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# THE LEGAL FRAMEWORK OF ORPHANAGE TRAFFICKING IN CAMBODIA, NEPAL AND UGANDA:

## Enhancing Identification, Prosecution & Prevention

### SUMMARY REPORT

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This report is part of a study funded by UBS Optimus Foundation and the Law Futures Centre, Griffith University, entitled 'Enhancing the identification, prosecution and prevention of orphanage trafficking through the legal frameworks of Nepal, Uganda and Cambodia: Stage 1'.

**Disclaimer**

The opinions expressed in this publication are those of the authors. They do not purport to reflect the opinions or views of Griffith University, Better Care Network or UBS Optimus Foundation.

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# Introduction

Orphanage trafficking involves the recruitment and/or transfer of children to residential care institutions for a purpose of exploitation and profit. It typically takes place in lower- and middle-income countries where child protection services systems are highly privatised, under-regulated, and primarily funded by overseas sources. In such circumstances, residential care is used prolifically and inappropriately as a response to child vulnerability, including a lack of access to education.

The trafficking of children into orphanages has been linked to fraudulent intercountry adoptions in many countries. However, many states have since implemented the provisions of the Hague Convention aimed at eradicating fraudulent international adoptions, and as such, more recent years have seen the trafficking of children into orphanages re-emerge in an adapted form. Commonly referred to as 'orphanage trafficking', this type of child trafficking is not for the primary purpose of intercountry adoption, and orphanages are no longer a transit destination. Rather, children are trafficked into institutions where they are harboured long-term for the purpose of exploitation (such as sexual or labour exploitation) or, more commonly, for profit-making purposes whilst in 'care'.

Profiting from the institutionalisation of children typically involves the marketing of children as 'orphans' or as abandoned children found in dire situations and in need of support, care, love and attention. Most of these children have parents. In some cases, fraudulent documentation, such as birth certificates, are issued to disassociate children from their biological parents and support claims of orphanhood or abandonment. Donors are encouraged to ameliorate the child's situation by donating to the orphanage and/or visiting institutions by way of orphanage tourism. These donors are, however, unaware that orphanage tourism and foreign funding are primary drivers of orphanage trafficking.

This study assesses and maps 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 effective prevention and prosecution programs aimed at combating the issue. The project addresses this gap in understanding. This report represents a summary of the overall findings for each country, which are found in separate respective reports. This report should be read in conjunction with those reports for further detailed analysis.

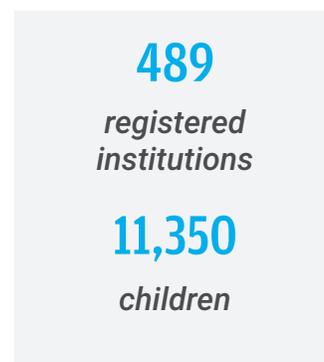
# Background

The inappropriate institutionalisation of children and orphanage trafficking is an issue in many countries, including across all three of the case study countries considered in this study: Cambodia, Nepal and Uganda.

**CAMBODIA** saw a 75% increase in the number of institutions in operation between 2010 and 2015,<sup>1</sup> primarily driven by orphanage tourism and foreign funding. In recent years, the Cambodian government has moved to decrease the number of children and youth living in residential care. As of 2020, there were 9578 children living in in 360 residential care centres.<sup>2</sup> Media reports and records dating back to 2013 note the ‘signs of human trafficking’ in conjunction with the closure of abusive orphanages in Phnom Penh and Siem Reap.<sup>3</sup> Allegations of human trafficking were made; however trafficking charges were never filed. In 2016, the Global Slavery Index identified orphanage tourism in Cambodia as driving the demand for the sale and institutionalisation of children. Specific forms of exploitation were noted as occurring in institutions, all related to the purpose of profit making. This included forcing children to work on farms, perform for tourists and hand out flyers in the streets to raise funds.<sup>4</sup>



In **NEPAL**, as of 2019, there were 533 functional child care homes in 46 of 77 districts, housing 15,565 children.<sup>5</sup> In 2020, the number of functional child care homes dropped to 489 in 45 districts, housing 11,350 children<sup>6</sup> reflecting the government’s commitment to reducing the number of children in care. The National Child Rights Council (NCRC) rescued around 80 children from various childcare homes in the first six months of 2020, finding that the children were ‘in an abject state of negligence’.<sup>7</sup> The NCRC also found that the majority of the children living in child care homes have families.<sup>8</sup> According



<sup>1</sup> Cambodian Ministry of Social Affairs, *With the Best Intentions: A Study of Attitudes Towards Residential Care in Cambodia* (2011) <[https://www.thinkchildsafe.org/thinkbeforevisiting/resources/Study\\_Attitudes\\_towards\\_RC.pdf](https://www.thinkchildsafe.org/thinkbeforevisiting/resources/Study_Attitudes_towards_RC.pdf)>.

<sup>2</sup> UNICEF, Cambodia child protection quarterly brief July-September (2020).

