

Enhancing the identification, prosecution and prevention of orphanage trafficking through the legal frameworks of Nepal, Uganda and Cambodia

SUMMARY OF FINDINGS



UBS Optimus
Foundation



Background to the study

Orphanage trafficking refers to the process of children being transferred or recruited into orphanages for the purpose of exploitation and profit. Whilst much work is being done on strengthening child protection systems and deinstitutionalisation, orphanage trafficking as a driver of institutionalisation remains under-researched despite being an issue that heavily impacts upon the ongoing institutionalisation of children. In some countries, an 'orphanage industry' has even emerged due to the high levels of tourist, volunteer and foreign donor interest in assisting orphaned children.

Study aims

As the first project of its kind in the world, this study assesses the legal, policy and procedural frameworks in both domestic and international law across Nepal, Uganda and Cambodia, where orphanage trafficking continues to undermine domestic efforts to stem the overuse of institutionalisation of children. Little is known about how governments, law enforcement and court systems respond to orphanage trafficking. Without this information, it is difficult to develop and implement prevention and prosecution programs aimed at combating the issue. The project addresses this gap in understanding by investigating and mapping current legal responses to orphanage trafficking in the three jurisdictions of Nepal, Uganda and Cambodia.

The project is unique in that it seeks to understand both the existing legal framework of orphanage trafficking as well as how law enforcement, government and courts have responded to, and are responding to, the issue. The outcomes of the project provide recommendations for enhancing the identification, prosecution and prevention of orphanage trafficking, and develop evidence-based sensitisation activities designed to increase the rates of prosecution.

The research project also enriches other current UBS Optimus Foundation-funded grants in the areas of deinstitutionalisation and child protection systems, by providing tools and strategies that can be

implemented to address the issue of orphanage trafficking as a driver of child institutionalisation. Research shows that orphanages proliferate in times of disaster which makes the project particularly timely given the pandemic of COVID19. In Nepal, Uganda, and Cambodia, we expect to see a rise in orphanage trafficking as unscrupulous operators seek to take advantage of family desperation to keep children safe by offering a perceived haven of boarding school or an orphanage. This project establishes the existing legal responses to orphanage trafficking in order to leverage the stakeholder’s ability to respond and protect children as they move through this crisis.

The selection of case countries

This study focuses on three case countries: Nepal, Uganda and Cambodia. There is extensive documentation of the recruitment of children into orphanages for exploitation and profit over the past decade in all of these countries; however, law enforcement and government have been slow to respond. Our selection of these case countries also aligns our study with sites in which UBS OF already has existing care reform and anti-trafficking programs. As such, in Nepal we worked across the districts of Kathmandu, Pokhara and Chitwan; in Uganda, we worked across the districts of Kampala, Fort Portal and Jinja; and in Cambodia, we worked across the districts of Phnom Penh, Battambang and Siem Reap.

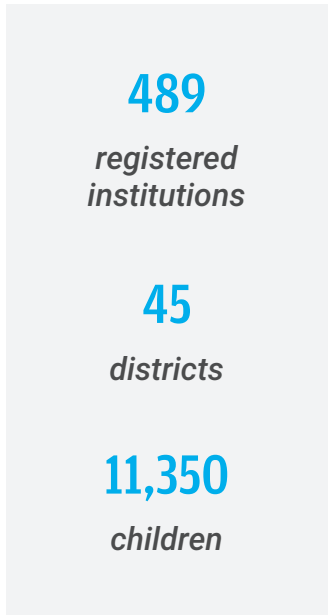
Summary of findings

NEPAL

As of 2020, there were 489 registered institutions in Nepal operating in 45 districts, housing 11,350 children. The overwhelming majority of these care facilities – some 90 percent – are located in the top five tourist areas (the three districts of Kathmandu, Pokhara and Chitwan). More than half are based in Kathmandu. There are also many unregistered institutions. The National Child Rights Council rescued around 80 children from various care facilities in the first six months of 2020, finding that the children were ‘in an abject state of negligence’.

The *Criminal Code*, which came into force in 2018, provides the general principles of criminal justice in Nepal. *The Human Trafficking and Transportation (Control) Act 2007* (Nepal) and the *Act Relating to Children* are other specific laws that also address trafficking in persons, including children. Nepal has also ratified the *United Nations Trafficking Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* (the Palermo Protocol).

While the components of orphanage trafficking – unlawful removal of a minor from their guardian, forcibly declaring or registering them as an orphan, and keeping them in a children’s home – do not come within the definition of ‘human trafficking’, the unlawful removal of a minor from guardianship for the purpose of exploitation falls within the definition of ‘human transportation’ under the *Human Trafficking and Transportation Act*. Once a child is in an institution, the act of keeping them there could then be deemed to be violence against children under the *Act Relating to*



of keeping them there could then be deemed to be violence against children under the *Act Relating to Children*. Forcibly declaring or registering a child as an orphan and keeping a child in a care facility, except in accordance with the law, are also illegal under this legislation. Therefore, while neither the *Human Trafficking and Transportation Act* nor the *Act Relating to Children* explicitly define orphanage trafficking as a crime, they do criminalise its components, such as separating children from their family, transporting them from their place of origin, bringing them into orphanages and exploiting them for profit, and falsifying their identity.

However, inconsistencies exist between each of the relevant legislative frameworks, which creates challenges in terms of effective investigation and prosecution. In addition, there are gaps in the government's monitoring of these institutions – Local Child Rights Committees are expected to conduct inspections of care facilities; however, these committees have not been assembled in all municipalities. Local authorities also often lack the capacity to pursue potential orphanage trafficking matters, and there appears to be a lack of clarity and consistency in the application of the various policies, guidelines and procedures, where they exist.

