Part I

Orphanage Tourism, Modern Slavery and the Convention on the Rights of the Child

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1 Orphanage Tourism and the Convention on the Rights of the Child

Hannah Reid
Lawyer, Auckland, New Zealand

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[T]he child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding…

(CRC, preamble)

1.1   Introduction

I was a university student when I travelled to Cambodia to volunteer in 2013, and again in 2014. Like many students, I wanted to 'give back' while I travelled and was genuinely motivated to help others in any way that I could. In 2013, I volunteered as an English teacher in Siem Reap, Cambodia. In 2014, I signed up for a two-month 'Working with NGOs' programme in Cambodia through one of the world's leading volunteer trip providers, International Volunteer HQ. In the first few days of my 2014 trip, I heard about fellow volunteers visiting for just two weeks and being left alone to care for dozens of vulnerable children in orphanages, with many of the volunteers busily uploading photographs to social media of themselves holding babies and partially-clothed infants. Volunteers also invited me to watch children from the orphanages perform 'charity concerts' in the evenings. I left the two-month 'Working with NGOs' programme after just one week, with ignited concerns that this kind of short-term, unskilled volunteering

could be causing harm, particularly to the vulnerable children involved. When I returned to my home in New Zealand, I began to research orphanage tourism, sustainable development and children's rights protected under international law.

In the growing body of literature examining orphanage tourism and its adverse affects on institutionalized children, Articles of the United Nations Convention on the Rights of the Child (CRC) are seldom mentioned. A comprehensive analysis of how and the extent to which orphanage tourism undermines the rights contained in the CRC is needed, particularly given the increasing advocacy and intensification of awareness about the harms of orphanage tourism. This chapter provides an overview of that analysis, offering a foundation from which orphanage tourism can be discussed and critiqued from an international human rights law-based standpoint.

In this chapter, it is argued that the CRC is a useful lens through which to view the adverse effects of orphanage tourism. The rights contained in the CRC and the *Guidelines for the Alternative Care of Children* (the *Guidelines*) are comprehensive and provide a clear blueprint for the care and protection of children. While the Committee on the Rights of the Child (Committee) has expressed concern regarding the increasing institutionalization of children and in particular regarding the wellbeing of children in orphanages, the Committee has not yet directed its comments or

concerns towards States responsible for both the facilitation of orphanage tourism and consequently the growing numbers of orphanages. Linking children's rights, the CRC, orphanage tourism and States' obligations is an important first step towards strengthening the rights of children in need of care and protection.

The first section of this chapter provides an introduction to the contents of the CRC and the second section explains what orphanage tourism is. The third section considers how orphanage tourism interacts with the rights relating to family environment and alternative care contained in the CRC as well as the *Guidelines*. Moreover, the extent and nature of how orphanage tourism incentivizes the unnecessary institutionalization of children in breach of their rights codified in the CRC is outlined. The fourth section applies CRC Articles on general wellbeing to the circumstances of institutionalized children, particularly children affected by orphanage tourism. Importantly, this section shows the extent to which orphanage tourism undermines fundamental rights contained in the CRC relating to a child's development and overall wellbeing. The fifth and final section considers how the CRC can be utilized to combat orphanage tourism. The report *Hidden in Plain Sight* (Commonwealth of Australia, 2017) was produced following the Australian government's inquiry into establishing a Modern Slavery Act in Australia and sets a precedent that other States should follow. The Australian government has set a benchmark for how other States should investigate and acknowledge the ways in which they facilitate or aid orphanage tourism. To comply fully with their obligations under the CRC, States should follow Australia's footsteps in recognizing that orphanage tourism undermines and violates children's rights. What is more, it is only once States acknowledge those connections and take steps to regulate orphanage tourism that children's rights can be fully protected.

1.2   The United Nations CRC

The CRC was the first international treaty delineating children's rights. Adopted by the United Nations on 20 November 1989, it comprehensively set out the protections afforded to children and the obligations placed on States to ensure that children and young people enjoy these protections. The CRC sets standards for the treatment of children and young people up to the age of 18. It sets, as Detrick states, 'a benchmark against which all future claims for evolution will and must be answered' (1999, p. 721).

The provisions of the CRC elevated children, through the lens of international human rights law, to individuals holding not only fundamental human rights, but also special rights owing to the differences between children, young people and adults. The CRC is anchored in the principle that parents have the primary responsibility for their child's upbringing and that the role of the State is primarily to support parents and families. Infringing upon this principle can only be on the basis of the best interests of the child and any such infringement must be a measure of last resort and comes with a multitude of legal requirements and safeguards. The CRC also contains provisions relating to the implementation of its provisions and the dissemination of its principles, obligating States to make the provisions of the CRC 'widely known'. States are required to undertake 'all appropriate legislative, administrative and other measures for the implementation of the rights recognized' in the CRC.

The CRC establishes a Committee, called the Committee on the Rights of the Child, made up of 18 independent experts. This Committee monitors and reports on the implementation of the CRC by individual States. It does this by receiving periodic reports from States and commenting on those reports by issuing documents called 'Concluding Observations'. The Committee also provides assistance in the interpretation of the CRC by issuing 'General Comments' on particular aspects of the CRC. These General Comments clarify how the CRC is to be interpreted and implemented.