<sup>3</sup> USA Today, ‘Cambodia shuts orphanage after reported abuse’, 25 March 2013, <<https://www.usatoday.com/story/news/world/2013/03/25/cambodia-shuts-orphanage-after-reported-abuse/2017279/>>.

<sup>4</sup> Global Slavery Index, 2016, <<https://www.globalslaveryindex.org/resources/downloads/>>, 100.

<sup>5</sup> National Child Rights Council, Nepal. *State of Children in Nepal 2019*, <<http://www.ncrc.gov.np/storage/resources/downloads/2020/May/05/1588671135status%20report%20ENGLISH.pdf>>, ix.

<sup>6</sup> National Child Rights Council, Nepal. *State of Children in Nepal, 2020*, 46.

<sup>7</sup> Shuvam Dhungana, ‘Government rescues hundreds of children every year but does little for their care’, *Kathmandu Post*, 12 January 2020, <<https://tkpo.st/2tb70aH>>

<sup>8</sup> Ibid.

to the NCRC 2020 State of Children Report, monitoring of 216 childcare homes in 12 districts showed that 12 child care homes were in a critical condition while 100 were in satisfactory and 102 were in good condition.<sup>9</sup> There are, however, many unregistered child care homes where standards are likely to be lower.

The 2021 US *Trafficking in Persons Report* indicated that there are more than 11,000 children residing in both registered and non-registered children's homes and orphanages in Nepal.<sup>10</sup> According to that report, in some of those institutions, children were forced into manual labour, begging as well as entertaining visitors to attract donations.<sup>11</sup> There have been cases of fraudulent documents and illegal adoption, as well as instances of sexual violence against children in the orphanage/child care homes in Nepal. Children in these institutions are also vulnerable to abuse by foreign paedophiles due to ineffective regulation in the system.<sup>12</sup>

A 2018 mapping of orphanage tourism providers and destination countries identified **UGANDA** as one of the top five destination countries for orphanage tourism.<sup>13</sup> As of November 2019, Uganda had over 140 registered homes<sup>14</sup> with most of them being non-government organisations running care facilities for orphans and other vulnerable children. This represents a significant increase on the 17 approved homes as of January 2017.<sup>15</sup> There are also a large number of unapproved homes or care facilities that have contributed to the exploitation of children.<sup>16</sup> A 2012 report by the Ministry of Gender, Labour and Social Development in Uganda<sup>17</sup> found that, of the approximately 420 operational children's homes within the country,



<sup>9</sup> National Child Rights Council, *State of Children in Nepal 2020*, <<http://www.ncrc.gov.np/storage/resources/downloads/2021/Jun/28/1624902043SoCiN2020.pdf>>, 50.

<sup>10</sup> United States Department of State, *Trafficking in Persons Report*, 2020.

<sup>11</sup> Ibid.

<sup>12</sup> Nicole Smith, 'Foreign paedophiles prey on Nepal', *The Times*, 23 August 2015, <<https://www.thetimes.co.uk/article/foreign-paedophiles-prey-on-nepal-8vxxqd5wvpv3>>.

<sup>13</sup> BCN, *Orphanage Tourism Research*, 2019.

<sup>14</sup> Ministry of Gender, Labour and Social Development, *Attached List for Approved Homes* (November 2019).

<sup>15</sup> Daily Monitor, 'Most children's homes illegal – official', 3 January 2017, <<https://www.monitor.co.ug/uganda/news/national/most-children-s-homes-illegal-official-1682022>>.

<sup>16</sup> See also E.J. Walakira, I. Dumba-Nyanzi, B. Bukenya (2015) *Child Care Institutions in Selected Districts in Uganda and the Situation of Children in Care: A Baseline Survey Report for the Strong Beginnings Project*, Kampala: Terres des Hommes Netherlands, 7, reporting that most care homes in the study were not registered as approved homes, with the majority registered as non-governmental organisations.

<sup>17</sup> Mark Riley, Ministry of Gender, Labour and Social Development, *Baseline Study: The State of Institutional Care in Uganda*, 2012, <<https://bettercarenetwork.org/sites/default/files/Baseline%20Study-%20The%20state%20of%20Institutional%20Care%20in%20Uganda.pdf>>.

the majority were established through irregular procedures.<sup>18</sup> Many more exist under relative anonymity due to the lack of complete information.<sup>19</sup> The report indicated that there were 12,000 children in institutional care, and conservatively estimated at least an additional 45,000 children in irregularly-established institutions.<sup>20</sup> There have been reports of abuse and exploitation of children living in orphanages and other alternative care facilities, taking diverse forms such as the sexual exploitation of minors, forced marriage and financial exploitation through illegal adoptions.

