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**HIDDEN AND FORGOTTEN:
THE PLIGHT OF CHILDREN TRAFFICKED
FOR DOMESTIC WORK IN UGANDA**

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DECLARATION

I, **ANNE MARY NYAKATO**, declare this dissertation is my own unaided work. It is submitted in fulfillment of the requirements for the degree of Masters of Law by dissertation at the University of Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other University.

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ABSTRACT

The recruitment of children from rural areas to work as domestic workers in urban areas is a practice that has gone unhindered for many years. In many communities in Africa, and in Uganda in particular, the placement of children in the homes of wealthier relatives or friends to perform domestic work in exchange for education and other benefits is considered a survival strategy. Like in many other societies, Ugandan communities find it culturally acceptable to use children to complement family income efforts. They hardly acknowledge that using children to undertake domestic activities, which at times may be hazardous to their health and education, amounts to exploitation of children. This is worsened by the fact that the use of children for domestic work co-exists with such other malicious practices, including the trafficking of children which violate their most basic and fundamental rights.

This dissertation argues that although the law on child labour has existed for a long time, this practice has flourished and in some cases it has contributed to the development of child trafficking and slavery. The study acknowledges that there are many international law and domestic instruments which seek to address these problems. While analyzing the available literature and the body of international and national legal instruments, the study challenges the extent to which these instruments are useful in delivering protection to children. It will show that, while it is evident that the UN Protocol on Trafficking in Persons brought significant contribution to international criminal law, it did not add much value in the fight against the trafficking of children for domestic work as its scope is limited to addressing transnational crimes and those involving an organized criminal group.

The dissertation also shows that neither international human rights law, nor national labour law have dealt with the question of exploitation of children adequately. It is highlighted in the study that international law has neither defined clearly the term ‘exploitation’, nor distinguished effectively between acceptable work and harmful work for children. The dissertation argues for a child-centred approach that values the full range of children’s rights and does not seek only to eliminate child labour, but also understand the reasons why children work, recognise their rights as workers and provide mechanisms that ensure decent work for children.

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DEDICATION

This dissertation is dedicated to my mother, Mrs Joy Nyirabakiga Nyakaana Akiiki, a woman with a heart of gold.

To my husband, Edwin Walter Tumushime Araali and son Aaron Wayne Mpaano
Amooti: you make my life beautiful and worth living.

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CHAPTER ONE: INTRODUCTION

1. Introduction

The trafficking of persons is an appalling and pervasive phenomenon of our times. It is a crime that affects practically every region in the world. It involves the cross border and or internal movement of people for the purpose of engaging them in sexual activities, labour exploitation and or removal of body organs. The trafficking of persons is said to be one of the greatest human rights challenges of our times¹ and the underside of globalisation.² The United Nations has defined the trafficking of persons as the

*‘recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation’.*³

Most often, human traffickers victimise the most vulnerable groups of society. Their targets are mostly children and young women, whom are tricked through creative and ruthless maneuvers designed to trick, to coerce, and to win the confidence of the victims. Very often the

¹ Kathleen Fitzgibbon ‘Modern-day slavery, the scope of trafficking in persons in Africa’ (2003) 12(1) *African Security Review* 81 at 83.

² International Labour Office *Stopping forced labour* Global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 89th session 2001, Report 1B at 47.

³ United Nations Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (CTOC) Article 3 (a). The Protocol was adopted by resolution A/RES/55/25 of 15 November 2000 at the fifty-fifth session of the General Assembly of the United Nations and entered into force 25 December 2003, is available at < <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>> [Accessed on 27th April 2009].

methods used by traffickers involve promises of a better life through employment, educational opportunities, and marriage.⁴

Given the clandestine nature of trafficking of persons and the difficulty of distinguishing it from other activities such as the smuggling of persons and economic migration, it becomes difficult to establish the exact number of people trafficked worldwide. However, there are several estimates on the scope and magnitude of problem. The government of the United States of America (USA) estimates that every year approximately 600,000 to 800,000 victims are trafficked across international borders.⁵ The International Labour Organization (ILO) estimates are more worrying. It calculates that in the whole world at least 2.45 million people are caught up in both transnational and internal trafficking.⁶