Notably, the CRC has had nearly universal ratification. Currently, 196 States have ratified the CRC, with Somalia, the USA and South Sudan being the only States that have not. The key entitlements the CRC provides for children, summarized as child survival, child development, child protection and child participation, are for all children irrespective of origin (Muntarbhorn, 2017, p. 19). The Committee acknowledged, in its 1994 report on its fifth session, that the 'family', to which so much importance

is attached under the CRC, can come in many forms and reflect 'different family structures arising from various cultural patterns and emerging familial relationships'. In this sense, the CRC envisages diverse forms of families and its provisions are applicable to the wide range of cultures found in the 196 States that have ratified the CRC.

The CRC is a comprehensive blueprint for children's rights. It sets goals and standards that States sign up to and States' obligations are monitored by the Committee. Given the near-universal ratification, the CRC is a significant international legal instrument and its provisions should be examined more closely in the context of orphanage tourism, a phenomenon featuring vulnerable children at its core.

1.3 Orphanage Tourism

1.3.1 What is an orphanage?

This chapter uses the terms 'orphanage', 'residential care facility' and 'institution' interchangeably as all of these terms are used in the literature on alternative care and orphanage tourism. It should be noted that children in orphanages are not necessarily orphans. An orphan is a child who has lost one or both parents. Article 29(c)(iv) of the UN *Guidelines* defines 'residential care' as 'care provided in any non-family-based group setting, such as places of safety for emergency care, transit centres in emergency situations, and other short- and long-term residential care facilities, including group homes'. Save the Children has defined residential care as 'a group living arrangement for children in which care is provided by remunerated adults who would not be regarded as traditional carers within the wider society' (International Save the Children Alliance, 2003, p. 1).

1.3.2 What is orphanage tourism?

Orphanage tourism involves tourists visiting and interacting with children in institutionalized care (Johnson, 2014, p. 600). Linda Richter and Amy Norman, in one of the earliest scholastic pieces on the topic, described orphanage

tourism as 'travel to residential care facilities, volunteering for generally short periods of time as caregivers' (2010, p. 217). It is common for tourists to pay a fee to visit and interact with children in orphanages (Johnson, 2014, p. 600). Day trips to orphanages, volunteering in orphanages and watching children from an orphanage perform dances and songs are all forms of orphanage tourism.

Orphanage tourism has become a particularly popular, perhaps the most popular, form of voluntourism. When the author visited Cambodia through voluntourism company International Volunteer HQ in 2015, the majority of volunteers visiting through the company were there to teach or care for children through the 'childcare' programme, which involved volunteering in orphanages. A 2014 study by an international consortium of child protection agencies, the Inter-Agency Initiative, found that out of the 23 organizations in the first two pages of a Google search for 'volunteer abroad', 20 offered childcare and orphanage opportunities (Better Volunteering, Better Care, 2014, p. 11). Although many leading voluntourism companies began phasing out orphanage placements in 2017, there are presently still operators offering orphanage placements and visiting orphanages is still a common occurrence on faith-based group trips, gap years and organized tours.

Voluntourism encompasses a diverse range of forms of volunteering abroad, but it predominantly involves unqualified tourists paying fees, often to travel companies or specialist voluntourism companies, to undertake certain work or tasks in the country they plan on visiting. Tourists see volunteering as a way of 'giving back' while visiting other countries and most, although not all, undertake voluntourism with good intentions. Frequently, tourists undertake fundraising initiatives and donate items to orphanages at the time of their visit or once they have completed their volunteering placement.

The voluntourism market has burgeoned in recent decades, but it is difficult to quantify how much orphanage tourism is occurring given the fragmentation and lack of initiatives toward aggregating data on the phenomenon. An estimated 1.6 million people each year will volunteer while travelling abroad (Tourism Research and Marketing, 2008; Guttentag, 2009) and the market has been characterized as highly competitive

Fig. 1.1. Author volunteering as an English teacher, Cambodia (Reid, 2013).

and unregulated (Goodwin, 2015, p. 45). Voluntourism providers often stress the needs of local communities and encourage volunteers to bring 'happiness' and 'hope' to children in orphanages, who are abused, abandoned, or, as described on the Love Volunteers website, 'come from tremendously difficult and traumatic circumstances' (Love Volunteers, 2019). Quantifying the scale of orphanage tourism and assessing the links to the voluntourism market is inexact and difficult due to the lack of data on residential care facilities and inconsistent definitions of what an 'institution' is comprised of (Rotabi *et al.*, 2017, p. 3). The voluntourism market has expanded in recent decades and orphanage tourism, in its variety of forms, has played a prominent role in that expansion.

1.4 Articles on Family Environment and Alternative Care

A core group of CRC Articles relate to the provision of care by families and by alternative means where the family environment has failed to function in particular ways. The CRC treats a family environment as the preferable and primary environment for children.

1.4.1 Which Articles relate to the family environment and alternative care?

Article 5 provides that States shall respect the responsibilities, rights and duties of parents, or other family-like structures, to provide guidance in a child's exercise of their rights. The term 'family environment', used in other Articles of the CRC is not defined in the CRC but during the final stages of the CRC's preparation it was pointed out that Article 5 formed the relevant provision for what constitutes a 'family environment' (Detrick, 1999, p. 335). The 'family-like structures' listed in Article 5 include members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child. This list of family-like structures shows that the CRC drafters envisaged that extended family and the community could inherit the responsibilities and duties of caring for a child from the child's parents.

