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## **Separated Children and Human Trafficking: Issues of Protection in the United States**

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### **Abstract**

Drawing on research conducted for a Master's thesis in Social Policy which focused on the impact of legislation and policy on the care of separated children through a comparative analysis of Ireland, the United Kingdom and the United States, this article will focus on a particular area, the issue of trafficking, which was examined within this thesis. This article will explore how the issue of trafficking can have a profound and consequential impact on separated children and will consider this in relation to the United States. In addition to this, this article will also consider how the issue of trafficking impacts on the full realisation of separated children's rights. The legislation and policy relating to trafficking in both a national context and supranational context will be analysed in relation to the impact that this has on separated children's care and protection.

**Keywords:** Separated Children, Trafficking, Protection, Care, Impact

### **Introduction**

There has been an increasing awareness in recent years of the situation of separated children and the circumstances that they face (Ni Raghallaigh and Gilligan, 2010).

Separated children are defined as: "...under 18 years of age, outside their country of origin and separated from both parents, or their previous legal, or customary primary caregiver. Some children are totally alone while others, who are also the concern of the SCEP, may be living with extended family members..." (Separated Children in Europe Programme, 2009, p. 3). It has come to light that separated children migrate and flee to escape armed conflict situations and war, severe deprivation and poverty and also to escape persecution (Halvorsen, 2005). In addition to this, separated children flee to escape torture, sexual assault and violence that has resulted in the death of relatives or their parents (Abunimah and Blower, 2010). Furthermore, it has also come to the fore that a number of separated children may arrive in their destination country as a result of being trafficked (Halvorsen, 2005). The reasons behind the movement of separated children differ and so do the means of how they complete this travel. Many children are alone whilst travelling and in order to cross borders, ride or walk huge distances. A number of children are accompanied, some by adults unrelated to them, others by escorts while others are brought by traffickers or smugglers (Bhabha et al, 2007). In light of this, the term separated children will be utilised throughout this article as opposed to unaccompanied minors as it is thought that separated children provides a broader definition which encompasses the essential problems faced by these children (SCEP, 2009). However, it is important to note that not all of the reasons why separated children migrate are recognised by international refugee law, such as specific forms of child persecution, which may not have been foreseen when The Refugee Convention 1951 was drafted (Bhabha et al, 2007).

### **Human Trafficking**

The emergence of persons who are trafficked and refugees who are forced to migrate is a critical issue in relation to human rights (Bhabha, 2004). It has been argued that the worst human development to arise which is related to an increase in global mobility is that of human trafficking (Danailova-Trainor and Laczko, 2010) and that every country can be affected by the issue of human trafficking either as a destination country, a source country or as a transit country (Obokata, 2010). It is acknowledged that the trafficking of human beings grossly abuses human rights which are fundamental and can be described as a crime which is heinous (Winterdyk and Reichel, 2010). Human trafficking can be depicted as '...a trade that exploits the vulnerability of human beings, especially women and children, in complete violation

of human rights, making them objects of financial transactions through the use of force and duress for the purpose of sex, labour, slavery or servitude' (Forrest, 2008, p.15). It has been argued that in contemporary society, the increase of organised crime which is transnational corresponds with domestic governance failing to address this issue. It has been put forward that at a domestic level; law enforcement does not succeed in the elimination of organised crime as traffickers' activities can be deemed to be transnational. It has therefore been argued that organised crime which is transnational is a contributor to and also a reflection on a form of geopolitics which is new where boundaries, state territory and power are no longer the sole characteristics but flows of people, money and commodities which are transnational are (Williams and Baudin-O'Hayon, 2002 cited in Obokata, 2010). Therefore, it is essential to recognise that the state centric approach which is traditional is not an adequate approach to organised crime which is transnational and that action which is effective requires multiple actors and a global level of governance (Obokata, 2010).