Persons may be trafficked for various purposes. According to the 2000 United Nations Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Optional Protocol), these include, but are not limited to, trafficking for purposes of sexual exploitation, forced labour or slavery or practices similar to slavery or servitude and the removal of organs.⁷ Although the Optional Protocol provides the various forms of exploitation which trafficked persons may be subjected to, research data, advocacy efforts and reporting initiatives have focused on one form of trafficking, in particular the trafficking for the purpose of prostitution. In most cases these have shown that the victims are forcefully recruited during the process. It has been suggested that modern manifestations of trafficking involve the coerced recruitment and transportation of women, children and men for purposes of sexual exploitation,

⁴ United States of America State Department *Trafficking in Persons Report* June 2008 at 10. Available at <<http://www.state.gov/g/tip>> [Accessed 23rd March 2009].

⁵ United States of America State Department *Trafficking in Persons Report*, June 2005 at 7. Available at <<http://www.state.gov/g/tip>> [Accessed 22nd March 2009].

⁶ Patrick Belser et al *Minimum Estimate of forced labour in the World* (2005) at 31.

⁷ Article 3 of the UN Trafficking Protocol.

as well as, a variety of other forms of forced labour and slavery-like practices, including forced domestic labour, factory labour and commercial marriages.⁸

According to the 1932 ILO Convention Concerning Forced or Compulsory Labour, forced labour is all work or service which is exacted from any person under the menace of any penalty and for which a person has not offered him or herself voluntarily.⁹ The ILO estimates that out of a total of 12.3 million people involved in forced labour, at least 2.45 million are victims of trafficking.¹⁰ However, it remains questioned whether or not domestic work amounts to forced labour. Despite such controversy, the ILO reported that domestic work is one of the different categories of forced labour.¹¹

The 1927 Slavery Convention, defined slavery as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.¹² This definition was expanded in the 1957 Supplementary Convention¹³ to include all practices similar or related to slavery. However, in many cases ‘slavery’ is used to connote the practice of buying and selling people and it brings images of the historical transatlantic slave trade and the gross ill treatment of slaves.

There is a very close connection between slavery, trafficking of persons and child labour as will be shown later in the dissertation. For instance, it will be shown that the majority of children in domestic work are victims of trafficking. The arguments will highlight that some children are forcefully recruited to work in homes other than their own homes in conditions that are very

⁸ Janie Chuang ‘Redirecting the debate over trafficking in women: definitions, paradigms and contexts’ (1998) 65 Spring *Harvard Human Rights Journal* 65 at 67.

⁹ Convention Concerning Forced or Compulsory Labour (ILO No.29) entered into force May 1, 1932, Article 2 (1).

¹⁰ International Labour Office (note 2) at 47.

¹¹ *Idem*.

¹² The Slavery, Forced Labour and Similar Institutions and Practices Convention, entered into force on 9 March 1927, Article 1(1).

¹³ The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, entered into force 30 April 1957.

much akin to slavery. Although child labour is prevalent in other parts of the world, going by statistics, the problem is also acute in Africa. According to the ILO, Africa has the highest percentage of child labourers in the world with an estimate of eighty million or forty-one per cent of African children working.¹⁴ Research data shows that majority of these children fall between the age of five and fourteen, with many of them being young girls.