Articles 7, 9 and 18 also contain rights relating to the family environment and the primary responsibility of parents. Article 7 provides that children have the right, as far as possible, to know and be cared for by their parents. Article 9 requires States to ensure that children are not separated from their parents against their will, except where competent authorities determine that such separation is necessary for the best interests of the child, such as where a child is abused or neglected. The Article further suggests that such separation may be necessary in situations involving abuse or neglect of a child by the parents. Article 18 contains the principle that both parents have common responsibility for the upbringing and development of the child. Also, the Article provides that States shall render assistance to parents in the performance of this responsibility. A separate but related obligation is contained in Article 39, which provides that States shall take all appropriate measures to promote recovery and reintegration of children who are victims of any form of neglect, exploitation, or abuse, torture or other forms of cruel, inhuman or degrading treatment or punishment, or armed conflicts.

Article 20 is the key provision to examine in the context of orphanage tourism as it expressly deals with the protection to be accorded to individual children deprived of a family environment. Article 20 importantly provides:

1. A child temporarily or permanently deprived of his or her family environment, or in whose best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

The key words in Article 20(3) are 'if necessary'. In the list of alternative care options contained in sub-Article (3), children should only be placed in institutions 'if necessary'. The use of the words 'if necessary' only before the mention of institutions suggests that foster care, *kafalah* and adoption are preferable and that placing children in institutions should be seen as a last resort, should other alternative care options not be possible. There is a clear preference reflected in Article 20 for children to be placed in family-like alternative care settings, as opposed to orphanages.

The reference to 'best interests' in Article 20(1) should be interpreted in light of Article 9, which provides that children should not be separated from their parents against their will, except where separation is necessary, such as where children are being abused or neglected. The steps States must take to implement the rights in Article 20 are not specified, except for the obligation to ensure alternative care for children in accordance with their national laws. The final sentence of Article 20(3), according to the *travaux preparatoires*, was to give some context and suggested factors to be taken into account when assessing the best interests of the child when it comes to their placement in alternative care.

Article 25 provides that where children are placed in alternative forms of care, they have the right to a periodic review of the treatment provided to them and all other circumstances relevant to their placement. The general guidelines for States' periodic reports refers to placements in public as well as private institutions, suggesting that periodic reviews of institutionalised

children must be carried out regardless of the nature of the institution and that the Article captures children in institutions run by non-governmental organizations (NGOs) as well as institutions that are not registered with the government (Detrick, 1999, p. 439).

1.4.2 The development of the *Guidelines*

In 2004, the Committee's Decision No 7 focused on children without parental care. The Decision noted that the number of children separated from their parents was projected to grow. The Committee recommended that the UN Commission on Human Rights establish a working group to prepare guidelines for the protection and alternative care of children without parental care.

In 2005 the Committee convened a 'Day of General Discussion' about children without parental care (CRC/C/153, 2006). The Committee noted that in many States, 'the number of children separated from their parents and placed in alternative care is increasing and at a high level' and 'these placements are not always a measure of last resort and therefore not in the best interests of the child' (CRC/C/153 2006, p. 130). The Committee also questioned whether a 'new paradigm' was needed to replace the reliance on institutions and emphasized that placement into out-of-home care should always be looked at case by case, based on the actual situation of the child (CRC/C/153 2006, p. 131).

To celebrate the twentieth anniversary of the CRC, in 2010 the General Assembly adopted a resolution containing guidelines that set out 'desirable orientations for policy and practice' (A/RES/64/142, 2010). The *Guidelines*, at [2], specifically sought to support efforts to keep children in, or return them to, the care of their family or, failing this, to find another appropriate and permanent solution, and to ensure that the most appropriate alternative care is identified and provided. The *Guidelines* were intended to guide policies and activities of all concerned with child welfare in both the public and private sectors. While recognizing the immediate need for residential care in some circumstances, the *Guidelines* at [23] state that where large institutions remain, 'alternatives should be developed

in the context of an overall deinstitutionalization strategy'.

The *Guidelines* enhance the implementation of the CRC and provide additional obligations on States when it comes to protecting children deprived of parental care. The *Guidelines* provide that it is the responsibility of States to protect children and ensure appropriate alternative care is provided where children are deprived of parental care (at [5]). If children are to be removed from their families, this decision should be made by qualified and trained professionals (at [40]), through a judicial, administrative or other adequate and recognized procedure (at [57]) and should take into account the child's cultural, linguistic and religious background (at [62]). Children should only be removed from their families as a last resort and such removal should be temporary and for the shortest possible duration (at [14]).

Importantly, the *Guidelines* specifically provide that 'financial and material poverty … should never be the only justification for the removal of a child from parental care, for receiving a child into alternative care, or for preventing his/her reintegration' (at [15]). The *Guidelines* provide that States should ensure the right of any child placed in temporary care to thorough review, preferably at least every three months, of the appropriateness and necessity of their placement (at [67]). All alternative care providers should be appropriately qualified (at [73]) and States should prohibit the recruitment and solicitation of children into institutions (at [127]).