### ***Human Trafficking and Separated Children***

It has come to light in recent years that children, both female and male, are trafficked for a number of purposes which are exploitative. These include illegal adoption, forced labour, sexual exploitation, petty crimes and theft in addition to begging. It has been found that children may be transported within countries or across nations (Lind Haldorsson et al, 2007). The experience for child victims of trafficking invariably is one in which multiple forms of violence are experienced. It is also now known that there are a variety of reasons why children become vulnerable in relation to trafficking. These reasons can include a complex interaction in factors which relate to their social context and the broader situation of macro-economics, living conditions, issues and beliefs in the community and also in the family in addition to the child's individual decisions and psychological factors (Lind Haldorsson et al, 2007). Significantly, there is both an acknowledgement and recognition by the United Nations Committee on the Rights of the Child that there is a link between trafficking and separated children's situation (Nicholson, 2008). It has been estimated that separated children account for one third of victims of trafficking (Bump and Duncan, 2003 cited in Derluyn et al, 2009). This issue is one which is crucial and can put the care and protection in addition the realisation of separated children's rights further at risk.

### **Separated Children in the US**

In the US, historically unaccompanied children arrived through programmes for planned resettlement (Byrne, 2008). Many unaccompanied children fled their own countries and were admitted into the US as refugees through different programmes. This included 14,000 Cuban children and 2,547 children from Vietnam in 1975 (Steinbock, 1989). However, the phenomenon of separated children who arrived outside of these programmes went unnoticed until recently and consequently also went unmeasured. It was found that in the 1980's, increasing numbers of separated children began to arrive in the US and in response to this, government agencies began developing data systems in order to track separated children. Current statistics from the Office of Refugee Resettlement (ORR) show that since 2005, between 7,000 and 9,000 separated children every year, to 2008, have been referred by the Department of Homeland Security (DHS) to ORR (Byrne, 2008). In addition to this, in 2009, it was reported by the DHS that 6,074 separated children were apprehended (ORR, 2009). However, it has been argued that these ORR statistics do not reflect the full scale of the migration of separated children to the US as these figures do not include children who the DHS apprehends but does not refer to ORR. Added to this, these figures also do not contain the numbers of children who do not come to the attention of the authorities (Byrne, 2008). In addition to this, there are concerns being voiced in relation to policy regarding separated children. There is a debate in the US in relation to policy regarding separated children and this has polarised in recent years. Advocates of child welfare argue that separated children are akin to refugees and seek policy which is more refugee orientated in light of many separated children being victims of economic circumstances, abuse and trafficking. However, advocates for immigration security argue that increased violence in communities and activities which are illicit are associated with unauthorised immigration and thus contend that policy which is more restrictive in terms of deportation and repatriation should be enforced (Haddal, 2007). However, the needs of separated children must be taken into account and the protection and care of separated children must be paramount.

### ***Forms of National Protection***

In the US there are several forms of protection available in relation to those who apply, either within the country or at port of entry, for protection from persecution and this includes separated children. The Refugee Act 1980 saw the incorporation of the

Refugee Convention 1951 into domestic law. Children who claim a fear of persecution that is well founded can apply for asylum. Withholding of Removal is available for those who apply for asylum but are ineligible either due to circumstances in which their claim does not fall within the Refugee Convention and the five grounds set forth in the convention or that the applicant did not receive the authorities' discretion in their favour. There is also relief available under the 1948 Torture Convention. However, the Immigration and Nationality Act (INA) governs these forms of relief and it is stipulated under this Act, the criteria which must be satisfied and how the process is to be conducted. While the Chief of Border Control put forward in a letter to the American Bar Association that Expedited Removal should not apply to separated children, this letter does not have the force of policy or of the law (Bhabha et al, 2007). In addition to this, while the US signed the United Nations Convention on the Rights of the Child (CRC), it has not ratified it (Byrne, 2008). In light of the US signing the CRC, there is an obligation in which any new legislation enacted cannot contradict the convention however, as the US has not ratified the CRC, there is no legal requirement for the full provisions of the CRC to be enforced into domestic law (Bhabha and Schmidt, 2006). It has been put forward that the US should ratify the CRC as this would bring the US into line with international standards in relation to the rights of separated children (Byrne, 2008).