It can be argued that, when performed by children, domestic work is one of the worst forms of child labour. UNICEF states that domestic work has some features that distinguish it from other forms of child labour. First, it is among the lowest status, least regulated, and poorest remunerated of all occupations, whether performed by adults or children. Secondly, most child domestic workers live in, and are under the exclusive control of, the employer. The majority of child domestic workers are girls and their powerlessness within the household makes them vulnerable to sexual abuse. Given that young children can undertake light household tasks, it is possible that children can be subject to this practice as early as at the age of five. Lastly, most children undertaking domestic work activities do not manage their earnings, which is often given to parents or people, who appear as ‘aunties’, when in reality, they are unrelated recruitment agents.¹⁵

Child domestic workers have been defined as children who work in households of people, other than their closest family, doing domestic chores, caring for their children, running errands and sometimes helping the employer run a small business from home.¹⁶ This dissertation adopts this definition of child domestic workers.¹⁷ The ILO defines a domestic worker as a wage earner working in a private household, under whatever method and period of remuneration, who may be

¹⁴ International Labour Office *Child Labour: Targeting the intolerable*, (1998) at 6.

¹⁵ United Nations Children's Fund (UNICEF) *Child Domestic Work* (1999) at 5.

¹⁶ Cecilia Flores-Oebanda *Addressing vulnerability and exploitation of child domestic workers: an open challenge to end a hidden shame* (2006) at 2.

¹⁷ Child domestic workers include all children in domestic service who are under the legal minimum age of admission to work as well as those above the age of admission but below the age of eighteen working as domestic workers.

employed by one or several employers and who receives no pecuniary gain from this work.¹⁸ The notion of domestic worker as defined in international law instruments has also been incorporated in domestic jurisdictions. For example, in Uganda the former Employment Act (now repealed)¹⁹ had a definition which was consistent with the international law standard. However, it is lamented that the current labour law of Uganda does not provide any such definition.

It is against this background that this study aims to examine the contribution of the Ugandan law on trafficking of persons to the ever increasing practice of child domestic labour in Uganda. It seeks to establish whether children trafficked in Uganda for purposes of domestic work are protected under the law. While the trafficking of persons, and in particular the trafficking of children, is a subject which can be studied in many fields including criminal law, migratory laws, human rights law, and other relevant areas; this study limits its scope to analyzing the problem from a criminal law, children's rights and child labour. While looking at the problem from children's rights and child labour perspective, I consider child labour as the economic exploitation of children. I discuss the nature and the conditions of work that are detrimental to the well-being and development of children. From the criminal law perspective, I explore the ways in which the available criminal law provisions can be used to effectively prosecute offenders and protect children from trafficking and labour exploitation.

The study argues that although legislation seeking to protect children from child labour has been in place for quite some time, these laws have not been effectively used to offer sufficient protection to children. The study will show that child labour has instead evolved into the most intolerable forms, including, 'the worst forms of child labour' such as child trafficking, the sale of children and child prostitution. It is further argued that, in the Ugandan context, this evolution has mainly been a result of the fact that the law is unclear on its definition of a child and child labour and it lacks provisions which specifically detail the rights of working children.

¹⁸ ILO Meeting of Experts *Towards an international regulatory framework for Domestic workers* (1951) Report, Document MDW/8 at 47. Available at <<http://www.Etuc.org/a/2809>> [Accessed on 28th March 2009].

¹⁹ Employment Act Cap 219 section 1 (g).

I contend that, whereas the law forbids the employment of children below the minimum age of admission to work, it permits children above that age to work. By focusing on the elimination of child labour, the law only seeks to protect children below the minimum age of admission to work and consequently increases the vulnerability of the other group to exploitation. I argue that the law needs to provide mechanisms that ensure decent working conditions for children, taking into consideration their best interest, labour rights and access to justice. I further argue that the failure of the law to recognize domestic work as a legitimate form of employment and the lack of regulation of the informal sector places children at a higher risk of trafficking and exploitation. I assert that most forms of child trafficking take place in sectors that are unmonitored, unregulated or illegal. Therefore the regulation of the informal sector is paramount to the reduction and prevention of child trafficking.