Therefore, whilst there is evidence that child exploitation is occurring in orphanages, the prosecution of orphanage trafficking and related crimes has proved more elusive. For example, whilst numerous cases of sexual exploitation occurring in residential care institutions in **CAMBODIA** have been prosecuted (often in conjunction with unregistered institutions), there is no known case of the prosecution of orphanage trafficking under Cambodia's trafficking offences. In fact, the 2018 US Department of State's Trafficking in Persons (TiP) Report noted specifically the failure of law enforcement to take appropriate action against 'orphanage directors complicit in child trafficking crimes'.<sup>21</sup> Reported cases where orphanage trafficking was suspected, or could have been reasonably suspected, have often been dismissed as irregular admission into institutions and dealt with under child protection regulation, or at times prosecuted for a constituent element, such as sexual exploitation.<sup>22</sup>

We can see this as well in **NEPAL**, where a handful of high-profile prosecutions have been pursued in relation to physical and sexual violence taking place within orphanages. Foreign volunteers including Ernest Macintosh,<sup>23</sup> Jean-Jacques Hayes,<sup>24</sup> Simon Jasper-MacCarthy,<sup>25</sup> and Geoffrey

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<sup>18</sup> Research shows that admission procedures of most care homes do not follow procedures adequate to assess the needs and necessity of placement in an institutional arrangement: see Walakira et al. *Child Care Institutions in Selected Districts in Uganda and the Situation of Children in Care*, 27.

<sup>19</sup> UA 2018 BBC investigation into UK-funded orphanages reported on the neglect, exploitation and abuse perpetrated against children at the hands of staff and paying tourists. See Kate West, 'UK groups fund illegal orphanages in Africa', File on 4, 17 January 2019, <<https://www.bbc.com/news/uk-46890772>>.

<sup>20</sup> Riley (2012) *Baseline Study*.

<sup>21</sup> United States Department of State, Trafficking in Persons Report 2018, <<https://www.state.gov/reports/2018-trafficking-in-persons-report/>>, 125.

<sup>22</sup> See generally United States Department of State, *Trafficking in Persons Reports 2017–2020*.

<sup>23</sup> The Straits Times, 'Nepal convicts Canadian orphanage volunteer of sexual assault of disabled boy, 15', 27 January 2016, <<https://www.straitstimes.com/asia/south-asia/nepal-convicts-canadian-orphanage-volunteer-of-sexual-assault-of-disabled-boy-15>>.

<sup>24</sup> Janakraj Sapkota, 'Under the guise of humanitarian aid, high-profile paedophiles are abusing Nepali children', *Kathmandu Post*, 5 February 2015, <<https://kathmandupost.com/2/2019/11/15/under-the-guise-of-humanitarian-aid-high-profile-paedophiles-are-abusing-nepali-children>>.

<sup>25</sup> Kerry McQueeney, 'Son of YardBirds drummer Jim McCarty jailed for 30 years for sexually abusing children' *Daily Mail UK*, 7 September 2012, <<https://www.dailymail.co.uk/news/article-2199835/Son-Yardbirds-drummer-Jim-McCarty-jailed-30-years-sexually-abusing-children.html>>.

John Prigge,<sup>26</sup> have been prosecuted for sexually abusing children in orphanages in Nepal. Nepalese nationals have also been prosecuted for sexual abuse against minors, including Rabin Shrestha and Rabin Chalise who were sentenced to a 17-year jail term in 2014.<sup>27</sup> Similarly, there have been several cases in which Nepali orphanage directors have physically and sexually abused children in their care.<sup>28</sup> These examples highlight the existence of rampant violation of child rights in institutional care where many cases go unreported, and also demonstrate how there may be a preference for prosecuting constitutive elements of orphanage trafficking over addressing the issue more holistically.

In some cases, a corrupt judicial system can stymie attempts to prosecute orphanage trafficking. In **UGANDA**, for example, two High Court judges, two lawyers and an orphanage were implicated in a lucrative irregular adoption scheme in 2020 that saw children removed from their families and trafficked into orphanages by means of deceit or fraud (usually under the guise of offering the vulnerable children education sponsorships). The children were then offered to foreigners seeking to adopt children from Uganda.<sup>29</sup> Some of the US-citizen perpetrators of the scheme were indicted in the US, while others (who were citizens of Uganda) became subject to US financial sanctions and visa restrictions. It remains unclear if any legal action will be taken domestically in Uganda.

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<sup>26</sup> NK. Arlington, 'Nepal charity work hid predator's sex abuse of children', *Sydney Morning Herald*, 15 November 2010, <<https://www.smh.com.au/national/nsw/nepal-charity-work-hid-predators-sex-abuse-of-children-20101114-17sq2.html>>.

<sup>27</sup> The Kathmandu Post, 'Two jailed for 17 years', 3 December 2014, <<https://kathmandupost.com/miscellaneous/2014/12/03/two-jailed-for-17-years>>.

<sup>28</sup> S. Neupane, 2012, 'Importance of effective regulation in orphanages', Republica, <[http://myrepublica.com/portal/index.php?action=news\\_details&news\\_id=37574](http://myrepublica.com/portal/index.php?action=news_details&news_id=37574)>.