1.4.3 The Committee's concerns about the increasing institutionalization of children

States must report periodically to the Committee and the Committee specifically asks that States indicate the measures adopted to ensure monitoring of the situation of a child placed in alternative care. The Committee publishes concluding observations on each State's progress in protecting children's CRC rights and identifies areas that need improvement.

Notably, the Committee has, since around 2005, expressed concern at the number of children being unnecessarily separated from their families and placed in residential care. In 2012 the Committee expressed concern that in Bosnia and Herzegovina, a lack of financial resources was accepted as a reason to separate children from their families and place them in institutional care (CRC/C/BIH/CO/3-4 2012, at [49]). In 2013, the Committee noted its concern that in Armenia, child protection at the local level was 'to a large extent by volunteers without necessary qualifications and training' (CRC/C/ARM/CO/3-4 2013, at [29]), stressing that children should not be placed in institutional care for financial reasons only (at [29] to [32]). As well as expressing concerns at the lack of foster care structures, the over-reliance on institutions and the lack of funding to ensure proper processes are followed, the Committee has expressed concern at the reliance on NGOs in the alternative care space, such as by Rwanda (CRC/C/RWA/CO/3-4 2013, at [39]).

The Committee has expressed concern over the institutionalization of children in States most commonly associated with orphanage tourism. In Africa, Uganda and Ghana are orphanage tourism destinations. In 2005, the Committee asked Uganda to reduce the resort to residential care for children and instead promote and support family-type forms of alternative care (CRC/C/UGA/CO/2 2005, at [42]). In 2015, the Committee expressed concern about the increasing number of children institutionalized in Ghana due to socioeconomic pressures (INT/CRC/COC/GHA/20799 2015, at [43]).

Southeast Asian States are also popular orphanage tourism destinations and the Committee has expressed concern at the increasing numbers of institutionalized children in Southeast Asian States. In 2011, the Committee expressed concern that the number of children in orphanages in Cambodia had increased by 65% between 2005 and 2008 (CRC/C/KHM/CO/2 2011, at [45]) and the Committee urged Cambodia to reduce the number of children living in care institutions and implement mechanisms to reintegrate institutionalized children into their families (at [46]). In 2012, the Committee recommended that Vietnam develop a strategy for the deinstitutionalization of children with a clear time frame and budget, including the reintegration of children with their families (CRC/C/VNM/CO/3-4 2012, at [50]).

The Committee has identified orphanage tourism destinations where institutionalized children live in substandard conditions and children

are placed in orphanages unnecessarily. In 2016, the Committee expressed concern about the unnecessary placement of children in residential care and the inadequate qualifications of personnel running residential care facilities in Nepal (CRC/C/NPL/CO/3-5 2016, at [43]). The Committee drew Nepal's attention to the *Guidelines*, emphasizing that financial poverty should never be the sole justification for institutionalizing children (at [44]). The Committee made similar comments to India in 2014 (CRC/C/IND/CO/3-4 2014). When reviewing reports on Indonesia in 2014 and Tanzania in 2015, the Committee noted with concern that large numbers of institutions were operating unlicensed and institutionalized children were being exposed to violence and abuse (CRC/C/IDN/CO/3-4 2014, at [43] and [44]; CRC/C/TZA/CO/3-5 2015, at [48] and [49]).

The Committee has clearly and consistently expressed concerns about the increase of institutionalization and the unnecessary placement of children in orphanages, particularly in States that are some of the most popular orphanage tourism destinations.

1.4.4 Orphanage tourism undermines the CRC articles on family environments and alternative care

There are several common themes in the CRC Articles on family environments and alternative care that run counter to the placement of children in institutional care and the subsequent conflation of institutionalized children with tourism. Children are being unnecessarily institutionalized and separated from their families to meet the demands of the burgeoning orphanage tourism industry.

1.5 The Tourism Demand and the Need for a Supply of Institutionalized Children

The number of institutionalized children has increased in many orphanage tourism destination countries, including Cambodia, Ghana, Haiti, Nepal and Uganda, which runs counter to the deinstitutionalization goal of the CRC and the *Guidelines*. In Cambodia, for example, a UNICEF-supported study found a 75% increase in the number of residential care facilities between 2005 and 2012 (UNICEF and MoSVY, 2011). This increase in institutionalization can partly be attributed to the rise in popularity of orphanage tourism. In terms of demand and supply, more tourists wanting to visit orphanages and play with or befriend children leads people at destination-level, and often in partnership with large tourism agencies, to create a supply or product. The increase in institutionalization can also be attributed to the reliance on orphanages as care options for children living in poverty and social exclusion (Save the Children, 2009, p. vii), as well as children with disabilities or parents labouring under drug and alcohol abuse (Bilson and Cox, 2007).

Maintaining a supply of children in orphanages to meet the growing tourism demand has meant that children have been unnecessarily institutionalized. Far from the comprehensive and formal assessments States are required to make under the CRC and the *Guidelines* before removing children from their families, it is well-documented that children are removed from their families and placed into orphanages by unqualified individuals where no assessment of the appropriateness of alternative care has been carried out (Goodwin, 2015; Rotabi *et al.*, 2017). There is often no formal legal process by an authorized body to regulate the placement of children in residential care and it is unlikely that there is any extensive assessment of a child's situation in accordance with the best interests principle and the *Guidelines* when children are placed in orphanages that partake in orphanage tourism (International Save the Children Alliance, 2003, p. 11). Over 80% of orphanages in Uganda are funded by predominantly faith-based foreign NGOs and more than 95% of the facilities are not appropriately licensed by the government (Van Doore *et al.*, 2017), meaning the overwhelming majority of institutionalized children in Uganda have likely been institutionalized in blatant contravention of the rights and safeguards enshrined in the CRC and *Guidelines*.