1.1 Background

Although the subject of trafficking of persons has only received increased international attention in the recent past, its origins date back to the end of the nineteenth century when feminists such as Josephine Butler brought involuntary prostitution into international discourse under the term ‘white slave trade’.²⁰ The ‘white slave trade’, also known as ‘the white slave traffic’, consisted of procurement by force, deceit or drugs of a white woman or girl against her will for prostitution.²¹ Four international instruments were adopted to abolish this practice, namely the 1904 International Agreement for the Suppression of the White Slave Traffic,²² the 1910 International Convention for the Suppression of the White Slave Traffic,²³ the 1921 International Convention

²⁰ Elzbieta M Gozdzia and Elizabeth A Collett ‘Research on human trafficking in North America: a review of literature in International Organisation for Migration *Data and research on human trafficking, A global survey* (2005) at 100.

²¹ Joe Doezenia ‘Loose women or lost women? The re-emergence of the myth of white slavery in contemporary discourses of trafficking in women’ (2000) *Winter Gender Issues* 23 at 25.

²² International Agreement for the Suppression of the White Slave Traffic, 1 L.N.T.S. 83, *entered into force* 18 July 1905.

²³ International Convention for the Suppression of the White Slave Traffic 30 U.N.T.S. 23, *entered into force* 21 June 1951.

for the Suppression of the Traffic in Women and Children²⁴ and, the 1933 International Convention for the Suppression of the Traffic in Women of Full Age.²⁵

However, none of these instruments distinguished between forced and voluntary prostitution and, therefore they failed to acknowledge that women were capable of giving consent to working as prostitutes. Joe Doezenia noted that these instruments identified white women as victims of the white slave traffic and they aimed to protect them from the perceived threat to their purity or chastity; that is, the concept of trafficking dealt with was in relation to the so called immoral purposes or prostitution.²⁶

In 1949, the United Nations adopted the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others²⁷ which consolidated and extended the scope of the four previous international agreements on the white slave traffic. The 1949 Convention took a step forward in so far as it made reference not only to white women and children, but more generally to persons, thus including also men and young boys. Most importantly, the 1949 Convention extended its application to all persons independent of their racial origins. It adopted an abolitionist approach to prostitution, acknowledging that both prostitution in general and the trafficking in persons for the purpose of prostitution are incompatible with the dignity of the human person.²⁸ However, not many countries supported this position, which explains why the Convention was not widely ratified.²⁹ In addition, the 1949

²⁴ International Convention for the Suppression of the Traffic in Women and Children, entered into force on 15 June 1922.

²⁵ International Convention for the Suppression of the Traffic in Women of Full Age, 150 L.N.T.S., *entered into force* 24 August 1934.

²⁶ Alice Edwards 'Traffic in human beings: at the intersection of criminal justice, human rights, asylum/migration and labour' (2007) 36 *Denver Journal of International Law and Policy* 9 at 32.

²⁷ Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others Approved by General Assembly resolution 317(IV) of 2 December 1949 *entered into force* 25 July 1951

²⁸ The Preamble of the 1949 Convention states that prostitution in general and the trafficking in persons for the purpose of prostitution are incompatible with the dignity of the human person.

²⁹ Silvia Scarpa 'Child trafficking: international instruments to protect the most vulnerable victims' (2006) 44 No.3 *Family Court Review* 429 at 436. The two main models are: the abolitionism model that considers

Convention did not define trafficking in persons. Like the counterpart conventions, it only referred to trafficking for the purpose of prostitution, thus limiting its sphere of application to this specific form of exploitation. Other lacunae in the Convention were emphasized by the Special Rapporteur on Violence Against Women, when she noted that the Convention does not consider trafficking as a human rights issue and has not served to protect victims of human rights abuses and to fight against a new form of slavery.³⁰