<sup>29</sup> Alice McCool, 'Uganda to US adoption scam: Judges and lawyers sanctioned', *The Guardian*, 19 August 2020, <<https://www.theguardian.com/global-development/2020/aug/18/uganda-to-us-adoption-scam-judges-and-lawyers-sanctioned>>.

# Overview of legal and justice systems

Cambodia, Nepal and Uganda have quite different legal systems. The Cambodian legal system broadly follows the civil law tradition.<sup>30</sup> However, it has been described as a hybrid system that amalgamates three distinct influences: Cambodian customs, the French civil system (due to the period of colonisation), and, more recently, common law (attributed to legal and judicial reforms influenced by foreign aid).<sup>31</sup> There are two main sources of law within the Cambodian system: primary sources – which can be organised in an eight-tier hierarchy of norms<sup>32</sup> – and secondary sources, which include ‘custom, tradition, conscience, equity, judicial decisions, arbitral awards and doctrines’.<sup>33</sup>

Nepal’s legal system is adversarial in nature, and Nepal’s police are assigned the role of investigator, while government attorneys act as prosecutors and judges occupy a neutral role in the trial and adjudication process. The country adopted a new Constitution in 2015, moving from a unitary model of governance to a federal model with federal, provincial, and local levels of government.

In contrast, and as a result of its colonial history, many of Uganda’s laws and legal precedents originate from or are based on the English common law system. Since it declared independence, Uganda’s legal framework is something of a hybrid system, meaning that aspects of the colonial system of governance remain which are supplemented by new laws developed by Acts of Parliament, statutory instruments and other subsidiary legislation, common law precedents and applicable customary law.

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<sup>30</sup> UNODC *Country Review Report of Cambodia*, Review by Togo and Myanmar of the implementation by Cambodia of articles 15–42 of Chapter III. ‘Criminalization and law enforcement’ and articles 44–50 of Chapter IV. ‘International cooperation’ of the United Nations Convention against Corruption for the review cycle 2010–2015 (2015) 2 <<https://uncaccoalition.org/files/Cycle1-Country-Report-Cambodia.pdf>>.

<sup>31</sup> Kong Phallak, ‘Overview of the Cambodian Legal system’, 8.

<sup>32</sup> The highest law is The Constitution, followed by Laws (Chbab), Royal Decrees (Preah Reach Kret), Sub Decrees (Anu-Kret), Ministerial Orders or Proclamations (Prakas), Decisions (Sech Kdei Samrach), Circulars (Sarachor) and Local Regulations or By-Laws (Deika).

<sup>33</sup> Phallak, ‘Overview of the Cambodian Legal system’, 8.

# Overview of laws and offences related to orphanage trafficking

## CAMBODIA

The Law on Suppression of Human Trafficking and Sexual Exploitation is the relevant trafficking framework in Cambodia and is supplemented by Criminal Code offences. The Law on Suppression of Human Trafficking and Sexual Exploitation implements Cambodia's state party obligations to various international treaties pertaining to human trafficking, but extends upon them to include a section on sexual offences, which are prosecutable irrespective of whether they occur in connection with or separately to human trafficking offences.<sup>34</sup> It criminalises the full range of conduct that falls under the constituent elements of trafficking (act, means and exploitative purpose), though it does not include provisions for victim support.

There are seven offences contained in Chapter 2 of this law that include specific clauses on minors. In most offences, these specific clauses relate only to punishment, with harsher penalties ascribed to offences against minors. Article 8, however, provides for a specific definition of unlawful removal in the case of minors, and this provision therefore has implications for many human trafficking offences, where unlawful removal is an element.

The offences in the Law on Suppression of Human Trafficking and Sexual Exploitation that could be used to prosecute perpetrators of orphanage trafficking include Article 10 (Unlawful Removal with Purpose), Article 15 (The Act of Buying, Selling or Exchanging of Human Being with Purpose), Article 17 (Transportation with Purpose), and Article 19 (Receipt of a Person with Purpose). Relatedly, Article 9 relates to the unlawful removal of a minor which, though it could not be used to bring charges of child trafficking, could be used to prosecute the active recruitment and removal of children from their parents and legal guardians for admission into orphanages where it occurs without legal power or justification.

A particularly promising aspect of this legislation is that it recognises profit making as a purpose. This potentially enhances the ability to prosecute orphanage trafficking as it removes the requirement to prove the intent or actual subjection of children to exploitative conditions in the institution. Regardless of the conditions or standards of living or treatment in the institution, provided the purpose for the child's unlawful removal or receipt and admission into the institution is profit making and not based on mandated assessment procedures to determine necessity and suitability, trafficking offences can theoretically be brought against perpetrators.

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<sup>34</sup>Law on Suppression of Human Trafficking 2008 Explanatory Note, 13.