Often, families are deceived and told that the children are going to receive a good education and a better life (Goodwin, 2015, p. 47). There are also reports of families being coerced into giving up their children in exchange for money (Van Doore, 2016, p. 1). This process of sourcing and recruiting children for orphanages

was recognized as a form of trafficking for the first time by the US Department of State's 2017 *Trafficking in Persons Report* on Nepal (US Department of State 2018, p. 22). Lumos, a renowned NGO founded by author of the Harry Potter books, J.K. Rowling, has found that orphanage trafficking is found across the developing world, particularly in Cambodia, Nepal, Uganda and Haiti.

There are an estimated 8 million children living in residential institutions around the world and it is estimated that four out of every five children in orphanages have at least one living parent (Save the Children, 2009; Lumos, 2016). Van Doore uses the term 'paper orphans' to describe some of these children, who have been constructed as orphans by removing them from their families and creating fraudulent documentation while placing them in an orphanage (Van Doore, 2016, p. 2).

There is a paucity of data not only on the numbers of children affected by orphanage tourism, but also on the frequency or nature of any reviews of the appropriateness of institutionalization for each child placed in an orphanage. A 2016 Lumos study estimated that only 15% of orphanages in Haiti were registered with the government, with the majority operating outside the law (Lumos, 2016, p. 5). With the orphanage industry bourgeoning, States may either be unaware of the numbers of orphanages in operation or may not commit the resources to reviewing the placement of children in orphanages as required under the CRC and the *Guidelines*. When a child's placement is not periodically reviewed, it means that there is no regular assessment of the best interests of the child, which 'paves the way' for longer-term institutionalization (International Save the Children Alliance 2003, p. 10). The increasing numbers of children placed in orphanages without regular review of the necessity and quality of their placement are being denied their rights under the CRC.

1.5.1   Orphanages as businesses and children as commodities

It is clear that many orphanages are established primarily to benefit the owners and evidently some orphanages are funded entirely by tourism (Goodwin, 2015, p. 47; Cantwell and Gilloz, 2018, p. 5). In Ghana, news reports on the increasing number of orphanages observed 'running an orphanage in Ghana has become a business enterprise, a highly lucrative and profitable venture' and that the children's wellbeing is 'secondary to the profit motive' (Van Doore, 2016, p. 3). A 2017 Lumos study estimated that US$100 million is sent by donors to orphanages in Haiti every year, and that, based on this figure, it estimated that billions of dollars would go into orphanages around the world (Lumos, 2017, p. 6). Numerous other studies have concluded that the expansion of institutions has been driven by the availability of funds available for them (UNICEF, 2004; Firelight Foundation, 2005).

Volunteers are often seen as a cost-cutting measure and as useful for providing material assistance through gifts and financial assistance through fundraising efforts for the orphanage before their trip or once they return home (Punaks and Feit, 2014). When Tess Guiney researched orphanages in Cambodia, one orphanage director stated, 'If no tourists, no donation to this orphanage there will be no staff and no children, no food, no everything here' (Guiney, 2012, p. 12). Research into orphanages for children with disabilities in Guatemala found that volunteers paid hundreds of dollars per week to volunteer in orphanages overcrowded with children, whereas programmes existed that helped children with or without disabilities to live at home and avoid institutionalization for between US$10 and US$60 per month (Disability Rights International, 2018, p. v). The UN Committee on the Rights of Persons with Disabilities expressed concern in its concluding observations on Guatemala that children with disabilities were being segregated in institutions sustained by voluntourism (DRPD/C/GTM/CO/1 2016, at [74]). Despite programmes supporting children to live in family-like environments being more cost effective than institutionalization, children have been placed in orphanages, often in substandard conditions, with a reliance on tourism to sustain those orphanages.

Further, Next Generation Nepal has found that orphanage tourism 'encourages managers to deny the children proper care, because the worse conditions the children appear to be in, the more they will pull at the heart strings of volunteers, thus making it easier for orphanages to solicit donations' (Next Generation Nepal, 2013, p. 2). Children have the right to protection from

Fig.1.2. A bus of volunteers travelling from Phnom Penh to Siem Reap, Cambodia (Photo author's own, 2014).

abuse and neglect under Article 19 of the CRC and the Committee's concluding observations on institutionalized children in Indonesia and Tanzania noted the abuse and violence those children experience. In the orphanage tourism business model, children become commodities for orphanage directors to use to solicit donations and for tourism providers to use to attract customers.

1.6 Articles on General Wellbeing and Participation Rights

Beyond the unnecessary placement of children in orphanages, orphanage tourism facilitates breaches of other rights relating to a child's development and wellbeing. Once children are placed in orphanages unnecessarily and the orphanage engages in various forms of orphanage tourism, other children's rights are adversely affected. These rights include the child's right to have their best interests taken into account, to express their views freely, to a healthy standard of living and development and to privacy. In some cases, institutionalized children are denied these rights entirely.

