}. That is, ‘educational, social or cultural measures’ should be undertaken to counter the demand of orphanage tourism. These measures include bolstering child protection systems in developing countries, the regulation of a more robust and transparent volunteering process, and state regulation of orphanage tourists from both sending and receiving countries.\textsuperscript{114}

Gallagher and Skrivankova explain that ‘states are able to shape demand for the goods and services produced by trafficking through laws and policies’ and that failure to provide protection can ‘further contribute to constructing demand by exacerbating vulnerability, and thereby, exploitability’.\textsuperscript{115} Governments and producers can manipulate the ‘availability, affordability and social meaning of any commodity or type of personal service, and therefore levels of demand for it’.\textsuperscript{116} In developing States, the state’s failure to effectively regulate orphanages, the increased reliance on non-government organisations for the provision of alternative care, as well as government complicity and corruption, lead to an enabling environment that ‘encourages demand’ for orphanage tourism.\textsuperscript{117} Those involved in the paper orphaning process, whether recruiters, orphanage operators, corrupt officials or others, ‘encounter fewer obstacles in territories where institutions do not sufficiently protect children, convict traffickers, provide proper education or support communities in keeping children safe’.\textsuperscript{118} As demonstrated in Chapter Two and Chapter Three, orphanages are often highly reliant on donations and orphanage tourism to fund their work, and ‘become profit-making businesses’.\textsuperscript{119} Because of this, orphanages often view any measure that might
discourage orphanage tourism as disadvantageous. In addition, the ‘failure of these States to effectively investigate, prosecute and punish trafficking and related exploitation can contribute to demand generated by traffickers and exploiters by maintaining trafficking as a low-risk, high-profit crime’.120

When tackling demand in trafficking, there are three levels that must be addressed.121 The first is the ‘employer demand’ targeted at orphanage operators who run the orphanages that profit from having paper orphans available for orphanage tourism. This requires addressing both the systems of initial registration and ongoing licencing of orphanages, as well as prosecuting unregistered or exploitative orphanage operators. Where orphanages are properly registered, strong gatekeeping mechanisms should be in place to ensure that children are not admitted to the orphanage unless it is a last resort and only for a short-term placement to discourage the use of institutionalisation for the purpose of orphanage tourism. Orphanage operators who are found to be participating in paper orphaning through recruitment and exploitation should be prosecuted for child trafficking.

The second level is the ‘consumer demand’ of orphanage tourists, targeted at both the tourists themselves, and the companies promoting and facilitating orphanage tourism. Targeting intending orphanage tourists with awareness raising campaigns by challenging the ‘prevailing global “orphan rescue” myth’ is an important part of addressing the consumer demand.122 Companies that are promoting and facilitating orphanage tourism must also be made aware of their complicit participation in paper orphaning. Companies may prove difficult to persuade given the commercial nature of their interests. Where paper orphaning is regarded as a form of trafficking, the criminalisation of the process, and prosecution of involved parties may assist in this endeavour. However, whether this criminalisation would, or could, extend to orphanage tourists is contentious. Orphanage tourists usually have no intention to exploit children, but may be indirectly involved in the paper orphaning process due to the demand for paper orphans created by their desire to assist.

120 Gallagher and Skrivankova, above n 51.
121 Recommendations to address demand are outlined in depth in Chapter Seven, Part IV.
The third level is the ‘third parties and other intermediaries’ involved in the paper orphaning process, who should be targeted through prosecution.¹²³ These are people who profit indirectly such as the recruiters and child finders who bring the children to the orphanage, and corrupt public officials who enable the process. These parties form part of the larger criminal network involved in the paper orphaning process and it is essential that prosecution is pursued to halt the process and to serve as a deterrent. The difficulty in addressing orphanage tourism as a demand driver for child trafficking through prosecution mechanisms lies in determining who should be prosecuted and for what crime.

VII  CONCLUSION

Orphans and orphanages have become a business in some developing States. This chapter established that like any commercial business, the demand for the product of orphanage tourism is driving a market to supply orphans. To satisfy the demand, children are actively recruited from their families, lured with the promise of education or returning in the future, and produced as orphans to reside in orphanages for the purpose of orphanage tourists hoping to assist them.

A comprehensive review of demand in relation to trafficking has stated that it is ‘over-simplistic to describe trafficking as demand led’¹²⁴ and that social and political factors must be considered. Building on the investigation in Chapter Three of the enabling environment that contributes to paper orphanging, this chapter asserted that orphanage tourism creates a demand for the paper orphanging process. Orphanage tourism is an exemplification of the western desire to assist orphaned children. As a form of volunotourism at the intersection of the global aid discourse and travel, orphanage tourism has grown increasingly popular as it is perceived as a way to contribute meaningfully to less affluent developing States. Orphanage tourists view orphanages as a necessary saviour of orphaned children. The reality is that many resident children are actively recruited into orphanages to meet the demand of orphanage tourism.

¹²⁴ Anderson and O’Connell-Davidson, above n 8, 62.
In the trafficking literature, demand is understood as being predicated upon consumer desire. Supply is then produced to meet that demand. To understand how orphanage tourism functions as a demand driver for paper orphaning, the demand/supply interrelationship requires a reconceptualisation. This is because orphanage tourism is predicated upon a perception of supply of orphans requiring assistance. It is this perception of supply that drives demand of orphanage tourists to provide assistance. The demand for orphanage tourism in turn drives the supply of paper orphans. This is representative of what Gallagher describes as supply generating its own demand\(^{125}\) and illustrative of why demand drivers must always be examined in light of their causal factors.

These causal factors were examined in Chapter Three which detailed the enabling environment that paper orphaning emerges in, which provides impetus for the orphan addiction.\(^{126}\) As an exemplification of this orphan addiction, orphanage tourism is predicated on the consumer desire to assist orphans. The specificity of assisting ‘orphans’ to the exclusion of other vulnerabilities leads to the conclusion that paper orphaning is a form of embodied labour. In extending this argument, the behaviour of the orphans towards the orphanage tourists must affirm their motivation to assist. This pressure on paper orphans to express emotions and form relationships with orphanage tourists in particular ways in order to encourage donations is a form of emotional labour. Both embodied labour and emotional labour form a critical part of how the demand for orphanage tourism is constructed.

To address the demand of orphanage tourism, the perception of the supply of vulnerable orphans must be countered. As this perception is cultivated as part of the paper orphaning process through the enabling environment described in Chapter Three, orphanage tourism needs to be addressed bilaterally as both a threat to child protection and as creating a demand for child trafficking into orphanages. These measures are called for in article 9 of the *Trafficking Protocol* where it is recognised that States parties need to take action educationally, culturally, socially and legally against demand for trafficking. Educational, cultural and social measures may be achieved through awareness campaigns focusing on how orphanage tourism actively contributes to paper orphaning aimed at would-be volunteers, orphanage operators and child welfare organisations and government departments. Having established

\(^{125}\) Gallagher and Skrivankova, above n 51.

\(^{126}\) Cheney and Rotabi, above n 78.
the method, prevalence and enabling environment of paper orphaning, and the demand of orphanage tourism, the following chapters develop the legal argument that paper orphaning is a form of child trafficking under international law.
CHAPTER FIVE: FROM ORPHANHOOD TO TRAFFICKED

I INTRODUCTION

This chapter begins the argument that the process of paper orphaning, defined as children being actively recruited into orphanages for the purpose of exploitation and profit, can be interpreted as a form of child trafficking in international law. Thus far, this thesis has established the method and prevalence of paper orphaning, the environment that enables paper orphaning, and how demand for orphanage tourism drives the paper orphaning process.

The International Labor Organisation estimates that 1.2 million children are trafficked each year. This figure does not include children who are subject to the paper orphaning process because they have not previously been regarded as meeting the definition of ‘trafficked’. While the language utilized in media reports consistently refers to the paper orphaning process as trafficking, this lay reference does not mean that the legal definition of child trafficking under international law has been met. Research has noted the recruitment of children, including those with parents, into orphanages for the purpose of financial profit through intercountry adoption. While there has been extensive investigation of whether intercountry adoption can be considered as child trafficking, to date there has been little academic scrutiny of the active recruitment of children from their families into orphanages for the purpose of profit and exploitation. This chapter asserts that international law should regard the initial displacement of such children from the family of origin to an orphanage as a form of child trafficking.

3 Corinna Csáky, ‘Keeping children out of harmful institutions: Why we should be investing in family-based care’, (Report, Save the Children, 2009) 8.
4 Previous research acknowledged that paper orphaning had not been legally regarded as a form of child trafficking. See for example Martin Punaks and Katie Feit, ‘Orphanage voluntourism in Nepal and its links to the displacement and unnecessary institutionalisation of children’ (2014) 1(2) Institutionalised Children Explorations and Beyond 179. The first legal argument for paper orphaning to be considered as a form of child trafficking was published by van Doore, above n 1.
The chapter begins in Part II by reflecting upon the history of the development of child trafficking in international law. Examining the foundational constructs of the international framework of trafficking lays the groundwork for asserting that the current definition of trafficking in international law incorporates paper orphaning as a form of child trafficking.

In Part III, the chapter articulates the importance of paper orphaning being categorised as child trafficking, particularly in relation to child laundering, and distinguishes paper orphaning from the research pertaining to intercountry adoption as child trafficking. Proponents of the argument that intercountry adoption is a form of child trafficking often assert that the purpose of recruitment into orphanages is for the purpose of adoption. This thesis asserts that the recruitment of children into orphanages for the purpose of exploitation should be considered as a separate and standalone act of trafficking.

In Part IV, the chapter begins the application of the international framework on child trafficking to the process of paper orphaning. It applies the relevant articles on child selling, trafficking and exploitation under the Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and argues that the criminalisation of paper orphaning as a form of sale of children or abduction fails to provide potential criminal accountability for the whole process of paper orphaning.

To provide this accountability, the process of paper orphaning should be recognised and criminalised as a form of child trafficking under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000. To achieve this, the definition of trafficking found in article 3 of the Trafficking Protocol is applied to the process of paper orphaning. That

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definition has two elements: the act element and the purpose element. Part V of this chapter applies the act element to paper orphaning. The act element must be for a purpose of exploitation, which is the subject of Chapter Six.

II HISTORICAL RESPONSES TO CHILD TRAFFICKING IN INTERNATIONAL LAW

This part provides a brief history of the development of child trafficking in international law. This establishes that an interpretation of child trafficking as including paper orphaning is congruent with how the offence of child trafficking has developed.

Prior to the implementation of the modern international treaty system, trafficking was initially acknowledged as an international issue in 1904 when European nations came together to conclude the International Agreement for the Suppression of the White Slave Traffic\(^8\), the first international agreement concerning trafficking. The purpose of the agreement was to protect white women and girls from being moved abroad for ‘immoral purposes’.\(^9\) The Agreement did not specifically utilise the term ‘child trafficking’, but did specify that States parties should provide ‘effective protection’ for ‘girls that are under age’ from the ‘criminal traffic known as the ‘White Slave Traffic’.\(^10\)

The International Convention for the Suppression of the White Slave Traffic 1910\(^11\) amended the 1904 Agreement. This Convention explicitly created the offence of trafficking and States parties were required to legislate to effect punishment\(^12\) for ‘whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes’.\(^13\) Article 2 of the 1910 Convention introduced the idea currently referred to as the ‘means criterion’ of trafficking, that is, that the movement or recruitment of a victim is induced ‘by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman or

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\(^8\) International Agreement for the Suppression of the White Slave Traffic 1904, opened for signature 4 May 1904, 1 LNTS 83 (entered into force 18 July 1905) (‘1904 Agreement’).

\(^9\) Ibid art 1.

\(^10\) Ibid preamble.


\(^12\) Ibid art 3.

\(^13\) Ibid art 1.
girl over age’. A girl ‘over age’ was defined as ‘over twenty completed years of age’. The explicit reference to ‘girls over age’ (over twenty years old) was in direct contrast to Article 1 which referred to ‘girls under age’. Where girls were under age, the ‘means criterion’ was not required. The removal of the means criterion for girls under age as forming part of the legal requirements of trafficking was the first acknowledgement of the vulnerability of children in relation to trafficking and is mirrored in the current Trafficking Protocol.

The International Convention for the Suppression of Traffic in Women and Children 1921 superseded the 1910 Convention. Article 2 of the 1921 Convention extended the coverage of trafficking to include both boys and girls by specifying that ‘all measures to discover and prosecute persons who are engaged in the traffic in children of both sexes’ was covered. The 1921 Convention also raised the age of girls from under ‘twenty completed years’ (previously provided in the Final Protocol of the International Convention for the Suppression of the White Slave Traffic 1910) to under ‘twenty-one completed years of age’. Thus, from 1921, children of both sexes under the age of 21 years were protected by States parties from trafficking. In the same vein as the 1910 Convention, the 1921 Convention heavily focused on the prosecution and punishment of traffickers.

By 1949, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others firmly aligned the offence of trafficking to the purpose of prostitution. It also changed the direct references to women and children found in the previous Conventions to ‘persons’ rendering the victims’ gender and age irrelevant for the purpose of trafficking. The 1949 Convention was the first to seek to ‘control both the process (procurement, enticement, or leading away) and the result (exploitation of prostitution)’ of trafficking.

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14 Ibid art 2.
15 Ibid Final Protocol [B].
16 International Convention for the Suppression of Traffic in Women and Children, opened for signature 30 September 1921, 9 LNTS 415 (entered into force 15 June 1922) (‘1921 Convention’).
17 Ibid art 2.
18 Ibid art 5.
Between the introduction of these Agreements and Conventions that were trafficking-specific, the *League of Nations Slavery Convention* was introduced in 1926\(^{21}\) and the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* was introduced in 1956.\(^{22}\) Whilst these instruments do not specifically deal with child trafficking, they provide background context to the further development of trafficking law internationally and are critical to the interpretation of the current trafficking definition. The *Slavery Convention* is centred on the rights of ownership of a person.\(^{23}\) In the past decade there has been a convergence of the understanding of trafficking and slavery with trafficking often being referred to as a form of ‘modern slavery’\(^{24}\) and a continued discussion regarding this conflation of definitions.\(^{25}\) The current definition of trafficking in the *Trafficking Protocol* includes slavery or practices similar to slavery as forms of exploitation.\(^{26}\)

The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* was adopted on 15 November 2000. Article 3 of the *Trafficking Protocol* provides the definition of ‘trafficking’ in an international convention as:

(a) “Trafficking in persons” shall mean 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, of deception, of 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 labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

\(\text{\textsuperscript{21}}\) *Slavery Convention*, opened for signature 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927) (‘Slavery Convention’).

\(\text{\textsuperscript{22}}\) *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, opened for signature 7 September 1956, 266 UNTS 3 (entered into force 30 April 1957) (‘Supplementary Convention on Slavery’).

\(\text{\textsuperscript{23}}\) Slavery Convention art 1.


\(\text{\textsuperscript{26}}\) An analysis of slavery and the practice or institution similar to slavery and their relevance to the exploitation that paper orphans experience is provided in Chapter Six, Part III (C) and (D).
(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) 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 subparagraph (a) of this article;

(d) “Child” shall mean any person under eighteen years of age.

The Protocol articulates that the purpose of trafficking is for exploitation, representing a departure from the purpose of prostitution that was previously utilised. The introduction of the Trafficking Protocol as part of the Convention against Transnational Organized Crime officially cleaved the offence of trafficking from its foundation in human rights and located it as a form of transnational crime.

The current ‘vague and expansive definition gives the term “trafficking” enormous elasticity’ and allows for application to many scenarios that traditionally would not have been regarded as trafficking. Whilst this elasticity can lead to ambiguity and vagueness, it can also be harnessed to recognise practices as trafficking that might previously have been regarded differently because, prima facie they do not appear to be trafficking cases. The importance of this lies both in accountability through criminalisation and prosecution of trafficking practices, as well as the potential of remedies for victims of trafficking. Paper orphaning is one such practice. Having considered the evolution of international law as it pertains to child trafficking, the next section considers the rationale for considering paper orphaning as an offence of trafficking.

III  WHY TRAFFICKING?

This part argues that the most appropriate offence for the process of paper orphaning is trafficking in children. It articulates potential concepts and offences in international law such as child laundering, selling, and abduction that can apply to paper orphaning, but determines that only the offence of child trafficking can offer criminal accountability for the whole paper

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27 Trafficking Protocol art 3.
orphaning process. It then distinguishes arguments regarding paper orphaning as child trafficking from the extensive research arguing that intercountry adoption is a form of child trafficking. It does this by highlighting the contribution that this thesis makes in concentrating on the recruitment of the child into the orphanage for the purpose of exploitation as the first act of trafficking.

The manner in which trafficking is interpreted has 'serious implications for the identification, assistance and protection of trafficking victims'. To establish paper orphaning as trafficking is to recognise the systemic nature of how this process is occurring and to acknowledge paper orphans as trafficking survivors. Importantly the recognition of paper orphans as survivors of child trafficking would provide impetus for States parties to meet their obligations in the United Nations Principles and Guidelines on Human Trafficking. These Guidelines state that a 'failure to identify a trafficked person correctly is likely to result in a further denial of that person’s rights. States parties are therefore under an obligation to ensure that such identification can and does take place'. Without recognition of the process of paper orphaning as one of child trafficking in international law, States parties are not obligated to criminalise the process of paper orphaning, prosecute offenders under trafficking laws, or provide any assistance to survivors.

The importance of categorising paper orphaning as a form of child trafficking lies in finding appropriate mechanisms to prosecute paper orphaning as an offence. Where paper orphaning is not regarded as a form of trafficking, it can effectively be ignored as a systemic issue and addressed only in a piecemeal approach. Without a categorisation of trafficking, only separate elements of the paper orphaning process can be prosecuted. For example, the recruitment act in paper orphaning could be categorised as child selling or abduction under the Convention on the Rights of the Child and the Optional Protocol. Neither of these offences have

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32 How the concepts of child selling and abduction found in the Convention on the Rights of the Child and Optional Protocol relate to paper orphaning is explained in Part IV.
the ability to recognise the whole process of paper orphaning as a systemic issue or to prosecute paper orphaning as a singular holistic offence of trafficking. A recognition of paper orphaning as a form of child trafficking enables prosecution of the paper orphaning process as a singular offence incorporating both the act of recruitment and the purpose of exploitation elements, whilst also enabling survivors access to trafficking redress schemes.

The term child laundering as an alternative to child trafficking derives from David Smolin’s research on the practice of intercountry adoption. Child laundering is where children are removed from their parents and produced as orphans for the purpose of intercountry adoption. Smolin refers to the practice of intercountry adoption as legitimising the illegal laundering and trafficking of children for the purpose of a ‘commercialized and corrupted system driven by the demand of rich western adults for children’. Smolin states:

The term “child laundering” expresses my claim that the current intercountry adoption system frequently takes children illegally from birth parents, and then uses the official processes of the adoption and legal system to “launder” them as “legally” adopted children. Thus, the adoption system treats children in a manner analogous to a criminal organization engaged in money laundering, which obtains funds illegally but then “launders” them through a legitimate business.

Smolin describes the process of a child taken from their family and constructed as an orphan for the purpose of intercountry adoption. Whilst the term ‘child laundering’ is useful to express the process of paper orphaning, it is not a legal term and there is no offence attached to it by that name in international law. Therefore, it does not assist in criminalising the paper orphaning process.

Much research has focused on intercountry adoption as a form of child trafficking. The majority of research on trafficking and intercountry adoption focuses on the transnational

34 Ibid.
adoption as the trafficking component. However, there are often two (or more, depending on the circumstances) acts of trafficking involved in intercountry adoption. The first act of trafficking may occur when the child is recruited into an orphanage and experiences exploitation. This is the same act of trafficking that this thesis concentrates on. These children may then be trafficked again through intercountry adoption; however, those acts of trafficking are beyond the scope of this thesis. The recognition of paper orphanning as a discrete form of child trafficking clearly shows that this process is separate from intercountry adoption. A concentration on the initial act of trafficking enables States parties to recognise, prosecute and act to prevent the systemic issue of paper orphanning as a form of child trafficking without the context of intercountry adoption adding to the complexity.

This thesis makes the argument that child trafficking is the most appropriate offence to establish criminal accountability for paper orphanning. It further distinguishes the initial paper orphanning process as a distinct trafficking act that potentially forms part of intercountry adoption, but can also stand alone. Part IV begins situating the process of paper orphanning in international law to assert that paper orphanning is a form of child trafficking.

IV SITUATING PAPER ORPHANNING IN INTERNATIONAL LAW

This part examines the instruments relevant to child trafficking in international law and applies them to paper orphanning. Child trafficking is not defined and regulated by one instrument alone. A complex set of international conventions define and provide regulatory guidance on what constitutes trafficking to States parties, as well as aspirational guidance for non-signatory States. This part applies the Convention on the Rights of the Child, the associated Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and the Trafficking Protocol to situate paper orphanning in international law as a form of child trafficking. The Convention on the Rights of the Child and the Optional Protocol offers limited potential criminal accountability for the paper orphanning process, as they do not provide for the criminalisation of the whole process of paper orphanning as a form of child trafficking. Therefore, a successful application of the definition of child trafficking in the Trafficking Protocol offers the best mechanism to ensure the whole process of paper orphanning can be criminalised and prosecuted.

Because the contribution that this thesis makes is an interpretation and application of the international framework on child trafficking, it is important to briefly articulate the method of interpretation that is undertaken. The goal of interpretation of an international treaty is to ‘deduce the meaning exactly of what has been consented to and agreed’.36 This thesis applies a textual approach to interpretation in accordance with articles 31 and 32 of the Vienna Convention on the Law of Treaties.37 Article 31(1) of the Vienna Convention states ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose’. In order to resolve any ambiguity that arises, the interpretation adopted in this thesis incorporates an intentionalist approach as allowed for in article 32 of the Vienna Convention. This approach confirms the interpretation that article 31 and the ‘ordinary meaning’ have produced through an examination of secondary documents such as the Travaux Préparatoires and other associated documents relevant to the drafting of the treaties.38

A Convention on the Rights of the Child

The Convention on the Rights of the Child is the pre-eminent international treaty detailing the civil, political, economic, social, health and cultural rights of children. This section applies the articles 32, 35 and 36 of the Convention that pertain to trafficking and exploitation to the process of paper orphaning. It demonstrates that while the Convention can apply to paper orphaning, it does not mandatorily require States parties to criminalise the whole process of paper orphaning, as the Trafficking Protocol does.

Article 35 of the Convention provides that ‘States parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form’.39 This article establishes that children have a right to be protected by the State from abduction, sale or trafficking, and imposes an obligation on States parties to prevent trafficking of children for ‘any purpose or in any form’. This

requires States parties to legislate domestically to address child trafficking as they believe is warranted.

As discussed in Part III of this chapter, the offence of sale of children has the potential to cover only one part of the paper orphanning process. Therefore, the focus of this application of article 35 is on the trafficking element. Article 35 of the Convention does not provide a definition of trafficking, or address how it differs from the sale of children or abduction. The Special Rapporteur on the sale of children and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, notes ‘the sale of and trafficking in children, although similar, are two distinct but linked human rights violations, and States are legally bound to take measures to prevent both’. The Travaux Préparatoires of the Convention state that the scope of article 35 was intended to be broader than the historical position of trafficking being for the purpose of sexual exploitation. Instead, the drafters explained that article 35 should cover the ‘sale or traffic for many reasons: economic exploitation, sexual exploitation and sexual abuse, as well as for reasons of adoption or labour’. The first of these, ‘economic exploitation’ of children, can be applied to the process of paper orphanning where children are recruited into orphanages for the purpose of profit. This is particularly the case where children are deliberately kept in substandard conditions to encourage donations from visitors and volunteers through orphanagan tourism.

Article 32 of the Convention also uses the term ‘economic exploitation’, requiring that children must be protected from all forms of ‘economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development’. Applying a purely textual analysis, this article distinguishes ‘economic exploitation’ from ‘performing any work’. This means that economic exploitation does not require the performance of work, thus meaning that economic exploitation can occur outside of a labour

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40 Maud de Boer-Buquicchio and Maria Grazia Giammarinaro, Joint report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material and the Special Rapporteur on trafficking in persons, especially women and children, GA res 71/177 and HRC res 34/16 and 35/5, UN GA, 72nd sess, provisional agenda items 69(a) and 73(b), UN Doc A/72/164 (18 July 2017) 16/24.
42 See the Mukti Nepal case discussed in detail in Chapter Six, Part III.
43 Convention on the Rights of the Child art 21(d).
context. This is particularly applicable to paper orphaning, where children may not be engaged in conduct that would meet the requirements of labour, but their very presence in an orphanage is exploited for economic gain.

Finally, article 36 of the Convention provides that ‘States parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare’. Article 36 was introduced to ensure that States parties have an obligation to protect children from all forms of exploitation even where they are not specifically articulated in the Convention. The concept of exploitation for the purpose of the Convention was never defined, either in the Convention itself or in the Travaux Préparatoires, and nor has it since been defined by the Committee on the Rights of the Child. Though the Convention does not provide examples of what was meant by exploitation, the purpose of the article is to ensure that all forms of exploitation are encompassed and children experiencing forms of exploitation that are not stipulated in the Convention itself will still have recourse to enforce their rights.

Exploitation is also a required element of the trafficking definition found in the Trafficking Protocol. In the Protocol, exploitation includes at a minimum ‘the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs’. Although it is not intended to be, this list is treated as prescriptive by many domestic jurisdictions. This is contrasted with article 36 of the Convention which has a broader scope. This means that the exploitation that paper orphans experience may be theoretically easier to prove under article 36 of the Convention than meeting the requirements of the Protocol. However, enforcement of that right may be problematic as there have been no investigations carried out by the Committee on the Rights of the Child on article 36 to date. The Convention creates a right for children to be protected from trafficking and exploitation, and States parties are obligated to take appropriate measures to enact this protection. This can lead to vastly differing responses to paper orphaning where some States parties treat the issue as one of child protection whilst others

44 Convention on the Rights of the Child art 36.
46 Trafficking Protocol art 3(a).
47 The concept of exploitation as an element of trafficking is detailed in Chapter Six.
pursue prosecutions for parts of the paper orphaning process, but not the whole, as discussed above.

States parties responses to the obligation to protect children from trafficking and exploitation can include both institutionalisation in orphanages and deinstitutionalisation from orphanages. Both may be seen by States parties as appropriate measures to protect children from being continually exploited as part of the paper orphaning process. A State party may concentrate on the institutionalisation of children as a mechanism to protect children from trafficking, as is often seen in shelters for trafficking victims. This can become problematic where institutionalisation is ongoing and harm caused becomes a form of exploitation in itself.48

Conversely and increasingly, States parties are focusing on addressing paper orphaning through the process of deinstitutionalisation, which is the process of removing children from orphanages and reintegrating them with their families or ensuring family based care. Adopting a mandate of deinstitutionalisation may be seen as a direct measure that disrupts the paper orphaning end point of ongoing institutionalisation for the purpose of profit. Indeed, the deinstitutionalisation mandate has been widely adopted by governments in States parties where the paper orphaning issue is prevalent such as Nepal,49 Cambodia,50 Ghana,51 and Uganda,52 and also has been promoted by the United Nations53 and international non-governmental organisations.54 In this context, deinstitutionalisation is a child protection response, and not a response to child trafficking. The result of this is that paper orphaning

48 The issue of institutionalisation as protection becoming exploitative is discussed in detail in Chapter 6, Part IV.


is not regarded as an offence, and deinstitutionalisation is implemented in a vacuum with no charges being laid or prosecutions pursued to act as a deterrent.