This is an important measure for two key reasons. Firstly, it recognises the commodification of children as exploitative enough to warrant prosecution where it is coupled with unlawful removal, unlawful recruitment, or the sale of a child. Secondly, it removes the need to rely on other forms of exploitation to prosecute trafficking, which in some cases occur as a consequence of the commodification of children rather than the express purpose. This is particularly the case with sexual exploitation of children trafficked into institutions, which often occurs due to lax child protection measures, including low standards of care, lack of supervision and allowing visitors and volunteers unfettered access to children as a part of orphanage tourism and other means of profiteering.

Whilst the Law on Suppression of Human Trafficking and Sexual Exploitation is the specialist legislation for human trafficking-related offences, there are a number of ancillary offences contained within the Criminal Code that could be relevant to an overall prosecutorial strategy for orphanage trafficking. These include offences against minors and the family, and include those that criminalise prohibited actions under related non-criminal public laws such as the Intercountry Adoption Law and executive regulations pertaining to child protection.

Cambodia's existing legal and policy framework therefore contains sufficient provisions to differentiate between lawful child protection interventions and instances of orphanage trafficking and to pursue prosecution under a range of trafficking offences, where orphanage trafficking has occurred. The existence of these offences in Cambodia represents a promising legislative development. In practice, however, successful prosecution is as contingent upon the degree to which actors responsible for detection, referral and investigation are sensitised as it is to the presence of relevant laws. At present, based upon current levels of awareness of orphanage trafficking, this limits the opportunities to pursue legal action against perpetrators of orphanage trafficking.

## NEPAL

There are four main laws in Nepal that are relevant to orphanage trafficking. They are the Constitution of Nepal, the *Criminal Code 2017* (and associated *Criminal Procedure Code 2017*), the *Act Relating to Children 2018*, and the *Human Trafficking and Transportation Act 2007*.

The *Human Trafficking and Transportation Act* prohibits the buying or selling of a person as a form of human trafficking, criminalising both the buyer and seller.<sup>35</sup> As an exceptional provision which differs from the *Criminal Procedure Code*, this Act places the burden of proof on the accused and provides that the court shall keep the accused in custody during the prosecution of all but one of the acts defined as 'human trafficking'.<sup>36</sup> Other key provisions of the Act are that the victim has a right to separate legal representation and a right to ask permission for a translator or interpreter.<sup>37</sup>

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<sup>35</sup> Ibid s 3.

<sup>36</sup> Ibid ss 8-9.

<sup>37</sup> Ibid ss 11-12.

It has been reported that cases of orphanage trafficking have been prosecuted in the lower courts of Nepal as trafficking and/or transportation (though the decisions are not publicly available).<sup>38</sup> However, applying a technical interpretation of the Act, particularly as it relates to human trafficking, orphanage trafficking poses a challenge because the elements of both trafficking and transportation under the Act are vastly different to those found in international law. To meet the definition of trafficking under the Act, the elements involved in orphanage trafficking would need to include either the sale or purchase of a person for any purpose; the 'use' of someone into prostitution, with or without any benefit; the extraction of human organs (except where allowed by law); or to 'go in for prostitution'.<sup>39</sup> The most likely application would be the sale or purchase of a person under section 4(1)(a); however, this would only include where money has been exchanged for the child being transferred to the orphanage. Under international law, this would be likely regarded as 'sale of children' rather than child trafficking, as international law does not require purchase or sale to have taken place for trafficking to occur. Under Nepali law, it would need to be proven that the child had been sold to the orphanage to prove trafficking had occurred.

To meet the requirements of the offence of transportation,<sup>40</sup> a child would need to be moved over a state border into the orphanage and a sale would need to take place. The unlawful removal of a minor from guardianship for the purpose of exploitation can also fall within the definition of 'human transportation' under the *Human Trafficking and Transportation Act*. However, to meet the definition of exploitation, a child transported to an orphanage where there has been inducement, fear, threat, or coercion aimed at the guardian or custodian would then need to have proven that they were kept as a slave in order for the offence of transportation to be proven.

In addition to this Act, the *Criminal Code 2017* also contains provisions that criminalise human trafficking and exploitation of persons, as does the *Act Relating to Children* – which holds, for example, that once a child is in a children's home, the act of keeping them there could be deemed to be violence against children.

Nepal has therefore enacted laws guaranteeing the rights of child and laws against human trafficking and has separate laws and mechanisms for both child protection and human trafficking. Given the above context, however, orphanage trafficking is currently most likely to be successfully prosecuted under the offence of human transportation in Nepal. In practice, however, institutional care is widely used, and there is little evidence of these laws being applied, or of orphanage trafficking being prosecuted. It is therefore vital that effective social and legal frameworks are established and implemented in order to protect children from exploitation and violence. It is hoped that the incoming harmonisation of domestic anti-trafficking law and policy with international law will include provision for orphanage trafficking to be prosecuted as a form of child trafficking.

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<sup>38</sup>Bhrikuti Rai, 'Selling Sympathy: Beware of fake orphanages that exploit children and fleece bleeding-heart donors', *Nepali Times*, 11 April 2014 <<http://archive.nepalitimes.com/article/nation/fake-orphanage-exploit-children-in-nepal,1277>>.

