

**PAPER ORPHANS:
EXPLORING 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 facilities, globally and it is estimated that four out of five of these children are not orphans. It is well documented that many of these children are taken from their families by recruiters and sold into orphanages for the purpose of profit. These children are known as 'paper orphans'. There is no formal legal academic research available on how international law regards this displacement from family and construction as an orphan.

This article provides a legal account of the movement of the children from the family to the orphanage, and considers whether this movement can be categorised as child trafficking under international law. The major point of contention as to whether paper orphans are considered trafficked is whether they experience a form of exploitation that is included in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. This article examines the forms of exploitation that have been documented as being experienced by paper orphans and argues that the process of paper orphaning meets the current interpretation of the definition of trafficking.

INTRODUCTION

In 2009, Save the Children reported that internationally four out of five children in orphanages were not orphans and noted that some poor families were coerced into giving up their children in exchange for money by unscrupulous institutions and adoption agencies hoping to profit from either the residence or trafficking of children (Csáky 2009, 5). In May 2014, 600 children were 'rescued' from two railway stations in India with claims they were being trafficked from their families in Bihar and Jharkhand to an orphanage in Kerala. Forty-three people were arrested and charged with child trafficking (Swamy 2014). In Nepal, since 2006, many stories have emerged regarding children being constructed as false or 'paper' orphans and trafficked to orphanages in order to take advantage of the orphanage tourism business where westerners pay to volunteer with orphans.²

¹ Griffith Law School, Australia. The author wishes to thank Professor Mary Keyes, Dr Patricia Fronek and Dr Anne T Gallagher for their advice, wisdom and kind encouragement in relation to this research project. The author also acknowledges funding received from the Griffith Law School and Law Futures Centre, Griffith University that contributed to this research.

² See for example Pattison, Pete. "Nepal's bogus orphan trade fuelled by rise in voluntourism." *The Guardian*, May 27, 2014, <http://www.theguardian.com/global-development/2014/may/27/nepal-bogus-orphan-trade-voluntourism>; World News Australia, "Police in Nepal have arrested a man and rescued several children from a so-called 'orphanage' in the capital Kathmandu, The raid follows 7-month investigation into institutions that

These examples represent only a few of many news stories in recent years that have linked the movement of children into orphanages with child trafficking. This article examines whether the situation of children who have been displaced from their biological families, fraudulently constructed as 'orphans' and placed in orphanages³ for the purpose of profit can be characterized as child trafficking under international law. The term 'paper orphans'⁴ (Image Ark, 2010) is used to identify children who have been constructed as orphans and 'paper orphaning' to identify the process of movement of the child from the family, the creation of fraudulent documentation, often including death certificates of parents and new identity registration documents, and placement in an orphanage.

Child trafficking is an endemic issue globally with the International Labor Organization (hereinafter "ILO") estimating that 1.2 million children are trafficked each year (ILO 2002, 25). This figure does not include children that have been taken from their families, constructed as orphans, and fraudulently placed in orphanages. While the language utilized media reports consistently refer to the process as 'trafficking', this lay reference does not mean that the legal definition of child trafficking under international law has been met.

In academic literature, no legal analysis exists that assesses whether there is an argument for these paper orphans being considered as trafficked under international law, or assessing what such a categorisation might entail. Children in this situation have not been considered as trafficked due to the definitional requirements of trafficking in the Paper orphans have previously not been considered as trafficked due to the interpretation of the definition of trafficking provided in Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children⁵ supplementing the United Nations Convention against Transnational Organized Crime 2000 (hereinafter "the Trafficking Protocol").

This article is concerned with the initial moment of displacement of the child, and assessing whether this particular act of displacement and its resultant exploitation, can be considered child trafficking under international law. It is acknowledged that following the initial displacement of the child from the family under false circumstances, there is potential for a child to be trafficked further into different scenarios, be it sexual exploitation, bonded

have allegedly abducted children and presented them as 'orphans'," *World News Australia*, SBS Television, 18:30 March 25, 2014.

<http://search.informit.com.au.libraryproxy.griffith.edu.au/documentSummary;dn=TSM201403250073;res=TVNEWS>

³ These childcare residential facilities are known as orphanages, children's homes and institutions. I utilize the term 'orphanages' throughout this article as this is the organizational identity most commonly used.

⁴ This term was coined by Terre Des Hommes and UNICEF in their 2010 documentary, 'Paper Orphans' produced by Image Ark.

⁵ Opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003), (hereinafter Trafficking Protocol).

labour, slavery or organ harvesting,⁶ however these further potential instances of trafficking are not explored in this article.

One of the major issues with the definition of child trafficking being utilized in this context is the requirement of a purpose of exploitation. While in many respects paper orphaning can be analogized to arguments that inter-country adoption is child trafficking, it differs in the application of the definition of exploitation. In this paper, I argue that a child's ongoing institutionalisation in an orphanage is a form of exploitation for the purposes of article 3(a) of the Trafficking Protocol and therefore, the movement of a child from their family to an orphanage under false circumstances should be classed as child trafficking under international law.

To do this, I examine the international instruments that pertain to child trafficking beginning with an analysis of the Convention on the Rights of the Child and the associated Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. This article will then examine the elements of trafficking as required by the Trafficking Protocol, with particular reference to the requirement of exploitation.

THE PROBLEM OF PAPER ORPHANS

The problem of children being manufactured as orphans and used to generate profit in orphanages is global. Evidence of paper orphaning is found predominantly in non-governmental reporting, particularly in formalized qualitative research reports, as well as government agency reporting and media reports.