Finally and crucially, whilst establishing the rights of children to be free from trafficking and exploitation, the Convention does not specifically establish trafficking or exploitation as offences under international law, nor does it require States parties to domestically criminalise trafficking. Under the Convention, determining how these rights are to be protected is left to the States’ discretion. In 2002, the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography reinforced the protection of article 35 by requiring ratifying States to take measures to criminalise and prosecute all forms of sale of children.\(^{55}\) However, it did not create a specific offence of child trafficking.\(^{56}\)

In summary, although the Convention entitles children to protection from trafficking and exploitation, how States parties enact this is left to them. The Convention does not specifically establish either trafficking or exploitation as offences under international law, nor does it require States parties to criminalise trafficking. States parties are to determine how best to legislate the right of children to be protected from trafficking for their jurisdiction, which can lead to differing responses to the paper orphaning process, often outside of the criminal justice system which may perpetuate the problem. Therefore applying the Convention is unlikely to lead to a consistent response, and may not lead to a comprehensive response. The Optional Protocol builds upon the protection offered by the Convention on the Rights of the Child through criminalising the sale of children and is explored in the next section.


The Optional Protocol extends the scope and reach of the Convention on the Rights of the Child in relation to the sale of children which has direct relevance to paper orphaning, however still fails to provide criminal accountability for the whole process.\(^{57}\) The Optional Protocol provides

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\(^{56}\) This is discussed in detail in the following section.

a definition of child selling, and requires States parties to take measures to criminalise and prosecute all forms of the sale of children.⁵⁸

Article 1 of the Optional Protocol relevantly provides that ‘States parties shall prohibit the sale of children…as provided for by the present Protocol’.⁵⁹ The ‘sale of children’ is defined in article 2(a) as ‘any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration’.⁶⁰ Article 3(a)(i) obliges States parties to specifically criminalise, at a minimum, the sale of a child for the purpose of sexual exploitation, transfer of organs, or engagement in forced labour,⁶¹ which are similar to the exploitation requirements of the Trafficking Protocol.⁶² However, the list is non-exhaustive and ‘does not prescribe every act which may amount to the sale of a child’.⁶³ Notwithstanding these specific offences, it must be recalled that article 1 obliges State parties to prohibit the sale of children generally, without any requirement for exploitation to have occurred.

Article 3(a)(ii) extends this by explicitly stating that the sale of children includes ‘improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption’.⁶⁴ The recognition that there is a relationship between the sale of children and adoption is highly significant in relation to paper orphans. It makes clear that where consent is improperly induced for the purpose of adoption, this amounts to child selling. This is important because consent for intercountry adoption can form part of the recruitment for the paper orphaning process. As Smolin writes:

> Children are often transferred multiple times, passing from an individual who obtains the child from the birth parent to an orphanage, perhaps passing from one orphanage to another, and then passing from the orphanage to the adoptive parents overseas. If any of these transfers involve consideration paid for the transfer, and

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⁵⁸ Optional Protocol art 3(1).
⁵⁹ Optional Protocol art 1.
⁶⁰ Ibid art 2(a).
⁶¹ Ibid art 3(a)(i).
⁶² The application of the exploitation requirements of the Trafficking Protocol to paper orphaning is discussed in Chapter 6.
⁶⁴ Optional Protocol art 3(a)(ii).
the original consent was illicit, then under the Optional Protocol the sale of a child (and child trafficking) has occurred.65

This statement similarly applies to the situation of paper orphans. As examined in the method of paper orphaning in Chapter Two, parental consent for children to be taken from their families is often gained by recruiters under false pretences, for example, the promise of education or better prospects for the child. This recruitment under false pretences would meet the requirements of 'improperly inducing consent, as an intermediary'. As discussed in Part III of this Chapter, the scope of this thesis is limited to the end point of recruitment and maintenance of a child in an orphanage for the purpose of exploitation, and does not extend to intercountry adoption. As Article 3(a)(ii) implies that the purpose of the consent must be for adoption, it provides limited recourse for paper orphaning. Smolin suggests:

it is particularly significant that the law has often refused to define the mere sale of a person as a form of trafficking; instead, the law has defined illicit trafficking to require some form of exploitation beyond sale, such as enslavement, sexual exploitation, or exploitative labour.66

Anne Gallagher notes that the major difference between child selling and child trafficking is that child selling is not for an exploitative purpose, whereas trafficking generally requires this.67 The requirements of 'child selling' might be satisfied in cases where a child is displaced from their biological family on false pretences with the end point of intercountry adoption. Even where the sale of children can be proven, illegal adoption will not be characterised as trafficking under the Trafficking Protocol unless exploitative intent can be shown.68

This can be contrasted with paper orphaning, where a child does not move beyond the orphanage and their orphanhood and presence in the orphanage is commoditised, entrenching them in an ongoing state of institutionalisation. This institutionalisation can be regarded as a form of exploitation, for example through the act of 'selling time' with orphans through orphanage tourism programs, and the use of orphans’ photographs and stories to

65 Smolin, 'Intercountry adoption as child trafficking', above n 35, 302.
66 Smolin, 'Intercountry adoption as child trafficking', above n 35, 281.
67 Gallagher, The International Law of Human Trafficking, above n 20, 68.
elicit donations and sponsorship. In more disturbing cases, exploitation occurs through orphanage operators deliberately withholding food and proper living environments in an effort to keep paper orphans looking malnourished to attract more sympathy from visitors and volunteers. If the defining element separating child trafficking from child selling is exploitation at the end point, then it follows that where a purpose of exploitation can be evidenced, a process should be considered child trafficking.

In summary, whilst article 1 of the Optional Protocol prohibits the sale of children generally, it cannot provide an avenue of recourse for the whole process of paper orphaning. (removal of reference to requirement of exploitation) If the paper orphaning process is criminalised as merely the sale of children, it concentrates on one component of the offence, the act of sale, only, and fails to provide accountability for the full process of paper orphaning. In contrast, a categorisation of child trafficking enables recognition and criminalisation for the whole process of paper orphaning from recruitment to exploitation. To ensure that States are obligated to criminalise paper orphaning as an offence of child trafficking, it is essential to determine that the process is a form of trafficking under the Trafficking Protocol.

V THE TRAFFICKING PROTOCOL

To ensure potential criminal liability for the whole process of paper orphaning, child trafficking is the most applicable offence. Child trafficking is defined in international law in the Trafficking Protocol. This part begins the application of the Trafficking Protocol to the process of paper orphaning. It first establishes that paper orphaning falls within the scope of the Protocol and the associated United Nations Convention against Transnational Organised Crime. It then provides the definition of child trafficking that will be applied to the process of paper orphaning and applies the first element of child trafficking – the ‘act’ element – to the process of paper orphaning.

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69 This was discussed in Chapter Three in detail, and will be further explored in Chapter Six.
72 This analysis in continued in Chapter Six with the application of the second required element of child trafficking, the purpose element. The application of the purpose element is conducted in a separate chapter as it is extensive and is a major contribution of this thesis.
A **THE SCOPE OF THE TRAFFICKING PROTOCOL**

The *Trafficking Protocol* was adopted in November 2000 by the United Nations General Assembly and came into force on 26 December 2003 following initial ratification by 40 countries. It is one of three protocols that supplement the *Transnational Organised Crime Convention*, the others being the *Protocol against the Smuggling of Migrants by Land, Sea and Air*,73 and the *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*.74 The *Trafficking Protocol* and the *Migrant Smuggling Protocol* particularly relate to each other by distinguishing migrants who consent to be moved illegally across borders, which constitutes smuggling, and those who are coerced or fraudulently moved and remain in a situation of exploitation, which constitutes trafficking.

Before applying the definition of trafficking to the process of paper orphaning, it must be established that the process of paper orphaning falls within the scope of the *Trafficking Protocol*. Article 4 of the Protocol provides that there are two requirements for an offence of trafficking to fall within its scope:

> This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.75

The first requirement is that the offence is transnational in nature. There is no definition of transnational provided in the Protocol, however article 1 states that the protocol is supplementary to the *Transnational Organised Crime Convention* and that they should be interpreted together.76 Article 3(2) of the *Transnational Organised Crime Convention* provides that an offence is transnational if:

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75 *Trafficking Protocol* art 4.

76 Ibid art 1.
(a) It is committed in more than one State;

(b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;

(c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or

(d) It is committed in one State but has substantial effects in another State.\(^{77}\)

For paper orphanning to fall within the scope of the * Trafficking Protocol*, it appears on a textual interpretation that the offence would need to be transnational in nature. Although there have been instances where cross-border paper orphanning has occurred,\(^{78}\) the majority of paper orphanning occurs domestically. The view that where exploitation occurs domestically without the involvement of other States would be considered beyond the scope of the Protocol has been heavily critiqued.\(^{79}\) Gallagher has extensively considered whether trafficking as an offence only arises under the Protocol in transnational cases\(^{80}\) and clarifies that the intention of the transnational requirement was to require interstate or transnational cooperation rather than a requirement that the exploitation or trafficking itself be transnational. She notes that the Protocol contains a general obligation on States parties to criminalise ‘exploitative practices taking place within as well as between national borders’ and that the ‘central and mandatory obligation of all States parties to the Protocol is to criminalise trafficking in their domestic legal systems’.\(^{81}\) Reinforcing this, Gallagher persuasively argues that she is not aware of any evidence of a domestic statute limiting the definition or the scope of criminalisation to only transnational instances.\(^{82}\) When interpreted in this manner, the transnational requirement does not preclude the application of the * Trafficking Protocol* to the situation of paper orphanning.

\(^{77}\) *Transnational Organised Crime Convention* art 3(2).


\(^{82}\) Ibid.
The second requirement that must be satisfied in order for paper orphaning to fall within the scope found in article 4 of the *Trafficking Protocol* is that the offence involves an organised criminal group.\(^{83}\) An organised criminal group is defined as:

a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.\(^{84}\)

Whether organised criminal groups are involved in paper orphaning will differ from case to case. Some cases may involve organised criminal groups that are acting in concert to recruit children and establish profit motivated orphanages; whilst other instances may occur via an orphanage operator deliberately recruiting children into their orphanage for their own gain.

The United Nations Office on Drugs and Crime acknowledges that in trafficking in persons ‘the recruitment, transportation and exploitation phase can be orchestrated and sustained by one trafficker’\(^{85}\) which indicates that the involvement of an organised crime group be involved is not a requirement.

The United Nations Office on Drugs and Crime’s Legislative Guide for the implementation of the Trafficking Protocol which states:

(a) Non-inclusion of transnationality in domestic offences: The element of transnationality is one of the criteria for applying the Convention and the Protocols (art. 3 of the Convention), but transnationality must not be required as a proof in a domestic prosecution. For this reason, transnationality is not required as an element of domestic offences;

(b) Non-inclusion of an organized criminal group in domestic offences: As with transnationality, the involvement of an organized criminal group must not be required as a proof in a domestic prosecution. Thus, offences established in accordance with the Protocol should apply equally, regardless of whether they were

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\(^{83}\) *Trafficking Protocol* art 4.

\(^{84}\) *Transnational Organised Crime Convention* art 2(a).

committed by individuals or by individuals associated with an organized criminal group and regardless of whether this can be proved or not.

This means that despite paper orphaning not being transnational in nature or always involving organised criminal groups, it can still fall within the scope of the Trafficking Protocol for the purpose of consistency with the domestic codification of the offence of paper orphaning as a form of trafficking. Thus, the scope of the Protocol can extend to the categorisation of paper orphaning as a form of trafficking.

B  **THE DEFINITION OF TRAFFICKING**

This section provides the definition of child trafficking that will be applied to the process of paper orphaning to assert it is a form of trafficking under international law. The Trafficking Protocol provides the most comprehensive definition of trafficking in international law. Trafficking in persons is defined in article 3(a) as 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, of deception, of 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 labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Trafficking in children is provided for in article 3(c):

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 subparagraph (a) of this article.

Article 3(d) provides that a ‘Child shall mean any person under eighteen years of age’.

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87 Trafficking Protocol art 3(a).
88 Ibid art 3(c).
89 Ibid art 3(d).
As paper orphaning pertains to children under the age of eighteen, article 3(c) is applicable and the process must only meet the act and purpose elements in order to be regarded as child trafficking. The means element is not required. Gallagher states that almost all States parties have ‘affirmed the international definition of trafficking in children by establishing the elements of the offence as a stipulated “act” committed for a stipulated exploitative “purpose”’.90

The act element encapsulates the components of ‘recruitment, transportation, transfer, harbouring or receipt of a child’.91 The purpose element requires the act element to be conducted for ‘a purpose of exploitation’.92 What exploitation includes is found in article 3(a):

Exploitation includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.93

Thus, the following analysis of how the Trafficking Protocol applies to paper orphaning examines only the act element and the purpose element. The next section begins the application of the definition of child trafficking to the process of paper orphaning. This commences with an analysis of the components of the act element, and how each component applies to paper orphaning.

C. THE ACT ELEMENT

The first element of the trafficking in children offence is that there has been a ‘recruitment, transportation, transfer, harbouring or receipt of a child’.94 This requirement is the actus reus which constitutes the material or physical elements necessary for the commission of the offence.95 There is no guidance available in either the instrument or the Travaux

91 Trafficking Protocol art 3(c).
92 Ibid.
93 Ibid art 3(a).
94 Ibid art 3(c).
Préparatoires on how the terms included in the act element should be interpreted or applied. The terms have recently been discussed in a Joint Study conducted by the Council of Europe and the United Nations on organ trafficking.\(^{96}\) In the study, the definition of trafficking in human beings is discussed extensively. In relation to the act element, the study states that the recruitment, transportation, transfer, harbouring or receipt of a child ‘are neutral actions, which become criminally relevant if they are conducted with the intention of exploiting others’.\(^{97}\) Therefore, it is necessary to show that the act element is for the purpose of exploitation to meet the legal requirements of trafficking. To prove that paper orphaning is a form of child trafficking, one or more of the terms of the act element must be present. To illustrate this, each of the terms ‘recruitment, transportation, transfer, harbouring or receipt of a child’ is applied to the process of paper orphaning to prove the act element as required by article 3(c) of the Trafficking Protocol.

The term recruitment ‘is to be understood in a broad sense, meaning any activity leading from the commitment or engagement of another individual to his or her exploitation’.\(^{98}\) In the context of paper orphaning, the process of a recruiter or orphanage operator approaching a family and improperly inducing consent to recruit the child into an orphanage, possibly under the guise of a purpose of education, would satisfy the definition of recruitment.\(^{99}\) The ‘commitment or engagement’ by the parents directly leads to recruitment of the child to an orphanage for the purpose of exploitation. Whether the parents or guardians consent to the recruitment of the child is irrelevant as there is no means requirement in child trafficking.\(^{100}\)

The term transportation refers to ‘the act of transporting a person from one place to another’.\(^{101}\) The definition explicitly states that ‘it is not necessary for the victim to have crossed any borders, nor is it necessary for the victim to be present illegally in a state’s


\(^{97}\) Ibid.

\(^{98}\) Ibid 78.

\(^{99}\) Punaks and Feit, above n 4, 181.

\(^{100}\) Improperly inducing consent, fraud or coercion is not a requirement of the trafficking in children offence as article 3(c) of the Trafficking Protocol provides that there is no means element necessary for trafficking in children to occur. However, whilst not required legally, the statement that recruiters improperly induce consent is reflective of how the process of paper orphaning occurs.

\(^{101}\) Caplan et al, above n 96.
territory102 thereby including both transnational and domestic trafficking. This also supports
the conclusion described above that there is no requirement that trafficking be
transnational.103 Transportation is the physical displacement of the child from the family in
paper orphaning.

Perhaps the most important term for paper orphaning is ‘transfer’. The definition provides
that ‘transfer of a person includes any kind of handing over or transmission of a person to
another person’.104 The definition elucidates that the concept of ‘transfer’ is ‘particularly
important in certain cultural environments where control over individuals (mostly family
members) may be handed over to other people’.105 For transfer to occur, the transferee must
be under the control of someone and that control must be given to someone else. Transfer
occurs in paper orphaning when parents or guardians hand over control of their child to a
recruiter or to an orphanage operator.

The final potential ‘act’ component of trafficking is the ‘harbour or receipt’ of the child.
Harbouring ‘means accommodating or housing persons in whatever way, whether during
their journey to their final destination or at the place of the exploitation’.106 Similar, the act
of receiving is not required to occur in the final destination or at the place of exploitation,
but can occur along the way.107 Gallagher clarifies that the inclusion of harbouring and
receipt, in addition to the movement elements of recruitment, transportation and transfer,
suggests that both the movement of an individual into exploitation, and the maintenance of
an individual in an exploitative situation, can be considered trafficking.108 Gallagher states
that this inclusion results in ‘not just recruiters, brokers, and transporters, but also owners
and managers, supervisors, and controllers of any place of exploitation’ being brought within
the ‘potential reach of the definition’.109 This is critical in the context of paper orphaning, as
it makes it clear that both the recruiter who recruits and transports or transfers the child from

102 Ibid.
103 Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Ground? A response to James
Hathaway’, above n 81, 812. See above Part V(A) for discussion on why trafficking need not be transnational
to fall under the Trafficking Protocol.
104 Caplan et al, above n 96.
105 Ibid.
106 Ibid.
107 Ibid.
109 Ibid.
their family; as well as the orphanage owner or director who receives and harbours the child, can be potentially prosecuted as traffickers. As trafficking can occur even when there has been no movement, it can also extend to the situation where a parent/family relinquishes their child to an orphanage, on the promise of a good education, when in reality the orphanage is exploiting the child.

As not every situation of paper orphaning is the same, different parties may carry out different components of the act element. For example, whilst a recruiter or an orphanage operator may recruit or transfer a child from a family to an orphanage; trafficking can still occur when a parent or family member transfers control of their child to an orphanage, if there is a purpose of exploitation present. It is not necessary to prove that the parent or family member has knowledge that the child will be exploited, only that the recruiter or orphanage operator has that purpose.

Any arrangement whereby the child is recruited, transported, transferred, received or harboured to an orphanage meets the act element of trafficking in children. However, to be considered as trafficking in children under article 3(c) of the Trafficking Protocol, the act element must be ‘for a purpose of exploitation’.

VI Conclusion

The aim of this chapter was to situate paper orphaning as a form of child trafficking in international law. The chapter began with an examination of the history of child trafficking in international law. Following a long history of regulation of trafficking at an international level, the Trafficking Protocol provided an agreed upon international definition of trafficking for the first time in 2003. Because of the ambiguity present in the definition, what constitutes trafficking is often not clear. This chapter clarifies the application of this definition in the context of paper orphaning.

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110 Ibid.
111 Ibid.
112 Punaks and Feit, above n 4, 181.
114 Trafficking Protocol art 3(c).
Child trafficking is commonly provided for in international law alongside other forms of exploitation such as the sale and abduction of children. The distinguishing element between child trafficking and the sale of children is whether a purpose of exploitation is present. This is also the distinction that separates the arguments pertaining to paper orphaning as child trafficking from intercountry adoption as trafficking.

An analysis of how the Convention on the Rights of the Child and the Optional Protocol apply to paper orphaning specifically in relation to trafficking and exploitation further illustrated the differences between child selling and trafficking. It was asserted that even if paper orphaning was regarded as the sale of children under international law, this offence could not recognise the whole spectrum of the paper orphaning process and therefore could not effectively provide the potential of criminal accountability.

To provide this potential, it was argued that the process of paper orphaning should be recognised and criminalised as a form of child trafficking under the Trafficking Protocol. Paper orphaning is not required to be transnational in nature or to involve an organised criminal group to fall within the scope of the Trafficking Protocol, though these features may be present in some cases. The definition of child trafficking found in article 3(c) of the Trafficking Protocol was then applied to the paper orphaning process. This chapter applied the act element to paper orphaning and examined how each term listed in the act element could apply to each discrete part of the process. Having established that the act element is satisfied, it now must be established that the purpose element is also present in paper orphaning.

The final requirement for paper orphaning to be considered a form of child trafficking at international law is that the act element occurs for a purpose of exploitation. The analysis of the exploitation that paper orphans experience and whether it meets the definitional requirements of trafficking is the subject of Chapter Six.
CHAPTER SIX: ESTABLISHING EXPLOITATION

I  INTRODUCTION

This chapter demonstrates how the exploitation that paper orphans experience meets the purpose element of the Trafficking Protocol. The definition of child trafficking states that the act element must be ‘for the purpose of exploitation’. This argument follows on from Chapter Five which outlined that both an act element and purpose element must be evidenced for child trafficking to meet the requirements of the definition found in article 3 of the Trafficking Protocol. Whilst child protection advocates have long argued that paper orphaning should be regarded as trafficking, it has only recently been included as a form of trafficking in the annual Trafficking in Persons Report produced by the United States Department of State. The inclusion followed the publication of my article making the case that paper orphaning is a form of child trafficking under international law in the International Journal of Children’s Rights in 2016. This chapter further develops the arguments made in that article.

Part II examines what a ‘purpose of exploitation’ is in trafficking. The term ‘exploitation’ is not defined in the Trafficking Protocol. Instead, the definition of trafficking provides a non-exhaustive list of what ‘exploitation shall include’, namely sexual exploitation, forced labour or services, slavery or practices similar to slavery and servitude, or the removal of organs. This list of the forms of exploitation is prefaced with the statement ‘Exploitation shall include, at a minimum’ which indicates that the included list of forms of exploitation is not meant to be exhaustive and that there is potential for other forms of exploitation to be

5 van Doore, above n 1.
6 Trafficking Protocol art 3(a).
7 Ibid.
recognised as meeting the trafficking definition. The requirement of a purpose of exploitation is to establish the intention of the offender in committing the offence. It is not necessary for exploitation to actually occur, as the existence of an intended purpose or end point of exploitation is sufficient.8

This chapter then turns to establishing that the element of a purpose of exploitation can be satisfied in paper orphaning. To do this, I make two overarching arguments. The first, in Part III, is that paper orphans are often recruited for a purpose of exploitation that is listed in the definition of trafficking, and that in these cases, paper orphans should be regarded as victims of child trafficking. The second argument, in Part IV, is that because the definition of trafficking stipulates that the included forms of exploitation are ‘at a minimum’, where paper orphans are recruited for a purpose that is not listed in the Trafficking Protocol but can be shown to be exploitative, the purpose element should be interpreted in a way that recognises these forms of exploitation. As there is no legal test for assessing whether an act is exploitative, these actions are considered with reference to whether the exploiter takes unfair advantage9 of the child, and whether the conduct would meet a threshold of seriousness.10 I assert that two forms of exploitation that paper orphans are commonly subjected to are ongoing institutionalisation for profit or orphanage tourism.

This chapter ultimately argues that ‘a purpose of exploitation’ should be interpreted in a way that recognises the exploitation experienced by paper orphans, whether directly listed in the Trafficking Protocol or not. It concludes that having met both the act and purpose elements, paper orphaning should be interpreted as meeting the definition of child trafficking under international law.

II THE PURPOSE ELEMENT

As explained in Chapter Five, both an act element and a purpose element must be present to meet the requirements of child trafficking under international law. Chapter Five concluded that the recruitment or placement of children into orphanages in situations of paper


10 Gallagher and McAdam, above n 8, 40.
orphaning met the ‘recruitment, transportation, transfer, harbouring or receipt of a child’ element for the purposes of the Trafficking Protocol. This chapter establishes that the act element in paper orphans takes place ‘for the purpose of exploitation’.  

To do this, this first part examines what a ‘purpose of exploitation’ in trafficking entails and how the paper orphans process is undertaken for a purpose of exploitation. Secondly, this part describes what constitutes exploitation under the Trafficking Protocol. This provides the foundation for the next part which considers the forms of exploitation that paper orphans experience.

**A  FOR THE PURPOSE OF EXPLOITATION**

This section argues that the act element in paper orphans is committed for a purpose of exploitation. Article 3 of the Trafficking Protocol states that the act element must be ‘for the purpose of exploitation’. The purpose element provides the mens rea, or the mental intention, of the offence of trafficking. This ‘specific or special intention’ forms a critical part of the offence. An end result of exploitation need not occur for this special intention to be fulfilled, and ‘no exploitation needs to take place’ for trafficking to occur as it is sufficient that the act element was committed with only an intention that exploitation will occur. The timing of when the exploitation occurs is irrelevant as there is a ‘lack of an explicit timeframe within which exploitation must occur (that is, before, during, or after the transfer of a child)’. The act element itself cannot be considered exploitation, however the anticipated end point of the trafficking must be for a purpose of exploitation. This means that trafficking only occurs where there is an intent that it will lead to exploitation.

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11 Ibid.
12 Ibid.
13 Gallagher and McAdam, above n 8, 5.
18 Gallagher and McAdam, above n 8, 40.
act and intent to exploit can be proven, it is not necessary to prove that the child has actually been exploited for the offence of child trafficking to be committed.\textsuperscript{19}

There are a number of activities in the paper orphanning process that indicate that the intent to exploit is the reason for the act of recruitment. For example, the recruitment of the child utilising a fraudulent promise of education indicates that recruiters/orphanage operators are aware that education will convince families to either place their children in an orphanage, or allow their children to be recruited into what they believe is an educational facility, where the true situation is that this education will not be provided and the children will instead be utilised to attract funding to the orphanage. This use of an incentive that will not be fulfilled evidences that the intent to exploit the child for the purpose of funding and profit may be the basis of the recruitment.

The provision of fraudulent identity documentation which manufactures the child as a ‘paper orphan’ evidences intent to exploit the utility of orphanhood as explained in Chapter Three. Other indicators of the intent to exploit can be found in the failure of an orphanage to provide sufficient food, healthcare and education to resident children in order to elicit funding; the recruitment of volunteers who pay to work with the children where children are kept in poor conditions to elicit an ongoing commitment to funding by the volunteers; or bringing multiple tour groups to visit the orphanage to elicit donations. These are all activities that take place as part of paper orphanning and provide a clear indication that people perpetrating paper orphanning commit the act element with an intention to exploit children. Whether these activities are sufficient to meet the definition of exploitation provided in the \textit{Trafficking Protocol} is the next step in establishing that paper orphanning is an offence of child trafficking.