<sup>39</sup>*Human Trafficking and Transportation Act* s 4(1).

<sup>40</sup>*Ibid* s 4(2).

## UGANDA

There are a four key laws in Uganda that are relevant to orphanage trafficking. They are the Constitution, the *Prevention of Trafficking in Persons Act*, the *Children Act* (Cap. 59) as amended in 2016, and the *Penal Code* (Cap.120). While the Constitution does not directly address the trafficking of persons, human trafficking – including orphanage trafficking – often violates the rights and freedoms contained therein. Under Chapter 4 – ‘Human Rights and Freedoms’ – the rights of children are specifically protected, with particular emphasis placed on the protection of children from exploitation, the right to be raised by their families, and the right to be protected against arbitrary separation.

The *Prevention of Trafficking in Persons Act 2009* was enacted to domesticate the Palermo Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children. It creates offences, sets out the steps for the prosecution and punishment of offenders, prevents trafficking in persons, and protects victims of trafficking in persons. The Act criminalises trafficking in persons and expands the definition of trafficking in persons to include recruiting, hiring, maintaining, confining, transporting, transferring, harbouring, or receiving a person or facilitating 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.<sup>41</sup>

There are provisions in this Act that are particularly promising for the prosecution of child trafficking (and therefore orphanage trafficking); these are found in Part II Trafficking in Persons. This includes the offence of aggravated trafficking in section 4, and the offence of trafficking in children as prescribed in section 5. Section 4(b) specifically includes the use of child care orders, including but not limited to for adoption, guardianship and fostering, to facilitate exploitation. In doing so, the Act recognises situations where care orders are misappropriated to facilitate the transfer of a child, under the guise of ‘legality’ into an alternative care setting for the purpose of exploitation as a form of aggravated trafficking.

The *Children Act*<sup>42</sup> also considers child sexual exploitation to be a form of trafficking but has significantly weaker penalties than the *Prevention of Trafficking in Persons Act*. It criminalises the removal of a child from an approved home<sup>43</sup> without reasonable cause<sup>44</sup> and unlawful removal of a child from the lawful custody of another person, institution or organization.<sup>45</sup> More broadly, the Act offers guiding principles for determining matters relating to children, including situations in which it is appropriate to terminate parental rights, the arrangements for guardianship of an orphaned, abandoned or legally relinquished child, and the placement of a child in residential care.

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<sup>41</sup> *Prevention of Trafficking in Persons Act 2009* s 3..

<sup>42</sup> See s 8A as amended.

<sup>43</sup> An approved home is defined by s 1(a) of the *Children Act* as a government or non-governmental home approved to provide substitute family care for a child and includes babies’ homes and children’s homes. This includes orphanages, children’s shelters and other alternative care homes.

<sup>44</sup> *Children Act* s 61.

<sup>45</sup> *Ibid* s 73.

This Act establishes the legal criteria for the removal of children from their family, establishing that removals must be in accordance with legal powers, grounds, and procedures. The Act holds that any person who contravenes this, which includes the child's right to live with their family, commits an offence. As such, the act of violating a child's right to live with their family, including through unlawful removal and irregular admission into residential care, is considered an offence under the Act and one that carries a penalty of a fine and/or imprisonment. In the Ugandan framework, there are no circumstances under which an unapproved children's home can operate and/or receive children legally. Furthermore, it provides for an offence that can be used to prosecute operators of unapproved residential care facilities.

Taken together, Uganda's legal framework does in theory allow for orphanage traffickers to be prosecuted under the legal framework. However, in practice, weak oversight of institutions and limited resources for identifying and investigating potential instances of orphanage trafficking mean that prosecution is rare.

# Detecting and reporting cases of orphanage trafficking

There are a number of challenges relating to the identification and prosecution of orphanage trafficking. First, orphanage trafficking is a relatively new issue, and many law enforcement and child protection officials do not yet fully understand its constituent elements and indicators, or how relevant offences (where they exist) apply. Families and children, despite holding concerns regarding the circumstances of whereabouts of children, may not realise acts perpetrated against them constitute a criminal offence. Even when child welfare reports are made about children who have been transported to residential care institutions, the gravity of the situation may not be well articulated by those making reports or perceived by those receiving them. As such, they may not be acted upon appropriately, meaning that cases may be overlooked, misinterpreted, or incorrectly categorised. It is likely that this reduces the opportunity for cases to be referred for investigation and progressed to prosecution.

Second, orphanage trafficking occurs under the guise of a child protection intervention, with offenders purporting to provide 'care' to orphaned, at risk or vulnerable children. The association of orphanages with child protection, charity and altruism makes it less likely that officials encountering potential child victims in institutions will detect and correctly interpret risk indicators for child trafficking and take appropriate action.