1.6.1 The best interests principle

Article 3 of the CRC sets out the best interests principle, which provides that in all actions concerning children, whether taken by public or private bodies, the best interests of the child shall be a primary consideration. The Committee has asserted that this principle is a threefold concept: a substantive right, a fundamental, interpretive legal principle and a rule of procedure (Buck, 2014, p. 138). From the placement of a child in an institution to the process undertaken that determines such a placement, the best interests of the child must be a primary consideration. States must ensure that the child's best interest is a primary consideration in decisions and actions taken by the private sector, which would extend to tourism companies and volunteer placement agencies. The Committee has recommended in particular that decisionmakers consider a list of elements as part of the best interests assessment: the child's views; the child's identity; preservation of the family environment and maintaining relations; care, protection and safety of the child; situations of vulnerability; the child's right to health; and the child's right to education (Buck, 2014, p. 140). In the context of orphanage tourism,

considering the well-documented harms of institutionalization on children and their development, the unnecessary placement of a child in an orphanage cannot possibly be in the child's best interests.

1.6.2   The right to form and express views

Article 12 provides that States shall assure to the child capable of forming their own views the right to express those views freely in all matters affecting the child. Aisling Parkes has observed that a family environment is the ideal forum for children to learn about the right to express themselves freely (Parkes, 2013, p. 77). Parkes links this to participation in family decision-making and observes that children are still largely seen as passive members of a family unit, not being sufficiently encouraged to exercise their right to be heard and express their views (p. 77).

When children are taken out of a family environment and institutionalized, it is vital that they are given the opportunity to express their views every step of the way. In the context of orphanage tourism, it is unclear whether children are given the opportunity to express their views about being separated from their families and kept, often indefinitely, in an orphanage. Once in an orphanage, it is once again unclear whether children are encouraged to express themselves. The totalitarian form of care in orphanages results in the loss of the child's independence and freedom, undermining their self-determination (International Save the Children Alliance, 2003, p. 12). Given that children are often made to perform for visitors or interact with volunteers, and the absence of a family environment in which children best learn to express themselves, it is likely that orphanage tourism adversely affects children's rights under Article 12 to express their views freely in all matters affecting them.

1.6.3   The right to privacy

Article 16 provides that no child shall be subjected to arbitrary or unlawful interference with their privacy or family home. When reporting to the Committee, States are asked to indicate the specific measures adopted to protect this right for children placed in institutions (CRC/C/58 1996, p. 15). Generally, the concept of orphanage tourism gives rise to concerns that children are being subjected to arbitrary interferences with their privacy. Visitors to orphanages are often given tours throughout the children's living spaces and bedrooms. Tourists, who are complete strangers to the children, are regularly visiting and interacting with the children within the orphanage, which has become the children's home. During these visits, or when volunteers spend time with the children, they often take photos of or with the children. These photos often appear on various social media platforms and are rarely screened by orphanage directors. The children and their caregivers are rarely asked by tourists for their consent to have their photographs distributed and published, which may constitute an arbitrary interference with their privacy.

When the author did a voluntourism trip to Cambodia, within a few days of arriving in Siem Reap those volunteers placed in orphanages were uploading photographs on social media of partially clothed children, including one photograph of a toddler being spoon fed with her top falling off. It is difficult to reconcile the Article 16 right to privacy with strangers regularly visiting the homes of vulnerable children, forced interactions between the strangers and those children and photographs of vulnerable children being taken and shared online. It is also difficult to reconcile orphanage tourism with the *Guidelines*, which provide at [13] that children must be treated with dignity and respect at all times.

1.6.4   The right to a standard of living adequate for the child's development

Article 27(1) recognizes the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. This operates in conjunction with Article 3(3) which imposes the obligation on State parties to ensure that institutions, services and facilities responsible for the care or protection of children conform to the standards established by competent authorities, particularly in the areas of safety, health, the number and suitability of their staff, as well as competent supervision. Children in orphanages are sometimes held in

poor conditions in order to elicit more donations and gifts from visitors and volunteers which can adversely affect their physical health and development in contravention of children's rights under Article 27(1).

In terms of a child's right under Article 27 to mental, moral and social development, there is a body of research on the detrimental impact institutionalization has on the development of a child. Long-term institutional care adversely affects young children in a number of ways, and the agreed explanation for these effects concerns the dependency of children on stable and secure attachments to adults (Rutter *et al.*, 1990; Frank *et al.*, 1996; Richter, 2004; Viner and Taylor, 2005). The UN High Commissioner for Human Rights has stated that institutional care in early childhood 'has such harmful effects that it should be considered a form of violence against young children' (Disability Rights International, 2018).

Numerous studies have shown that a high turnover of caregivers harms a child's emotional and social development (McDonald, 1996; Dozier and Bick, 2007; Johnson, 2014, p. 602). Research shows that children institutionalized at a young age develop emotional, social and behavioural problems that persist over time (Berrick *et al.*, 1997; Rutter, 2002). Institutionalized children have increased risk of infectious illness and delayed language development, and children institutionalized in the long term have increased likelihood of growing into psychiatrically impaired and economically unproductive adults (Rank *et al.*, 1996; Margoob *et al.*, 2006).