There is ample evidence of paper orphaning detailed by non-government organisations. In 2009, Save the Children (Csáky 2009, vii) reported that internationally four out of five children in orphanages were not orphans and noted that some poor families were coerced into giving up their children in exchange for money by unscrupulous institutions and adoption agencies hoping to profit from either the residence or trafficking of children (5). In 2003, Save the Children reported that research showed that 85% of children in residential care in Uganda had identifiable and traceable family, (Dunn, Jareg and Webb 2003, 16) while in Ghana, the number of child care homes has significantly grown from 5 in the 1990's to over 110 in 2010 (Department of Social Work 2014, 7) correlating with news reports (Integrated Regional Information Networks 2009) 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." Orphanages have also been known to actively recruit for children. For example, in Malawi a

⁶ As per Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons (hereinafter "the Trafficking Protocol"), the purpose of 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.'

comprehensive national survey of 104 institutions stated that 52% of the facilities were actively involved in recruiting (Williamson 2014).

A United Nations Children's Fund (hereinafter "UNICEF") report entitled 'With the Best Intentions: A Study of Attitudes Towards Residential Care in Cambodia' was conducted in 2011 regarding the increasing number of residential child care institutions. The key findings included that overseas donors were the main funders of residential care and that many residential care centres had turned to orphanage tourism to attract funders through taking volunteer placements and having children solicit for funding, and in doing so were putting children at risk. In Cambodia, 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 has doubled in the past five years (UNICEF 2014). UNICEF Cambodia draws a direct correlation between these statistics and tourists donating time and money.

The Programme Cooperation Agreement 2011-2012, a working contract outlining the basis on Terre des Hommes (an international children's rights organization) and UNICEF, would work together in Nepal, provided the background 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" (Save the Children 2008, 6). The Agreement details 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 (Save the Children, 2010).

In Nepal, there are 16,617 children currently residing in orphanages (Government of Nepal Ministry for Women, Children and Social Work 2014, 85) and up to 80% of children living in these orphanages could be raised by at least one of their parents (UNICEF and Terre Des Hommes 2008, 19). The UNICEF and Terre Des Hommes report, 'Adopting the rights of the child: A study on inter-country adoption and its influence on child protection in Nepal' in 2008, details 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 (13).

The report highlights that around 1,000 children were transported from the mountain districts of Humla and Jumla to orphanages in Kathmandu. 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 the children to school on the understanding that the children would return home on holidays, and that the families would be able to visit. However, 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 (UNICEF and Forum for Women, Law and Development, 2005).

Some of the children were sent to orphanages or circuses in India. Others remained in terrible conditions in unregistered and illegal orphanages in Kathmandu. After two years, an investigation was launched after a child was admitted to hospital suffering from severe malnutrition (UNICEF and Terre Des Hommes 2008, 19). The report determined that upon advice from the Central Child Welfare Board of Nepal, 400 of the 1,000 children could be traced. Those 400 children were either returned to their families or sent to other orphanages (UNICEF and Terre Des Hommes 2008, 13).

In 2014, Better Care Network reported that the problem existed in Cambodia, Nepal, Thailand, Indonesia, Kenya, Ghana, and Guatemala (Better Volunteering, Better Care, 9) They also noted that the findings in Nepal and Cambodia from a range of actors, including the government of Cambodia, United Nations International Children's Emergency Fund (UNICEF), and NGO actors 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" (9). Following the earthquakes in Nepal in April 2015, reports are already emerging of children being removed from families by recruiters with attempts to place them in orphanages (Om Astha Rai, 2015).

From the above, it is clear that orphans and orphanages have become a business in some developing nations. Like any business, the demand for the product, in this case, orphans, has driven the market. To satisfy the demand, children have been taken from families with the promise of education or returning in the future, and manufactured as orphans to reside in orphanages and solicit funding.

This article is not concerned with the manufacture of paper orphans for the purpose of profit per se, but rather how international law regards the initial displacement of such children from the family to the orphanage. Research has noted the recruitment of children, including those with parents, into orphanages for the purpose of financial profit through inter-country adoption (Csaky 2009, 8). However, while there has been extensive investigation of whether inter-country adoption can be considered as child trafficking, to date there has been little academic scrutiny of the initial displacement of children from their families into orphanages where consent has been obtained on the basis of fraud and the intention of the deception is that the child will be institutionalised long-term. This article aims to fill this gap through investigating whether this process can be classed as trafficking.

WHY TRAFFICKING?

The failure of international law to recognize the process of paper orphaning as a form of child trafficking results in an absence of recognition by governments and subsequent action. An example of this is the Trafficking in Persons Report (hereinafter "the TIP Report") completed annually each year by the United States Department of State. Considered a comprehensive resource of anti-human trafficking efforts internationally and the *de facto*

treaty monitoring body of the Trafficking Protocol, the TIP Report limits the definition of trafficking to, “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” as described in the Trafficking Victims Protection Act 2000 (hereinafter “TVPA”) as amended, and the Trafficking Protocol. ‘Compelled service’ is described as including involuntary servitude, slavery or practices similar to slavery, debt bondage, and forced labour (U.S. State Department 2014, 29).

Whilst the TIP Reports have been perhaps the most successful “single initiative in exposing the breadth and extent of contemporary exploitation of individuals for private profit” and have compelled governments to take action which otherwise would not have done so (Gallagher 2012, 174), the limited scope of application of the element of exploitation has precluded paper orphans from being considered as trafficked for the purpose of inclusion in the TIP Report. Attempts to extend the definition for the purpose of the TIP Report have proved fruitless thus far, with the 2005 Report noting that the definition of human trafficking was too narrow to include the practices of buying, selling or abducting children for the purpose of inter-country adoption.⁷ A legal analysis which successfully posits paper orphans as trafficked under international law will have a critical impact on the inclusion of such a practice in the TIP Reports and other associated international reporting, which may then see a resultant response in governments addressing the issue.

CHILD TRAFFICKING OR CHILD LAUNDERING?