The increase in trafficking of persons across the world for purposes other than prostitution, as well as the failure of the 1949 Convention to address the issue in detail, created a demand for another international instrument. In 2000 the UN adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, as a supplement to the UN Convention against Transnational Organized Crime.³¹ This instrument includes some important provisions which can be used to address the problem of trafficking of children. Nevertheless, a lot of attention is still being paid to trafficking for the purposes of prostitution and for sexual exploitation. Research on trafficking of persons has centered on women and children trafficked for prostitution or sexual exploitation and not much attention has been paid to other victims and to other forms of exploitation. Shawn Hsu argued that although the particular language and sole focus on sensational cases of white women tricked into prostitution has been long abandoned, the racist and sexist underpinnings of that discourse persist. Governments and non-governmental organisations have continued to focus their anti-trafficking efforts on

prostitution illegal and thus punishes both prostitute and client, and the regulationist model that sees prostitution as a 'necessary evil' that has to be tolerated and regulated at the same time. It should also be noted that many States preferred to adopt or maintain other approaches to regulating prostitution.

³⁰ United Nations, Economic and Social Council, Commission on Human Rights, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, on Trafficking in Women, Women's Migration and Violence Against Women, Submitted in Accordance with Commission on Human Rights Resolution 1997/44, 56th Sess., Agenda Item 12(a) at 10. U.N. Doc. E/CN.4/2000/68 (2000) at 11-12.*

³¹ The Convention against Transnational Organized Crime was adopted by resolution A/RES/55/25 of 15 November 2000 at the fifty-fifth session of the General Assembly of the United Nations and entered into force on 29 September 2003. Available at <<http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>> [Accessed 27th April 2009].

‘innocent victims’; women and children trafficked for the purpose of prostitution or sexual exploitation.³² It is pertinent that efforts to curb trafficking of persons focus on other forms of exploitation such as forced labour, slavery, servitude, as well as, removal of organs. Therefore, this study will focus on the question of child domestic labour as a form of exploitation resulting from the trafficking of children.

There is a wide variety of literature available focusing on trafficking of persons and migration for purposes of domestic work in Europe and Asia mainly. In the context of Africa, a lot of research on trafficking in persons for domestic work has tended to centre on Southern and West Africa where the problem seems to be prevalent and very limited research is available on the East African region, in particular Uganda. Most of the research on child domestic workers in Uganda has been geared towards studying domestic work as a child labour issue. As such, there is a dearth of literature on trafficking of children for domestic work.

Nonetheless, most of the research on child domestic workers in Uganda has indicated that there is trafficking or illegal movement of children from rural to urban areas for purposes of sexual exploitation and domestic work. A 2006 study on violence against girls in Uganda, established that 10% of 500 girls interviewed in Kampala slums had been trafficked for sexual purposes and for domestic work.³³ The use of children for domestic work is a widespread practice in Uganda. Employers mainly from urban areas recruit children from rural areas through family, friends and contacts to perform domestic chores in their homes. Parents and guardians of affected children are made to believe that there are great employment opportunities in the urban areas.³⁴

³² Kevin Shawn Hsu ‘Masters and servants in America: the ineffectiveness of current United States anti-trafficking policy in protecting victims of trafficking for the purpose of domestic servitude’ (2007) XIV *Georgetown Journal on Poverty Law and Policy* 489 at 498.

³³ Uganda Youth Development Link *Retrospective study on Violence against girls in Uganda* (2006) at 15.

³⁴ International Labour Office-International Program on Elimination of Child labour *Rapid Assessment Report on trafficking of children into the worst forms of child labour including child soldiers in Uganda* (2007) at 7.

Research has also indicated that these children suffer gross abuses. A study by the Uganda Women Lawyers Association (FIDA) reported that trafficked children work more than 15 hours every day in order to complete the assigned tasks and extra chores. They wake up earlier than others and are the last to go to bed. The study also revealed that payments are often withheld or delayed, despite harsh working conditions.³⁵ It further noted that trafficked children also suffer sexual exploitation. This was substantiated by another study in the Tororo district, which said that children working as domestic workers sleep in open areas where they are vulnerable to sexual abuse.³⁶

1.2 Statement of the research

It is seldom that domestic work performed by children is regarded as child labour or forced labour. This is particularly so because domestic work is traditionally viewed as one of the oldest occupations in which children have played a significant role. Traditionally, domestic work was seen to be a natural and important process of childhood. In this regard, many societies view domestic work as a vital process of preparation for the child's future adulthood, marriage and parental life.³⁷