UGANDA

As of November 2019, Uganda had over 140 registered government-approved homes with most of them being non-government organisations running care facilities for orphans and other vulnerable children. It has also been reported that there are a large number of unapproved homes or care facilities that have made the exploitation of children rampant. One estimate suggests that more than 50,000 children are housed in orphanages in Uganda today. The majority of institutions are located in urbanized districts like Wakiso, Kampala, Jinja, and Mukono. Reports exist of an organised recruitment strategy to move children from rural to urban areas for the purpose of institutionalisation, with the prospect of financial gain through arranging the legal guardianship and adoption of these children.

140+
*registered
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50,000
children

There are a number of laws that are relevant to orphanage trafficking in Uganda, including the Constitution of the Republic of Uganda, the *Penal Code Act*, the *Children Act*, and the *Prevention of Trafficking in Persons* (which represents the domestic implementation of the Palermo Protocol). The latter in particular has a number of provisions that could be used to pursue prosecution for orphanage tracking, with many of the features of orphanage trafficking identified as aggravating factors (including where the offender is an organisation engaged in the activities of organising, directing or protecting the vulnerable persons in society; and where adoption, guardianship, fostering and other orders in relation to children is undertaken for the purpose of exploitation).

However, there are practical challenges to pursuing legal remedies. Inspectors are legally mandated to conduct bi-annual inspections of care facilities, though a lack of funding and other resources have often created obstacles to effective monitoring and oversight. A further complication is collusion between orphanages, law practitioners and judicial officers to facilitate irregular adoptions, which can be very lucrative for agents and traffickers. Cases have recently come to light where High Court judges were complicit in trafficking by improperly approving court orders of guardianship and adoption. Therefore, while there are some potentially effective anti-orphanage trafficking legislative provisions in place in Uganda, there are also a number of

challenges to effectively prosecuting orphanage trafficking as a result of a lack of resources, a lack of capacity, and in some cases, outright corruption.

CAMBODIA

In the 1990s, fraudulent inter-country adoption was widespread, and orphanages were a transit destination where trafficked infants would be transferred, harboured and posited as orphans eligible for adoption. Since then, various laws have been passed to stamp out fraudulent international adoptions. However, orphanage trafficking has re-emerged in recent years, sometimes for the purpose of sexual or labour exploitation or, more commonly, in order to make a profit from orphanage tourism and foreign donations. Cases where orphanage trafficking has been reported, or could have been reasonably suspected, have often been dismissed as irregular admission into institutions and dealt with under child protection regulations. This in part reflects the Cambodian criminal justice system's response to trafficking, which is characterised by insufficient investment in investigation, low levels of prosecution, a tendency to prosecute for lesser offences, and a lack of willingness to address trafficking cases involving corruption amongst government officials.



Other, more specific, challenges impact upon the identification and prosecution of orphanage trafficking. Firstly, orphanage trafficking is a relatively new issue, and Cambodia's law enforcement and child protection officials do not yet fully understand its constituent elements and indicators, or how Cambodia's trafficking offences apply. Secondly, orphanage trafficking occurs under the guise of child protection, with offenders purporting to provide 'care' to orphaned, at-risk or vulnerable children. The association of orphanages with charity and altruism makes it less likely that officials coming in contact with potential child victims in institutions will detect and correctly interpret risk indicators for child trafficking and take appropriate action. A third and related factor is the historical lack of regulation over care facilities and the processes for admitting children into alternative care. Irregular and even unlawful admission of children into institutions has been commonplace and normalised, and is therefore often ignored and rarely investigated.

There are therefore legislative provisions under which orphanage trafficking could theoretically be prosecuted in Cambodia. However, in practice, successful prosecution is contingent upon the relevant actors detecting, referring and investigating potential trafficking situations. More work is required to increase the level of awareness of orphanage trafficking amongst mandated child protection authorities and those working in the criminal justice system.

Next steps

This project has been pivotal in establishing the potential legal avenues for prosecuting orphanage trafficking in three jurisdictions, Nepal, Uganda and Cambodia. Our findings in all jurisdictions were that greater sensitisation of how orphanage trafficking occurs and what legal options are available to remedy and disrupt the practice in each country is required. Having established the legal framework, Stage 2 of this project aims to conduct field work to establish how the framework currently works in context in order to create sensitisation and training initiatives to enhance both the general awareness of orphanage trafficking amongst stakeholders and to form a prosecutorial strategy.

Increasing sensitisation and awareness of orphanage trafficking across child protection, anti-trafficking and law enforcement, including sensitisation on the indicators, modalities and elements at law, is critical to make further progress on combating this practice. Further, to enhance the potential prosecution of orphanage trafficking, special attention must be paid to the detection, identification and referral of potential cases and victims of orphanage trafficking. This can be achieved by working with stakeholders across government and civil society to amend guidelines on victim identification/referral and bolstering aspects of alternative care inspection procedures, to incorporate indicators of orphanage trafficking and appropriate referral mechanisms.

Concurrently, training and capacity building for law enforcement and the judiciary to enhance investigation and prosecution of cases of orphanage trafficking and related offences (those critical to curbing the orphanage industry) is required. Stage 2 of this project will conduct an examination of previous case law and case files to identify how potential orphanage trafficking cases were identified and pursued by civil society, law enforcement, prosecutors and judges. This will include an examination of the types (if any) of charges that were brought, the offences that were prosecuted, and the extent to which the cross-referral mechanisms from child protection to law enforcement are being used where criminal conduct is first detected through the child protection system.

The UBS Optimus Foundation and Griffith University Law Futures Centre funded project is catalytic in transforming responses to orphanage trafficking across the civil society, government, law enforcement and prosecution in three countries and will provide a blueprint for assessing responses to orphanage trafficking in others.