\textbf{B \textit{WHAT CONSTITUTES EXPLOITATION FOR THE DEFINITION OF TRAFFICKING?}}

Although a purpose of exploitation is a necessary element of the trafficking offence under the \textit{Trafficking Protocol}, no explicit definition of exploitation is provided in the Protocol itself, and nor in international law generally. Instead, article 3(a) of the Protocol provides:

\textsuperscript{19} Ibid.
Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.20

Thus, there are two aspects to what constitutes the element of a purpose of exploitation according to article 3(a). The first aspect is the inclusion of a list of activities that are regarded as forms of exploitation:

the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.21

The second aspect is the statement that the list of what constitutes exploitation is non-exhaustive or ‘at a minimum’. This reference to ‘at a minimum’ may be considered ‘not definitional but categorical’22 as the provision ‘speaks to adding various new types of exploitative behaviour’23 rather than seeking to establish what constitutes exploitation. This allows States parties to insert different forms of exploitation into their domestic legislation that do not appear in the Trafficking Protocol. This is supported by the Travaux Préparatoires stating that the:

words ‘at a minimum’ will allow States parties to go beyond the offences listed in this definition in criminalizing. It was also intended to make it possible for the protocol to cover future forms of exploitation (i.e. forms of exploitation that [are] not yet known.24

That exploitation is not provided for exhaustively in the Protocol is also articulated in Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, which state that the Protocol:

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20 Trafficking Protocol art 3(a).
21 Ibid.
22 Allain, above n 17, 350.
23 Ibid.
deliberately provides a non-exhaustive list of forms of exploitation in order to make it possible for States parties to include additional forms of exploitation when defining and criminalizing trafficking in persons crimes in their national legislation.\textsuperscript{25}

This latitude in the definition of exploitation in the Protocol gives States parties the ability to ratify the forms of exploitation that they believe are appropriate for their domestic contexts and is intended to allow the inclusion of new forms of exploitation. This discretion has also served as a restraint of sorts where some states have chosen to only ratify against the included forms of exploitation listed in the Protocol.

Where a country has ratified the Protocol, there is an obligation to:

\begin{quote}
beschäftigen sich nicht ausdauernd mit einem nicht-ausgeschöpften Verzeichnis von Formen der Ausbeutung in Ordnung, um es den Staatenparteien möglich zu machen, zusätzliche Formen der Ausbeutung bei der Definition und Straffung von Täuschungsinstituten in ihrer Nationallegislation zu integrieren.\textsuperscript{25}
\end{quote}

To ensure that paper orphaning is interpreted as meeting the definition of child trafficking in international law, and is able to be criminalised in domestic law where a narrow definition of exploitation has been adopted, the next part seeks to evidence that paper orphans have been documented as experiencing forms of exploitation that are included in the Protocol, and thus could have been interpreted as instances of child trafficking.

### III \hspace{2em} Applying the Included Forms of Exploitation

This part argues that where paper orphans are subject to a form of exploitation that is listed in article 3 of the \textit{Trafficking Protocol}, paper orphaning should be interpreted as meeting the definition of child trafficking. The forms of exploitation included in the Protocol are the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. Whilst exaction of exploitation is not required to prove that trafficking has taken place, the unfortunate reality is that in most instances an intent to exploit will be very difficult to prove without some exaction occurring. This part examines each of the listed forms of exploitation and provides examples of how these forms of exploitation are found in paper orphaning.

\begin{quote}
Passas et al, above n 15, 367.  
Passas et al, above n 15, 268.
\end{quote}
A  EXPLOITATION OF THE PROSTITUTION OF OTHERS OR OTHER FORMS OF SEXUAL EXPLOITATION

The first listed form of exploitation in article 3 of the Trafficking Protocol is the ‘exploitation of the prostitution of others or other forms of sexual exploitation’. The terms ‘prostitution of others or other forms of sexual exploitation’ are the only listed forms of exploitation in the definition of trafficking that are not defined, either within the definition itself, or elsewhere in international law. The Travaux Préparatoires indicate that the drafters intended that the Protocol address sexual exploitation only as it related to the context of trafficking in persons, and that this was intentional so that States parties could legislate regarding prostitution without prejudice to their domestic trafficking legislation.

Whilst sexual exploitation is not generally defined, the Convention on the Rights of the Child does define ‘sexual exploitation of children’, as including the following:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;
(b) The exploitative use of children in prostitution or other unlawful sexual practices;
(c) The exploitative use of children in pornographic performances and materials.

There is no evidence to suggest that all victims of paper orphaning experience sexual exploitation or prostitution, however there are certainly reported situations across many countries where paper orphans are exploited in this manner. One of those countries is Nepal where there have been several prosecutions involving children being recruited into orphanages for the purpose of sexual exploitation. From 1996 – 1999, six tourists and expatriates in Nepal were arrested for operating unregistered orphanages where children were sexually exploited.

The Committee on the Rights of the Child noted in its 2012 Concluding Observations on Nepal in relation to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography that they were


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particularly concerned about ‘cases of children being abused by foreign paedophiles who run so-called orphanages and street shelters’.  

There are examples of orphanages being established for the purpose of sexual exploitation, and of staff and volunteers working in orphanages in order to sexually exploit children. An example of an orphanage being established for the purpose of sexual exploitation of the paper orphan inhabitants is the case of the Hamro Jiven orphanage in Kathmandu, Nepal. In 2007, Henk Molhuysen, the founder of the Hamro Jiven orphanage, was arrested for molesting 48 of the children in his care. Molhuysen had previously been convicted of child rape in Spain and sentenced to eight years’ incarceration in 1995 and had been deported to the Netherlands to serve his sentence. Following his incarceration, he opened the Hamro Jiven orphanage in Kathmandu in 2003. Volunteers were invited to stay at the orphanage to provide a source of revenue. It is clear that this orphanage was established for the purpose of sexual exploitation, as well collecting fees from volunteers for assisting in the home. Following his arrest, the Sunaulo Pravat Bal Griha orphanage assumed responsibility for the 48 children from Hamro Jiven, and continued to receive funding from a Dutch donor. In a horrifying twist, the operator of that orphanage, Bala Giri, fled in 2011 with two million rupees of donations intended for the maintenance of the children.

An example of staff in orphanages sexually exploiting children is that of Rabin Shrestha, the former head of adoptions at Bal Mandir, the only government run orphanage in Nepal. In December 2014, Shrestha and Rabin Chalise, a former student who ran a Youth Club at the same institution, were convicted for sexual exploitation of the minors in their care. The children’s testimonies stated that children were sexually abused and raped every Saturday under the guise of ‘birthday’ and ‘wedding’ parties at the orphanage. As part of the parties,

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the girls, aged 13 and 14, were adorned in bridal gowns and then forced to consummate the false ‘marriages’. They were then forced to sexually abuse two young boys, both four years old. The girls’ testimonies said that Shrestha would take them to dance bars to groom them to be prostitutes. This testimony was corroborated by medical evidence of rape.\textsuperscript{35}

An example of volunteers using orphanages to sexually exploit children is Ernest Fenwick MacIntosh, a Canadian citizen, who entered Nepal on a tourist visa and approached the St Xavier’s Social Service Centre orphanage with an offer of donations and requesting to volunteer in August 2014. On 1 March 2015, he was convicted of sexually abusing a child who was a resident in the orphanage. It was discovered that in Canada, MacIntosh had been convicted for 17 child sex offences, but the convictions had been overturned on a technical appeal.\textsuperscript{36} He had also been convicted of sexual assault in the 1980s.\textsuperscript{37} In Nepal, he was sentenced to seven years imprisonment and ordered to pay US$10,000 compensation to the victims.\textsuperscript{38} The conviction of MacIntosh illustrates the alarming risk of sexual exploitation by unscreened international volunteers working in orphanages, and was described as a ‘wakeup call for other organisations to better screen volunteers’.\textsuperscript{39}

Another case of a volunteer sexually exploiting resident children in an orphanage is that of United States citizen, Matthew Lane Durham who volunteered through mission trips from 2012 to 2014 at Upendo Children’s Home in Kenya. Initially, Durham stayed with sponsor families in Nairobi. On his last trip from April to June 2014, he requested to stay on site at the orphanage in an ‘overflow bunk’.\textsuperscript{40} Whilst he was volunteering, the caretaker of the centre noticed Durham acting strangely towards the children. She found him lying in bed with the children late at night and he was seen embracing them in what she characterised as a

\textsuperscript{35} Ibid.
‘lingering’ manner. He was subsequently accused of engaging in sex acts with as many as ten children aged from four to nine years old. Durham left Kenya in an attempt to avoid prosecution, but was charged in Oklahoma, US under extraterritorial laws of 17 counts of traveling to engage in illicit sexual conduct; engaging in illicit sexual conduct in foreign places; attempt and conspiracy; and aggravated sexual abuse with children. He was convicted in July 2015 of seven of the charges and sentenced to serve 210 years in prison, a period of 30 years for each conviction.

These cases illustrate the link between child institutionalisation, paper orphaning and sexual exploitation with exploiters being orphanage operators, staff and volunteers. However, to be considered trafficking, the recruitment of the children into the orphanage must have been for a purpose of sexual exploitation. This may be readily established in some cases, such as the Molhuysen case, but in others, such as the Durham case, will be more difficult to prove. Where this link can be proven, it would clearly fall within the definition of trafficked under the Trafficking Protocol.

B FORCED LABOUR OR SERVICES

The second listed form of exploitation in article 3(a) of the Trafficking Protocol is forced labour or services. Forced or compulsory labour is defined in the Convention on Forced Labor as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’. In the situation of paper orphaning, it is argued that paper orphans are often ‘under menace’ of physical or verbal abuse by orphanage operators. Indeed, there have been instances of children recruited into orphanages and forced to labour under menace. In India, one such example is when 198

43 This is not to say that all children who are sexually exploited in orphanages have been trafficked. Whether they are regarded as trafficked is dependent on how the child came to be living in the orphanage and the ongoing context in which they are institutionalised.
44 Forced Labor Convention, opened for signature 28 June 1930, C029 (entered into force 01 May 1932) art 2.
children were recruited from the Manipur state between 2007-2010 and trafficked into orphanages in other states. On their time in the orphanages, a 15 year old reported:

We were made to dig the mud, carrying stones and cleaning toilets with bare hands, if we disobeyed we were beaten up and giving punishment of not giving sufficient foods and place to sleep.45

These kind of activities, performed under menace of punishment, meet the criteria for forced labour. As paper orphans are minors, there is a question regarding whether they have sufficient agency to offer themselves voluntarily. To deal with this issue, it is generally accepted that there be appropriate:

modifications of the concepts of ‘voluntariness’ and ‘menace of penalty’ that take due account of the particular legal and social situation of children including their increased vulnerability to threat and intimidation.46

Where children are recruited into orphanages with the intention that they are to be engaged in forced labour or services, the element of a purpose of exploitation under the Trafficking Protocol is met.

C Slavery

The third included type of exploitation listed in the Trafficking Protocol is slavery. Article 1(1) of the 1926 Slavery Convention defines slavery as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.47 To be considered slavery, both elements of the definition of slavery of ‘the status or condition of a person’ and ‘the powers attaching to ownership’ must be evidenced.

1 The status or condition

A status of slavery refers to the legal status of slavery, that is, the ‘virtue of a legal right of ownership where legal systems recognise a right of property in people’.48 This is known as

46 Gallagher and McAdam, above n 8, 40.
47 Slavery Convention, opened for signature 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927) (‘Slavery Convention’) art 1(1).
de jure slavery. The legal status is contrasted with the condition of slavery, which is not recognised by law, but is a ‘factual state of affairs evidencing the exercise of the powers attached to the right of ownership’. This is known as de facto slavery.

For paper orphaning to meet the element of a status or condition of slavery, it must be shown that paper orphaning is recognised at law as a form of legal ownership, or that the conditions in which paper orphans are maintained can evidence a factual construction of slavery. Finding a law that recognises ownership of paper orphans is difficult as legal ownership of human beings was eliminated through the introduction of anti-slavery legislation globally. There is, however, an argument to be made for paper orphans being held in conditions of slavery.

Dottridge argues that where young children are removed from their family environment and become dependent upon their guardians for the provision of basic needs, de jure ownership is irrelevant. This is because generally children have little option but to remain with the people who control them, or have de facto ownership of them. Following this argument, it could be interpreted that paper orphans are subject to de facto slavery.

2 Exercising the powers attaching to ownership

The second element of the definition of slavery is the ability of the slaveholder to exercise the ‘powers attaching to ownership’. There are six characteristics of exercising the powers attaching to ownership:

1. The individual of servile status may be made the object of purchase;

2. The master may use the individual of servile status, and in particular his capacity to work, in an absolute manner, without any restrictions other than that which might be expressly provided by law;

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50 Kolodizner, above n 48.
52 Ibid.
3. The products of labour of the individual of servile status become the property of the master without any compensation commensurate to the value of the labour;

4. The ownership of the individual of servile status can be transferred to another person;

5. The servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it;

6. The servile status is transmitted ipso facto to descendants of the individual having such status.\(^53\)

Allain argues that when the characteristics are considered in light of the definition of slavery provided in the 1926 Convention, ‘what emerges are elements which, taken separately or together, constitute slavery in law’.\(^54\) A plain and literal application of these characteristics to paper orphaning can be applied to determine whether orphanage operators exercise the powers attaching to ownership over paper orphans. Some characteristics are applicable, for example, a paper orphan may be the ‘object of purchase’ in a situation where an orphanage operator or recruiter has paid a parent or guardian for the child to be placed in an orphanage. The orphanage operator may also use the services of the paper orphans in an absolute manner for the purpose of orphanage tourism. The profit from orphanage tourism becomes the property of the orphanage operator without any compensation to the paper orphan. Paper orphans may be sold or transferred between orphanages as commodities for the purpose of orphanage tourism. The servile status of a paper orphan may be regarded as permanent particularly as the paper orphan is unable to terminate the status themselves. The final characteristic is not applicable to the situation of paper orphaning.

The Harvard Bellagio Guidelines on the Legal Parameters of Slavery, published in 2012, largely echo these characteristics, focusing on possession as a form of control being indicative of slavery.\(^55\) Specifically, Guideline Two states that

the exercise of ‘the powers attaching to the right of ownership’ should be understood as constituting control over a person in such a way as to significantly

\(^53\) Secretary-General on Slavery, the Slave Trade, and Other Forms of Servitude, Report of the Secretary-General on Slavery, the Slave Trade, and Other Forms of Servitude, UN Doc E/2357, (27 January 1953) 36 [1].

\(^54\) Allain, ‘The Definition of Slavery in International Law’, above n 49, 263.

deprive that person of his or her individual liberty, with the intent of exploitation through the use, management, profit, transfer or disposal of that person.\textsuperscript{56}

In paper orphaning, orphanage operators maintain control of children by refusing to release them to their parents where requested to do so, in order to maintain them in ongoing institutionalisation for the purpose of profit. In addition, orphanage operators are documented as threatening children with violence if they reveal that they are not orphans. In this way, orphanage operators significantly deprive paper orphans of their freedom with an intent of exploitation.

Thus, it can be argued that there are situations where paper orphans are held in slavery. However, this plain and literal application can also be problematic. For example, on the potential of the paper orphan being an object of sale, Dottridge states that even though money may change hands when ‘parents hand a child to intermediaries to take to a city or other destination, this rarely constitutes the actual sale, even a temporary one, of the child’.\textsuperscript{57} Other issues with a plain and literal interpretation include whether the presence of paper orphans in the orphanage can constitute the orphanage operator having absolute control of their capacity to work; whether the maintenance of the children within the orphanage constitutes a form of compensation; and whether the illicit transfer of a paper orphan to another orphanage constitutes the transfer of servile status.

To determine with legal certainty whether a situation is one of slavery, Allain proposes the following questions be asked:

What transpired in the process of enslavement: was the person forced, deceived or coerced? Once enslaved, was the person controlled; their personal autonomy diminished to the extent that they were treated like a thing possessed? Being possessed, was that person bought or sold, were they used or managed, or was money made from their use or management?\textsuperscript{58}

The case study of Mukti Nepal illustrates how a response to these questions in the context of paper orphaning might be interpreted as a case of slavery.

\textsuperscript{56} Ibid, guideline 2.
\textsuperscript{57} Dottridge, above n 51, 257.
\textsuperscript{58} Jean Allain, \textit{The Law and Slavery: Prohibiting Human Exploitation} (Brill Nijhoff, 2015) 472.
Mukti Nepal was an orphanage established in 2004 by a Nepali woman, Goma Luitel. Ms Luitel advertised for foreign volunteers to pay to assist at the home. Despite securing full funding in 2010 from a Spanish funding body, she produced a fraudulent video of her rescuing children from the street to raise more money. The resident children in the orphanage were abused, made to perform all household tasks, and some were forcibly kept from attending school. Luitel constantly threatened violence towards the children’s families if they revealed that they were not true orphans to the volunteers.59

In 2010, one of the children was struck by a vehicle and Luitel ordered that she be taken to the roof of the home and beaten with metal rods and nettles. The girl subsequently died of her injuries.60 Later that year, the children confided in a volunteer who reported the case to Terre Des Hommes. In March 2011, the children were rescued by the Central Child Welfare Board and police, and placed with a reputable reunification organisation. Subsequently, 18 of the 20 children were reunified with their families, with the remaining two placed in alternative care situations. It was revealed that these paper orphans had been abused and denied access to their families by Luitel for the express purpose of maintaining the orphanage façade and collecting donations.

In 2012, Luitel was convicted of torturing 16 children under section 7 of the Children’s Act 1992 (Nepal). There is no provision dealing with slavery in the Children’s Act 1992 (Nepal). She was sentenced to one month’s incarceration, a fine of NPR5,000 (approximately AUD$70) and compensation of NPR10,000 (AUD$120) restitution to be paid directly to the victims. Luitel never paid the fines or restitution, nor served her sentence.61

To establish whether this situation was slavery, the first question to ask is, what transpired in the process that indicates it was a situation of slavery?62 In this situation, Luitel recruited the children into the orphanage through deceiving their parents for the purpose of holding them

60 Ibid.
61 Ibid.
62 Allain, above n 58, 472.
captive to attract funding and volunteers to the orphanage. She forced and coerced the children to stay at the orphanage by subjecting them to abjectly cruel treatment and abuse. The active deception of the parents of the children in the recruitment stage, in combination with the intended purpose of keeping the children in poor conditions to elicit funding, could indicate a situation of slavery.

The second question is ‘once enslaved, was the person controlled; their personal autonomy diminished to the extent that they were treated like a thing possessed?’\(^\text{63}\) In this case, once at the orphanage, the children were not allowed to leave, made to perform all household tasks and were kept solely to ensure income to the orphanage. Luitel had control of the children’s movement and physical environment, and exerted psychological control over them through the constant use of violence and threat of harm to families. Many of the children were not allowed to go to school or to see their families. This level of control resulted in the children being treated like Luitel’s possessions.

The final question posed is, ‘being possessed was that person bought or sold, were they used or managed, or was money made from their use or management?’\(^\text{64}\) In this case, the children were used as commodities for fundraising. The children were deliberately kept in poor conditions and malnourished in order to elicit sympathy and increase donations. The constant presence of volunteers and visitors attending to interact with the ‘orphans’ ensured a continual income stream from their ‘use or management’. Thus, according to Allain’s definition, this case could be considered a situation of slavery under international law.

**D A Practice Similar to Slavery**

A practice similar to slavery, or servitude, is human exploitation that falls short of slavery.\(^\text{65}\) Article 1(d) of the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* has clear applicability to paper orphaning and provides that a practice similar to slavery is:

\[
\text{any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to}
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\(^{63}\) Ibid.

\(^{64}\) Ibid.

another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.66

The drafters of the Supplementary Convention included both the terms ‘institution’ and ‘practice’ to ensure that even where a process akin to slavery was not recognised as an institution in law, such as forced marriage or illegal adoption, it could be considered as a practice similar to slavery.67 The process of paper orphaning is considered a practice as it does not directly relate to an institution recognised in law.

In paper orphaning, a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to either an orphanage or a recruiter. This can happen in two ways. The first is where parents voluntarily take their children to orphanages, not realising that they may be relinquishing their parental rights. The second is the active recruitment process described in Chapter Three where recruiters travel through remote villages collecting children from families on the promise of education being provided. In both situations, the child is delivered to the orphanage. While such recruitment activities may appear neutral in themselves, they ‘take on a different character when undertaken in a particular way (means) and with the intention to exploit (purpose)’.68

Financial compensation or ‘reward’ is not a necessary condition to indicate a practice of slavery. In some situations of paper orphaning, parents pay recruiters to take their children believing that they will be attending school and will return home eventually.69 In other situations, recruiters may pay the family for the child. ‘Whether for reward or not’ merely indicates that reward is not a necessary condition for the exploitation, which is supported by the premise that profit is not required for exploitation to be proven.70

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66 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, opened for signature 7 September 1956, 266 UNTS 3 (entered into force 30 April 1957) (‘Supplementary Convention on Slavery’) art 1(d).
68 Gallagher and McAdam, above n 8, 24.
70 Gallagher and McAdam, above n 8, 26.
The final part reads ‘with a view to the exploitation of the child or young person or of his labour’ (emphasis added). The manner in which this is drafted suggests that exploitation of the child’s labour is not a mandatory requirement for the child to experience exploitation. The exploitation of the child, irrespective of whether their labour has been exploited, is sufficient to classify this process as a practice similar to slavery. This means that even where forced labour cannot be evidenced, paper orphans can still be considered as being held in a practice similar to slavery where they suffer exploitation. This exploitation can be any of the forms discussed above, or economic exploitation.\(^7\) Where paper orphaning is considered a practice similar to slavery, then the purpose element for the definition of trafficking in the *Trafficking Protocol* is met.

**E REMOVAL OF ORGANS**

The final listed form of exploitation in the *Trafficking Protocol* is the removal of organs. There have been many media reports associating orphanages with organ trafficking, however in most cases the evidence remains anecdotal.\(^7\) For example, a report by the International Association of Democratic Lawyers for the United Nations Working Group on Slavery alleged that children were being kidnapped from orphanages in Guatemala for the purpose of providing organs and other body parts for recipients in the United States.\(^7\) The reports were rigorously denied by the United States and not able to be substantiated with evidence.\(^7\) Some verifiable reports do exist. A 2015 report by Disability Rights International found that Ukraine’s ‘system of orphanages serves as a recruitment tool - or direct feeder - for traffickers to find vulnerable children for sexual exploitation, organ harvesting and forced labour’.\(^7\) To meet this form of exploitation, it would need to be proven that a child had been recruited into an orphanage for the purpose of the removal of their organs. This is very situational and could only be proven with significant evidence.

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\(^7\) As discussed in Chapter Five, economic exploitation does not require the performance of work to be present and can take place outside of a labour context. This is particularly applicable to paper orphaning, where children may not be engaged in conduct that would meet the requirements of labour, but their presence in the orphanage provides economic incentive.


\(^7\) Ibid.

In concluding this part, paper orphans frequently suffer forms of exploitation that are listed in the *Trafficking Protocol*. As each situation is highly contextual, by no means can it be said that all paper orphans suffer a form of exploitation that is listed in the definition of trafficking. To ensure a holistic response to paper orphaning, it is argued that other forms of exploitation that paper orphans experience should be interpreted as meeting the requirements of the purpose element in the definition of child trafficking. This argument is developed in Part IV.

**IV Exploitation Beyond ‘At a Minimum’**

To establish that paper orphaning can be categorised as a form of child trafficking, I argue that two other forms of exploitation that are commonly experienced by paper orphans meet the requirements of the definition of trafficking: ongoing institutionalisation for profit and orphanage tourism. This argument requires a move beyond the listed forms of exploitation, to investigate how other forms of exploitation might be regarded as meeting the purpose element of the definition of child trafficking.

The extension of the interpretation of ‘a purpose of exploitation’ is supported by undertaking both a textual and intentionalist interpretation of article 3(a) of the *Trafficking Protocol*. In applying a textual interpretation, the list of forms of exploitation provided in the definition of trafficking is not exhaustive, as noted in Part II.\(^{76}\) The inclusion of the ‘at a minimum’ reference in article 3(a) means that forms of exploitation not ‘explicitly mentioned in the definition may also be captured within the Protocol’s definition of trafficking in persons’.\(^{77}\) Gallagher and McAdam state that ‘the stipulated forms constitute a minimum list of exploitative purposes’\(^{78}\) and that ‘States parties are required to at least include these forms of exploitation but may also target other forms of exploitation’.\(^{79}\)

Applying an intentionalist interpretation, the United Nations Working Group on Trafficking states that the inclusion of ‘at a minimum’ indicated the drafters’ intention that other forms of exploitation be recognised, particularly forms of exploitation that were not known at the

\(^{76}\) Gallagher and McAdam, above n 8, 5.  
\(^{77}\) Ibid 24.  
\(^{78}\) Ibid 27.  
\(^{79}\) Ibid.
time of negotiation of the *Trafficking Protocol*. This means that even forms of exploitation that are not specifically mentioned may be considered as still meeting the purpose of exploitation element. In addition, the Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto state that:

> The Protocol requirements are a minimum standard. Domestic measures may be broader in scope or more severe than those required by the Protocol, as long as all obligations specified in the Protocol have been fulfilled.

Other forms of exploitation that do not appear in the definition, but have been recognised as meeting the purpose element in trafficking previously are begging, the trafficking of children to be camel jockeys, the trafficking of children to Europe to be professional soccer players, illicit adoption, surrogacy and early marriage. The United Nations Working Group on Trafficking in Persons has also found that some States parties have addressed ‘exploitation in public and private care sectors’ as a form of exploitation for trafficking, but did not specify what care sectors they pertained to.

These examples illustrate that the concept of exploitation for the purpose of the definition of trafficking found in the *Trafficking Protocol* has already been expanded beyond just the included listed forms of exploitation. In some cases, critics have argued that this expansion

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81 Gallagher and McAdam, above n 8, 24.
82 Passas et al, above n 15, 255.
87 Jean Allain, ‘No effective trafficking definition exists: domestic implementation of the Palermo Protocol’, above n 9, 123.
of exploitation or ‘exploitation creep’, has worked against the concept of trafficking by ‘obscuring the core of what trafficking laws are intended to address—situations of exploitation from which individuals cannot escape’. Whilst acknowledging this issue, Gallagher writes that the expansion of the concept of trafficking also has positive aspects. She argues that legal and political developments around trafficking have had the effect of re-enlivening legal action for practices that have long been legally prohibited at national and international levels, but have suffered a lack of international scrutiny and attention, such as forced marriage, debt bondage and forced labour. As part of the trafficking sphere, these areas are now attended to with ‘new laws, institutions, and compliance machinery’ which ‘strengthen the capacity of both national and international law to address such practices effectively’. This makes it:

not unreasonable to conclude that a broadening of the parameters of trafficking to embrace the many ways in which individuals are exploited for private gain, even those that appear to be at the less severe end of the spectrum – will have a similarly positive effect: focusing law, public attention and resources where they are so badly needed.

For paper orpharing, an expansion of the concept of exploitation is necessary to recognise that all paper orphans are victims of child trafficking, not just those who suffer a listed form of exploitation.