Third, many of the institutions implicated in orphanage trafficking are unregistered, operating outside of the monitoring system of government in the context of a historical lack of regulation over residential care facilities. They are therefore not subject to regular inspections which could uncover more nuanced indicators and trigger reporting to law enforcement. This, coupled with the characteristically closed environment of residential care institutions, reduces opportunities for detection, referral and for victim identification and rescue, as well as for prosecution.

Overall, this study found insufficient investment in investigation, low levels of prosecution, a tendency to prosecute for lesser offences (if at all) and a lack of willingness to address trafficking cases. In some cases, including Cambodia and Uganda, a complicating factor was corruption, including amongst government officials and judges, who have reportedly used their position to facilitate illegal intercountry adoptions for profit.<sup>46</sup>

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<sup>46</sup> See, on Cambodia, Trafficking in Persons Reports 2017–2020; see also McCool, 'Uganda to US adoption scam'.

# Ways forward

Orphanage trafficking is a complex crime which is further complicated by its masquerade as a child protection intervention. The blurring of lines between 'protection' and 'exploitation' make orphanage trafficking a particularly challenging crime to identify, prove and prosecute.

As this study demonstrates, there are important legal, regulatory, and policy measures that are critical to the prevention of orphanage trafficking. These include the strengthening of legal safeguards around guardianship and adoption orders and the development of procedures for the closure of residential care facilities that are unapproved or operating below minimum standards. These measures, if implemented effectively, could severely curtail the ability of traffickers and the orphanage industry to operate and profit from the institutionalisation of children, and thus reduce the incentives for orphanage trafficking. For these important safeguards to be prioritised and effectively and consistently implemented, however, human and financial resource constraints within the social services and child protection sectors need to be addressed.

As the Cambodian case study in particular demonstrates, the development of legal mechanisms by which orphanage trafficking might be prosecuted is a promising development but not, in and of itself, a 'fix' to the issue. Successful prosecution is as contingent upon the degree to which actors responsible for detection, referral and investigation are sensitised as it is to the presence of relevant laws.

Significant efforts are required to increase the level of awareness of orphanage trafficking amongst mandated child protection authorities and actors who enact and enforce the criminal justice system. The identification and integration of orphanage trafficking indicators into the alternative care inspectorate system, victim identification and referral mechanisms would be an important first step to improving detection and encouraging referrals across the child protection and criminal justice systems. Without concerted awareness raising and cooperation across these two systems, the prosecution of orphanage trafficking remains difficult as issues of victim identification, referral to the criminal justice system and offence classification will continue to impede and circumvent legal action.

# Conclusion

This project has established the potential legal avenues for prosecuting orphanage trafficking in three jurisdictions: Cambodia, Nepal, and Uganda. Across all three jurisdictions, we found a need for greater sensitisation of how orphanage trafficking occurs and what legal options are available to remedy and disrupt the practice in each country.

Having established the legal framework, Stage 2 of this project aims to conduct field work to establish how the framework currently works in context to create sensitisation and training initiatives to enhance both the general awareness of orphanage trafficking amongst stakeholders and to form a prosecutorial strategy. 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 of charges that were brought (if any), 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.

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.

# Appendix 1: Relevant legal and policy frameworks

## RELEVANT INTERNATIONAL LEGAL FRAMEWORKS

|   | CAMBODIA                | NEPAL                    | UGANDA  |
|---|-------------------------|--------------------------|---|
| Convention on the Rights of the Child   | 15 October 1992 (rat.)  | 14 September 1990 (rat.) | August 1990 (ent.)<br>Amendment: June 1997 (ent.) |
| CRC Optional Protocol on the Sale of Children and Child Prostitution and Pornography  | 30 May 2002 (rat.)      | 8 September 2000 (rat.)  | November 2001 (ent.)                              |
| CRC Optional Protocol to the Convention on the Right of the Child on Involvement in Armed Conflict                            | 16 July 2004 (rat.)     | 3 January 2007 (rat.)    | May 2002 (ent.)                                   |
| United Nations Convention Against Transnational Organized Crime   | 12 December 2005 (rat.) | 23 December 2011 (rat.)  | December 2000 (rat.)<br>March 2005 (ent.)         |
| UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children                              | 2 July 2007 (rat.)      | 16 June 2020 (acc.)      | December 2000 (rat.)                              |
| ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour | 14 March 2006 (rat.)    | 3 January 2002 (rat.)    | June 2001 (ent.)                                  |
| Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993                          | 1 August 2007 (rat.)    | Signed but not ratified  | n/a   |
| Convention Concerning Forced or Compulsory Labour 1932  | 24 February 1969        | 3 January 2002           | June 1963 (rat.)                                  |

## RELEVANT INTERNATIONAL LEGAL FRAMEWORKS

|                                  | CAMBODIA   | NEPAL   | UGANDA  |
|----------------------------------|--|---|---|
| Regional trafficking conventions | ASEAN Convention Against Trafficking in Persons, Especially Women and Children | SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution | <ul style="list-style-type: none"> <li>African Charter on Human and Peoples' Rights (Banjul Charter) 1986</li> <li>African Charter on the Rights and Welfare of the Child 1990</li> </ul> |