David Smolin refers to the practice of inter-country 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 2006, 113). Smolin describes the process of child laundering as:

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 2006, 113).

The process that Smolin describes represents the full gamut of a child displaced from their family, and constructed as an orphan for the purpose of the end point of inter-country adoption. He discusses the movement of the child from the birth family, to the orphanage and onward to the adoptive family. However, his investigation is not centred on the orphanage, as for Smolin, the orphanage is a transient locale on the way to inter-country

⁷ For further commentary on the 2005 TIP Report see Patricia Meier’s article “Small Commodities: How Child Traffickers Exploit Children and Families in Intercountry Adoption and What the United States Must Do to Stop Them,” *J. Gender Race & Just.* 12 (2008): 192.

adoption. He looks at the orphanage as temporary, a holding yard for orphans waiting to be adopted. However, not all children are adopted from orphanages. This article examines the orphanage as a space of exploitation – whether temporary or permanent.

When we examine the concept of trafficking for the purpose of orphanages, we are examining the period prior to inter-country adoption. The locale of laundering and extended commodification actively engages persons who are domicile in other countries as financial contributors to the paper-orphaning process. Some may argue that the ultimate goal of trafficking children in this manner is for inter-country adoption. However, this article argues that the closure of programs from some source countries and difficulties adopting from some non-Hague signatory countries have resulted in a decrease of the number of children available for inter-country adoption. As a result, orphanages in corrupt and uncertain regimes are spaces of ongoing exploitation and are either a transit zone, or an end point, for trafficking. That is, not all paper orphans are available for inter-country adoption. Instead, this article argues that children are being trafficked for the specific purpose of institutionalisation for profit in orphanages.

This article now turns to provide a legal analysis of the situation of paper orphans under international law, with a particular focus on whether the process can be categorized as a form of child trafficking.

SITUATING PAPER ORPHANS IN INTERNATIONAL LAW: CHILD TRAFFICKING?

Trafficking is a relatively new legal concept to international law. Child trafficking is not defined and regulated by one instrument alone. A complex set of international conventions seek to define and provide regulatory guidelines to signatory and ratifying states, as well as provide aspirational guidance for other nation states on what trafficking is.

To establish the foundations for this argument, this paper begins with a legal analysis of the international instruments that pertain to child trafficking and the sale of children, those being the Convention on the Rights of the Child,⁸ the associated Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,⁹ and the Trafficking Protocol.

A *Convention on the Rights of the Child*

In relation to child trafficking, an analysis of the *Convention on the Rights of the Child* (CRC) is brief but important, as it establishes whether there are rights of the child in relation to trafficking. The CRC addresses child trafficking in a very broad context in article 35 which

⁸ Opened for signature 20 November 1989, 1588 UNTS 530 (entered into force 16 January 1991), (hereinafter CRC).

⁹ Opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002), (hereinafter OP-CRC).

states 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”.

The open framing of this article provides an expansive obligation on states to prevent *any* trafficking of children. The fact that the purpose or form of the trafficking is not explicitly stated, nor trafficking defined for the purpose, leaves states to domestically legislate as they believe is warranted.

Article 36 of the CRC also relates to paper orphans as it places an obligation on the state to “protect the child against all other forms of exploitation prejudicial to any aspect of the child’s welfare”.

The term ‘exploitation’ is not defined within the CRC and so could potentially be interpreted to include the situation of paper orphans. However, the CRC is problematic in that it provides a very broad call to action on the very complicated and technical issue of child trafficking. It may be argued that the CRC is too openly framed with respect to child trafficking and exploitation, and thus in its attempt to be inclusive of all and any forms of the purpose of child trafficking and exploitation, the net is cast too wide. That is, that the criteria are fulfilled so easily that it undermines the motivation of the Article.

B Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

The OP- CRC was developed to extend the scope and reach of the CRC in relation to the sale of children, child prostitution and child pornography (Gallagher 2010, 67).

While the OP-CRC does not deal with child trafficking specifically, it does provide a more specific definition in relation to child selling that the CRC does not. Article 1 of the OP-CRC outlines “States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.” 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.”

On initial assessment, article 2 provides a very broad definition of child selling which would easily encompass the situation of paper orphans. The scope is immediately limited in article 3(a)(i), through obliging states 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, which are similar to the exploitation requirements of the Trafficking Protocol. However, article 3(a)(ii) presents an interesting departure from the above where it explicitly outlines 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”.

The intentional parallel drawn between the sale of children and inter-country adoption is highly significant in relation to paper orphans. It indicates that where consent is improperly induced for the purpose of inter-country adoption, child selling is taking place. It infers that

the action of the sale of the child begins with an intermediary, or what is commonly termed as a 'recruiter', 'improperly inducing consent' of the parents. The method of 'improperly inducing consent' may take the form of monetary compensation, to either the parents or the recruiter. In either circumstance, the focus is on whether the consent is induced improperly notwithstanding that money may have changed hands. Thus, even where parents have willingly sent their children with recruiters, if their consent has been improperly obtained, it may be established that child selling has occurred.

David Smolin (2004, 302) writes that:

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 the original consent was illicit, then under the OP-CRC the sale of a child (and child trafficking) has occurred.

Notwithstanding the adoption reference, this statement similarly applies to the situation of paper orphans. Here, Smolin seems to align child selling with child trafficking, inferring that child selling and child trafficking may be equated under the OP-CRC. He suggests earlier in the same article that, "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"(281).

Like Smolin, Anne Gallagher (2010, 68) 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. Thus, it can be considered that a child displaced from their biological family on false grounds with the end point of inter-country adoption might satisfy the requirements of 'child selling'. However, even where the sale of children can be proven, illegal adoption will not be characterized as trafficking under the Protocol unless exploitative intent can be shown (Gallagher and McAdam 2015, 39).