**A Conceptualising Exploitation**

In the absence of a legal definition of exploitation under international law, other conceptualisations of exploitation can be utilised to establish the purpose element in the definition of trafficking. Exploitation is described as a ‘continuum’ with real life experiences ‘rarely static’ and often with permutations of experiences covering a sphere stretching from

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91 Ibid.
93 Ibid.
94 Ibid 35.
95 Ibid.
optimal to the worst."\textsuperscript{96} There is a general consensus that exploitation occurs where at ‘its most general level, A exploits B when A takes unfair advantage of B’.\textsuperscript{97} Allain applies this concept of exploitation to the legal context of trafficking and argues that unfair advantage should ‘be deemed the legal threshold’ for determining exploitation.\textsuperscript{98} He states that unfair advantage occurs where a ‘person is compelled “by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception”, to be party to an illegal activity’.\textsuperscript{99} This involves two components. The first is that a person is compelled; and the second is that the person is party to illegal activity.

As this conception of unfair advantage includes ‘by means of’,\textsuperscript{100} it appears to conflate the means and purpose elements found in the definition of trafficking. This conflation implies that the means element must be present in all forms of trafficking, as part of either the means or purpose elements. This may be problematic when considering the definition of child trafficking, as it requires only the act and purpose elements under the \textit{Trafficking Protocol}.\textsuperscript{101} Despite this, the general concept of unfair advantage, without the inclusion of the means criterion, still provides a useful framework in determining when conduct might be exploitative.

Gallagher and McAdam suggest that there are ‘some limits’ to the expansion of the concept of exploitation that serve to prevent the inclusion of less serious exploitative practices, such as labour infractions, being included in the concept of trafficking in persons. They state that most scholars agree that a ‘threshold of seriousness’ is appropriate in determining whether conduct is exploitative, however they also note that this is not established by the \textit{Trafficking Protocol}.\textsuperscript{102} A threshold of seriousness is considered a ‘first indicator to draw a line between trafficking-related exploitation and other, less severe, forms of exploitation of children’.\textsuperscript{103}

\begin{flushleft}
98 Jean Allain, ‘No effective trafficking definition exists: domestic implementation of the Palermo Protocol’, above n 9, 129.
99 Ibid.
100 Ibid.
101 \textit{Trafficking Protocol} art 3(d).
102 Gallagher and McAdam, above n 8, n 40.
\end{flushleft}
focus on the threshold of seriousness leads to a focus on the worst situations. Applying a threshold of seriousness means that the term ‘trafficking’ should only be utilised for the ‘most abusive cases, in which the appropriate remedy is to move the child or adolescent out of the control of the abuser’, rather than to improve their situation. To determine whether a situation is exploitative for children and the most appropriate remedy is to remove them from the situation, it is recommended that child protection professionals ‘who have an understanding of the local social, economic and cultural practices’ are involved in making culturally appropriate decisions regarding what forms of exploitation will constitute trafficking. To apply a threshold of seriousness in the context of paper orphaning, it is suggested that the recommendations of child protection professionals are followed to ascertain whether a child is appropriately institutionalised, or being held in exploitation.

Considering these approaches, both whether an unfair advantage is present and whether the conduct meets a threshold of seriousness are utilised to determine whether forms of exploitation might meet the requirements of the trafficking definition. This combination is necessary as unfair advantage alone is not sufficient to prove exploitation as codified in the Trafficking Protocol. This has been illustrated in cases where children have been removed from their birth families and sold into international adoption without consent. For example, where an adoption agency profits through adoption by taking unfair advantage of a child and their family, it will generally not meet the seriousness threshold because the child is not considered to be held in ongoing exploitation. Because of this, both whether an unfair advantage exists and the seriousness threshold is met should be considered in attempting to ascertain whether a form of exploitation can be interpreted as meeting the requirements of the definition of trafficking.

Taking this into account, I argue that there are two forms of exploitation that occur in paper orphaning that indicate an unfair advantage is present and the conduct meets the threshold of seriousness, therefore ultimately fulfilling the requirements of a ‘purpose of exploitation’

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104 Ibid.
107 Gallagher and McAdam, above n 8, 40.
in the definition of trafficking. The first is ongoing institutionalisation for the purpose of profit as exploitation, and the second is orphanage tourism as exploitation.

B **ONGOING INSTITUTIONALISATION AS A FORM OF EXPLOITATION**

The research is clear. Traumatising and institutionalising children is harmful. This is an issue for which there is no debate in the science about the effect -- the negative effects on children’s cognitive, social and psychiatric development. That’s really what needs to be stressed. The neuroscience and the developmental science are in sync in saying that these particular practices have negative effects.\(^\text{108}\)

It has long been established in research that ongoing institutionalisation is harmful to the psychological and physical wellbeing of children.\(^\text{109}\) Children in institutions may be subject to violence within the institution from staff or officials and may also suffer from isolation, stigmatisation and de-socialisation.\(^\text{110}\) Studies have recorded a range of abuses including ‘systematic rape and other forms of sexual abuse; exploitation, including trafficking; physical harm such as beatings and torture; and psychological harm including isolation, the denial of affection and humiliating discipline’ all occurring within institutions.\(^\text{111}\) Children subject to ongoing institutionalisation experience a heightened risk of violence in comparison to children in the community.\(^\text{112}\) In addition, the outcomes for children who grow up in orphanages are far worse than those who grow up in families or other forms of alternative care such as fostering. One in three children exiting residential care become homeless; one in five gain a criminal record; and as many as one in ten commit suicide.\(^\text{113}\) Even where an orphanage is clean and well run, the same outcomes are identified.\(^\text{114}\) Despite these increased

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\(^\text{108}\) Distinguished University Professor Nathan Fox, University of Maryland, quoted in Maggie Fox, ‘Border separations show why the U.S. doesn’t have orphanages any more’, NBC News, 21 June 2018 <https://www.nbcnews.com/storyline/immigration-border-crisis/border-separations-show-why-we-don-t-have-orphanages-any-n884906>.

\(^\text{109}\) Kevin Browne, ‘The Risk of Harm to Young Children in Institutional Care’, (Report, Save the Children and Better Care Network, 2009).


\(^\text{111}\) Corinna Csáky, ‘Keeping children out of harmful institutions: Why we should be investing in family-based care’, (Report, Save the Children, 2009) 7.

\(^\text{112}\) Pinheiro, above n 110, 175.


risks and harm, institutionalisation would not meet the unfair advantage and seriousness thresholds to be considered exploitation in and of itself. This is because increased risk and poor outcomes are recognised as the ramification of institutionalisation. There is no unfair advantage existing where a child is legitimately and appropriately institutionalised due to necessity.

Under certain circumstances, I argue that ongoing institutionalisation should be regarded as exploitation. The circumstance that elevates ongoing institutionalisation to a form of exploitation is where the purpose of ongoing institutionalisation is profit. That is, where a child is recruited into an orphanage solely to attract funding, either from international donors, governmental donors, or through orphanage tourism.

The aim of traffickers is to ‘acquire additional profits through the exploitation of victims’.\textsuperscript{115} Whether a purpose of profit constitutes a form of exploitation is debated. In the drafting of the \textit{Trafficking Protocol}, it was suggested that a profit motive should be included to prove the exploitation element.\textsuperscript{116} It was eventually decided that including the requirement of a profit motive was ‘unnecessarily restrictive’.\textsuperscript{117} Whilst a profit motive does not definitively mean that exploitation is occurring, it does form a part of exploitative conduct. That is, a purpose of profit is not exploitation in and of itself, but requires additional exploitative conduct to meet the requirements of the \textit{Trafficking Protocol}. There are circumstances in paper orphaning that indicate that profit coupled with other exploitative conduct is the motive for ongoing institutionalisation, rather than a child legitimately requiring residential care. These circumstances include where ongoing institutionalisation is used as a rationale for protection, with no family reunification or reintegration attempted; and where children are institutionalised for the purpose of profit through orphanage tourism.

1 \textit{Where protection ends and exploitation starts}

This section considers the circumstances under which ongoing institutionalisation as a form of protection can be considered as exploitation. Institutionalisation has long been considered

\textsuperscript{116} Gallagher and McAdam, above n 8, 7.
\textsuperscript{117} Ibid.
a form of protection for children at risk. In the trafficking context, some orphanages are touted as trafficking shelters with a focus on continued institutionalisation to ‘protect’ children from trafficking. The Special Rapporteur of the Human Rights Council on the sale of children, child prostitution and child pornography has reported that in some cases orphanages are utilised as a long-term solution for child victims of trafficking and exploitation. However, article 20 of the Convention on the Rights of the Child states that children should only be placed in institutional care ‘if necessary’ and the United Nations Committee on the Rights of the Child states that the use of institutional care should always be the last resort after all other care options have been exhausted.

Children identified as victims of trafficking, or children identified at risk of trafficking, are institutionalised in these trafficking shelters or orphanages primarily for the purpose of protection. In certain circumstances, where there is no custodial court order placing the child in the institution, the child is unable to leave the orphanage, and the parents are unable to extract their child, it has been construed as a form of detention. This form of detention is justified through ‘the need to provide shelter and support; the need to protect victims from further harm; and the need to secure victim cooperation in investigation and prosecution of traffickers’. The key distinction is between when a child is appropriately institutionalised for protection, and when institutionalisation becomes exploitative.

I argue that where a profit motive for the continued residence of children exists, ongoing institutionalisation that is maintained for this purpose is a form of exploitation. As explained in Chapter Three, orphanages are often funded based on how many children they have in residence providing a financial incentive to maintain as many children as possible in paper orphaning. Because of the profit motive, orphanages may be disinclined to pursue family

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120 Committee on the Rights of the Child, General Comment No. 10 (2007) Children’s rights in juvenile justice, UN CRC, 44th sess, UN Doc CRC/C/GC/10, (25 April 2007) [47].
122 Ibid.
123 Georgette Mulheir, ‘I have seen many institutions, just like Virgen de la Asunción, where tragedy is inevitable’, Lumos, CEO Blog, Lumos, 8 March 2017 <https://wearelumos.org/content/i-have-seen-many-institutions-just-virgen-de-la-asunc%C3%B3n-where-tragedy-inevitable>.
reunification or reintegration, or to provide support for the child to live at home with their family, despite it being more cost effective than institutionalisation.\textsuperscript{124} Where orphanages maintain ongoing institutionalisation of children and do not conduct reintegration or family based care programs, there is great potential for orphanage operators to prioritise profit over the welfare of the children, and to keep children institutionalised for the purpose of funding.

The profit motive can also lead orphanage operators to keep children in orphanages in poor conditions to elicit sympathy, and thereby increase funding, as detailed in Chapter 2. In some orphanages, operators deliberately withhold food and proper living environments to keep paper orphans looking malnourished.\textsuperscript{125} At an orphanage in Haiti, it was reported that the children were kept deliberately malnourished in order to utilise photographs of ‘emaciated orphans’ to encourage donations.\textsuperscript{126} As a result, the orphanage was receiving approximately USD$6000 per child per year from foreign donors with no efforts made to reunify the children with their biological families.\textsuperscript{127} Another case reported found that several babies had died as a result of being kept malnourished to attract donations.\textsuperscript{128}

Even where paper orphans are not kept in poor conditions, but are kept separated from their families for the purpose of profit, it can be argued that exploitative conduct is still present. Article 9 of the \textit{Convention on the Rights of the Child} states that:

\begin{quote}
States parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.\textsuperscript{129}
\end{quote}

\begin{footnotes}
\textsuperscript{124} Csáky, above n 111.
\textsuperscript{127} Ibid.
\textsuperscript{128} Ibid.
\textsuperscript{129} \textit{Convention on the Rights of the Child} art 9.
\end{footnotes}
There is an obligation on States parties to ensure that institutionalisation should only occur when competent authorities have determined that it is necessary. A State party contravenes its obligations under this Convention where it fails to ensure that a child has not been separated from their parents against their will. The maintenance of ongoing institutionalisation for profit, in combination with a child being separated from their parents in contravention of the Convention, amounts to exploitation.

To determine whether ongoing institutionalisation is a form of exploitation satisfying the definition of trafficking, I consider whether an unfair advantage is present and whether the conduct meets a threshold of seriousness. First, exploitation occurs where an orphanage operator takes unfair advantage of children by profiting through their institutionalisation. The unfair advantage component could be met by orphanage operators profiting from children being unnecessarily institutionalised and having their rights contravened. The illegal activity component would be met by the fraudulent activity that is undertaken as part of the paper orphaning process. Second, the threshold of seriousness is met in circumstances where paper orphans are held in poor conditions in order to elicit funding, or in other cases where the Convention on the Rights of the Child is contravened by the ongoing institutionalisation and separation of a child from their parents for profit. Lastly, child protection professionals state that institutionalisation is harmful for children, and the Alternative Care Guidelines recognise that such care should be only be used as a last resort and temporary measure until family or community based care can be arranged. This satisfies the threshold of seriousness. As both unfair advantage and the seriousness threshold are met, the exploitation experienced by paper orphans can be interpreted as meeting the purpose element in the trafficking definition.

C. ORPHANAGE TOURISM AS EXPLOITATION

Orphanage tourism is another form of profiting from children residing in orphanages. This section considers orphanage tourism as a form of exploitation for the purpose of the definition of trafficking. Thus far, I have considered orphanage tourism from a number of different perspectives. In Chapter Two, I argued that the profit from orphanage tourism is a

130 Kevin Browne, ‘The Risk of Harm to Young Children in Institutional Care’, (Report, Save the Children and Better Care Network, 2009).
motive for orphanage operators to undertake paper orphaning; in Chapter Three, I argued that governments may prioritise the tourism revenue raised from orphanage tourism over child protection; and in Chapter Four, I argued that orphanage tourism is a form of embodied labour and a demand driver for paper orphaning. Here, I consider the impact of orphanage tourism on paper orphans themselves and argue that orphanage tourism is a form of exploitation that meets the requirements of the definition of trafficking.

As with institutionalisation, there are many child protection issues associated with orphanage tourism. Child protection experts state that the constant rotation of volunteer caregivers contributes to attachment disorders in children without primary caregivers.132 Those participating in orphanage tourism rarely have appropriate credentials to work with vulnerable children and whether the focus on play by rotating volunteers is of any worth to the long-term development of the children has not been established.133

Many orphanages offering volunteer placements or visiting do not require police clearance reports, conduct any background checks before volunteers have contact with children, or provide adequate supervision of volunteers once they are in the presence of children.134 This leads to the exposure of children in orphanages to unqualified and unscreened international volunteers heightening the risk of abuse and exploitation.135 Even where volunteers have only good intentions, their very presence normalises the practice of potentially vulnerable children being cared for by unqualified volunteers.136

Where the presence of volunteers does not benefit the children, it is argued that the purpose of orphanage tourism is profit driven.137 In these instances, paper orphans are commodified

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for the purpose of volunteers and visitors. Examples of commodification are the act of selling time with orphans through orphanage tourism programs, and the use of orphans’ photographs and stories to elicit donations and sponsorship. Rotabi et al label this as ‘altruistic exploitation’ where the good intentions of the volunteer collide with the inherent risk to, and vulnerability of, the children they are seeking to support. They state that ‘photographs or stories of vulnerable people are used to enhance the volunteer’s image or the tourism company’s marketing’ and assert that this violation of ‘human rights to privacy and dignity’ is an exploitative act. Whilst this is not a reference to the legal concept of exploitation, it speaks to exploitative conduct which, in combination with other factors, may constitute exploitation meeting the purpose element of trafficking.

In paper orphanning, children are recruited into orphanages to meet the demand for orphanage tourism, and then forced to perform and act in certain ways to attend to the desires of orphanage tourists. As detailed in Chapter Four, paper orphans are forced to dance or perform, beg, are coached to lie to volunteers about their orphan status, or forced to perform other activities to please foreign donors. Guiney and Mostafanezhad argue that orphanage tourism is akin to child labour where the orphanage director profits in the same way as ‘traditional capitalist accumulation’. They note that while children being sent to beg or perform shows has been heavily critiqued, the ‘encounter between volunteers and children is seen as unmediated’ as the emotional aspect of relationship building ‘disguises the labour within it’. In this way, ‘orphanages maintain the appearance of legitimacy whilst still eliciting donations from tourists’. In Nepal, one journalist noted that orphanages are ‘a business model built on a double deception: the exploitation of poor families in rural Nepal and the manipulation of wealthy foreigners. In the worst cases, tourists may be unwittingly complicit in child trafficking’.

139 Ibid.
141 Guiney and Mostafanezhad, above n 137, 143.
142 Ibid.
143 Ibid.
The 2016 Report of the Special Rapporteur to the Human Rights Council on the sale of children, child prostitution and child pornography draws a direct correlation between orphanage tourism, the maintenance of children in poor conditions and profit:

Research has provided evidence of systems in which the owners of orphanages use intermediaries to get children who look poor to orphanages, in order to satisfy a fee-based volunteering demand, generating significant profits. Traffickers lure poverty-stricken families into giving away their children, under promises of good living conditions and education. Children are then often left in poor conditions, in order to prompt foreign charity, and forced to perform activities to please foreign volunteers.145

A National Human Rights Commission Report from Nepal states that volunteers are often considered as sources of income, either by paying to volunteer or by funding the orphanage after they have left.146 They further state that there is a tendency for orphanages to fraudulently record less income than they actually receive from volunteers, which indicates that orphanages may use orphanage tourism for illicit means.147

The link between orphanage tourism and the exploitation of children in orphanages is increasingly being recognised. The Global Slavery Index 2016 listed the practice of orphanage tourism in the Cambodian Country Report and referenced specific forms of exploitation that take place in residential care including forcing children to perform dances for tourists, perform farm work or distribute flyers in order to raise funds.148 The Government of Sweden linked the issues of exploitation and orphanage tourism in its 2016-2018 Action Plan to protect children from human trafficking, exploitation and sexual abuse149


147 Ibid.


by stating that ‘particular attention should be drawn to the risks of exploitation of children linked to orphanage tourism and voluntourism’. It further noted that ‘the general public must also be informed of the existence of exploitation and human trafficking in children in connection with orphanage tourism and voluntary work in other countries, and how this can contribute to the increasing vulnerability of children’. The Action Plan includes specific measures to prevent abuse and crimes against children in the context of orphanage tourism.

Orphanage tourism can also provide a gateway to further exploitation. As argued in Part III of this chapter, orphanage tourism can provide a forum for people to sexually exploit children. A child may be recruited into an orphanage for the purpose of profit through orphanage tourism, but then be sexually exploited by an orphanage volunteer. In this instance, the purpose of the recruitment of the child is for profit through orphanage tourism, with sexual exploitation a by-product of the access to children due to orphanage tourism. This illustrates the intersections of orphanage tourism with other forms of exploitation.

Again, in determining whether orphanage tourism is a form of exploitation satisfying the definition of trafficking, I consider whether unfair advantage is present and the seriousness threshold can be met. In the first instance, where an orphanage operator takes unfair advantage of children by profiting through orphanage tourism, it would be considered exploitation. The unfair advantage component would be met by orphanage operators profiting from children being subject to orphanage tourism which is harmful to them. Further, the illegal activity component would be met by the fraudulent activity that is undertaken as part of the paper orphaning process and also through the children being forced to lie about their orphanhood. It could also be satisfied where orphanage operators commit fraud by failing to report the income gained from volunteers and visitors. Second, the seriousness threshold is met in circumstances where paper orphans are forced to perform and act in certain ways to meet the desires of the orphanage tourists, or are kept in poor conditions in order to elicit more funding from orphanage tourists. Child protection professionals have documented the harm that this causes children. With both unfair advantage being present and the seriousness threshold met, I conclude that where children

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150 Ibid 8.
151 Ibid 12.
152 Richter and Norman, above n 132.
are actively recruited into an orphanage for the purpose of profit and exploitation through orphanage tourism, the definition of trafficking should be interpreted as being met.

V Conclusion

This chapter established that the purpose of paper orphaning is exploitation. The definition of child trafficking requires that the act element, of ‘recruitment, transportation, transfer, harbouring or receipt of a child’, is for a purpose of exploitation. This chapter made two arguments in relation to how a purpose of exploitation meeting the requirements of the definition of trafficking occurs in paper orphaning. The first argument articulated the forms of exploitation that are listed in the Trafficking Protocol and how they occur in some instances of paper orphaning. This description of how sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs occur in paper orphaning illustrated that in many instances, the exploitation experienced by paper orphans is already covered by the Trafficking Protocol. In these instances, the exploitation offence is often prosecuted singularly without recognising that it is a component of a trafficking process.

The second argument sought to expand the concept of exploitation in trafficking to encompass ongoing institutionalisation and orphanage tourism. I argued that where a situation involves unfair advantage and meets the seriousness threshold, it should be interpreted as meeting the requirements of exploitation as codified in the Trafficking Protocol. The two forms of exploitation that I conclude meet these requirements are ongoing institutionalisation for the purpose of profit and orphanage tourism.

Both of these forms of exploitation are undertaken with a primary motive of profit. However, a primary motive of profit is not enough to constitute exploitation, as it only indicates exploitative conduct when coupled with other actions. In paper orphaning, where a child is recruited into ongoing institutionalisation and the orphanage profits through either the residence of the child, or by subjecting the child to orphanage tourism, the purpose element of exploitation in trafficking should be interpreted as being satisfied. Keeping children in ongoing institutionalisation in order to receive funding where there is no

153 \textit{Trafficking Protocol} art 3(d).
legitimate requirement for care, illustrates an unfair advantage is present and meets the seriousness threshold, and thus should be considered a form of exploitation that satisfies the purpose element of the definition of child trafficking. Similarly, subjecting a child to orphanage tourism which forces them to lie about their identity, dance, perform, beg or act in certain ways to please volunteers and visitors with a view to attracting more donations and funding, similarly indicates an unfair advantage is present and meets the seriousness threshold, and should also be considered a form of exploitation satisfying the purpose element of the definition of child trafficking.

In conclusion, where paper orphans are recruited for a purpose of exploitation that is included in the *Trafficking Protocol*, and/or for a purpose of profit from ongoing institutionalisation and/or orphanage tourism, the paper orphaning process should be interpreted as meeting the requirement of the purpose element in the definition of child trafficking. Having established that the act element of recruitment into an orphanage is for a purpose of exploitation, it is conclusively argued that paper orphaning can be interpreted as a form of child trafficking under international law. Chapter Seven recommends a framework for addressing paper orphaning as child trafficking.
CHAPTER SEVEN: TACKLING PAPER ORPHANING AS CHILD TRAFFICKING

I INTRODUCTION

Having demonstrated the prevalence, method, and utility of, and demand for, paper orphaning, and established that paper orphaning is a form of child trafficking under international law, the final substantive chapter of this thesis makes recommendations for how countries should address paper orphaning. Currently paper orphaning is addressed as part of the broader child protection issue of the overuse of residential care for children in developing States, if at all. As such, measures to address paper orphaning have largely centred on ameliorating systemic issues within the alternative care system such as improving gatekeeping procedures, the process by which children are admitted to alternative care, and adopting deinstitutionalisation mandates (the process where children are removed from residential care and placed into family or community based care). ¹ Whilst these systemic reforms are crucial to ensuring the best outcomes for children, they do not directly target paper orphaning as trafficking. As this thesis has established that paper orphaning is a form of child trafficking, this chapter recommends that in addition to the systemic reform of alternative care of children and emphasising family strengthening, an anti-trafficking framework must be adopted to tackle paper orphaning.

This chapter recommends a comprehensive multi-sector framework to combat paper orphaning as a form of child trafficking.² This framework is founded on the three main pillars for addressing human trafficking provided in the Trafficking Protocol: prosecution,³ prevention⁴ and protection⁵. This chapter recommends that countries undertake measures to combat paper orphaning through the criminalisation and prosecution of paper orphaning as a form of child trafficking; the prevention of paper orphaning through addressing vulnerability,

⁴ Ibid art 9.
⁵ Ibid art 6.
demand, corruption and complicity; and the provision of protection and assistance focusing on identification and reintegration of paper orphans, and the accessibility of remedies.

The unifying theme drawing these recommendations together is the implementation of a child rights based approach to combatting paper orphaning. Part II begins by describing why a child rights based approach is favoured when adopting an anti-trafficking framework to combat paper orphaning. A child rights based approach produces victim centred programs that focus on prevention and protection, and not just prosecution.

Part III makes recommendations for a criminal justice response to paper orphaning as a form of child trafficking. The first section examines why criminal justice responses are appropriate in the context of paper orphaning and explains the obligation for States parties to criminalise trafficking under the Trafficking Protocol. The second section makes recommendations regarding how paper orphaning should be criminalised as a form of child trafficking in domestic jurisdictions where paper orphaning is experienced. There are two ways for countries to approach this. The first approach is where countries have adopted the direct text of article 3 of the Trafficking Protocol; and the second approach is where countries have legislated explicitly for child trafficking, including specific forms of exploitation, in their domestic legislation. The third section considers the obligation to criminalise for countries where paper orphaning does not occur, but whose citizens, residents and entities contribute to paper orphaning through founding, funding and volunteering in orphanages, and makes recommendations for measures that should be undertaken to curb these contributions which drive the demand for paper orphaning. As a country that has recently considered its contribution to paper orphaning, Australia is utilised as an example.

Part IV details recommendations on measures that should be implemented to prevent paper orphaning. In Chapter Three, it was established that the enabling environment in which paper orphaning occurs is typified by precarious child protection systems with inadequate enforcement of alternative care regulations; where the demand for orphanage tourism is prioritised over child protection; and where complicity and corruption by government officials is present throughout the paper orphaning process. Together, these factors ensure a ready supply of paper orphans in orphanages to meet the demand of orphanage tourism. The recommendations for prevention respond directly to these causative factors and are
made to address vulnerability, demand, corruption and complicity. The first recommendation explains how vulnerability can be addressed through strengthening the capacity of alternative care systems in developing States. The second recommendation addresses the demand of orphanage tourism using a legislative framework. The third recommendation for prevention centres on exposing and ending corruption and complicity by government officials in paper orpharing.

Part IV makes recommendations concerning the provision of protection and assistance for paper orphans. To access the rights and services afforded to trafficking victims, paper orphans must be identified as victims of child trafficking. Reintegration is a key component of the assistance afforded to victims of child trafficking and should form a cornerstone of assistance provided to paper orphans. Other remedies, such as restitution, rehabilitation and compensation, are also contingent upon paper orphans being identified as trafficking victims.