## RELEVANT DOMESTIC LEGISLATION

|  | CAMBODIA   | NEPAL   | UGANDA  |
|--|--|---|---|
| <b>Constitution</b>                              | The Constitution of the Kingdom of Cambodia (1993)   | The Constitution of Nepal (2015)  | The Constitution of the Republic of Uganda (1995) |
| <b>Human trafficking and sexual exploitation</b> | Law on the Suppression of Human Trafficking and Sexual Exploitation (2008)   | Human Trafficking and Transportation (Control) Act (2007)   | Prevention of Trafficking in Persons Act (2009)   |
| <b>Criminal law</b>                              | <ul style="list-style-type: none"> <li>Criminal Code of the Kingdom of Cambodia (2009)</li> <li>Code of Criminal Procedure (2007)</li> </ul> | The Crime Victim Protection Act (2018)  | The Penal Code Act (1950)                         |
| <b>Intercountry adoption</b>                     | Law on Intercountry Adoption (2009)  | Country Code (Muluki Ain)   | The Children Act (1997) (amended 2016)            |
| <b>Family law</b>                                | Law on Marriage and Family (1989)  |   |   |
| <b>Children</b>                                  |  | <ul style="list-style-type: none"> <li>The Act Relating to Children (2018)</li> <li>Child Labour (Prohibition and Regulation) Act (2000)</li> </ul> | The Children Act (1997) (amended 2016)            |
| <b>Tourism</b>                                   | Law on Tourism (2009)  |   |   |
| <b>Civil provisions</b>                          | Civil Code of Cambodia (2007)  | Civil Code (2017)   |   |

## RELEVANT REGULATIONS

|  | CAMBODIA   | NEPAL | UGANDA   |
|--|--|-------|--|
| <b>Residential care institutions</b>         | <ul style="list-style-type: none"> <li>Sub Decree 119 on the Management of Residential Care Centres</li> <li>Sub Decree 34 MoSVY on transfer of functions of RCIS</li> </ul> |       | Children's Approved Homes Rules No. 52 of 2013 |
| <b>Governmental administrative functions</b> | Sub Decree 184 on Functions and Structure of District Administrations  |       |  |

|                                       | CAMBODIA | NEPAL   | UGANDA   |
|---------------------------------------|----------|---|--|
| Trafficking                           |          | Human Trafficking and Transportation (Control) Rules (2008) | Prevention of Trafficking in Persons Regulations |
| Governmental administrative functions |          | Child Labour (Prohibition and Regulation Rules) (2006)      |  |

## OTHER RELEVANT PROVISIONS, POLICIES AND PROCEDURES

|                                       | CAMBODIA   | NEPAL   | UGANDA   |
|---------------------------------------|--|---|--|
| Alternative care for children         | Prakas 2280 MoSVY Procedures to Implement the Policy on Alternative Care for Children  | <ul style="list-style-type: none"> <li>Procedure on Management of Childcare Home (2018)</li> <li>Procedure on Donation for Childcare Home Established for Protection of Disabled Children (2020)</li> </ul>   |  |
| Inter-country adoption                | <ul style="list-style-type: none"> <li>Joint Prakas on the Determination of Expenses, Fees and Contributions for Inter-Country Adoptions</li> <li>Prakas on the Procedures to Authorize Intercountry Adoption Agencies (2014)</li> </ul> | <ul style="list-style-type: none"> <li>Terms, Conditions and Procedures for Adoption of Nepalese Children by Foreign Citizens, 2065 (2008)</li> <li>Terms and Procedures for Adoption of Nepalese Children by Foreign Citizen (2nd Amendment), 2067 (2011)</li> </ul> |  |
| Governmental administrative functions | Prakas 33 MoSVY on the Establishment and Functioning of the Department of Social Services, Veterans Affairs and Youth Rehabilitation   |   | <ul style="list-style-type: none"> <li>National Action Plan for the Prevention of Trafficking in Persons in Uganda (2019)</li> <li>National Referral Guidelines for the Prevention of Trafficking in Persons in Uganda (2019)</li> </ul> |

|          | CAMBODIA | NEPAL   | UGANDA  |
|----------|----------|---|---|
| Children |          | <ul style="list-style-type: none"> <li>• Procedure on the Child Helpline Nepal 1098 (2019/2020)</li> <li>• Procedure on Searching children No. 104 (2019/2020)</li> <li>• Procedure on Protection Children via Economic Assistance (2019/2020)</li> <li>• Street Children Rescue, Protection and Management Guideline (2019/2020)</li> <li>• Procedure on Expenses Regarding Management of Street Children (2020)</li> <li>• Guideline on Reinstatement of Disabled Children in Society (2011)</li> </ul> | <ul style="list-style-type: none"> <li>• Orphans and Vulnerable Children Statistical Report (2017–2018)</li> <li>• National Child Labour Policy (2006)</li> </ul> |