This can be contrasted with the situation where a child does not move beyond the orphanage and their orphanhood is commodified, thus entrenching them in an ongoing state of institutionalisation. This institutionalisation could 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 elicit donations and sponsorship. In more disturbing cases, some orphanage operators have deliberately withheld food and proper living environments in an effort to keep paper orphans looking malnourished to attract more sympathy from visitors and volunteers and thereby being more profitable commodities (Guiney 2012, 9). If the defining element separating child selling from child trafficking is exploitation at the end point, then the argument follows that the latter situation could be considered child trafficking if exploitation can according to the Trafficking Protocol be illustrated.

Having analysed the child rights instruments relating to the trafficking of children, it is now necessary to turn to an analysis of the Trafficking Protocol as the most comprehensive international instrument pertaining to human trafficking.

THE TRAFFICKING PROTOCOL

The universally accepted international definition of trafficking is found in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. While the Preamble acknowledges that “there is no universal instrument that addresses all aspects of trafficking in persons”, the Protocol provides the most comprehensive definition of trafficking in international law. The Trafficking Protocol was adopted in November 2000 by the United Nations General Assembly and came into force on the 26 December 2003 following ratification by forty countries (Dottridge 2004, 42).

The Trafficking Protocol is one of three protocols that supplement the United Nations Convention against Transnational Organised Crime (UNTOC) which came into force in September 2003, the others being the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol against the Illicit Manufacturing and Trafficking in Firearms. The Trafficking Protocol and the Protocol against the Smuggling of Migrants by Land, Sea and Air particularly relate to each other by drawing a distinction between migrants who provide 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 (Dottridge 2004, 41).

A *A transnational requirement?*

Article 1 of the Trafficking Protocol outlines that it is supplementary to the UNTOC and thus they should be interpreted together. As a supplementary document, there is an initial implication that the definition of trafficking only applies to transnational cases (Gallagher 2001, 983) and those involving organized criminal groups which is defined in article 2(a) as ‘a structured group of three or more persons’. This interpretation highlights an immediate issue with application of the Trafficking Protocol to the situation of paper orphans, as the children at the point of this examination have usually not been moved transnationally. Thus, upon initial analysis, the situation of paper orphans could be construed as not meeting the definition of trafficking as it is not transnational in nature.

If the Trafficking Protocol imposes a transnational requirement, the argument for inter-country adoption as trafficking is an easier fit, as the nature of the action of adoption across nation borders is implicit. However, if we only consider that the act of child trafficking occurs at the point of inter-country adoption once the child is moved internationally, then we neglect to interrogate the prior actions and movements that situate the child in the position of availability for inter-country adoption. It is this initial movement that this paper is concerned with, the movement from the family to the orphanage where the child

becomes available for a second movement which meets the accepted definition of trafficking according to the Trafficking Protocol, or is held at the orphanage for the purpose of garnering funding under the guise of aid.

Indeed, the perception that exploitation occurring within the borders of only one nation without the involvement of outside parties would be considered beyond the scope of the Trafficking Protocol has been criticised (Hathaway 2008, 11). Anne Gallagher (2009, 49) clarifies the transnational requirement as requiring interstate *cooperation* rather than a requirement that the exploitation or trafficking itself be transnational. She notes that the Trafficking Protocol contains a general obligation on nation states to criminalise “exploitative practices taking place within as well as between national borders” (812) and that the “central and mandatory obligation of all State Parties to the Trafficking Protocol is to criminalize trafficking in their domestic legal systems”(813). In fact, Gallagher notes that she is not aware of any evidence of a domestic statute limiting the definition or the scope of criminalization to only transnational instances, which indicates that the intention of the drafters has been fully realized (813). Based on this, it is clear that the transnational element was not intended to limit the scope of the Trafficking Protocol in only addressing the act of transnational trafficking, and therefore we can utilise the definition as having a universal applicability to both domestic and international actions thereby potentially including the situation of paper orphans.

B *Defining Trafficking*

Antonela Arhin defines child trafficking as “the profit-oriented and exploitative purpose of moving a child away from home into an isolated environment, with no support mechanisms, further exacerbating child’s proneness to manipulation” (2012, 162). This definition encapsulates the situation of paper orphans. However to meet the legal definition, we must look to the definition provided in the Trafficking Protocol.

Trafficking in persons is defined in article 3(a) of the Trafficking Protocol 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.

Where children are involved, their special vulnerability is acknowledged through the removal of the means criteria as outlined 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) states that a 'Child shall mean any person under eighteen years of age'.

In applying the Trafficking Protocol to the situation of paper orphans, the movement of the child from the family to the orphanage establishes that these children have been recruited, transported or transferred by recruiters or agents as required by article 3(a). The orphanage then 'receives' the child.

The difficulty in making an argument for these children being considered as trafficked under the Trafficking Protocol lies in establishing that paper orphans are experiencing an included form of exploitation.

CONSTRUCTING EXPLOITATION: "AT A MINIMUM"

Exploitation is defined within the article 3(a) of the Trafficking Protocol as including 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. It must be noted that the trafficking act itself is not exploitation, but rather the end point of the trafficking must be for the purpose of exploitation (Allain 2012, 355).

In the case of paper orphans, the exploitation experienced may not prima facie meet the definition as provided as an act of prostitution, sexual exploitation, forced labour, slavery, servitude or the removal of organs. However, the explicit inclusion of prostitution, sexual exploitation, forced labour, slavery, servitude or the removal of organs does not exclude all other forms of exploitation, but rather provides a starting point for ratifying nations to legislate from.

The Trafficking Protocol indicates that the three identified motivations/exploitation types that are explicitly mentioned are "at a minimum". Jean Allain (2012, 350) argues that the manner in which the provision is laid out is "not definitional but categorical" and that rather than seeking to establish what constitutes exploitation, the manner in which the sentence begins, "speaks to adding various new type of exploitative behaviour" (350). This allows member states to insert other types of exploitation into their domestic legislation.