II A CHILD RIGHTS BASED APPROACH

Principle 1 of the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking provides that ‘the human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims’. A rights based approach requires that right holders be able to benefit from their rights, and that capacity is built for duty bearers to be held accountable. This part advocates for a child rights based approach to the anti-trafficking framework for combating paper orpharing as ‘the guiding principle in state responses’. Recently, there has been increasing support for victim-centred approaches to trafficking over those of traditional law enforcement. A child rights approach to child trafficking prioritises and furthers the realisation of the rights of all children as provided for in the Convention on the Rights of the

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9 Ibid 29.
10 Committee on the Rights of the Child, General Comment. No. 13 (2011) The right of the child to freedom from all forms of violence, UN CRC, UN Doc CRC/C/GC/13, (18 April 2011) (‘General Comment No.13’) 23.
Child.\textsuperscript{11} Importantly, a child rights based approach to child trafficking advocates for the rights of all children, not just children who are victims of child trafficking\textsuperscript{12} and ‘helps us to understand that the human rights embedded in treaties must be translated into services on the ground’.\textsuperscript{13} This consideration of the ‘impact of laws, policies, and programs on children, whether or not they are victims’\textsuperscript{14} results in a holistic, child-centred, rights-based anti-trafficking framework that ensures prevention programs aimed at reducing vulnerability are just as important as protection programs assisting victims, and prosecution programs focused on offenders. Placing the child at the centre of efforts to combat trafficking ‘recognizes the child’s right to be both protected and assisted as well as for the child’s perpetrator to be held accountable’.\textsuperscript{15} Critically, a child rights based approach shifts the paper orphan from being an object of child protection to a subject with entitlements to protection and assistance.\textsuperscript{16}

The Convention on the Rights of the Child provides that the best interests of the child shall be a primary consideration ‘in all actions concerning child victims, whether undertaken by public or private social welfare institutions, police, courts of law, administrative authorities or legislative bodies’.\textsuperscript{17} The best interests of the child is a ‘legal doctrine accepted in many countries, that has been enshrined in international law through the Convention on the Rights of the Child’.\textsuperscript{18} Article 9 of that Convention states that children should not be separated from their parents unless it is in their best interests.\textsuperscript{19} For children without parental care, ‘due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s

\begin{thebibliography}{9}
\bibitem{12} Todres, ‘Taking prevention seriously: Developing a comprehensive response to child trafficking and sexual exploitation’, above n 8, 29.
\bibitem{14} Todres, ‘Taking prevention seriously: Developing a comprehensive response to child trafficking and sexual exploitation’, above n 8.
\bibitem{15} Yvonne Rafferty, ‘Ending child trafficking as a human rights priority: Applying the Spectrum of Prevention as a conceptual framework’ in Janet Sigal and Florence Denmark (eds), Violence Against Girls and Women: International Perspectives (Praeger Perspectives, 2013) 146.
\bibitem{17} Convention on the Rights of the Child art 3.
\bibitem{19} Convention on the Rights of the Child art 9.
\end{thebibliography}
ethnic, religious, cultural and linguistic background\textsuperscript{20} to ensure the child’s best interests in deciding what alternative care might be appropriate.

A child rights based approach ensures that the child’s best interests are given primary consideration; that strategies employed in anti-trafficking are assessed on the basis of their impact on rights; and that ‘discriminatory practices and unjust distributions of power that underlie human trafficking that maintain impunity for traffickers, and deny justice to victims’ are identified and redress is provided.\textsuperscript{21}

The special vulnerability of children is recognised in Principle 10 of the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking:

\begin{quote}
Children who are victims of trafficking shall be identified as such. Their best interests shall be considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs.\textsuperscript{22}
\end{quote}

Guideline 8 further provides that ‘the best interests of the child must be a primary consideration in all actions concerning trafficked children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies’.\textsuperscript{23} International approaches to dealing with children’s issues place the best interests of the child at the centre. To maintain consistency, an international approach to tackling paper orphaning as child trafficking should also incorporate a child rights based approach.

For paper orphans, the best interests of the child should be a paramount consideration as children that have been both separated from their families, and have been trafficked. Reflecting this, the recommendations in this chapter integrate a child rights based approach into each of the three main pillars for addressing trafficking.

\begin{itemize}
\item \textsuperscript{20} Ibid art 20.
\item \textsuperscript{21} Rafferty, above n 13, 565.
\item \textsuperscript{22} UN Trafficking Principles and Guidelines, UN Doc E./2002/68/Add.1, principle 10.
\item \textsuperscript{23} Ibid guideline 8.
\end{itemize}
III CRIMINALISING AND PROSECUTING PAPER ORPHANING AS CHILD TRAFFICKING

Criminal justice responses should prioritise the rights of the trafficking victims and seek justice for them by ending impunity of traffickers.24 This part provides recommendations for how countries should criminalise and prosecute paper orphanking as a form of child trafficking under domestic law. Chapter Two detailed the process of paper orphanking and its prevalence in developing States. Chapter Five and Six established that paper orphanking is a form of child trafficking under international law. This part explains why a common approach to the interpretation of the Trafficking Protocol between States parties is necessary to tackle paper orphanking. There are three sections in this part. The first section describes why a criminal justice response, including domestic criminalisation and prosecution, is appropriate in the context of paper orphanking. The second section explains how countries where paper orphanking occurs should criminalise it as a form of child trafficking; and the third section explores criminalisation of paper orphanking for countries that do not directly experience paper orphanking, but who contribute to paper orphanking through orphanage tourism and funding.

A CRIMINAL JUSTICE RESPONSE TO PAPER ORPHANING

An effective criminal justice response is a ‘critical component of any lasting solution to trafficking’.25 Implementing a child rights based framework allows for ‘a comprehensive conceptual framework whereby victim-focused and law enforcement responses can be developed, implemented, and evaluated’.26 Criminal justice responses offer ‘much-needed accountability and restitution for egregious wrongs’ when ‘pursued in a victim centered, rights-protective manner’.27 It is widely recognised that there is a ‘culture of impunity for those involved in the exploitation of trafficking victims’.28 Effective criminal justice responses are required to counter this culture of impunity and to ensure that traffickers are arrested, investigated, prosecuted and convicted.29 Because paper orphanking has not been

24 Gallagher, above n 18, 370.
25 Ibid.
26 Rafferty, above n 13, 565.
28 Gallagher, above n 18, 370.
29 Ibid 370.
considered a form of trafficking in most countries, perpetrators have not been subject to criminal justice responses. With seeming impunity for the trafficking of children into orphanages, paper orphaning has thrived. Criminal justice responses, which include criminalisation and prosecution, have been widely criticised as inappropriate responses to human trafficking as they fail to comprehensively address the holistic nature of the trafficking phenomenon\textsuperscript{30} and do not take into account the perspectives and rights of trafficking victims.\textsuperscript{31} Thus, any recommendation that paper orphaning be criminalised and prosecuted as child trafficking must not made in isolation, but as one mechanism in a multi-sector framework.

Paper orphaning has predominantly been regarded as a child protection issue, and the associated response has been focused on the deinstitutionalisation of children\textsuperscript{32} with limited criminal justice intervention actioned only in cases of serious exploitation. In many countries, paper orphaning has largely been treated as a failure of gatekeeping, that is, a failure of due process in relation to how children are admitted into alternative care. However, as this thesis has shown, where the recruitment of children into an orphanage takes place for the purpose of exploitation, the issue shifts from being representative of insufficient gatekeeping in alternative care, to an offence of child trafficking; thereby making it subject to a criminal justice response. This is a necessary shift, as improvement of gatekeeping mechanisms and the adoption of deinstitutionalisation mandates have not been able to effectively combat paper orphaning. Whilst appropriate alternative care provisions including gatekeeping mechanisms and deinstitutionalisation are necessary and are discussed below as part of the multi-sector framework to paper orphaning, they must be coupled with a criminal justice response that serves as both a deterrent and as a punitive measure to orphanage operators and their accomplices involved in paper orphaning.

\section*{B CRIMINALISATION AND PROSECUTION IN COUNTRIES WHERE PAPER ORPHANING}

\textsuperscript{30} Ibid 370.


\textsuperscript{32} Tiwonge Kayira, ‘Fundamentals for effective monitoring of child-care institutions’ (2016) 42(1) Commonwealth Law Bulletin 105
The purpose of this thesis has been to demonstrate that paper orpaning is a form of child trafficking under article 3 of the Trafficking Protocol and therefore should be prosecutable as child trafficking. Prosecutions for trafficking are ‘complex and resource intensive’. Because of this, a fundamental challenge with prosecuting paper orpaning, and trafficking more broadly, is that often there is a tendency to prosecute either the act element or purpose element independently as standalone offences rather than the offence of trafficking itself. However, the obligation to criminalise trafficking is as ‘a combination of constituent elements and not the elements themselves’, and this should also be reflected in prosecutorial strategies for paper orpaning.

In many developing States where paper orpaning has been identified, those responsible have not been prosecuted for trafficking offences as the process has not been identified as trafficking. Instead, where prosecutions have taken place, they have often been for the form of exploitation experienced by the children, and not for trafficking. For example, the children in Mukti Orphanage in Nepal, described in Chapter Six, were actively recruited into the orphanage for the purpose of exploitation through orphanage tourism and foreign funding. Instead of being charged with child trafficking, Goma Luitel, the operator of Mukti Orphanage, was charged and convicted of torture. Were paper orpaning recognised as a form of child trafficking at the time, Luitel could have been charged with the offence of trafficking which would have recognised the full gambit of the offence committed.

This section explains how countries should criminalise and prosecute paper orpaning as child trafficking. The criminalisation of human trafficking in domestic legal systems is ‘the central and mandatory obligation of all States parties’ to the Trafficking Protocol. Whilst the Protocol requires States parties to legislate for trafficking as a constituent offence, it is not mandatory that States parties incorporate the exact wording of the Protocol in their domestic

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33 Gallagher, above n 18, 376.
35 See Chapter 6, Part III (C)(3) for a discussion of the case of Mukti Orphanage Nepal.
36 Passas et al, above n 34, 269 [36].
legislation.\textsuperscript{37} As such, domestic legislation on trafficking should be adapted to the context in which the relevant state has jurisdiction.\textsuperscript{38} States parties to the Protocol are required to criminalise the offence of trafficking under article 5:

1. Each State party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.\textsuperscript{39}

This section recommends a criminal justice response to paper orphaning which implements the definition of trafficking in persons found in the Protocol. A major purpose of the United Nations in providing a common definition of trafficking was to create consistency between countries in the interpretation and application of laws against trafficking.\textsuperscript{40} As paper orphaning is a form of child trafficking, States parties to the Protocol have an obligation to ensure that it is criminalised and able to be prosecuted as child trafficking. The following recommendations are divided into recommendations for criminalisation and prosecution for countries where paper orphaning occurs, and recommendations for criminalisation and prosecution for countries that contribute to paper orphaning.

There are two ways in which States parties where paper orphaning occurs legislate against human trafficking generally. The first is by adopting the definition of trafficking found in article 3 of the \textit{Trafficking Protocol} in domestic legislation; and the second is by adapting the definition found in article 3 to suit the context of trafficking in their country, but still ensuring that the obligation to criminalise trafficking under the Protocol is met.

The definition of child trafficking that is adopted or adapted into domestic jurisdictions is found in article 3(a), (c) and (d) of the Protocol:

\textbf{Article 3 (a) “Trafficking in persons” shall mean 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, of deception, of 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;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) 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 subparagraph (a) of this article;

(d) “Child” shall mean any person under eighteen years of age.\textsuperscript{41}

The following three sections detail how countries should criminalise and prosecute paper or orphaning where paper or orphaning occurs in their countries; whilst the fourth section details the obligation for States parties that contribute to paper or orphaning through their citizens founding, funding and volunteering in orphanages.

1 \textit{Criminalisation and prosecution for States parties that enshrine the article 3 definition in domestic legislation}

According to the arguments in this thesis developed in Chapters Five and Six, where States parties have enacted the direct text of article 3 of the \textit{Trafficking Protocol} verbatim in their domestic legislation, paper or orphaning is already effectively criminalised. Countries where paper or orphaning occurs that have signed, ratified or accepted the Protocol, and have adopted the verbatim definition of trafficking include Haiti,\textsuperscript{42} Liberia,\textsuperscript{43} Ghana\textsuperscript{44} and Indonesia.\textsuperscript{45} In these countries, prosecutions should be initiated for child trafficking where paper or orphaning is discovered.

\textsuperscript{41} \textit{Trafficking Protocol} art 3.
\textsuperscript{42} \textit{Anti-Trafficking Law No. CL./20140010 2014} (Haiti).
\textsuperscript{43} \textit{Act to Ban Trafficking} 2005 (Liberia).
\textsuperscript{44} \textit{Human Trafficking Act} 2005 (Ghana).
\textsuperscript{45} \textit{The Eradication of the Criminal Act of Trafficking in Persons} 2007 (Indonesia).
Haiti provides an example of a State party where paper orphaning occurs which has adopted the direct text of the definition of trafficking found in the *Trafficking Protocol*. Haiti ratified the Protocol by enacting the *Anti-Trafficking Law*\(^{46}\) in 2014. The definition of trafficking provided in article 1.1.1 of the *Anti-Trafficking Law 2014* (Haiti) is identical to the definition found in article 3 of the Protocol. The country narrative on Haiti in the Trafficking in Persons Report 2018 noted that the government demonstrated significant efforts to combat human trafficking by ‘closing several abusive orphanages and reconstituting its foster care system to support child trafficking victims and reduce vulnerability to abuse’.\(^{47}\) The ‘Protection’ section of the narrative on Haiti stated:

> In 2017, government officials closed four abusive orphanages that housed 116 children and potentially involved trafficking and placed 51 children from those orphanages into foster care; the remainder were returned to their families. The government accredited 76 families for its newly developed foster care program to make children less vulnerable to trafficking or being re-victimized.\(^{48}\)

Whilst paper orphaning has clearly been identified as an issue for Haiti, there were no prosecutions pursued for paper orphaning in the reporting period of 2017-2018\(^{49}\) despite non-government reports that they were being pursued.\(^{50}\) The narrative detailed several reasons for this including a lack of awareness of the trafficking framework among law enforcement, prosecutors and judges which ‘hindered prosecution and conviction of traffickers’ and a failure by the government to investigate or prosecute complicit officials.\(^{51}\)

For paper orphaning to be prosecuted under domestic legislation which has adopted the definition found in article 3 of the Protocol, several issues must be resolved. These issues predominantly centre on the awareness of paper orphaning as a form of child trafficking by law enforcement, prosecutors and the judiciary. Article 10 of the Protocol obligates States parties ‘to provide and/or strengthen training for officials in the recognition and prevention

\(^{46}\) *Anti-Trafficking Law No. CL./20140010 2014* (Haiti).


\(^{48}\) Ibid 212.

\(^{49}\) Ibid 211.

\(^{50}\) Lumos, ‘Report from the Round Table – EU Supporting Haiti in the Fight Against Trafficking of Children’, (Report, Lumos, 2016) 6.

\(^{51}\) United States Department of State, above n 47, 211.
of trafficking, including human rights training’.\textsuperscript{52} Gallagher suggests that an effective criminal justice response to trafficking requires training law enforcement, prosecutors and the judiciary on the technical skills required to identify, investigate, prosecute and adjudicate trafficking.\textsuperscript{53} The training should adopt a human rights approach and concentrate on strengthening the capacity of the officials to protect and promote the rights of victims.\textsuperscript{54} She further recommends that non-government organisations that support trafficking victims be involved in the training to increase its relevance and effectiveness.\textsuperscript{55}

Where paper orphaning is already criminalised, law enforcement and prosecutors require education regarding the process of paper orphaning so they may charge and prosecute those involved with the offence of child trafficking. In addition, sensitisation processes to the issue of paper orphaning may be useful in educating the judiciary on paper orphaning as a form of child trafficking. It must be acknowledged that training is a mere first step in establishing a prosecutorial strategy for paper orphaning as child trafficking. Establishing the political will to prosecute paper orphaning as child trafficking is another hurdle that States parties will need to overcome, and which may challenge the complicity and corruption that is endemic in the paper orphaning process. This is addressed in Part IV below.

2 \textit{Criminalisation and prosecution for States parties that have adapted the definition of trafficking to their context}

Some States parties have not enshrined the text of article 3 of the \textit{Trafficking Protocol} in their domestic legislation, but have met the obligation to criminalise by explicitly legislating to prevent trafficking in other ways. For these countries, an assessment of whether paper orphaning would be included as a form of child trafficking under the relevant trafficking legislation is required. Examples of countries which have signed, ratified or accepted the Protocol but have not adopted the direct text of the definition in their anti-trafficking laws

\textsuperscript{52} \textit{Trafficking Protocol} art 10.
\textsuperscript{53} Gallagher, above n 18, 386.
\textsuperscript{54} Ibid 387.
\textsuperscript{55} Ibid.
include Cambodia,\textsuperscript{56} Kenya,\textsuperscript{57} Guatemala\textsuperscript{58} and Malawi.\textsuperscript{59}

For example, Cambodia’s experience with paper orphaning has been extensively reported.\textsuperscript{60} Cambodia ratified the \textit{Trafficking Protocol} by enacting the \textit{Law on Suppression on Human Trafficking and Sexual Exploitation}\textsuperscript{61} in 2008. The law refers to trafficking as ‘unlawful removal’ and defines that term in article 8:

\textbf{Article 8: Definition of Unlawful Removal}

The act of unlawful removal in this law shall mean to:

1. remove a person from his/her current place of residence to a place under the actor’s or a third person’s control by means of force, threat, deception, abuse of power, or enticement, or

2. without legal authority or any other legal justification to do so, take a minor or a person under general custody or curatorship or legal custody away from the legal custody of the parents, care taker or guardian.\textsuperscript{62}

Article 9 criminalises the act of unlawfully removing a minor by stating that ‘a person who unlawfully removes a minor or a person under general custody or curatorship or legal custody shall be punished with imprisonment from 2 to 5 years’.\textsuperscript{63} Minors are those under eighteen years of age.\textsuperscript{64} However, article 9 also allows for remittance or mitigation of the prescribed punishment in situations where the minor is above 15 years of age and consents; and where a means of force, threat, deception, abuse of power or enticement, as listed in article 8, is not used; and where the offender does not have any intent to commit an offense.\textsuperscript{65} Article 9

\textsuperscript{56} \textit{Law on Suppression on Human Trafficking and Sexual Exploitation} 2008 (Cambodia).
\textsuperscript{58} \textit{Ley Contra la Violencia Sexual, Explotación y Trata de Personas} 2009 (Guatemala).
\textsuperscript{59} \textit{Trafficking in Persons Act} 2015 (Malawi).
\textsuperscript{61} \textit{Law on Suppression on Human Trafficking and Sexual Exploitation} 2008 (Cambodia).
\textsuperscript{62} Ibid art 8.
\textsuperscript{63} Ibid art 9.
\textsuperscript{64} Ibid art 7.
\textsuperscript{65} Ibid art 9.
prosecutions can only be commenced where a parent, custodian/caretaker or lawful guardian files a complaint.\textsuperscript{66}

An analysis of the Cambodian 	extit{Law on the Suppression of Human Trafficking and Sexual Exploitation 2008} indicates that paper orphaning could be prosecuted as the unlawful removal of a minor under article 9. The process of paper orphaning involving recruitment into an orphanage, as detailed in Chapter Two, could meet the definition of unlawful removal under by article 8 of the Cambodian law. Successful prosecution for paper orphaning under article 9 may prove difficult due to the requirement that prosecutions are only actionable where a complaint is filed by a parent or guardian, and also due to the factors allowing for remittance or mitigation of the punishment in certain circumstances. In this respect, it may prove more successful to prosecute paper orphaning under article 10, which criminalises unlawful removal with purpose:

Article 10: Unlawful Removal with Purpose

A person who unlawfully removes another for the purpose of profit making, sexual aggression, production of pornography, marriage against will of the victim, adoption or any form of exploitation shall be punished with imprisonment from 7 years to 15 years. The offence stipulated in this article shall be punished with imprisonment from 15 to 20 years when:

- the victim is a minor,

- the offence is committed by a public official who abuses his/her authority over the victim,

- the offence is committed by an organized group.

The terms “any form of exploitation” in this Article and Articles 12, 15, 17, and 19 of this law shall include the exploitation of the prostitution of others, pornography, commercial sex act, forced labour or services, slavery or practices similar to slavery, debt bondage, involuntary servitude, child labour or the removal of organs.\textsuperscript{67}

\textsuperscript{66} Ibid.
\textsuperscript{67} Ibid art 10.
Article 10 of the Cambodian law has the closest relevance to article 3 of the * Trafficking Protocol* by stipulating that the offence comprises an act of removal for a purpose of exploitation. However, article 10 of the Cambodian law expands on the original forms of exploitation found in article 3 of the Protocol, to include a ‘purpose of profit making, sexual aggression, production of pornography, marriage against the will of the victim, adoption or any other form of exploitation’. The other forms of exploitation listed in article 10 are identical to those found in article 3 of the Protocol. As the purpose of the unlawful removal in paper orphaning is profit, it follows that prosecution could proceed under article 10 of the Cambodian law. The term ‘profit making’ means that the offender ‘carried out the unlawful removal in exchange for or in order to receive something of value, including but not limited to money, other items of value (gold, jewelry etc.), services or persons’. Therefore, paper orphaning is effectively already criminalised under the *Law on Suppression of Human Trafficking and Sexual Exploitation 2008* (Cambodia) and no amendment would be required.

Despite paper orphaning being a well-documented issue in Cambodia, prosecutions for paper orphaning under the anti-trafficking legislation have not taken place. It is recommended that for prosecutions to proceed, awareness raising, training and sensitisation to paper orphaning as a form of child trafficking should be undertaken for law enforcement, prosecutors and the judiciary. This recommendation is supported by the findings in the 2018 narrative on Cambodia in the United States Trafficking in Persons Report which stated ‘Law enforcement authorities often did not take appropriate action against suspected or convicted traffickers, including orphanage directors complicit in child trafficking crimes’.

This example shows that where countries have not adopted the direct text of the definition of trafficking found in article 3 of the * Trafficking Protocol*, an analysis of the domestic anti-trafficking legislation in relation to paper orphaning should be undertaken to determine whether paper orphaning is already criminalised and the extent to which it is prosecutable. Where it is discovered that paper orphaning cannot be prosecuted under existing anti-

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68 Ibid.
69 Ibid.
71 Chapter Two, Part III outlined how paper orphaning occurs in Cambodia.
72 United States Department of State, above n 47, 127.
trafficking laws, amendments should be considered in order to fulfil the obligation to criminalise all forms of trafficking in article 5 the *Trafficking Protocol*.

### 3 Criminalisation and prosecution for countries that are not party to the Trafficking Protocol

The final consideration for criminalisation is for those countries which have not signed, ratified or accepted the *Trafficking Protocol*, but have developed their own definition of trafficking enshrined in domestic legislation. These countries are not obligated to criminalise paper orphaning as part of the Protocol, but may be under an obligation to protect children from trafficking and exploitation as States parties to the *Convention on the Rights of the Child*. Countries where paper orphaning occurs which are not States parties to the *Trafficking Protocol*, but are States parties to the *Convention on the Rights of the Child*, include Nepal and Uganda.

Nepal serves as an excellent example of a country seeking to combat paper orphaning using its anti-trafficking framework. Nepal introduced the *Human Trafficking and Transportation (Control) Act* in 2007. Trafficking is defined in section 4 which states:

> Acts considered as Human Trafficking and Transportation:

1. If anyone commits any of the following acts, that shall be deemed to have committed human trafficking:
   - (a) To sell or purchase a person for any purpose,
   - (b) To use someone into prostitution, with or without any benefit,
   - (c) To extract human organ except otherwise determined by law,
   - (d) To go in for prostitution.

2. If anyone commits any of the following acts, that shall be deemed to have committed human transportation:
   - (a) To take a person out of the country for the purpose of buying and selling,

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73 *Convention on the Rights of the Child* arts 35 and 36.
(b) To take anyone from his/her home, place of residence or from a person by any means such as enticement, inducement, misinformation, forgery, tricks, coercion, abduction, hostage, allurement, influence, threat, abuse of power and by means of inducement, fear, threat or coercion to the guardian or custodian and keep him/her into ones custody or take to any place within Nepal or abroad or handover him/her to somebody else for the purpose of prostitution and exploitation.

The definition of trafficking in Nepal is very broad including the selling or purchasing of a person for any purpose.\(^74\) This would apply to the situation of paper orphaning only where a payment was made for a child. The offence of human transportation more closely aligns with the process of paper orphaning and may provide an alternative for prosecution. Whilst there is no differentiation between child and adult trafficking or transportation in the offences, there is provision for harsher penalties where children are involved.\(^75\) The human transportation elements include ‘threat or coercion to the guardian or custodian’\(^76\) which would appear to include the situation of a child being fraudulently obtained from their parents. Thus, for the purposes of the Nepali law, it may be that paper orphaning is best prosecuted as human transportation. It should be noted that newspapers have reported that cases of paper orphaning have been prosecuted in the lower courts of Nepal as trafficking and/or transportation, however the decisions are not available.\(^77\)

Whilst Uganda is not a party to the *Trafficking Protocol*, it has largely adopted the text of article 3 of the Protocol in its *Prevention of Trafficking in Persons Act 2009* (Uganda).\(^78\) Section 3 states:

**Offence of trafficking in persons**

(1) A person who—

(a) recruits, transports, transfers, harbours or receives a person, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or

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\(^74\) *Human Trafficking and Transportation (Control) Act 2007* (Nepal) s4(1)(a).
\(^75\) Ibid s15.
\(^76\) Ibid s4(2)(b).
\(^78\) *Prevention of Trafficking in Persons Act 2009* (Uganda).
receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation;

(b) recruits, hires, maintains, confines, transports, transfers, harbours or receives a person or facilitates the aforementioned acts through force or other forms of coercion for the purpose of engaging that person in prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude, death bondage, forced or arranged marriage; commits an offence and is liable to imprisonment for fifteen years.

Section 3(3) states that the means element is not required for child trafficking and section 3(4) adds that ‘the consent of the victim of trafficking or if a child, the consent of his or her parents or guardian to the acts of exploitation shall not be relevant’. Therefore, on the basis that the definition is very similar to that provided in the Trafficking Protocol, paper orphaning is prosecutable already.

Of significance in this analysis is section 4 of the Act which particularises aggravated trafficking:

A person commits the offence of aggravated trafficking where—

(a) the victim of trafficking is a child;

(b) adoption, guardianship, fostering and other orders in relation to children is undertaken for the purpose of exploitation;

(c) the offence is committed by a syndicate, or on large scale;

(d) the offender is an organization engaged in the activities of organizing, directing or protecting the vulnerable persons in society;

(e) the offender is engaged in organizing or directing another person or persons to commit the offence;

(f) the offence is committed by a close relative or a person having the parental care, authority or control over the victim or any other person;

(g) the offence is committed by a public officer;

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79 Ibid s3(4).
(h) the offence is committed by military personnel or law enforcement officer;
(i) where the person organizes, facilitates or makes preparations for the kidnapping, abduction, buying, selling, vending, bringing from or sending to, receiving, detaining or confining of a person for purposes of harmful rituals or practices, human sacrifice, removal of any body part or organ, or any other act related to witchcraft;
(j) the victim dies, becomes a person of unsound mind, suffers mutilation, gets infected with HIV/ AIDS or any other life threatening illness;

and shall be liable to imprisonment for life.

Several parts of this section could apply to paper orphaning. The victims of paper orphaning are children under section 4(a); section 4(b) applies where guardianship has been undertaken for an exploitative purpose; and section 4(d) where the ‘offender is an organization engaged in the activities of organizing, directing or protecting the vulnerable persons in society’ which would include orphanages or residential care institutions. The presence of these factors elevates the offence from trafficking to aggravated trafficking and the associated penalties are also increased. As a form of aggravated trafficking, those convicted of child trafficking may be liable to the death penalty.