Orphanage tourism on top of initial institutionalization exacerbates this. Volunteers mostly stay for short periods of time, several weeks or months. Orphanages and tourism providers often suggest that the main role of volunteers is to provide love and to make intimate connections with vulnerable children (Johnson, 2014, p. 602). However, the children repeatedly form emotional ties with adults who leave, exacerbating the feelings of abandonment and rejection they have by virtue of being in an orphanage in the first place. This cycle can lead to children displaying unusual behaviour towards strangers in an effort to form attachments. During one study by Disability Rights International (2018), an investigator visited an orphanage in Guatemala and recalled: 'Carlitos, a 5-year-old boy, greeted us at the door and approached one of DRI's investigators, held her hand, and immediately asked "is this my new mommy?" He tried to stay close to the investigator the whole time we were there, sat on her lap and held her hand.'

In terms of the right to a standard of living adequate for the child's spiritual development, orphanage tourism in many cases may interfere with this right. The *Guidelines* at [20] state that alternative care should never be provided with a prime purpose of furthering the religious goals of the providers and, at [88], that the child's own religious background should be respected, and no child should be encouraged or persuaded to change their religion or belief during a care placement.

Orphanage tourism is sometimes facilitated by faith-based providers and supported by faith-based trips or fundraisers. While the *Guidelines* are clear that children should not be encouraged or persuaded to change religion during a care placement, orphanages often operate with the effect of changing the child's religion. In Cambodia, for instance, an estimated 95% of the population are Buddhist and Buddhism is firmly entrenched in Cambodian communities and culture. Many orphanages in Cambodia are funded by faith-based organizations and run by religious institutions. When the author volunteered in Cambodia, some of the volunteers placed in orphanages distributed necklaces with wooden crosses to the children at one placement. When researching the different placements the volun-tourism provider had sent volunteers to, the author noted that many of the websites had mission statements that specifically stated their mission was to raise children by the word of God in a Christian environment.

1.6.5   The right to be protected from exploitation

Articles 32 to 36 protect children against exploitation, including economic exploitation (Article 32), sexual exploitation and sexual abuse (Article 34), sale, trafficking and abduction (Article 35) and other forms of exploitation (Article 36). The Committee has expressed concern, in relation to Liberia, that orphanages and adoption agencies were reportedly being used as hubs for child trafficking (CRC/C/LBR/CO/2-4 2012, at [82]). Vitit Muntarbhorn, the first Special Rapporteur on

the sale of children, child prostitution and child pornography, defined the 'sale of children' as 'the transfer of a child from one party (including biological parents, guardians and institutions) to another, for whatever purpose, in exchange for financial or other reward or compensation' (A/49/478 1994, p. 5). There is anecdotal evidence of some children being moved into orphanages with some form of payment provided to their families in exchange, meaning that some instances of institutionalization for orphanage tourism constitutes the 'sale of children' contrary to Article 35.

In terms of sexual exploitation and abuse, child abusers sometimes use orphanage tourism to gain access to, and to sexually abuse, children. The UK Child Exploitation and Online Protection Centre (CEOP) report found that of the over 1,200 investigations into UK nationals travelling abroad to sexually abuse children between 2006 and 2011, teaching and undertaking roles that provided access to children accounted for up to 19% of the cases (CEOP, 2011).

The Committee has expressed concern about orphanage tourism in Cambodia, observing that it 'seems to be a growing phenomenon where children in institutions and orphanages are being exposed to sexual exploitation by foreigners, such as tourists and volunteer workers' (CRC/C/OPSC/KHM/CO/1 2015, at [18]). The Committee went on to specifically comment on its concerns about the links between child sexual abuse and orphanage tourism. In its Concluding Observations on Cambodia in 2015, the Committee urged Cambodia 'to pursue its efforts to prevent child sex tourism and orphanage tourism' and to 'ensure that all cases of child sex tourism and orphanage tourism are investigated and that alleged perpetrators are prosecuted and duly sanctioned' (CRC/C/OPSC/KHM/CO/1 2015, at [19]). The Committee has also expressed concern at the reports of physical abuse and sexual exploitation of children in residential institutions in Vietnam (CRC/C/VNM/CO/3-4, 2012). Many orphanages and volunteer placement organizations do not require or conduct background checks of volunteers before giving them access to orphanages, which leaves children vulnerable to sexual abuse by child sex offenders (Johnson, 2014, p. 602).

1.7   The Utilization of the CRC to Combat Orphanage Tourism

The rights contained in the CRC provide a useful framework in which to consider and discuss the adverse effects of orphanage tourism. With orphanage tourism facilitating the breaches of so many of the fundamental rights in the CRC, it is difficult to see how orphanage tourism has not only persisted, but burgeoned, in the past decade. When States sign and ratify the CRC they commit to undertaking domestic law and policy reform to give effect to the CRC, yet orphanage tourism has flourished and for the most part not been addressed directly by domestic law reforms.

The CRC has paradoxically led to the strengthening of children's rights as well as a failure to ensure the rights of all children are safeguarded (Liefaard and Sloth-Nielsen, 2017, p. 2). Many States have outlawed the death penalty for children. Domestic law reform and policy development often refers to the CRC and the CRC has promoted and motivated changes to resource allocations and cooperation between agencies. However, challenges to implementing the CRC rights have included corruption, poverty and inequality, armed conflicts, environmental degradation, impunity and the lack of accountability, and tokenism with regard to child participation (Muntarbhorn, 2017, p. 23).