Gallagher (2009, 814) notes that the definition "encompasses both the bringing of a person into exploitation as well as the maintenance of that person in a situation of exploitation". There is a clear argument that where children are being constructed falsely as orphans, and kept in, or moved on from, orphanages for the purpose of profit, they are being exploited.

However, whilst the purpose of exploitation is to be construed "at a minimum", ongoing ramifications exist where a strict interpretation is utilized. Allain (2012) states that "trafficking is the international supply chain into exploitation, it is not a type of exploitation" (355). Therefore, the movement of children is not sufficient to categorise paper orphans as

trafficked. Unless paper orphans experience one of the included forms of exploitation, they are not considered as trafficked under international law and therefore not included in official research or reporting on trafficking that is limited by the scope of the definition in article 3.

Consequently, it is important to establish whether the situation of paper orphans can be considered as one of the specific included exploitative purposes referred to in the Trafficking Protocol. This is the aim of the next part of this article which initially will address whether the included forms of exploitation (those of sexual exploitation, forced labour, slavery or servitude) can apply in the context of paper orphans. Secondly, it will examine whether a legal argument can be made to move beyond the exclusionary concept to a broader definition of exploitation which could encompass the ongoing institutionalisation of paper orphans.

A *Exploitation of the prostitution of others or other forms of sexual exploitation*

It can certainly be established that in some cases of paper orphaning, sexual exploitation is present. For example, in Nepal in December 2014, Rabin Shrestha, former head of adoptions at Bal Mandir, an orphanage in Kathmandu, and Rabin Chalise, a former student who ran a Youth Club at the same institution, were convicted for sexually exploitation of the minors in their care. The case outlined how Shrestha and Chalise molested three of the children over a period of time. This was supported by medical evidence that the three victims had been raped. The children's testimonies stated that they and two young boys were sexually abused and raped every Saturday under the guise of Shrestha and Chalise throwing 'birthday' and 'wedding' parties at the orphanage (Nelson and Giri 2014). As part of the parties, 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 the two young boys, both four years old. In the evenings, the girls' testimony said that Shrestha would take them to dance bars to groom them to be prostitutes (Nelson and Giri 2014).

This case is not unusual. There have been several cases linking orphanages to sexual exploitation internationally. In 2007, Henk Molhuysen, the founder of Hamro Jiven orphanage in Kathmandu, Nepal, was arrested for molesting 48 of the children in his care (Dutch News 2007). As details of the case came to light, it was revealed that Molhuysen had previously been convicted of child rape in Spain and sentenced to 8 years incarceration in 1995. He was deported back to the Netherlands to serve his sentence. Subsequently, in 2003, he opened the Hamro Jiven orphanage in Kathmandu. Volunteers were invited to stay at the orphanage providing a source of revenue. Given his history and his subsequent actions, 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.

The Sunaulo Pravati Bal Griha orphanage subsequently assumed responsibility for the 48 children from Hamro Jiven, and continued to receive funding from a Dutch donor. In an ironic and 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 (Poudel 2011). Thus, the children had experienced two facets of exploitation.

In another case in Haiti, eleven children were sexually abused by missionary volunteers at the 'In the Father's Hand Children's Home' (McVay 2011); given that it is estimated that 80% of the 30,000 children in orphanages in Haiti have at least one parent that can care for them (Brennan 2012), it can be argued that these children were also being constructed as orphans for the purpose of exploitation – both financial (through inter-country adoption) and sexual.

It cannot be said that sexual exploitation exists in every situation of paper orphaning. However, clear examples do exist. In these cases, the purpose of exploitation can be illustrated and paper orphans experiencing this type of exploitation should be regarded as victims of child trafficking.

Where sexual exploitation does not exist, and to establish a firmer foundation for paper orphaning as child trafficking more generally, we can now narrow our scope to investigating the other provided forms of exploitation in the Trafficking Protocol – that is, forced labour or services on one hand, or slavery or practices similar to slavery and servitude on the other hand. As the end point for paper orphans, the outcome of this examination results in a clear argument for defining the movement of children for the purpose of institutionalisation for profit as a form of child trafficking.

B *Forced Labour or Services*

Forced labour or services is not defined in the Trafficking Protocol. Therefore we must turn to accepted definitions provided in other international instruments to aid interpretation. Forced labour or services in relation to children is defined by the International Labour Organisation Worst Forms of Child Labour Convention 1999 (hereinafter "Child Labour Convention").¹⁰

Article 3(a) of the Child Labour Convention states that the term 'the worst forms of child labour' comprises:

all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory

¹⁰ International Labour Organisation Worst Forms of Child Labour Convention 1999 (No. 182) (hereinafter "Child Labour Convention") was adopted on 17 June 1999 by the General Conference of the International Labour Organization at its eighty-seventh session. Entry into force on 19 November 2000, in accordance with article 10.

recruitment of children for use in armed conflict.

In applying this article, we can instantly strike out 'debt bondage and serfdom' as it does not fit the situation of paper orphans.

The use of children for begging has been considered forced labour in some contexts (Delap 2009, 6). Where orphanages are run as profit making businesses, utilising children in their care for profiteering through child sponsorship or forcing the children to dance for visitors (UNICEF 2011, 27), paper orphans might be regarded as beggars legitimized through the guardianship of the orphanage and forced or compulsory labour might apply.

To move beyond an argument for forced labour, the phrase in article 3(a) that elicits the most interest is, "all forms of slavery or practices similar to slavery, such as the sale and trafficking of children".