Whilst countries that are not States parties to the Trafficking Protocol have no obligation under international law to criminalise trafficking, many have developed their own legislative framework. In this situation, an analysis of the domestic anti-trafficking legislation in relation to child trafficking and paper orphaning should be undertaken to determine whether paper orphaning is already criminalised, and the extent to which it is prosecutable.

C  CRIMINALISATION AND PROSECUTION FOR CONTRIBUTING COUNTRIES

The Trafficking Protocol stipulates that international cooperation is required to combat trafficking. Gallagher states that ‘improved co-operation between countries on the issue of

80 Section 2(d) of the Prevention of Trafficking in Persons Act 2009 (Uganda) states that “exploitation” includes at a minimum, sexual exploitation, forced marriage, child marriage, forced labor, harmful child labour, use of a child in armed conflict, use of a person in illegal activities, debt bondage, slavery or practices similar to slavery or servitude, human sacrifice, the removal of organs or body parts for sale or for purposes of witchcraft, harmful rituals or practices’.
81 Prevention of Trafficking in Persons Act 2009 (Uganda) s5.
82 Trafficking Protocol art 2(c).
trafficking is the raison d’etre’ of the Trafficking Protocol.\textsuperscript{83} Whilst paper orphaning occurs primarily in developing States, it is important that other countries consider how they contribute to paper orphaning and regulate accordingly. For ease of reference, I call these ‘contributing countries’. These countries predominantly contribute to paper orphaning through sending funding and/or resources to orphanages, and/or by sending visitors and volunteers participating in orphanage tourism. This section recommends that contributing countries criminalise paper orphaning by ensuring domestic anti-trafficking legislation captures their citizens’ participation in paper orphaning, and giving those provisions an explicitly extraterritorial effect.

Australia is amongst the largest donor and volunteer sending country investing in overseas orphanages, particularly those in the South East Asian region.\textsuperscript{84} Anecdotal evidence suggests that each year thousands of volunteers and tourists from Australia participate in orphanage tourism and volunteering. Australians are keen to volunteer with 93 percent of Australian charities working overseas reporting that they utilise volunteers.\textsuperscript{85} A mapping report of Australia’s contribution to residential care overseas found that orphanage volunteering and tourism is promoted and offered through university placements (comprising both volunteer placements and overseas internships for course credit), international volunteering and travel agencies, private and public school overseas trips, mission trips facilitated by churches or faith-based organisations, volunteer placements organised by Australian NGOs, corporate social responsibility programs, and general tourism.\textsuperscript{86} While orphanage tourists and volunteers usually have very good intentions, they often fail to realise or engage with how harmful the practice can be for the children in the care of the orphanage.

In 2017, Australia became the first country to actively consider its contribution to paper orphaning in developing States as part of its Parliamentary Inquiry into whether Australia should have a Modern Slavery Act. A substantial number of submissions were made to the

\begin{footnotes}
\item[85] Penny Knight and David Gilchrist, ‘Australian Charities Involved Overseas: A study supplementing the Australian Charities 2013 Report’ (Report, Curtin University Not for Profit Initiative, 2015) 11.
\item[86] Kathryn E. van Doore, Laura Healy and Megan Jones, ‘Mapping Australia’s Support for the Institutionalisation of Children Overseas’ (Report, ReThink Orphanages, 2016) 4.
\end{footnotes}
Inquiry regarding how Australia contributes to paper orphaning, or ‘orphanage trafficking’.87 These submissions provided evidence and examples of Australian entities and citizens participation in paper orphaning, and demonstrated the links between this form of trafficking and Australia’s investment in overseas orphanages, particularly through orphanage tourism.

As a result of the evidence presented, the Joint Standing Committee on Foreign Affairs, Defence and Trade’s Final Report, ‘Hidden in Plain Sight’, devoted an entire chapter of the report to how Australia should address paper orphaning and orphanage trafficking.88 Pertinent to the criminalisation of paper orphaning, recommendation 43 provided:

The Committee recommends that the Australian Government introduce offences and penalties for individuals, businesses, organisations and other entities that facilitate, enable, organise, benefit from, or profit from tourist visits to overseas residential institutions, and/or who donate to or fund overseas residential institutions, that do not operate in compliance with the United Nations Convention on the Rights of the Child, the United Nations Guidelines for the Alternative Care for Children and the proposed Australian Government register.89

The resulting Modern Slavery Bill 2018 (Cth) presented to the Australian federal parliament on the 28th June 2018 failed to realise the recommendations of the Joint Standing Committee in many respects, including recommendation 43. Whilst the Committee had recommended a robust modern slavery law, the Australian government instead chose to put forth a bill focused on requiring large Australian entities to report on their supply chains to ensure that

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87 See, eg, ReThink Orphanages, Submission 23 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry to establish a Modern Slavery Act in Australia, (2017); Cambodian Children’s Trust, Submission 25 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry to establish a Modern Slavery Act in Australia, (2017); Kathryn E. van Doore, Submission 52 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry to establish a Modern Slavery Act in Australia, (2017); ACFID Child Rights Community of Practice, Submission 55 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry to establish a Modern Slavery Act in Australia, (2017); Save the Children, Submission 97 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry to establish a Modern Slavery Act in Australia, (2017); Andrea Nave and Forget Me Not, Submission 114 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry to establish a Modern Slavery Act in Australia, (2017); ACC international, Submission 140 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry to establish a Modern Slavery Act in Australia, (2017); Acc international, Submission 140 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry to establish a Modern Slavery Act in Australia, (2017).


89 Ibid 267 [8.159].
they were free of modern slavery. If passed in its current form, the Modern Slavery Bill has the potential to impact on paper orphaning by requiring large travel companies with a revenue of over AUD$100 million to report on their supply chains, which will include orphanage tourism products, however will not criminalise paper orphaning or orphanage trafficking.

Given that the narrow focus of the proposed Modern Slavery Bill 2018 (Cth) does not incorporate the recommendations from the ‘Hidden in Plain Sight’ Report, it appears that the Bill in its current form is not the legislative vehicle through which recommendation 43 of the ‘Hidden in Plain Sight’ Report will be enacted. As the definition of modern slavery found in the proposed Modern Slavery Bill 2018 (Cth) relies upon the definition of trafficking found in the Criminal Code 1995 (Cth), it is suggested that a pragmatic approach would be to insert the proposed offences found in recommendation 43 of the ‘Hidden in Plain Sight’ Report into the Criminal Code 1995 (Cth). This suggestion would negate the need to wait for further legislation on modern slavery, which in any case has not been foreshadowed.

It is suggested that the proposed offences be included in the Criminal Code 1995 (Cth) under Division 271 which currently provides for the offence of trafficking. Australia ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, on 14 September 2005. As such, Australia has an obligation to criminalise, investigate, prosecute and prevent human trafficking, particularly where there is a transnational element involved. In paper orphaning, the transnational element is found in Australian entities or individuals engaging in activities that either create a demand for children to be recruited and exploited, or actually participate in the recruitment and exploitation. However, these activities do not meet the requirements of human trafficking offences under current Australian law as explained next.

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90 This references the Modern Slavery Bill 2018 (Cth) in the form presented to Parliament for the first reading speech on the 28 June 2018.
Human trafficking in Australia is criminalised under Division 271 of the *Criminal Code 1995* (Cth). The definition of trafficking in children for the purposes of the *Criminal Code 1995* (Cth) limits the crime of trafficking in children to offences involving the entry or proposed entry to, or exit or proposed exit from, Australia. The jurisdiction for trafficking offences is extended extra-territorially for Australian residents and citizens by section 15.2 (extended geographical jurisdiction—category B) of the *Criminal Code 1995* (Cth). As the definitional contours of the offence of trafficking in children itself is limited to entry into or out of Australia, Australian citizens, residents or entities participating in paper orphaning in other countries could not be prosecuted under the current trafficking provisions.

The United Nations Office on Drugs and Crime Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto are clear that where a country has ratified the *Trafficking Protocol*, there is an obligation to criminalise trafficking as a combination of constituent elements and not the elements themselves. Thus, any conduct that combines any listed action and means and is carried out for any of the listed purposes must be criminalized as trafficking.

To ensure that paper orphaning is criminalised, an offence of ‘orphanage trafficking’ should be inserted in the *Criminal Code 1995* (Cth). The recommended inclusion of an offence of orphanage trafficking in the *Criminal Code 1995* (Cth) accords with the existing legislative framework on human trafficking providing a consistent criminal response to the crime. The term ‘orphanage trafficking’ is suggested as it succinctly encapsulates the offence as a form of trafficking. The offence of orphanage trafficking could be included as an additional form of trafficking in Division 271 in the *Criminal Code 1995* (Cth) with a tailored section as follows:

**Subdivision BC 271.8 Offence of orphanage trafficking in children**

A person commits an offence of orphanage trafficking in children if:

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92 *Criminal Code 1995* (Cth) s271.4.
93 Passas et al, above n 34, 268 [33].
(a) the first-mentioned person organises or facilitates the transportation of another person to an orphanage or institutional facility; and

(b) the other person is under the age of 18; and

(c) in organising or facilitating that transportation, the first-mentioned person:

(i) intends that the other person will be exploited, either by the first-mentioned person or another, during or following the transportation to that other place; or

(ii) is reckless as to whether the other person will be exploited, either by the first-mentioned person or another, during or following the transportation to that other place.

Penalty: Imprisonment for 25 years.

It is suggested that that the offences be given an extra-territorial application, modelled on section 273.2 of the *Criminal Code* (Extended geographical jurisdiction - Category C) which reads:

273.2 Who can be prosecuted for an offence committed outside Australia

A person must not be charged with an offence against this Division that the person allegedly committed outside Australia unless, at the time of the offence, the person was:

(a) an Australian citizen; or

(b) a resident of Australia; or

(c) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or

(d) any other body corporate that carries on its activities principally in Australia.

This would apply to both Australian citizens and residents, but also include any incorporated bodies (such as charities or not for profit organisations) and any organisations that may be registered or incorporated overseas, but have their principal place of activity in Australia in accordance with section 273.2(d).
This recommendation does not represent a unique innovation for Australia. Having recognised the issue of Australian tourists travelling internationally for the purpose of sexually abusing children, Australia legislated to criminalise child sex tourism implementing a similar framework in the *Criminal Code 1995* (Cth) in 2017. Australia was the first country to legislate to allow a competent government authority to request that the Minister of Foreign Affairs and Trade refuse to issue, cancel, or order the surrender of a person’s Australian passport if that person’s name is entered on a child protection offender register of an Australian state or territory and has reporting obligations in connection with that entry.

Similarly, as a contributing country actively considering paper orphaning, Australia has the potential to be a model for other contributing countries to legislate to criminalise their citizens’ participation in orphanage trafficking. There may be several options for contributing countries to criminalise including through modern slavery legislation, anti-trafficking legislation, or through specifically tailored legislation aimed at halting paper orphaning. Criminalisation for contributing countries has the potential to cease the funding and founding of orphanages, and orphanage tourism which drives the demand for paper orphaning. Paper orphaning should be criminalised both by countries where paper orphaning occurs and contributing countries to ensure maximum impact on the paper orphaning business model.

**IV Preven **

Prevention programs are positive measures that are undertaken to halt potential future acts of trafficking. As one of the three pillars of addressing trafficking, States parties are obligated to deploy prevention programs under article 9 of the * Trafficking Protocol*. Prevention programs addressing paper orphaning provide the ability to intervene prior to the exploitation of children occurring. Governments often focus on dealing with the aftermath of ‘exploitation of children by seeking to prosecute traffickers or develop victim assistance programs’ but should orient their approach towards prioritising prevention as the

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95 *Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Act 2017* (Cth).
96 Gallagher, above n 18, 414.
ultimate goal.\textsuperscript{98} Indeed, to effectively prevent trafficking, ‘the anti-trafficking movement should reallocate its discourse and resources to the conditions that underpin exploitation’.\textsuperscript{99} To prevent the harm occurring in the first instance, Todres argues that intervention efforts must ‘move upstream’\textsuperscript{100} and that prevention must address the causes of trafficking.\textsuperscript{101} Gallagher states that in trafficking:

\begin{quote}
the most commonly cited causative factors are those that: (1) increase vulnerability of victims and potential victims; (2) create or sustain demand for the goods and services produced by the trafficked labour; and (3) create or sustain an environment within which traffickers and their accomplices can operate with impunity.\textsuperscript{102}
\end{quote}

To address the causes of paper orphaning, this part recalls the causative factors of vulnerability, demand, complicity and corruption discussed in Chapters Three and Four, and recommends that prevention be tailored as a direct response to each causative factor.

\section*{A Prevention through Addressing Vulnerability}

Article 9(4) of the \textit{Trafficking Protocol} provides that states should take measures to ‘alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity’.\textsuperscript{103} In paper orphaning, the causative factors which result in increased vulnerability for paper orphans and potential paper orphans include poverty,\textsuperscript{104} lack of educational opportunity,\textsuperscript{105} lack of access to appropriate health care, weak enforcement of alternative care regulations, and an over-use

\begin{footnotesize}
\textsuperscript{98} Todres, ‘Taking prevention seriously: Developing a comprehensive response to child trafficking and sexual exploitation’, above n 8, 3.
\textsuperscript{100} Todres, ‘Taking prevention seriously: Developing a comprehensive response to child trafficking and sexual exploitation’, above n 8.
\textsuperscript{101} Gallagher, above n 18, 414.
\textsuperscript{102} Ibid 414.
\textsuperscript{103} \textit{Trafficking Protocol} art 9(4).
\textsuperscript{105} Corinna Csáky, ‘Keeping children out of harmful institutions: Why we should be investing in family-based care’, (Report, Save the Children, 2009) 5.
\end{footnotesize}
of residential care in developing States.\textsuperscript{106} To combat this, ‘comprehensive, socio-economic policy orientated prevention programs’ should be implemented.\textsuperscript{107}

The first three causative factors, poverty, lack of educational opportunity and lack of access to appropriate health care, can be addressed by improving the socio-economic condition of both the people and their environment. This can be achieved through ensuring that there are appropriate health and educational facilities where children vulnerable to paper orphaning can be treated and educated without being separated from their families. This would result in the lure of health and education being removed as an incentive for the recruitment of paper orphans. Awareness programs aimed at source communities, where children are trafficked from, will assist in educating families about the process of paper orphaning and the way education is utilised as a lure. Awareness campaigns are a powerful tool in eliminating the abuse of power that is prevalent in trafficking and are a critical prevention mechanism.\textsuperscript{108}

The remaining vulnerabilities to address are the failure of child protection systems in developing States to enforce regulatory frameworks for the alternative care for children and the over-use of residential care.\textsuperscript{109} As explained in Chapter Three, weak regulation and enforcement of policies and legislation concerning alternative care for children is a touchstone of the enabling environment in which paper orphaning emerges. To address this vulnerability, it is recommended that the capacity of child protection systems in developing States be strengthened by ensuring alternative care frameworks for children are enacted, monitored and enforced.

To do this, it is recommended that the United Nations \textit{Guidelines for the Alternative Care for Children}\textsuperscript{110} be implemented through legislation and policy in countries experiencing paper orphaning. The \textit{Alternative Care Guidelines} were welcomed by the United Nations as an

\begin{footnotesize}
\begin{enumerate}
\item[106] Nigel Cantwell and Anna Holzscheiter, \textit{Article 20: Children deprived of their family environment} (Brill, 2007) 2.
\item[107] Sax, above n 7, 257.
\item[109] Cantwell and Holzscheiter, above n 106.
\item[110] \textit{Guidelines for the Alternative Care of Children}, GA Res 64/142, UN GAOR, 64th sess, 65th plen mtg, agenda item 64, supp no 49, UN Doc A/RES/64/142, (18 December 2009, adopted 24 February 2010) (‘Alternative Care Guidelines’).
\end{enumerate}
\end{footnotesize}
approved set of principles in 2009\textsuperscript{111} and set out ‘desirable orientations for policy and practice’\textsuperscript{112} for the alternative care of children for the ‘protection and well-being of children who are deprived of parental care or who are at risk of being so’.\textsuperscript{113} The purpose of the Guidelines is to ‘support efforts to keep children in, or return them to, the care of their family or, failing this, to find another appropriate and permanent solution’.\textsuperscript{114}

The \textit{Alternative Care Guidelines} do not impose mandatory obligations on states and are not binding. However, they ‘still have potentially very significant impact on practice’\textsuperscript{115} as a guidance for states in how alternative care for children should be carried out and as a reference point for United Nations monitoring bodies.\textsuperscript{116} The Guidelines provide a best-practice framework for preventing family separation\textsuperscript{117} and promoting family reintegration where separation has already occurred.\textsuperscript{118} Enshrining the guidelines in child protection legislation would provide a robust child rights based response to the over-use of residential care for children which makes forms part of the enabling environment for paper orphanning.

Specific issues of vulnerability that enable paper orphanning can be addressed through the implementation of the \textit{Alternative Care Guidelines} in policy and legislation. For example, implementation of the \textit{Alternative Care Guidelines} provides countries with a framework for addressing orphanages and residential care that are established with a profit motive, as occurs in paper orphanning. Specifically, guideline 20 states that ‘the provision of alternative care should never be undertaken with a prime purpose of furthering the political, religious or economic goals of the providers’\textsuperscript{119} and guideline 108 states that ‘the forms of financing care provision should never be such as to encourage a child’s unnecessary placement or prolonged stay in care arrangements organized or provided by an agency or facility’.\textsuperscript{120} If these guidelines were enshrined in legislation, they would become enforceable in domestic jurisdictions.

\textsuperscript{112} \textit{Alternative Care Guidelines}, UN Doc A/RES/64/142, guideline 2.
\textsuperscript{113} Ibid guideline 1.
\textsuperscript{114} \textit{Alternative Care Guidelines}, UN Doc A/RES/64/142, guideline 2(a).
\textsuperscript{115} Cantwell et al, above n 111, 21.
\textsuperscript{116} Ibid.
\textsuperscript{117} \textit{Alternative Care Guidelines}, UN Doc A/RES/64/142, guidelines 39-48.
\textsuperscript{118} \textit{Alternative Care Guidelines}, UN Doc A/RES/64/142, guideline 45.
\textsuperscript{119} \textit{Alternative Care Guidelines}, UN Doc A/RES/64/142, guideline 20.
\textsuperscript{120} \textit{Alternative Care Guidelines}, UN Doc A/RES/64/142, guideline 108.
Another vulnerability exists in alternative care systems where there are poor gatekeeping policies or regulations which enable orphanages to admit children to their care with little or no appropriately rigorous process. Gatekeeping is ‘the systematic assessment, rigorous screening and shared decision-making by authorised bodies to ensure that a child is admitted to alternative care only when necessary’. A lack of presence or enforcement of gatekeeping regulations enables child finders to recruit children into care and subsequently enable orphanage operators to claim that children were abandoned or relinquished, with minimal, if any, State intervention. The Alternative Care Guidelines provide for the State’s involvement and intervention in both abandonment and relinquishment situations providing that States should dictate how family tracing should take place and how ‘reunification or placement with the extended family’ should be pursued.

Further, the guidelines focusing on the prevention of family separation require the State’s involvement in potential relinquishment cases, including where non-government organisations are approached to take care of a child. They provide for a range of counselling and social support services to facilitate family preservation wherever possible, with a preference for other family members caring for a child where it is not possible to preserve parental care. The Alternative Care Guidelines further state that a child should only be admitted to alternative care when efforts to preserve parental and extended family care ‘have been exhausted and acceptable and justified reasons for entry into care exist’.

The State’s active involvement in, and enforcement of, gatekeeping procedures for the admission into alternative care would assist in preventing the vulnerability of orphanages claiming that a child has been relinquished or abandoned. Implementation of these procedures into policy and legislation will only improve the vulnerability of children to paper orphaning if monitoring and enforcement is undertaken. Addressing this, guideline 55 details that states should ensure that those providing alternative care ‘receive due authorisation to

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121 Cantwell et al, above n 111, 68.
122 The preference for orphanage operators to claim that children had been abandoned rather than relinquished was detailed in Chapter Two, Part II (B).
123 Alternative Care Guidelines, UN Doc A/RES/64/142, guideline 43.
124 Alternative Care Guidelines, UN Doc A/RES/64/142, guideline 44.
125 Alternative Care Guidelines, UN Doc A/RES/64/142, guideline 45.
do so from a competent authority and are subject to regular monitoring and review by the latter’. 126

It is not suggested that implementation of the Alternative Care Guidelines will provide a complete solution for the issue of paper orphaning, however incorporation of the Guidelines into the child protection legislation, policy and programming frameworks on alternative care with subsequent enforcement, will aid in addressing the vulnerability of weak child protection systems that paper orphaning currently exploits in many developing States. The Alternative Care Guidelines have already been implemented in response to specific issues in many of the countries experiencing paper orphaning. For example, in Liberia, the Guidelines have been ‘used to promote discourse regarding poverty and outlining social protection measures aimed at preventing children from being deprived of parental care based on socio-economic factors’. 127 Similarly, in Indonesia, the Alternative Care Guidelines were utilised as a framework ‘to increase awareness and being reference for legal reform of the detriments of institutional care and benefits of family-based alternative care’ following the tsunami in 2004. 128 Indonesia further adopted the National Standard of Care for Child Welfare Organisations in 2011 which reflected the principles of the Alternative Care Guidelines and in 2012 began to reallocate funds from supporting institutions to supporting children in families. 129 However, these partial adoptions of the Guidelines are insufficient if they are not coupled with addressing the over-use of residential care simultaneously.

To tackle the inappropriate over-use of residential care, it is essential to curb ongoing institutionalisation as a method of addressing vulnerability. To do this, it is recommended that countries adopt a deinstitutionalisation mandate. Deinstitutionalisation is the ‘process of reforming childcare systems and gradually closing down orphanages and children’s institutions, finding new placements for children currently resident and setting up replacement services to support vulnerable families in non-institutional ways’. 130 The aim of deinstitutionalisation is to close orphanages and residential care centres by reunifying

126 Alternative Care Guidelines, UN Doc A/RES/64/142, guideline 55.
128 Ibid 5.
129 Ibid.
children with their biological families where appropriate, or placing them in other family and community-based care options. Deinstitutionalisation takes a child rights approach by advocating for children to be raised in families, whether biological, kinship or community-based family-style care. UNICEF and other major child protection organisations have been advocating for deinstitutionalisation since the late 2000s with many resource poor countries achieving it successfully.

Deinstitutionalisation is usually cited as a child protection mechanism upholding the right of the child to grow up in a family environment, but also has potential to prevent paper orphaning occurring by eliminating countries’ reliance on orphanage care and thereby eradicating the context for paper orphaning. However, deinstitutionalisation can be used as a rationale to increase the numbers of children placed in intercountry adoption by emphasising the need for family care. This can have the unintended consequence of stimulating intercountry adoption as a demand driver for paper orphaning. To circumvent this unintended consequence, deinstitutionalisation should focus on family strengthening, preservation and reintegration programs in line with article 18(2) of the Convention on the Rights of the Child which requires States parties to ‘render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children’.

With family strengthening, preservation and reintegration programs underpinning deinstitutionalisation mandates, the risk of intercountry adoption further driving the demand for paper orphans is lessened.

It must be made clear that deinstitutionalisation alone cannot eliminate paper orphaning, but rather addresses the larger issue of the over-use of residential care of children. As such, this is not a targeted intervention directed at paper orphaning, but one that addresses the enabling

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131 Deinstitutionalisation and reintegration are different processes. Deinstitutionalisation is the adoption of a policy or mandate by the government that seeks to close or reduce institutionalisation. Reintegration is the process of children returning to their families and communities in a supported way. Reintegration is discussed in Part V(B) of this chapter.


134 Convention on the Rights of the Child art 18(2).
environment and will aid in the prevention of paper orphaning. As such, it is a critical component in a prevention strategy aimed at combating paper orphaning.

B PREVENTION THROUGH ADDRESSING DEMAND

This section advocates for the prevention of paper orphaning through addressing the demand of orphanage tourism. Chapter Four argued that the demand for orphanage tourism creates a demand for paper orphaning, and called for a paradigm shift recognising that not all ‘well-intentioned volunteering has good outcomes’. The measures suggested in Chapter Four sought to address the demand of orphanage tourism through tackling the roles of employer demand, consumer demand, and third parties and intermediaries. This section provides recommendations addressing the demand of orphanage tourism for countries where paper orphaning occurs and contributing countries through introducing awareness raising and regulatory measures.

Article 9(5) of the Trafficking Protocol addresses how demand should be discouraged:

> States parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

In the context of preventing orphanage tourism, it is recommended that educational, cultural and social measures are undertaken through awareness campaigns focusing on how orphanage tourism actively contributes to paper orphaning. These awareness campaigns can be aimed at would-be volunteers, orphanage operators, child welfare organisations and government departments. An example of an awareness campaign targeted at curtailing orphanage tourism is Australia’s Smart Volunteering campaign, launched in March 2018 which discourages Australian citizens from engaging in volunteering in or visiting orphanages by focusing on the harms of institutionalisation and the risk of orphanage

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136 See Chapter Four, Part IV.
137 This campaign followed the release of the Australian Government’s ‘Hidden in Plain Sight’ Report, above n 88, which extensively detailed how Australia’s contribution to orphanage trafficking and paper orphaning internationally should be curtailed.
trafficking.\textsuperscript{138} Whilst the campaign is a positive step, it falls short of calling for total avoidance of orphanage tourism.

Child protection experts advocate for orphanage tourism to be recognised as a harmful and exploitative practice that at the very least causes cognitive harm to children, and at the very worst is a demand driver for paper orpaning.\textsuperscript{139} To counter this harm and to respond to orphanage tourism as a demand driver for child trafficking, it is suggested that orphanage tourism be banned and recognised as a form of child exploitation in child protection policy and legislation both by countries where paper orpaning occurs and contributing countries.

Measures preventing orphanage tourism in countries where paper orpaning occurs must be implemented. Where the child protection system is strengthened as recommended in the previous section, strict regulations on orphanage tourism should be introduced as a matter of child protection. Child welfare bodies should be legislatively given the power to enforce a ban on orphanage tourism including a halt on visits to orphanages by tour groups and all general unskilled volunteering in orphanages.\textsuperscript{140} Specific allowances could be made for limited situations where professional volunteers with specific skillsets (such as medical or therapeutic) may obtain permission to volunteer in orphanages where a need is proven for that skillset only and they have undergone appropriate screening.\textsuperscript{141} This prevention recommendation would remove the profit of orphanage tourism from the paper orpaning process.

Contributing countries should also consider measures they can undertake to prevent orphanage tourism being a demand factor in paper orpaning. The Australian government considered measures to prevent orphanage tourism whilst the Inquiry into whether Australia should have a Modern Slavery Act was ongoing by requesting that the Department of


\textsuperscript{139} van Doore and Nhep, above n 91.