While the best interests of the child principle of the CRC has been incorporated into many aspects of law in the US, most notably family law, it has been argued that immigration law is a significant exception to this with substantive asylum law making no distinction between children and adults (Byrne, 2008). While this is a significant concern, the INA has been supplemented with guidelines, policy memos and legislation which are specific to separated children. In 1994 a memo was issued in relation to separated children and their release from detention and in 1998 guidelines relating to children who are seeking asylum was issued. In addition to this, in 2002, the Child Status Protection Act was passed in order to protect separated children from ageing out and becoming ineligible due to delays which are bureaucratic. Added to this, the Special Immigrant Juvenile Status was created for the protection of children who were neglected, abandoned and abused and therefore seek refuge in the US (Bhabha et al, 2007). Furthermore, the care of separated children was previously

under the Immigration and Naturalization Services (INS). However, it was argued that there was an inherent conflict in this arrangement given that the INS was acting as a guardian, prosecutor and jailer. It was also put forward that under this arrangement, children were treated as detainees first and children second. In 2002, the Homeland Security Act transferred the care and placement functions of separated children to the ORR from the INS (Nugent, 2005). Added to this, there have been developments recently in relation to separated children and legal relief under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (Lee et al, 2009).

### **Human Trafficking in the US**

The issue of human trafficking has received attention in the US in the last two decades with a significant focus on this issue coming to the fore in the late 1990's (Gozdziak and MacDonnell, 2007). It has come to light that the US is a source country in addition to being a transit and destination country for women, men and also children who are subjected to being trafficked (Department of State US, 2010). However, due to the clandestine nature of trafficking, the full extent of the problem is unknown. It has been estimated by the US Government that the number of people that are annually trafficked into the US is between 14,500 and 17,500. However, it has been argued by other commentators on this issue that these figures may be much higher (Bump et al, 2005). It has been put forward that up to 15,000 children may be trafficked every year into the US (Estes and Weiner, 2001 cited in Bump et al, 2005).

### ***National Anti-Trafficking Measures***

It has been noted that with the passing of the Trafficking Victims Protection Act (TVPA) into law in 2000, the US initiated progress in relation to victims being protected, traffickers being prosecuted and combating of human trafficking (Gozdziak and MacDonnell, 2007). In addition to this, the US engages in prevention efforts overseas and is continuing efforts in relation to protection and prosecution in the US. It has been put forward that the US provides a model in relation to other countries that are in the process of addressing the issue of human trafficking (Women's Commission for Refugee Women and Children, 2007). As noted, the TVPA was enacted in 2000

in order for issues arising in relation to trafficking to be addressed comprehensively. Under the TVPA, there is protection for victims of forms of trafficking which are severe and these include sex trafficking through coercion, fraud or force, or if a minor is trafficked. Victims of trafficking for the purpose of labour exploitation are also protected under this Act. Protections for victims of trafficking include access to safe shelter, psychological care, medical care and social assistance (Bishop, 2003).

In addition to this, victims of trafficking can, under the TVPA, apply for a T-Visa in order to remain in the US. While eligibility for access to trafficking related visas and access to services for children who are trafficked are two separate processes, it has come to light that these processes may interact. While there is no requirement for victims to be in receipt of a T-Visa in order to access services, children who are under the age of 18 are required to have a determination of eligibility from the ORR (Gozdziak and MacDonnell, 2007). Significantly, the implementation of the TVPA is coordinated by the statutorily directed President's Interagency Task Force to Monitor and Combat Trafficking (PITF). In addition to this, the guidance issued by the PITF is implemented by the Senior Policy Operating Group. This group is tasked with the coordination of the interagency efforts of the government to combat human trafficking (Department of State US, 2010). Furthermore, 38 task forces for anti trafficking purposes are funded by the Department of Justice. These task forces comprise of local, state and federal law enforcement prosecutors and investigators and a service provider for victims that is nongovernmental. The aim for these task forces is to coordinate law enforcement and case training in order to identify, investigate and also prosecute through an approach that is victim centred (Department of State US, 2010). In addition to this, anti trafficking law in the US was further reinforced with the TPVA reauthorisation Acts of 2003 and 2005 (Women's Commission for Refugee Women and Children, 2007). However, despite these efforts, it has come to light that most victims of trafficking, especially child victims are not identified and of those who are identified, there are issues regarding their access to services. This is particularly significant in relation to separated children in light of their situation and need for care and protection.

### ***International Anti-Trafficking Measures***

Significantly, the US has also ratified international conventions in relation to trafficking. In 2005, the US ratified the Protocol to Suppress and Punish Trafficking in Persons, Especially Women and Children which is the Protocol to the Convention Against Transnational Organised Crime (Women's Commission for Refugee Women and Children, 2007). In addition to this, the US ratified the Optional Protocol on the sale of children, child prostitution and child pornography of the CRC in 2002. However, upon ratifying the Optional Protocol, the US entered into significant reservations in relation to child pornography and its definition in the Optional Protocol. Significantly, the US also reiterated that in relation to the CRC, it still assumes no obligations (ECPAT International, 2006).