The direct correlation of slavery or practices similar to slavery with the sale and trafficking of children is the first indication that there is a substantive link between these concepts (Gallagher 2009, 189). This leads us to investigate the definition of slavery or practices similar to slavery, as a type of the "worst form of child labour" for the purposes of the Child Labour Convention, and also included as a form of exploitation satisfying the requirements of the Trafficking Protocol.

FROM TRAFFICKED TO SLAVERY - PAPER ORPHANS AS SLAVES?

An analysis of whether paper orphans can be characterised as slaves offers us two insights. The first is that slavery fulfils the exploitation requirement of the Trafficking Protocol, and thus we could consider paper orphans as trafficked. However, paper orphans do not necessarily need to be classed as slaves to achieve this, as the lesser element of servitude, or practices or institutions similar to slavery, also fulfils this criteria, which will be examined later in this paper.

The second insight is the legal space that paper orphans might occupy. Paper orphans as slaves offers a new conception of the plight of these children. It allows us to conceptualise beyond a construction of orphanhood or trafficked, and to identify the orphanage operators as slaveholders. This construction is not without reservation, as certainly paper orphans may not fit with our usual understanding of slavery and the expansion of the concept of slavery by scholar-activists has been critiqued (Gallagher 2009, 798-799). However, it would be remiss to reject an analysis of paper orphans as slaves on the pretense that prima facie the situation does not concur with our usual conception of slavery. Instead, it is important to thoroughly analyse whether paper orphans can be legally regarded as slaves at a definitional level in international law.

Of course, the argument for paper orphans being considered legally as slaves automatically precludes any children who have been adopted internationally. This argument concerns

those children who remain institutionalised in orphanages for profit motives. In this legal construction, the orphanage operators, are cast as the slaveholders, and the paper orphans as slaves.

In order to discuss how the legal construction of slavery might assist our understanding of the legal position of paper orphans, it is necessary to outline the definitions we are examining. In article 1(1) of the Slavery Convention, the international definition of slavery is “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.” Viscount Cecil of Chelwood, the rapporteur who helped develop the draft of the 1926 Slavery Convention and proposed the original text of the definition found in article 1(1), placed emphasis on the “abolition of slavery in all its forms” (Allain 2008, 245). In his Report on the Draft Convention to the Assembly of the League of Nations, he specifically included “the enslaving of persons disguised as the adoption of children and the acquisition of girls by purchase disguised as payment of dowry, etc” (Viscount Cecil of Chelwood 1925, 2). He further stated that “such similar conditions approach very close to and are, in fact, a form of slavery, but are not usually included in the simple term slavery”(2). This is indicative of the drafters’ intention to cast the interpretive net wider than the traditional proprietary form of slavery, and potentially encapsulate the paper orphans situation.

The definition of slavery found in Article 7(a) of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery extends the 1926 definition, providing that “Slavery means, as defined in the Slavery Convention of 1926, the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, and ‘slave’ means a person in such a condition or status.”

A *A technical argument for slavery*

A discrete argument lies in the technicality of applying the elements of the definition of slavery as provided for in article 1(1) of the 1926 Convention and article 7(a) of the 1956 Supplementary Convention.

(a) the status or condition

In examining these elements, Allain (2008, 259) relies on The Oxford English Dictionary to define the terms ‘status’ and ‘condition’ and intimates that the difference lies in their relational context to the law. Status refers to de jure slavery, or slavery as a status in law (259). Whereas, condition, he argues, is relational to de facto slavery, which is not recognised by law, but is slavery in fact (259). He notes with interest the juxtaposition of the terms configured by the essential conjunction of ‘or’ (259). That is, the status of slavery or

the condition of slavery, the inclusion of both seeking to encompass all forms of slavery whether de jure or de facto.

For paper orphans, this applies in a two-fold manner. The first manner of application is in referring to 'status' as a de jure form of slavery. The legal status of orphanhood, albeit fraudulently obtained, creates a potential de jure argument for slavery. This is because in the act of granting orphanhood as a legal status, the state legitimises the paper orphan at law. This legal legitimacy of paper orphanhood can be argued as a formalisation of slavery at law. De jure slavery is constructed as a legal status in the same way that paper orphans are constructed as legal orphans. Therefore, de jure slavery, like a paper orphan, is merely a construction, a veil of law drawn over fact.

The second manner of application is the condition of slavery, or de facto slavery, which can also be attributed to the situation of paper orphans. Where the fraudulent nature of orphanhood is revealed and the legal status of the (paper) orphanhood jeopardised or removed, the de jure form of slavery is crippled. In this instance, the de facto form of slavery, or the condition of slavery, remains.

With both the potential of de jure, status, and de facto, condition, of slavery having applicability, the criteria of 'status or condition' is fulfilled, and we can move to analysing the next element.

(b) powers attaching to

'Powers attaching to ownership' exhibits the factual circumstance of not a right, but an ability by slaveholders to exert the powers that attach to ownership in relation to slaves.

Control is enacted through paper orphans being denied access to their families to maintain the pretence of being an orphan, being forced to lie to donors regarding their orphan status, or even being forced to dance for orphanage visitors in order to encourage donations (UNICEF 2011, 27). These activities could be construed as the right to possess being actualised.

Further, these activities are formalised through the guardianship of paper orphans being entrusted to orphanages, albeit often on fraudulent grounds. In this context, the guardianship papers could thus be regarded as a materialisation of the ownership. In fact, the fraudulent nature of the formalisation process points further to an enactment of the right to possess as it is representative of the commodification of paper orphanhood.

Thus the right to use is best seen in the active control of the right to possess, that is, the forced dancing, begging or lying regarding orphanhood.

The commodification of the paper orphan has been well documented in inter-country adoption literature (Smolin 2004, 302). However, where inter-country adoption differs is

once again in the end point. There is no argument to be made for inter-country adoption being akin to slavery in a general sense. What the commentary on inter-country adoption offers us in this respect is the prospect of disposal of the asset, meaning that it is possible that the paper orphan can be disposed of by the orphanage for a sum of money. Outright transfer to another of the asset is another hallmark of ownership and provides an illustration of how guardianship in the context of paper orphans could be regarded as the enactment of ownership.