\textsuperscript{141} Ibid.
Foreign Affairs and Trade implement a ban on orphanage tourism and funding.\textsuperscript{142} The Department declined to implement such measures stating that they were concerned that an ‘immediate blanket ban on Australians donating to or volunteering in orphanages overseas may have unforeseen consequences for children and for reputable organisations working to help communities overseas’.\textsuperscript{143} The final report of the Inquiry, ‘Hidden in Plain Sight’, recommended that the Australian government should establish a register of residential care institutions that are compliant with the Convention on the Rights of the Child and the Alternative Care Guidelines with appropriate volunteering provisions\textsuperscript{144} and that after a period of two years,\textsuperscript{145} offences and penalties be introduced for individuals or entities that ‘facilitate, enable, organise, benefit from, or profit from tourist visits to overseas residential institutions, and/or who donate to or fund overseas residential institutions’ that are not in compliance with the Convention on the Rights of the Child, the Alternative Care Guidelines and proposed government register.\textsuperscript{146}

Whilst this recommendation can also be used to support the criminalisation of paper orphaning as detailed in Part III(C) above, another approach which can be undertaken either concurrently with, or independently of, the criminalisation recommendation is a broader focus on divesting from orphanage funding and volunteering. The ‘Hidden in Plain Sight’ Report recommended that there be a two-year transition period in which ‘individuals, businesses, organisations and other entities are supported to divest from funding ‘orphanage tourism’ visits and/or establishing, funding, donating to, or supporting overseas residential institutions’.\textsuperscript{147} This supported divestment recommendation represents a best practice model in ensuring that funding to orphanages and residential institutions is not halted immediately which has the potential to harm children. Instead, a two-year transition period allows for orphanages and residential institutions to concentrate on ensuring they are compliant with the Alternative Care Guidelines and Convention on the Rights of the Child, which would preclude any

\textsuperscript{142} Letter from Chris Crewther MP to Minister for Department of Foreign Affairs and Trade Hon Julie Bishop, 7 September 2017.
\textsuperscript{143} Department of Foreign Affairs and Trade, Australia, Submission 32a to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry to establish a Modern Slavery Act in Australia, (2017).
\textsuperscript{144} Joint Standing Committee on Foreign Affairs, Defence and Trade, Commonwealth of Australia, above n 88, recommendation 41 [8.157].
\textsuperscript{145} Ibid recommendation 43 [8.159].
\textsuperscript{146} Ibid.
\textsuperscript{147} Ibid recommendation 44 [8.160].
involvement in paper orphaning. Whilst the Australian government is yet to formally respond to these recommendations, some policy shifts are already evident. For example, the Department of Foreign Affairs and Trade launched a new Australian Aid Friendship Grant program in July 2018 which specifically excluded ‘activities that involve unskilled volunteers supporting orphanages or residential care institutions’ from being eligible activities for the grant.148 Following in Australia’s stead, contributing countries should consider the proposed framework for divestment as it has the potential to significantly curtail the participation of citizens of contributing countries in orphanage tourism.

C  PREVENTION THROUGH ADDRESSING CORRUPTION AND COMPLICITY

The final focus of the prevention pillar is on addressing corruption and complicity in the paper orphaning process. International law and policy is very clear that governments must take action to ‘identify and eradicate public sector involvement in trafficking’.149 As explained in Chapter Three, the complicity and corruption of public officials play a major role in the paper orphaning process. It is known that ‘traffickers require the active involvement or at least the acquiescence of public officials’ to deliver and maintain victims in situations of exploitation150 and that ‘endemic corruption aids and abets trafficking crimes’.151 Chapter Four argued that prosecution should be pursued for third parties and intermediaries involved in the paper orphaning process to serve as a deterrent for participation in paper orphans.152 These third parties and intermediaries include corrupt public officials who enable and facilitate the paper orphaning process either through deliberately ignoring the active recruitment of children into orphanages and their subsequent exploitation usually for a payment or other service rendered in the form of a bribe, or by being actively involved in the provision of fraudulent documentation for paper orphans.

149 Gallagher, above n 18, 443.
150 Ibid 443.
151 United States Department of State, above n 128.
152 Rafferty, above n 13, 565-566.
Countries should adopt measures to combat public sector corruption as a strategy to address human trafficking, including paper orphaning.\textsuperscript{153} The \textit{Trafficking Protocol} requires States parties to adopt ‘legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish corruption of public officials’.\textsuperscript{154} There are two general recommendations to address public sector complicity and corruption in paper orphaning. The first is that scrutiny of public sector involvement in the child protection system is enhanced with a view to identifying complicity and corruption which enables paper orphaning. This can be achieved through strengthening the capacity of the child protection system as recommended in Part IV(A) and the involvement of law enforcement in identification and investigation of complicity and corruption. The second recommendation is that public sector officials, including law enforcement, who are found to be complicit in paper orphaning are prosecuted either under anti-trafficking provisions or corruption provisions, depending on the context. Where public officials are operationally involved in paper orphaning, then it follows that they should be prosecuted under anti-trafficking provisions; but where the public official’s role pertains more to accepting bribes or services to deliberately ignore or fail to carry out their duties according to the requirements of the child protection system, and thereby are complicit in the paper orphaning business model, it may be more appropriate for them to be prosecuted under anti-corruption legislation.

Both of these general recommendations require countries to address the issue of corruption in the public service as an issue for systemic reform. The \textit{United Nations Convention on Corruption},\textsuperscript{155} ratified by 186 countries, provides a comprehensive framework for countries to tackle corruption. In many countries where paper orphaning occurs, a weak rule of law makes it difficult to address corruption, and the level of corruption makes reform difficult.\textsuperscript{156} To address this, research needs to be undertaken as to the extent of corruption in the paper orphaning process in each country context, and specific tailored measures must be designed to interrupt the corruption that exists.\textsuperscript{157}

\begin{footnotes}


\textsuperscript{154} \textit{Trafficking Protocol} art 9(2).


\textsuperscript{157} Ibid 15.
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V PROTECTION AND ASSISTANCE

The final pillar for addressing paper orphaning as child trafficking is that of protection and assistance. As victims of child trafficking, paper orphans 'are entitled to the right to be identified, to protection, to assistance and support, to safe return and protection from re-trafficking and persecution, and to access remedies'. A benefit of the agreed definition of trafficking provided in the *Trafficking Protocol* is that it allows for the standardisation of provision of support and assistance for victims under article 6 of the Protocol.

Article 6 of the *Trafficking Protocol* lists the States parties’ obligations to protect and assist trafficking victims. It states that trafficking proceedings are to be confidential and victims of trafficking should be provided with information and assistance for their views and concerns to be heard in proceedings. Article 6(3) details measures for the physical, psychological and social recovery of victims in relation to housing, counselling and legal rights, medical, psychosocial and material assistance, and employment, educational and training opportunities. Further, States parties are to take into account the age, gender and special needs of trafficking victims, and as such paper orphans are 'entitled to special protection measures, both as victims and as children, in accordance with their specific rights and needs'. This part details how countries can offer protection and assistance to paper orphans through three practical mechanisms which fall under the article 6 obligations: identification, reintegration and access to remedies.

A IDENTIFICATION OF PAPER ORPHANS AS VICTIMS OF TRAFFICKING

The right to protection and assistance by the State is contingent upon the identification of paper orphans as victims of child trafficking. Presently, paper orphans are regarded as institutionalised children and only entitled to rights that pertain to being a ward of the State.
as detailed in Chapter Three. The UNICEF Guidelines on the Protection of Child Victims of Trafficking detail that States parties should ‘develop and adopt effective procedures for the rapid identification of trafficked children’.  

Practically speaking, the identification of paper orphans as child trafficking victims is reliant upon States parties where paper orphanning occurs auditing all children resident in registered and unregistered orphanages and residential care to assess whether the children are legitimately institutionalised in line with the Convention on the Rights of the Child and Alternative Care Guidelines. If paper orphans are identified, they should be afforded the rights to which trafficking victims are entitled.

The identification of paper orphanning as a human trafficking offence shifts paper orphans from being an ‘object of intervention in need of protection’ to a ‘subject with entitlement to assistance’. Whilst the Convention on the Rights of the Child recognises that children should not be removed from their parents unless it is in their best interests, it provides no right of reunification or reintegration where separation has occurred. Family tracing and reunification may occur as part of the implementation of a broader mandate of deinstitutionalisation but this relies upon States parties enshrining such a mandate in legislation. For victims of child trafficking, States parties are obligated to provide family tracing and reintegrations as part of the protection and assistance offered to trafficking victims, which is detailed in the below section.

A failure to identify paper orphans as victims of child trafficking ‘obstructs the successful investigation and prosecution of trafficking related crime’. It is imperative that paper orphans are identified as victims of child trafficking as eligibility for services is often dependent on official classification as a victim of trafficking. Further, the funding of government and non-government agencies who provide these services also relies on this categorisation. Many non-government organisations that currently provide services to

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166 Tobin, above n 16, 167.
167 Convention on the Rights of the Child art 9(1).
168 Passas et al, above n 34, 290 [66].
169 Gallagher, above n 18, 324.
171 Ibid.
paper orphans do so under general funding provided for child protection, however if paper orphans are recognised as victims of child trafficking there are potentially more funding pools available to those organisations to aid in their work. Thus, the identification of paper orphans as victims of child trafficking provides paper orphans with access to rights to protection and assistance that otherwise would not be available.

B FAMILY REINTEGRATION

A key element of the assistance that should be provided to paper orphans is family reunification and reintegration. It is necessary to recall that paper orphans have not been voluntarily relinquished by their families to residential care, rather they have been recruited into orphanages for the purpose of exploitation. In many instances this means that paper orphans have had their identity changed with ‘deliberate separation from their parents or guardians being a strategy to facilitate exploitation’. Family tracing and reintegration is a child rights focused assistance intervention which incorporates the best interests of the child to be brought up in a family environment, preferably their biological family. Reintegration is defined as:

the process of a separated child making what is anticipated to be a permanent transition back to his or her family and community (usually of origin), in order to receive protection and care and to find a sense of belonging and purpose in all spheres of life.

As victims of child trafficking, paper orphans have ‘specific rights and requirements in respect to care, recovery and reintegration’. While there is no specific mention of reintegration in the Trafficking Protocol, supported reintegration is ‘a right owed to trafficked persons by virtue of their status as victims of crime and victims of human rights violations’. Once a child has been identified as a paper orphan, the relevant government child protection

172 See, for eg, in Nepal, the main non-government organisations (The Himalayan Innovative Society, Umbrella Foundation, Forget Me Not, CWISH and Sano Paila) that work with the Nepali Government on closing orphanages and returning children to their families are registered as working in child protection, not anti-trafficking.
173 Gallagher, above n 18, 324.
176 Joint Report, UN Doc A/72/164 (18 July 2017) [61].
177 Gallagher, above n 18, 352.
agency, working with other relevant authorities or non-government organisations, ‘should take all necessary steps to trace, identify and locate family members and facilitate the reunion of the child victim with his or her family where that is in the best interest of the child’. The child should be kept informed as to the progress of tracing efforts. Where family is located, a thorough psychosocial assessment should be undertaken to establish if reunification and reintegration is in the best interests of the child. Family reintegration should only take place where the outcome of the assessment is favourable and a determination is made that reintegration is in the child’s best interests.

The *Alternative Care Guidelines* provide best-practice guidance on how reintegration should be undertaken for children who have been residing in alternative care including that assessments as to the capacity of the family should be undertaken; that the family and child should be supported through the process; and that reintegration should be staggered through regular and appropriate contact until the child can return home with monitoring and support.

Reintegration should be embedded into child protection legislation and policy. Often developing nation governments may not have the resources to effect family tracing and reintegration themselves and will be reliant upon non-government organisations to assist. In this situation, government agencies should ensure that uniform standards for organisations conducting reintegration are adopted, such as the framework found in the *Alternative Care Guidelines* or the *Guidelines on Children’s Reintegration*, drafted by the Inter-Agency Group on Children’s Reintegration, which provide a detailed best practice model for holistic reintegration. The government should then focus on monitoring and enforcing reintegration practices by non-government organisations to ensure consistency.

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178 Passas et al, above n 34, 290 [66].
181 Convention on the Rights of the Child art 3.
182 Joint Report, UN Doc A/72/164 (18 July 2017) [61].
183 *Alternative Care Guidelines*, UN Doc A/RES/64/142 guidelines 49-52.
184 Delap and Wedge, above n 175, 5.
185 United States Department of State, above n 47, 211.
186 Delap and Wedge, above n 175.
187 Ibid 5.
C. ACCESS TO REMEDIES

The last measure of protection and assistance afforded to paper orphans as victims of child trafficking is an entitlement to remedies. Remedies for victims of trafficking can involve restitution, rehabilitation and compensation. As child victims, paper orphans require assistance to obtain remedies appropriate to their circumstances.

Restitution is aimed at restoring the victim to the situation that existed prior to the violation. Restitution can be achieved through successful management of reintegration of a paper orphan with their biological family. Restitution should also include addressing the root causes that resulted in the child being trafficked in the first instance which can be achieved through implementation of the prevention and awareness programs detailed in Part IV of this chapter. Access to rehabilitation, medical, psychological and legal assistance may be appropriate for paper orphans, especially where paper orphans have been kept in poor conditions and are experiencing health and psychological issues.

The most common form of remedy available to trafficking victims is compensation. Compensation is an appropriate remedy where the damage caused by an internationally wrongful act is economically assessable and not able to rectified by restitution. For victims of trafficking, compensation can be payable for ‘physical and psychological harm; lost opportunities; loss of earnings; moral damage; and medical, legal or other costs incurred as a result of the violation’. Article 6(6) of the Trafficking Protocol provides that a State party ‘shall ensure that its domestic legal system contains measures that offer victims of trafficking’.

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193 Gallagher, above n 18, 365.
194 Ibid.
195 Ibid.
in persons the possibility of obtaining compensation for damage suffered.\textsuperscript{196} Compensation for trafficking victims may be reliant on victims suing offenders for civil damages; criminal courts ordering that compensation be paid by offenders to victims; or the establishment of dedicated compensation scheme for trafficking victims.\textsuperscript{197}

It is recommended that the latter option, a dedicated compensation scheme, be established for paper orphans. This is recommended as victims of paper orphaning are children and require considerable assistance to obtain access to remedies. A dedicated scheme recognising this hurdle could be established in a manner that is easily navigated for non-government organisations working to assist with ‘information on the possibilities and processes for obtaining remedies’ for paper orphans.\textsuperscript{198} In such a scheme, it is key that eligibility for compensation should not be contingent upon the victim providing ‘significant assistance’ to law enforcement for investigation or prosecution which is ‘unduly onerous’,\textsuperscript{199} or the successful conviction of parties involved in paper orphaning.\textsuperscript{200} For example, section 17 of the \textit{Human Trafficking and Transportation (Control) Act 2007} (Nepal) provides that victims of trafficking are entitled to compensation which is predicated on the offender receiving the punishment of a fine. Such compensation is therefore only available when the offender is found guilty, and as a result, is rarely paid.\textsuperscript{201} A similar situation exists in Kenya, where there have already been calls for paper orphans to be eligible for the National Assistance Trust Fund for Victims of Trafficking.\textsuperscript{202} However, to be eligible to access the fund, the trafficking offence must be proven in court.\textsuperscript{203} In many countries, the investigation and prosecution process will also continue to be plagued by corruption and complicity.\textsuperscript{204} For these reasons,
compensation should not be contingent upon the participation of victims in the investigation or prosecution, or the successful conviction of traffickers.

To circumvent these issues, eligibility for the scheme could be determined by an inter-agency taskforce granted oversight of the scheme comprising government child protection agencies and anti-trafficking agencies. It should be a specific scheme, rather than any established scheme that is already in existence and may have barriers which make accessing the scheme practically difficult for paper orphans. This inter-agency taskforce could establish criteria for determining whether a child has been trafficked and be responsible for the implementation of the compensation scheme. A dedicated compensation scheme granting funds for paper orphans to reintegrate and ensuring access to education is a pragmatic and appropriate approach to providing access to remedies for victims of paper orphaning.

VI CONCLUSION

This chapter advocated for a multi-sector, child rights based, anti-trafficking framework to tackle paper orphaning as a form of child trafficking. It began by describing why a child-rights based approach is recommended when adopting an anti-trafficking framework to combat paper orphaning. A child rights approach based on the Convention on the Rights of the Child provides a consistent platform focused on ensuring the best interests of the child are a primary focus of the recommendations made to curtail paper orphaning.

This chapter recognised that there are current initiatives aimed at addressing broader child protection issues such as the over-use of residential care for children and the strengthening of alternative care systems in developing States which may impact on paper orphaning. However, these current interventions delivered through child protection mechanisms are not sufficient to halt the paper orphaning business model and therefore it is essential that paper orphaning be addressed as a form of child trafficking. The framework developed in this chapter for addressing paper orphaning as child trafficking does not advocate for a sole focus on prosecution, prevention or protection to combat paper orphaning, but rather advocates for a combination of all three pillars to be implemented concurrently.

The first recommendations focus on paper orphaning being criminalised and prosecuted as a form of child trafficking both in countries which experience paper orphaning and
contributing countries. This realisation of the obligation to criminalise and prosecute is critical to enhance the present child protection interventions addressing the systemic reform of alternative care of children. The examination of Haiti, Cambodia, Nepal and Australia illustrated the nuance that is present in how paper orphaning is criminalised and could potentially be prosecuted following awareness and sensitisation programs aimed at law enforcement and the judiciary. These four countries stand as examples of how anti-trafficking legislative frameworks in each country must be subjectively assessed to ascertain whether paper orphaning is already criminalised as trafficking in the jurisdiction, and to make amendments to existing criminal laws or devise prosecutorial strategies to successfully secure convictions for paper orphaning as child trafficking.

A criminal justice response alone will not ‘have the power to curb or even substantially disrupt’ the paper orphan trade.205 If governments are to make a significant impact on paper orphaning, they must work to provide prevention programs that alleviate the factors that fuel child trafficking.206 Directly responding to the factors described in Chapter Three as forming the enabling environment for paper orphaning, recommendations were made addressing vulnerability, demand, corruption and complicity. It was recommended that vulnerability to paper orphaning be addressed through the strengthening of local community and education facilities to alleviate the lure of education and provide appropriate social services; the introduction of awareness campaigns aimed at educating families and communities about paper orphaning; and strengthening the capacity of alternative care systems in developing States in conjunction with adopting a deinstitutionalisation mandate through enshrining the Alternative Care Guidelines in child protection legislation and policy.

The second recommendation for prevention was aimed at combating the demand of orphanage tourism. It was recommended that unskilled orphanage tourism be banned in both countries where paper orphaning occurs and also contributing countries. This could be achieved in countries where paper orphaning occurs through the introduction of strict regulations on orphanage tourism enforced through the child protection system and in contributing countries through a legislative requirement that entities divest of orphanage


206 Rafferty, above n 13, 570.
tourism following a transition period. The suggestion of a legislative framework was based upon Australia’s consideration of this model.

The third recommendation for prevention was focused on exposing and ending corruption and complicity by government officials in paper orphaning. Here, it was recommended that countries prosecute public officials for their involvement in paper orphaning, whether under anti-trafficking legislation or anti-corruption legislation, and consider implementing the *Convention against Corruption* to address endemic corruption involvement in trafficking generally.

Finally, to access the rights and services afforded to trafficking victims, paper orphans must be identified as victims of child trafficking. Family tracing and reintegration are critical to ensuring that paper orphans are returned to their families where it is in their best interests. To provide access to compensation, it is recommended that countries establish a dedicated compensation scheme for paper orphans, which is separate to any compensation scheme for trafficking that already exists. This scheme could be overseen by an inter-agency taskforce charged with the power to determine eligibility of paper orphans to the scheme without the need for successful prosecution of those involved in the paper orphaning process.

The recommendations made in this chapter illustrate why a multi-sector framework to combating paper orphaning is so crucial. To combat paper orphaning it is necessary to criminalise paper orphaning as a form of child trafficking, whilst concurrently addressing the enabling environment in which paper orphaning occurs, and providing protection and assistance for paper orphans. For that reason, criminalisation and prosecution strategies must be coupled with prevention programs which address the vulnerabilities of families desiring a better education for their children, the overuse of residential care in developing States, and the corruption and complicity of public officials in the paper orphaning process. In addition, it is necessary to identify paper orphans as victims of child trafficking rather than as subjects of institutionalisation and the child protection system. This identification provides rights to protection and assistance that are not accessible to children in residential care generally.

This chapter highlighted measures that countries should undertake to tackle paper orphaning as a form of child trafficking. It did not purport to provide a comprehensive plan to curtail
paper orphaning. Instead the framework provided a series of initial recommendations based on observations of similarities in the social and political contexts in countries where paper orphaning occurs. Therefore, this chapter represents only initial recommendations for countries to consider implementing to combat paper orphaning. Further research is required to provide specific comprehensive action plans which address the particular circumstances of each country, and how best to combat paper orphaning in their context.
CHAPTER EIGHT: CONCLUSION

I  INTRODUCTION

This thesis established that paper orphaning is a form of child trafficking under international law. It did so by providing a comprehensive analysis of how, where and why paper orphaning occurs; how international law should regard paper orphaning; and how it should be tackled through prosecution, prevention and protection. This chapter summarises the central arguments of the thesis and details its major contributions. Finally, this chapter makes recommendations for further research that should be undertaken to maintain the current global momentum of recognition of paper orphaning, and to encourage the implementation of practical interventions to combat the issue.

This thesis responded to the main central research question of whether the recruitment of a child into an orphanage or residential care institution for the purpose of exploitation and profit is a form of child trafficking under international law. This chapter refers to the six specific research questions posed in Chapter One as a framework for outlining the major contributions made by this thesis. These questions were:

1. What is the process and prevalence of paper orphaning?
2. What is the enabling environment for paper orphaning?
3. Can the relationship between the desire to assist orphans through volunteering at and visiting orphanages, and the paper orphaning process, be regarded as a demand driver for trafficking?
4. Does the definition of ‘child trafficking’ in international instruments include trafficking for the purpose of exploitation and profit in orphanages?
5. Can ‘a purpose of exploitation’ in the definition of child trafficking be interpreted as including the forms of exploitation that paper orphans experience?
6. How should States tackle paper orphaning as a form of child trafficking?
Part II of this chapter provides a summary of the central arguments of the thesis. Part III draws together the five major contributions the thesis makes and suggests further research that should be undertaken.

II SUMMARY OF CENTRAL ARGUMENTS

This part briefly summarises the central arguments of each chapter. Chapter One briefly introduced the issue of paper orphaning to contextualise the origin of the research question. It explained how paper orphaning has predominantly been regarded as an issue of child protection and has only anecdotally been referred to as a form of trafficking, but without a legal basis. This thesis resolves this issue by providing the legal argument for paper orphaning to be considered a form of child trafficking under international law.

In undertaking this thesis, a primary goal was to develop practical mechanisms to assist paper orphans through recognition of paper orphaning as child trafficking, and to formulate frameworks for action to address the issue. The introductory chapter detailed the practical impact the research contained in this thesis has already had both in Australia and internationally. The consideration by the Australian parliament of paper orphaning and orphanage trafficking in the Inquiry into whether Australia should have a Modern Slavery Act, and the resulting report ‘Hidden in Plain Sight’, was an important step in recognising that contributing countries also have a responsibility to address their citizens’, residents’ and entities’ contributions to, and participation in, paper orphaning. Further, the inclusion of trafficking of children into orphanages in the Trafficking in Persons Reports of 2017 and 2018 were pivotal moments in the recognition of paper orphaning as a form of child trafficking internationally.

Chapter Two focused on how and where paper orphaning occurs by establishing the method and prevalence of paper orphaning in developing States. An in-depth analysis of eight countries across four regions indicated that the same process of paper orphaning is occurring across the developing world. This does not suggest that paper orphaning is confined to just these eight countries, as many other countries were referred to various sections of this thesis.1

1 Countries where there is evidence of paper orphaning that were not analysed in this thesis, but were mentioned in parts, include South Africa, Botswana, Malawi, Kenya, Zimbabwe, Tanzania, Viet Nam, Myanmar, India, Sri Lanka, Bangladesh, the Philippines, Laos, Thailand, Malaysia, Argentina, Mexico, and Paraguay.
The eight countries analysed are representative of how paper orphaning is occurring in their regions. The global prevalence of paper orphaning means a consistent international approach is required to address the issue. This thesis applied international law to the issue of paper orphaning to provide a common platform for countries to begin addressing paper orphaning as a form of child trafficking.

Chapter Three described the enabling environment in which paper orphaning occurs to provide the context for the prevalence of paper orphaning, and the seeming impunity of orphanage operators who are active in this process. The enabling environment underpinning paper orphaning is sustained by the privileging of orphanhood in the aid and development context, and the use of the iconography of emergency through depicting orphaned children as alone and need of assistance, leading to the development of the ‘orphan addiction’. Orphanage tourism is an exemplification of the orphan addiction, where aid and development collide with the tourism sector to create a highly lucrative business model of people volunteering with, and visiting, orphans. This business model is supplemented by the complicity of governments which fail to regulate, monitor and enforce alternative care frameworks appropriately, and which may prioritise aid and tourism revenue over ensuring their obligations to uphold the rights of the child are met. The complicit participation of non-government organisations and governments means that children can be recruited into orphanages and subject to ongoing institutionalisation with little, if any, oversight and no criminal ramifications.

Chapter Four argued that orphanage tourism is a demand driver for paper orphaning by asserting that a re-conceptualisation of demand in trafficking is needed. Demand in trafficking is generally constructed as being driven by consumer desire usually for immoral or illegal activities or things, with supply being generated to meet the demand. In paper orphaning, it was argued that demand functions differently. Because the demand of orphanage tourism is predicated upon a perceived supply of orphans who require assistance, the perceived supply generates the demand. Chapter Four also argued that demand in paper orphaning can be constructed through understanding how the desire to assist orphans is a form of embodied labour. This chapter advocated that orphanage tourism should be addressed bilaterally as both a threat to child protection and as creating a demand for child trafficking into orphanages.
Chapters Five and Six established the legal argument for paper orpaning as a form of child trafficking under international law, which is at the heart of this thesis. Chapter Five situated paper orpaning in international law by reference to the *Convention on the Rights of the Child* and the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*. It was argued that to criminalise paper orpaning as a form of sale of children or abduction would fail to provide potential criminal accountability for the whole process of paper orpaning. From here, I determined that the most appropriate offence to encapsulate the entirety of the paper orpaning process was the offence of child trafficking under the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000*. To meet the requirements of the definition of child trafficking found in article 3(c) of the *Trafficking Protocol*, both the act and purpose elements must be satisfied. Chapter Five established that the recruitment of children into orphanages that occurs in paper orpaning satisfies the act element of article 3.

Chapter Six focused on demonstrating how the exploitation that occurs in paper orpaning satisfies the ‘purpose element’ of the definition. To do this, I made two arguments. The first was that paper orphans are often subjected to forms of exploitation that are listed in the *Trafficking Protocol*, and in these situations, the purpose element is met. The second was that where paper orphans experience forms of exploitation that are not listed in the *Trafficking Protocol*, the ‘purpose element’ can be satisfied in situations where an unfair advantage is present and a threshold of seriousness is met. Ongoing institutionalisation for a purpose of profit and orphanage tourism are both forms of exploitation that meet these considerations, and therefore should be regarded as satisfying the purpose element. Thus, it was concluded that paper orpaning is a form of child trafficking under international law.