The CRC is a 'legal umbrella' enacted to protect children everywhere (Muntarbhorn 2017, p. 18). Unlike some other human rights treaties, the CRC contains multiple provisions referring to cross-border problems such as child abduction, child support, adoption and trafficking (Van Loon, 2017, p. 32). The CRC also calls on States to cooperate and exchange appropriate information to safeguard some rights. Some States have enacted extraterritorial legislation enabling prosecutions of offenders in their home countries for child sex offences committed abroad (Johnson, 2014, p. 589). States should enact further extraterritorial laws to protect children abroad from a wider range of harm and exploitation caused when their citizens travel.

There is an uncomfortable inconsistency with the fact that the Committee expresses concern at the high rates and negative effects of institutionalization in its concluding observations on States such as Cambodia, Nepal and Haiti,

but does not express any such concerns in the concluding observations for States such as the USA and the UK, whose citizens, businesses and organizations fund and perpetuate institutionalization. This inconsistency could be because the Committee is not aware of the extent to which institutionalization is being aided by more economically developed States, or could be because the Committee does not consider it feasible to expect States to regulate the charity and tourism undertaken abroad by its businesses and citizens. However, if the CRC really is a 'legal umbrella', and if the rights contained in the CRC are to be truly and effectively protected, States must consider how best to regulate what happens within their own borders as well as what happens when their citizens leave their borders or whose actions breach the rights of children living outside their borders.

States are obligated to ensure CRC rights even where the potential breaches of these rights are attributable to the private sector. The Committee issued General Comment 16 in 2013 which established that a State will be in breach of its obligations 'where it fails to respect, protect and fulfil children's rights in relation to business activities and operations that impact on children'. Where businesses and other groups within a State's borders engage in activities that breach a child's rights, that State should take action, regardless of whether the child is located within the State or in another State.

The most significant step forward in fully implementing the CRC to protect institutionalized children affected by orphanage tourism has been seen in Australia, where, in 2017, Attorney-General George Brandis QC asked a parliamentary committee to enquire into and report on establishing a Modern Slavery Act in Australia. The parliamentary committee found that orphanage trafficking was a form of modern slavery. Importantly, submissions to the committee referred to the CRC in its 2017 *Hidden in Plain Sight* report (Commonwealth of Australia 2017), observing that the CRC should:

> ... extend to protecting children whose rights are being violated in the context of overseas residential care institutions where these human rights breaches (and trafficking acts) are being 'aided or assisted' by Australian registered

charities, and/or for the purpose of accessing Australian foreign aid funding or for voluntourism.

The report recommended that the travel industry engage in awareness-raising and advice to discourage orphanage tourism, except to overseas residential institutions registered as compliant by the Australian government and operating in compliance with the CRC and the *Guidelines*. The report also recommended:

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

The Australian parliamentary report is significant because it acknowledges, at the highest levels of government, that children's rights are being undermined by orphanage tourism, and it shows there is a willingness to use legislation and awareness-raising mechanisms to combat orphanage tourism. Relevantly, the report referred to the CRC and the *Guidelines* as international legal instruments that intersect directly with how children's rights are violated by orphanage tourism.

The International Save the Children Alliance stated that the issues faced by children in need of care will not be resolved unless 'the CRC is implemented holistically and indivisibly' (International Save the Children Alliance, 2003, p. 6). The US State Department's 2018 *Trafficking in Persons Report* stated that the governments of States that donate to orphanages can 'ensure foreign assistance ... does not support residential institutions that are not in compliance with international standards' and can look at how to 'increase oversight of organizations and charities funneling money to residential institutions abroad'. As people and organizations become more conscious of the harmful impact of orphanage tourism, States should follow Australia's lead by investigating exactly how they are contributing to orphanage tourism, recognizing

that orphanage tourism involves the undermining of CRC rights and taking action to protect and uphold CRC rights.

1.8 Conclusion

The CRC is a an important instrument in the toolkit used to critically discuss the institutionalization of children and orphanage tourism. The unnecessary institutionalization of children to facilitate tourism undermines the core rights afforded to every child under the CRC. As signatories to the CRC, States must implement domestic law and policy reforms to acknowledge violations of children's rights by orphanage tourism and take steps to prevent these violations. The Committee has consistently expressed concern about the increasing institutionalization of children in economically developing States, and concerns regarding the safety of those children once placed in residential care and exposed to tourists. However, the Committee has not yet used concluding observations for more economically developed States to critique the ways that those States incentivize and unwittingly contribute to the increased institutionalization.

By using the CRC as a starting point from which to critically discuss orphanage tourism, the children's rights violations caused by such tourism become the concern of States in their compliance with an international legal instrument. This gives the issues arising from orphanage tourism an anchor in international human rights law and the various mechanisms and processes governed by that area of law. In this sense, paying closer attention to the CRC opens a legal toolbox for practitioners and children's rights activists. Reform efforts can be focused towards regulatory bodies, governments and the Committee to increase awareness and enact change at higher levels. In light of the US State Department recognizing orphanage trafficking as a form of human trafficking, and the Australian *Hidden in Plain Sight* report, the CRC should be better utilized, and more frequently referred to, in orphanage tourism discourse.

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