Orphanhood becomes the commodity, and the creation of the orphan through fraudulent documentation of legal guardianship is akin to legal ownership. The trafficking of the child is critical in this instance, as the payment for the child initiates a process of commodification. The paper orphan becomes a tradeable commodity bought and sold by orphanages as product to utilise to garner funding.

In the context of contemporary child slavery, Dottridge notes that where young children are removed from their family environment, they become dependent upon their guardians for the provision of basic needs (2011, 259). Dottridge argues that at this point, *de jure* ownership is irrelevant as young children have no option but to remain with the people who control them, or have *de facto* ownership of them (259). He states the 'use of violence to exert control over a child and place associated limits placed on a child's choice of activity and freedom of movement' weighs more heavily in distinguishing whether a situation is child slavery or another form of exploitation (266).

In his examination of contemporary child slavery, Dottridge makes a reference that could apply to the situation of paper orphans. He states that even though money may change hands when "parents hand a child to intermediaries to take to a city or other destination, the rarely constitutes the actual sale, even a temporary one, of the child" (257). Dottridge's tendency to view the slaveholder, or exploiter, as benevolent carries through to inter-country adoption where he states that there are cases of "significant numbers of babies" being sold for inter-country adoption through "irregular transactions" and intermediaries taking advantage of "poor, young mothers who are willing to give away a baby" (256). He brushes aside the irregular transactions and instead focuses on "the desperation of childless couples from rich countries" with the endpoint being that "most such babies are genuinely adopted into a loving family rather than exploited" (257). This perspective subverts the exploitation experienced by both the birth family and the child in these situations. Hence, one might assume that Dottridge's perspective on paper orphans would be that whilst their families were deceived and the children are fraudulently created as orphans to garner funding, the exploitative acts are outweighed by the potential of the child being housed and educated.

While Dottridge's commentary is thorough, his insistence that the definition of child slavery should be based on the degree of agency that children possess in their lives, or whether they are subordinate to the wishes of another person is specious (258). A social construction

of children having the ability to enact their own agency belies the true condition that many children find themselves in, whether they be held in slavery or not, and it certainly does not correlate with the legal interpretation of what constitutes slavery. To recall, article 1(1) of the 1926 Slavery Convention only requires “any or all of the powers attaching to ownership” be exercised.

B *Paper Orphans as Slaves: The case of Mukti Nepal*

The case of Mukti Orphanage, examined by Lovera and Punaks (2015) in their “Reintegration Guidelines for Trafficked and Displaced Children Living in Institutions” illustrates the applicability of the definition of slavery to paper orphans. Mukti Nepal was established in 2004 by Goma Luitel, a Nepali woman who advertised for foreign volunteers to pay to assist at the home (Pathak 2011). Luitel secured a Spanish organisation to cover all running costs in 2010, but still continued to fundraise with help from other volunteers in part through the creation of a fraudulent video showing her method in rescuing vulnerable children from the street. The children 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 there were not true orphans to the volunteers.

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 in hospital, however Luitel convinced authorities that she was not to blame (Punaks 2015, 8). 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 organization. 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 denied access to their families by Luitel for the express purpose of maintaining the orphanage façade and collecting donations.¹¹

As Luitel had control of the children’s movement and physical environment, and was exerting psychological control over them through the constant use of violence and threat of harm to families. The constant threat to families could also be viewed as exerting exclusivity over the children. The children were also subject to abject cruel treatment and abuse, and this could be construed as a measure taken to prevent and deter escape. The duration was eight years, which is a significant amount of time, particularly in relation to children. The

¹¹ In 2012, Luitel was convicted of torturing 16 children under section 7 of the Children’s Act 1992, Nepal. She was sentenced to one month’s incarceration, a fine of NPR 5,000 (approximately AUD\$70) and compensation of NPR10,000 (AUD\$120) restitution to be paid directly to the victims. However, Luitel never paid the fines, restitution or served her sentence.

majority of the elements of enslavement have clear applicability in the Mukti Nepal case and therefore the children in the care of Mukti Orphanage could be considered slaves.

C *A Practice Similar to Slavery*

In 1956, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Supplementary Convention) was adopted outlining the institutions and practices similar to slavery. Article 1(d) of the Supplementary Convention provides that:

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 another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour (1956, art.1(d)).

is similar to slavery. This also aligns with the understanding that servitude is human exploitation falling short of slavery (Gallagher 2010, 182).

In order to apply this, it is necessary to examine each part of the Article in detail. The first part of the article

any institution or practice

is identifiable in this instance as the paper orphaning process. As outlined earlier in this paper, this is a clearly identifiable practice that is happening globally.

The second part of the article states:

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 another person.

Both of these circumstances occur in paper orphaning – in some cases, parents voluntarily take their children to orphanages not realising that they may be relinquishing their parental rights, in other cases, 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.

The third part of the Article:

whether for reward or not

is also applicable in this situation. It is clearly documented that some parents have paid recruiters to take their children believing that they will be attending school and will return to their home eventually (Save the Children 2010, 5). However, as already illustrated earlier, this does not always happen. In some situations, recruiters may pay the family for the child. This part merely indicates that reward is not a necessary condition for the exploitation.

Allain asserts that the Supplementary Convention becomes operational where a recruiter acting as a guardian during the transfer of a child from their parents knows that the child will be exploited (Allain 2012, 350). Thus, we can safely assume this element is satisfied.

The final part of the article reads,

with a view to the exploitation of the child or young person or of his labour.