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To combat paper orphaning as a form of child trafficking, Chapter Seven advocated a comprehensive multi-sector child rights based framework be adopted. The recommended framework incorporated the three pillars of prosecution, prevention and protection. First, recommendations for the prosecution pillar included the criminalisation and prosecution of paper orphaning as a form of child trafficking in domestic jurisdictions. Second, recommendations for the prevention pillar included developing prevention programs addressing the root causes of vulnerability, the demand of orphanage tourism, and the complicity and corruption of public sector officials. Finally, recommendations for the protection pillar encompassed the provision of protection and assistance to paper orphans as victims of trafficking to enable them to access reintegration and remedies.

Finally, this chapter concludes by reiterating the central arguments made in this thesis, and in the next part, drawing together the major contributions it makes.

III MAJOR CONTRIBUTIONS OF THE THESIS

This part summarises the five major contributions that this thesis makes to the literature in responding to the overarching research question of whether the recruitment of a child into an orphanage or residential care institution for the purpose of exploitation and profit is a form of child trafficking under international law. First, this thesis identified the common systemic issues that underpin the paper orphaning process. Second, it located orphanage tourism as both a demand driver for paper orphaning and a form of exploitation. The third major contribution is the assertion that paper orphaning should be conceptualised a form of child trafficking under international law. Fourth, this thesis advocated for paper orphans to be identified as victims of child trafficking. The fifth and final contribution made by this thesis is an argument for maintaining the present momentum in combating paper orphaning. This part integrates the issues identified throughout the thesis thematically with the intention of providing a final practical framework for action to combat paper orphaning.

A IDENTIFYING COMMON SYSTEMIC ISSUES WHERE PAPER ORPHANING OCCURS

The first major contribution of this thesis is detailing the prevalence of paper orphaning and its enabling environment in developing States. This contribution responded to the first and second of the specific research questions posed in Chapter One, that is, what is the process
and prevalence of paper orphaning; and, what is the enabling environment for paper orphaning? Chapter Two established the factual foundations for the analysis in later chapters by describing the process of paper orphaning as comprising the recruitment of children into orphanages; the manipulation of recording how children are admitted to care with a preference for abandonment or orphanhood over relinquishment; the creation of fraudulent documentation; and the maintenance of institutionalisation for the purpose of exploitation and profit. Chapter Two also described the prevalence of paper orphaning across developing States by focusing on four different regions. These countries exhibit common systemic issues that underpin the enabling environment in which paper orphaning occurs, which were then examined in Chapter Three. The following section integrates the common systemic issues that were identified in Chapters Two and Three, with the anti-trafficking recommendations focused on prosecution, prevention and protection made in Chapter Seven.

The first common systemic issue identified was that paper orphaning occurs predominantly in countries where children experience social vulnerabilities such as lack of access to education, medical and other social support services. These social vulnerabilities provide leverage for recruiters and orphanage operators to approach families offering opportunities for their children. There is evidence of the same method of recruitment, where a family is approached with an offer of education, or the promise of a better life for their child, in Ghana, Kenya, Malawi, Liberia, Uganda, Nepal, Cambodia, Indonesia, Haiti.

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Guatemala, and many other countries. In Chapter Seven, I recommended that anti-trafficking prevention programs should ensure that children are able to access social support services without being separated from their families. Programs should be targeted at increasing access to education, healthcare and appropriate socio-economic services aimed at alleviating poverty. These should include awareness programs directed at educating paper orphaning source communities about the harm of paper orphaning, and the way that access to education and other services are utilised as a lure by recruiters.

The second common systemic issue identified was that the business of paper orphaning is facilitated by the weak regulation, monitoring and/or enforcement of alternative care frameworks in developing States. The available evidence suggests that paper orphaning is prevalent in developing States, occurring in both registered and unregistered institutions. The manipulation of gatekeeping practices for admission, and the rationale of the provision of protection through institutionalisation, illustrate how alternative care frameworks can be used to justify and legitimise practices that form part of the paper orphaning process. This exploitation of existing alternative care frameworks means an orphanage may be registered and seemingly compliant with appropriate gatekeeping mechanisms, but still complicit in paper orphaning. The result is that paper orphaning is not confined to unregistered or ‘scam’ orphanages, but instead may be occurring to some level in many registered institutions. This particularly occurs where protection is utilised as a rationale for ongoing institutionalisation.

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16 See Chapter Two, Part II(B) regarding how orphanages manipulate the details of how a child is admitted into their care by recording them as abandoned or orphaned, which have lower evidentiary requirements than relinquishment does.
17 See Chapter Six, Part IV(B)(1) which outlines how protection is often utilised as a justification for ongoing institutionalisation despite international guidelines promoting institutionalisation being used as a last resort and for a short amount of time only.
To address the weak regulation, monitoring and/or enforcement of alternative care frameworks in developing States, child protection systems in developing States need to be strengthened. To do this, the United Nations Guidelines for the Alternative Care for Children\(^{20}\) should be implemented through legislation and policy in countries experiencing paper orphaning. Enshrining the Alternative Care Guidelines in domestic legislation offers the potential for enforceability through legislative mechanisms, rather than mere policy. This entrenchment in legislation will also assist where existing alternative care frameworks are exploited to enable facets of paper orphaning, such as how children are admitted to care through the manipulation of gatekeeping provisions, or how ongoing institutionalisation is rationalised using a mandate of protection when no attempts at reintegration are being made, by providing a standardised system.

The third common systemic issue identified was that countries where paper orphaning occurs have an issue with the prolific and inappropriate over-use of institutional care for children. Paper orphaning is a form of child trafficking that is sustained by the inappropriate over-use of institutional care which facilitates the orphanage industry. The prolific use of institutional care as the first response to vulnerability in developing States is a serious child protection issue. This does not mean that the use of institutional care is synonymous with exploitation and child trafficking. This thesis did not argue that institutional care is always inappropriate, or that it should be wholly abandoned. Indeed, institutional care may be necessary for children residing outside of parental care as a last resort and for a short amount of time.\(^{21}\) Instead, this thesis provided an account of how the prolific use of institutional care intersects with the emergence of paper orphaning as an offence of child trafficking. A mandate of deinstitutionalisation should be implemented focusing on family strengthening, preservation and reintegration to counter the prolific over-use of institutional care. This is not proposed as a panacea for paper orphaning itself, but recognises that the over-use of institutional care can contribute to, and even facilitate, the process of paper orphaning by providing the venue for the exploitation of orphanage tourism and ongoing institutionalisation.

\(^{20}\) Guidelines for the Alternative Care of Children, GA Res 64/142, UN GAOR, 64th sess, 65th plen mtg, agenda item 64, supp no 49, UN Doc A/RES/64/142, (18 December 2009, adopted 24 February 2010) (‘Alternative Care Guidelines’).

\(^{21}\) This is recognised in the Alternative Care Guidelines, UN Doc A/RES/64/142, guideline 14.
The fourth common systemic issue identified was that in many of the countries canvassed, there was a correlation between the sanctioning or closure of intercountry adoption programs on the one hand, and the proliferation of orphanages and the increase in numbers of children being institutionalised on the other. The majority of the countries analysed had experienced at the very least irregularities within the intercountry adoption system that led to censure and sanctioning, for example, Liberia, while at the other end of the spectrum, some countries had been forced to place a moratorium on their intercountry adoption programs due to documented fraud and child laundering, such as Cambodia, Guatemala and Nepal. The sanctioning and closure of intercountry adoption programs could be given as a reason for the increased number of children residing in orphanages. This does not correlate with the evidence that suggests that in these same countries, despite the numbers of children in residential care and residential care facilities increasing, the legitimate requirement for institutional care is decreasing. In these same countries, it is well documented that the majority of orphanages are privately funded by foreign funders and orphanage tourism, and that this is significantly contributing to orphanages recruiting children.

The fifth common systemic issue identified was the intersection of public official corruption and complicity with paper orphaning. Paper orphaning cannot operate without the complicity and/or corruption of public officials in the form of active participation, such as the creation of fraudulent documentation, or by passive oversight, in the form of failing to

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26 UNICEF and Terre Des Hommes, above n 10.
27 See, eg, Kristen Cheney, ‘The cognitive dissonance between child rescue and child protection’, Open Democracy, 21 July 2015 <https://www.opendemocracy.net/beyondslavery/kristen-e-cheney/cognitive-dissonance-between-child-rescue-and-child-protection>. In Uganda, the rate of orphanhood is sharply declining whilst the rate of institutionalisation is increasing. This was also discussed in detail in Chapter Three, Part IV.
appropriately monitor and enforce alternative care frameworks. To combat this, two broad recommendations were made. The first was to increase scrutiny of public sector involvement in the child protection framework through strengthening the capacity of the child protection system, particularly in relation to conducting investigations to identify corruption and complicity. The second was that prosecution of public officials who are found to be corruptly involved, or complicit in, the paper orphaning process, should be pursued either under anti-trafficking provisions, where those officials are actively involved in the paper orphaning process, or via anti-corruption provisions, depending on the context.

These common systemic issues underpin the enabling environment in which paper orphaning thrives, and provide the impetus for the recommendations for reform that were made in Chapter Seven. The symbiotic relationship between these systemic issues and paper orphaning means that the design of redress must be holistic and multi-sectored including criminal law responses, the systemic reform of alternative care frameworks, specifically designed prevention programs addressing vulnerability, demand and corruption, and the effective identification of paper orphans for the provision of protection and assistance.

B  ORPHANAGE TOURISM AS BOTH A DEMAND DRIVER AND EXPLOITATION

The second major contribution that this thesis makes was the conceptualisation of orphanage tourism as both a demand driver for paper orphaning and a form of exploitation that meets the requirements of the definition of child trafficking under international law. This thesis established that the tourism revenue raised from orphanage tourism may lead developing States’ governments to become complicit in paper orphaning; 29 that the profit from orphanage tourism is a motive for orphanage operators to undertake paper orphaning; 30 that orphanage tourism is a form of embodied labour 31 and a demand driver for paper orphaning; 32 and that orphanage tourism is a form of exploitation that meets the requirements of the definition of trafficking. 33

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29 See Chapter Three, Part VI (D).
30 See Chapter Four, Part II.
31 See Chapter Four, Part V.
32 See Chapter Four, Part VI.
33 See Chapter Six, Part V(C).
To understand how orphanage tourism drives demand, it is necessary to understand how the desire to assist orphans is promulgated. Chapter Three explained how the focal point of the orphan child is utilised and manipulated by governments and non-government organisations alike in order to profit from donor funding and orphanage tourism. The perceived supply of orphans requiring assistance creates and nurtures the ‘orphan addiction’ which in turn drives orphanage tourism and funding. In addition, the lower cost of travel and relative ease in moving between countries has facilitated the rise in popularity of orphanage tourism which has become a billion-dollar trade.\(^\text{34}\)

Orphanage tourism is thus a symptom of a larger issue; the financial reliance of governments and non-government organisations on having a population of ‘orphans’ that it can utilise to encourage and nurture this revenue stream. Paper orphaning has emerged to ensure this population of orphans is available to visit and volunteer with. To maintain this population and revenue, non-government organisations and orphanage operators participate in paper orphaning, and governments become complicit in paper orphaning. The various ways in which governments may be involved in the process of paper orphaning are highlighted in the identified common systemic issues discussed in the previous section. This involvement provides a rationale for why paper orphaning is able to thrive, but also underline the broader issue of how the child protection system fails to assist paper orphans and not only allows, but legitimises and justifies, their continued exploitation as being necessary to maintain funding for an institutionalised life.

The construction of orphanage tourism as a demand driver for child trafficking relocates the activity from one of seeming benevolence to one of harm and exploitation. Chapter Four outlined how orphanage tourism is often colloquially regarded as a positive contribution to child protection. Many orphanages advertise that they require volunteers to fulfil carer roles to provide affection and warmth to the children, and to lower the financial burden of operating the institution by not having to pay wages. For orphanage operators, it represents a double win as volunteers usually pay a stipend to perform the volunteer function. Research suggests that orphanage tourism is at the very least disruptive to vulnerable children’s lives\(^\text{35}\)

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and causes attachment disorders due to the continual revolving door of volunteer caregivers; and at the worst, creates a demand for trafficking of children from families to pose as orphans, as was detailed in this thesis.

Thus, it appears that everyone wins in orphanage tourism, except the one who matters most, the child. The orphanage operator lowers their wage costs and increases revenue; the government enjoys increased aid and tourism revenue; and the volunteers realise their desired goal of assisting the less fortunate. For the paper orphan who is subject to orphanage tourism, the narrative is very different. Trafficked from their family to meet the demand for their embodied labour, paper orphans are often kept in poor conditions, malnourished and with inadequate health care, forced to dance, perform, beg, or perform other activities to please foreign donors and coached to lie to volunteers about their orphan status. 

Chapter Seven advocated that a child rights based response to orphanage tourism as both a demand driver and form of exploitation would be to ban unskilled volunteering in orphanages and recognise orphanage tourism as a form of child exploitation in child protection policy and legislation both by countries where paper orphanging occurs and contributing countries. Whilst this proposal may appear contentious to orphanages and travel companies who facilitate orphange tourism, and to would-be volunteers who possess what they believe to be very good intentions to assist vulnerable children, banning unskilled volunteering in orphanages is the only child rights based response that can alleviate the issues that orphanage tourism causes. It is hoped that curbing the demand for orphanage tourism will lead to a reduction of paper orphanging.

C  

**Paper Orphanging is Child Trafficking**

The third major contribution of this thesis, and perhaps the most important pragmatically speaking, is the assertion that paper orphanging is a form of child trafficking under international law. This contribution responds to the fourth and fifth of the specific research questions posed in the introductory chapter: does the definition of ‘child trafficking’

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provided in international instruments include trafficking for the purpose of exploitation and profit in orphanages; and, can ‘a purpose of exploitation’ in the definition of child trafficking be interpreted as including the forms of exploitation that paper orphans experience?

Chapters Five and Six established that paper orphaning meets the definition of child trafficking found in article 3 of the *Trafficking Protocol*. To do this, the arguments centred on how the act element and the purpose element required in that definition occur in the paper orphaning process.

Proving that the act element occurs in paper orphaning is not contentious, as there is clear evidence across countries where paper orphaning occurs that the recruitment of children into institutional care takes place. The act element is constituted by ‘recruitment, transportation, transfer, harbouring or receipt of a child’. As a form of child trafficking, the means element is not required; it is irrelevant whether consent is given by guardians or parents for the recruitment. The crux of establishing that the offence of trafficking has occurred is that the act element is undertaken for a ‘purpose of exploitation’. Previous attempts by child protection agencies over the last decade to have paper orphaning regarded as a form of child trafficking were not successful because it was widely believed that the purpose element could not be satisfied. This thesis, including the research already published contained herein, resolves that issue by providing a comprehensive legal analysis that has already been utilised in legislative and policy change, as well as paper orphaning now being reported as a form of child trafficking.

Chapter Six described how the forms of exploitation that paper orphans may suffer, namely sexual exploitation, forced labour or services, slavery or practices similar to slavery and

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38 *Trafficking Protocol* art 3(c).
39 There is no means requirement in the offence of child trafficking as per *Trafficking Protocol* art 3(c).
41 See, eg, the inclusion of orphanage trafficking and the exploitation of children in orphanages as reportable forms of modern slavery in the Modern Slavery Bill 2018 (Cth), Explanatory Memorandum, 8 [50].
42 See, eg, the Department of Foreign Affairs and Trade, Australia, ‘Australian Aid: Friendship Grants: Australian Communities helping the Indo-Pacific’, *Australian Aid Friendship Grant*, 2018, <https://dfat.gov.au/aid/who-we-work-with/friendshipgrants/Documents/friendship-grants-eligibility-checklist.pdf> which provided that ‘activities that involve unskilled volunteers supporting orphanages or residential care institutions’ are not eligible activities for an Australian Aid Friendship Grant.
servitude, and the removal of organs, are listed in article 3 of the *Trafficking Protocol*.\(^{44}\) Of particular importance was the determination that the process of paper orphaning resulting in institutionalisation for the purpose of profit meets the requirements of a practice similar to slavery under international law. The result of this argument was that where a child is recruited purely for the purpose of institutionalisation, in the absence of an actual requirement of care, they can be deemed subject to a form of exploitation which meets the requirements of the offence of child trafficking. Overall, it was established that where paper orphans have been recruited into an orphanage for the purpose of a form of exploitation that is listed in the *Trafficking Protocol*, they should be regarded as victims of child trafficking. The publication of this argument in my article in the *International Journal of Children’s Rights* in 2016\(^{45}\) has underpinned significant shifts in how paper orphaning is regarded as a form of child trafficking, particularly through its inclusion in the Trafficking in Persons Reports in 2017 and 2018.

Because the list of forms of exploitation in the definition of trafficking is prefaced with the statement ‘exploitation shall include, at a minimum’,\(^{46}\) where paper orphans are recruited into an orphanage and experience a form of exploitation that is not listed in the *Trafficking Protocol*, they should still be regarded as victims of child trafficking. To assess whether other forms of exploitation meet the requirements of the *Trafficking Protocol*, the conduct should be assessed in light of whether an unfair advantage is present and the conduct meets a threshold of seriousness. Chapter Six argued that the conduct exhibited in ongoing institutionalisation for profit and orphanage tourism, indicate that an unfair advantage is present and the seriousness threshold can be met. Thus these activities should be regarded as meeting the element of a purpose of exploitation in the definition of child trafficking. Having established both the act element, in Chapter Five, and the purpose element, in Chapter Six, it is conclusively established that paper orphaning is a form of child trafficking under international law.

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\(^{44}\) *Trafficking Protocol* art 3.
\(^{46}\) Ibid
As it was determined that paper orphaning is an offence of child trafficking, countries should ensure that paper orphaning is criminalised under their domestic legislation. Countries that are States parties to the Trafficking Protocol have a mandatory obligation to ensure that paper orphaning is criminalised. Countries that are not States parties to the Trafficking Protocol, but are States parties to the Convention on the Rights of the Child, also have an obligation to protect children from trafficking and exploitation. In either situation, countries must ensure that their current anti-trafficking legislation incorporates the offence of paper orphaning as a form of child trafficking to meet their obligations under international law. Where it is determined that paper orphaning falls under existing trafficking offences, training programs regarding the offence of paper orphaning should be undertaken with law enforcement, lawyers and judges, to raise awareness of the crime and to ensure that prosecutions are pursued in appropriate cases. Where it is determined that paper orphaning is not covered by existing trafficking offences, amendments to the anti-trafficking laws should be sought to ensure State party obligations are fulfilled.

Criminalisation should not just be effected by countries where paper orphaning occurs. Countries that contribute to paper orphaning, through funding and sending volunteers, are also actively considering how they might curb the contributions of their citizens, residents and entities to, and participation in, paper orphaning. There is a variety of legislative mechanisms that contributing countries can consider implementing to curb orphanage tourism including modern slavery legislation, anti-trafficking legislation, or specifically tailored legislation aimed at halting paper orphaning. The criminalisation of the involvement of contributing countries’ citizens, residents and entities in paper orphaning has the potential to cease the funding and founding of orphanages, and facilitation and participation in orphanage tourism, both of which drive the demand for paper orphaning.

Whilst it is only one component of combatting paper orphaning, criminalisation and prosecution are the lynchpin in the recognition that paper orphaning is not just a child protection issue, but also an offence of child trafficking. As an offence of child trafficking under international law, paper orphaning should be criminalised in domestic legislation both

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47 Convention on the Rights of the Child arts 35 and 36.
by countries where paper orphaning occurs and contributing countries, with an aim of disrupting and ending the paper orphaning business model.

### D FROM ORPHANED TO TRAFFICKED

The fourth major contribution this thesis makes is the shift in identity at law for paper orphans. As paper orphans are depicted as ‘orphans’, the rights and obligations owed to them by the State are determined under child protection legislation. Once paper orphans are regarded as ‘trafficked’, they are able to access different entitlements.

As a child residing in institutional care under the guise of being ‘an orphan’, a paper orphan is regarded prima facie as a child who is ‘temporarily or permanently deprived of his or her family environment’ and requires alternative care.\(^{48}\) Children in this situation are afforded special rights to protection and assistance by the State.\(^{49}\) In some circumstances, the State’s obligation to provide special protection and assistance to children deprived of a family environment is met through the provision of ongoing institutionalisation,\(^{50}\) which infringes other rights owed to the child, such as the right to not be separated from their parents against their will.\(^{51}\) In other situations, the observance of these obligations is negated by the State’s complicity in the paper orphaning process, through the abrogation of responsibility for children requiring alternative care to non-government organisations;\(^{52}\) the failure to ensure adequate regulation, monitoring and enforcement of alternative care providers;\(^{53}\) the seemingly wilful blindness regarding the complicity and corruption of public sector officials in the paper orphaning process;\(^{54}\) and the apparent budgetary reliance on the aid and revenue that stems from support for orphaned children.\(^{55}\) Thus, the State’s obligation to provide special protection to children requiring alternative care is often not met.

The shift from ‘orphaned’ to ‘trafficked’ has very practical outcomes for paper orphans. In particular, where a child is institutionalised due to orphanhood, it is unlikely that family

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\(^{48}\) *Convention on the Rights of the Child* art 20.

\(^{49}\) Ibid.

\(^{50}\) See Chapter Six, Part IV(B)(1).


\(^{52}\) See Chapter Three, Part VI(A).

\(^{53}\) See Chapter Three, Part VI(B).

\(^{54}\) See Chapter Three, Part VI(C).

\(^{55}\) See Chapter Three, Part VI(D).
tracing or reintegration will be pursued unless a deinstitutionalisation mandate is adopted by domestic child protection frameworks. However, States parties to the Trafficking Protocol are obligated to provide family tracing and reintegration as part of the protection and assistance offered to victims of child trafficking. Another practical outcome for paper orphans as victims of trafficking is that they are entitled to access remedies including restitution, rehabilitation and compensation. All three remedies have the potential to assist paper orphans. Restitution should be utilised to return the child to their family and address the root causes of vulnerability that initially resulted in the child being trafficked. Rehabilitation should be utilised to provide paper orphans with access to medical, psychosocial and legal assistance. Finally, access to a tailored compensation scheme, that is not reliant on participation in investigation or prosecution of those involved in the child trafficking offence by the victim, is particularly important. Compensation may be used to alleviate the socio-economic conditions of the child and may reduce their vulnerability to re-trafficking. Access to these remedies is entirely contingent upon paper orphans being recognised as victims of trafficking, and not merely subjects of child protection residing in institutional care.

**E Maintaining Momentum**

The final contribution that this thesis makes is the provision of a framework for how States should tackle paper orphaning as a form of child trafficking. This part promotes the framework provided in Chapter Seven as a call to action to maintain the current global momentum on the recognition of paper orphaning as a form of child trafficking, and to encourage the implementation of practical interventions to combat it.

Chapter Seven articulated a framework for tackling paper orphaning that advocates for a comprehensive multi-sector approach utilising both anti-trafficking and child protection mechanisms to combat paper orphaning. The framework is centred on the three pillars for

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addressing human trafficking found in the Trafficking Protocol: prosecution, prevention and protection. The suggested framework is underpinned by a child rights based approach and advocates for the criminalisation and prosecution of paper orphaning as a form of child trafficking; the prevention of paper orphaning through addressing vulnerability, demand, and corruption and complicity; and for the provision of protection and assistance for child victims of paper orphaning focusing on identification and reintegration.

Thus far, the academic research on the recruitment of children into orphanages for the purpose of exploitation and profit as a form of child trafficking is limited to my own work including the article published in the International Journal of Children’s Rights in 2016 and this thesis. Whilst other research exists on paper orphaning as part of intercountry adoption, most of the literature on paper orphaning mentions it as a child protection issue, or recently lists paper orphaning and orphanage trafficking in reports as an emerging form of trafficking based on my research. This thesis provides the first comprehensive analysis of paper orphaning as a form of child trafficking under international law. The intention of this thesis was to provide a framework for the recognition of paper orphaning as a form of child trafficking, and to suggest practical interventions be implemented to combat paper orphaning as trafficking, rather than just as a child protection issue. To continue to encourage and justify implementation of this framework through practical interventions in legislation, policy and programming, governments and non-government organisations require further research to quantify the magnitude of the paper orphaning issue.

60 Trafficking Protocol art 5.
61 Ibid art 9.
Article 9(2) of the Trafficking Protocol stipulates that States parties should undertake research as part of their efforts to combat trafficking. Presently, there is a heavy reliance on non-governmental organisation reporting to evidence paper orphaning, and although these sources may be accurate representations, they are not necessarily empirical and result in an over-reliance on anecdotal material.\textsuperscript{66} This lack of ‘robust empirical and practical evidence’\textsuperscript{67} means there are ‘gaps in the knowledge base of practitioners, policymakers and researchers’,\textsuperscript{68} which is a substantial challenge to providing appropriate outcomes for paper orphans as trafficked children. To develop tailored programming, policy and legislative interventions to combat paper orphaning, research is needed to quantify the numbers of paper orphans present in residential care in each developing nation where paper orphaning is present. In addition, empirical data on how funding and orphanage tourism contribute to the demand for paper orphaning is necessary in order to justify continued intervention by contributing countries.

\textbf{IV \hspace{1em} CONCLUSION}

This thesis established that the recruitment of children into orphanages for the purpose of exploitation and profit is a form of child trafficking under international law. It argued that there is a connection between the increased number of children residing in orphanages, the proliferation of orphanages in developing States, and the demand for orphanage tourism. It asserted that orphanages are not being established in many developing States because there are orphans or vulnerable children that legitimately require care; but rather that orphans are being produced because there are orphanages.\textsuperscript{69} The paper orphaning business model is predicated on the demand for orphanage tourism, which leads to the active recruitment of children into orphanages to pose as orphans by unscrupulous orphanage operators.

\begin{itemize}
  \item \textsuperscript{66} Yvonne Rafferty, ‘Children for sale: Child trafficking in Southeast Asia’ (2007) 16(6) \textit{Child Abuse Review} 401, 416.
  \item \textsuperscript{67} Paul Rigby, ‘Separated and trafficked children: The challenges for child protection professionals’ (2011) 20(5) \textit{Child Abuse Review} 324, 337.
  \item \textsuperscript{68} Ibid.
\end{itemize}
Paper orphaning will only effectively be combated through concerted efforts to criminalise and prosecute paper orphaning as a form of child trafficking by both countries where paper orphaning occurs and contributing countries, and through the implementation of targeted interventions to alleviate vulnerability, address the demand of orphanage tourism, and ensure access by paper orphans to their rightful entitlements as victims of child trafficking. For paper orphans, trafficked into orphanages and forced to pose as orphans, who are currently languishing in institutional care when they could be growing up in their families, it is critical that the current momentum of recognition and intervention is maintained.
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