### **Protection Issues**

In light of this response to trafficking, it is stated in the Trafficking in Persons Report 2010 that 'The US government fully complies with the minimum standards for the elimination of trafficking' (Department of State US, 2010, p338). However, concern is still being voiced in relation to the protection of separated children. Separated children who attempt to enter into the US come into contact first with Customs and Border Control or the US Coast Guard, both of which are under the Department of Homeland Security. It has come to the fore that the majority of separated children are apprehended when crossing land borders. When arriving at land borders, children first come into contact with Customs and Border Control which is the agency that is responsible for immigration law being enforced at the ports of entry such as border entry sites and airports. The territory which remains between these sites is controlled by the Office of Border Patrol (Bhabha and Schmidt, 2006). However, it has been argued that the system in the US in relation to dealing with separated children on their arrival is both problematic and flawed. The aforementioned agencies that separated children first come into contact with have mandates of enforcement and there is a lack of procedures which are child specific and well articulated. It has come to the fore that in general, it is only separated children who are completely on their own that come to the attention of the authorities, not separated children who arrive and are accompanied by adults who do not have parental responsibility for them (Bhabha et al, 2007). It has also come to light that there are no written rules in relation to assisting officers of Border Patrol and the Coast Guard regarding interviewing children and on making

decision in relation to the credibility of the adult accompanying the child (Bhabha et al, 2007). This raises serious issues of child protection in light of the growing issue of child trafficking where it is possible that traffickers may be bringing these children into the country. In addition to this, it can be argued that this lack of policy and legislation in relation to this issue can have a serious and consequential impact on separated children and is therefore is not in the best interests of the child as stipulated in the CRC.

Concern is being voiced that there are numerous cases of child trafficking and abuse that are not being identified in relation to separated children (Women's Refugee Commission, 2009). It has come to light that the protocols issued for determining if children, who are transferred from the DHS to the ORR, are victims of trafficking are applied inconsistently. As a result of this, when a decision is made in relation to the placement of separated children, there is information missing which is crucial and a child who has possibly been trafficked may not receive the services and screening that they deserve (Gozdziak and MacDonnell, 2007). While it has come to light that the DUCS has initiated workshops entitled 'Identifying Victims of Child Trafficking', it has been argued that the current programme structure and also the services provided to separated children must be better calibrated in order to meet separated children's unique needs (Women's Refugee Commission, 2009).

Significant developments came to the fore with the William Wilberforce Trafficking Victims Protection Reauthorization Act 2008 with the eligibility process for separated children being streamlined in relation to access to services. In addition to this, greater authority is given to the department of Health and Human Services to manage these cases, recognising that separated children need access to services which is immediate (Polaris Project, 2008). In addition to this, the use of inappropriate secure facilities is reduced under this Act and it also creates a requirement for a review of the placement of children in secure sites. However, there is no restriction placed on the ability of the DUCS to place separated children in staff secure programmes, which are based on a service model that is correctional and therefore, not based on child welfare (Women's Refugee Commission, 2009). While there has been progress initiated in relation to the care of separated children and in identifying possible victims of trafficking, one

can argue that there is a significant amount of work needed in order to bring the care and protection of separated children who are victims of trafficking into line with international standards and to be equitable.

### **Conclusion**

In conclusion, it can be maintained that the trafficking of separated children is a significant issue in the US which has an effect on their care, protection and the full realisation of their rights. It has been acknowledged by the United Nations Committee on the Rights of the Child that there is link between the situation of separated children and the issue of trafficking and this is an issue which requires significant attention. It is essential to recognise that the traditional state centric approach to transnational organised crime is not adequate and action that is now required is a global level of governance in relation to this issue which involves multiple actors. While it has been put forward the US provides a model for other countries in relation to addressing the issue of trafficking, and engages in efforts in the US in relation to protection and prosecution in addition to overseas efforts to combat human trafficking, significant concern still remains in relation to the identification of separated children as victims of trafficking and in relation to access to services which is immediate. While one can see that there has been progress initiated in relation to the care and protection of separated children, it can be argued that there is a considerable amount of work needed in order to bring the care and protection of separated children who are victims of trafficking into line with international standards and for their rights to be fully realised.



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