This is the critical phrase in the article as the framing indicates a division between exploitation of the child and of the child's labour. This means that the exploitation of labour is not a mandatory requirement for the child to experience exploitation. In fact, the exploitation of the child irrespective of whether their labour has been exploited is sufficient to fulfil the article and classify this process as a practice similar to slavery. This applies perfectly to the situation of paper orphans where the exploitation Thus, the exploitation that paper orphans experience can be classified, at the very least, as a practice similar to slavery.

If paper orphaning is considered a practice similar to slavery, then it can be categorised as exploitation for the purposes of the Trafficking Protocol meaning that the definition of trafficking is fulfilled. This vein of argument would result in paper orphaning being successfully defined as a form of child trafficking.

BEYOND THE MINIMUM: THE ORPHANAGE AS A SPACE OF EXPLOITATION

If we move beyond the exclusionary concepts that a strict interpretation entails, and interpret the words, 'at a minimum' to provide a starting point for ratifying nations to expand upon, we can see two different elements of exploitation that occur in the creation of a paper orphan. First, the exploitation of the birth family; and second the exploitation of the child. In relation to inter-country adoption, Smolin notes that exploitation initially occurs in relation to the family who has lost their child (2007, 10) which can be analogized to the situation of paper orphans. Smolin argues that the term "exploitation" is dependent upon "complex intuitions regarding market transactions, human dignity, commodification, childhood and sexuality" (13). He further argues that it is difficult to consider adoption as a form of exploitation as we have been conditioned to consider adoption as inherently good rather than as a form of exploitation (13).

To state the obvious, children who become available for inter-country adoption are commonly adopted from orphanages. The true purpose of the movement of the child in these circumstances is likely not known by the family at the time of the child's removal. In that exploitative moment, the agent or recruiter is engaged in persuading the family that the child will experience a better life outside the family unit. For example, as previously detailed in the case of Humla in Nepal, many families have paid agents to take their children, believing that they are going to attend school in Kathmandu (Save the Children 2010, 5). Thus, the first moment of exploitation is experienced by the birth family of the

child and the second moment of exploitation is experienced by the child. This occurs when the child's legal status is falsely recorded as parentless in documentation and whose embodiment of orphanhood becomes a livelihood for others. There are many reports of children in Cambodian orphanages forced to perform traditional dance shows for tourists to garner donations, or sent begging in the evenings at tourist hot spots (UNICEF 2011, 27). In Nepal, one journalist noted, "It is 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" (Pattison 2014).

Thus, the exploitation is twofold, the deceptive separation of children from their families and the commodification of paper orphanhood. The exploitation is then further enacted in a myriad of ways, for example through the act of selling time with orphans through orphanage tourism programs and the use of orphans' photographs and stories to elicit donations and sponsorship. In more disturbing cases, some orphanage operators have deliberately withheld food and proper living environments in an effort to keep paper orphans looking malnourished to attract more sympathy from visitors and volunteers and thereby being more profitable commodities (Guiney 2012, 13).

CONCLUSION

The situation of paper orphans has not previously been analysed from an international law perspective as a form of child trafficking due to a perceived failure to meet the requirement of exploitation. The intention of this article was to lay a foundation argument regarding the displacement of paper orphans under international law. It is my hope that other research builds upon this foundation and that the plight of paper orphans is recognised and ameliorated. The ramifications of such a categorisation, whilst beyond the scope of this article, would result in the situation of paper orphans being documented as a form of trafficking in governmental reporting, such as the Trafficking in Persons Report, and would have a pragmatic impact for the practical situation of paper orphans through enabling access to remedies.

There is a clear argument to distinguish Smolin's description of child laundering with respect to intercountry adoption and the situation of paper orphans. Whilst child laundering may describe the pre-intercountry adoption process, it can be easily distinguished from the situation of paper orphans who are held in ongoing institutionalisation.

This article articulates a case for paper orphans to be categorised as victims of child trafficking under international law. Through examination of the Convention on the Rights of the Child and the Optional Protocol on the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, it is apparent that there are close correlations between the notions of child selling and trafficking. Whilst we could consider paper orphans as being victims of child selling, it would be remiss of us not to investigate

whether trafficking could also apply. The categorisation of trafficking allows paper orphans to access more appropriate and specific remedies to redress their situation.

To make a case for paper orphans to be considered as trafficked under international law, this article investigated whether the situation of paper orphans could be considered as meeting the specific included exploitative purposes referred to in the Trafficking Protocol. A thorough analysis of the exploitation “as a minimum” requirement illustrated that paper orphans can be considered as experiencing included forms of exploitation such as forced labour through begging, sexual exploitation, slavery and practices similar to slavery.

The case for paper orphans being regarded as slaves is a technical legal argument which does not coincide with our usual understanding of slavery. However, upon application of the definition of slavery, there is clear applicability. Perhaps of more weight is the direct correlation between a practice similar to slavery, found in Article 1(d) of the Supplementary Convention, and the element of exploitation required in the Trafficking Protocol. The clear applicability of Article 1(d) to the situation of paper orphans fulfils the requirement of exploitation for the Trafficking Protocol and crystallises the argument for paper orphaning to be considered as a form of child trafficking under international law.

Beyond the exclusionary concept of the “at a minimum” requirement, the article argued for a broader definition of exploitation to be utilised for child trafficking which could encompass the ongoing institutionalisation of paper orphans. The practical ramifications of one child held in a brothel being considered a victim of trafficking, while a child institutionalised in an orphanage is not considered trafficked, seems to be a contradiction in interpretation, particularly where both children are removed from their families for the ultimate purpose of profit. For paper orphans presently suffering in ongoing institutionalisation, it is an unacceptable interpretation which effectively denies them access to remedies or justice.

In conclusion, there is a clear legal argument for the situation of paper orphans to be considered as trafficking under international law and as such, the paper orphans should be considered victims of child trafficking.

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