Some societies perceive domestic work as part of a woman's apprenticeship for adulthood and marriage. Parents in such societies, often see domestic work as a lighter form of work for their children, in particular their daughters.. In such societies, where domestic work is undertaken outside the child's own home, the employers often see themselves as 'benefactors' to the child's family rather than as exploiters of cheap and malleable labour.³⁸ Again, in such circumstances the work performed by a child in a home other than his or her own, is neither

³⁵ Uganda Women Lawyers Association (FIDA) *Report on the survey on children in domestic service in Kampala district* (1999) at 26.

³⁶ Uganda Child Rights NGO Network *The Situation of Child Labour in Tororo District; Background and Findings* Sept (1998) at 15.

³⁷ United Nations Children's Fund (UNICEF) (note 15) at 5.

³⁸ Jonathan Blagbrough et al 'Child domestic workers: characteristics of the modern slave and approaches to ending such exploitation' (1999) *Childhood* 51 at 52.

considered as ‘employment’ nor as ‘child labour’, let alone as any possible form of child ‘exploitation.’

Consequently, it may be argued that child domestic labour occurs in societies where the use of domestic assistance in the home is common and, where it is established as an accepted practice. In the African context, domestic work is a practice based on the traditional idea of ‘placement’.³⁹ It is a common practice that children are often placed in the home of a relative or acquaintance considered to be economically well. It is believed that within such settings children perform less demanding activities in exchange for their education and training opportunities, food and other benefits considered essential for them.

However, the concept of domestic work and the role of children has evolved with the changing times and society. Because children are cheap to employ, the demand for child domestic workers has grown in many societies. Resultantly their supply has become more organized as recruitment agencies and traffickers recruit children from poorer communities to work in urban areas and in some cases in wealthier countries. In countries like Uganda, where child trafficking is not widely recognized, there is evidence that children and young women are regularly recruited from poor rural areas to work in urban areas. They are often promised better employment opportunities, enrolment in schools or better life opportunities. However, the majority of these children are exploited and abused in various ways, including through sex work or by engaging them in exploitative domestic labour. There are instances, where such abuses occur to children whom have been placed at the responsibility of acquaintances or members of their extended families.⁴⁰

In most cases, the question of trafficking of children for sexual exploitation is quite straightforward as many States have criminalized any form of sexual engagement with children. However, the question of trafficking of children for domestic work remains a complex one as some countries have laws which permit the employment of children at the age of fourteen

³⁹ Kathleen Fitzgibbon (note 1) at 3.

⁴⁰ Uganda Youth Development Link (UYDEL) *Child trafficking and enslavement of children in Uganda, working handbook for NGOs and community workers* (2008) at 16.

to perform ‘light work’, which may include domestic work.⁴¹In Uganda, as already mentioned, the Employment Act permits the employment of children above the age of fourteen years and those below to perform ‘light work’ under the supervision of an adult. Resultantly, domestic work has been considered ‘light work’ and thus permissible for children as young as twelve years. However, research indicates that these children are not doing light work but are instead working in various homes in conditions akin to slavery, hidden and forgotten by the law. Whereas it is not contested that domestic work is important for the development of a child, the law needs to distinguish between children doing domestic work in their homes after school and those who are trafficked to work as domestic workers in homes other than their own.

The Prevention of Trafficking in Persons Act of Uganda criminalises the trafficking of children for harmful child labour and as such seeks to address the issue of child trafficking for domestic work. However, without a law that clearly defines harmful child labour, the provisions of this Act are rendered inapplicable. The Ugandan labour law does not define harmful labour, but seeks to address to the exploitation of children by regulating the minimum age of admission to work. The law does not regulate the conditions of work of children permitted to work and as such only seeks to protect children below the minimum age of admission to work from exploitation. This study therefore seeks to examine the efficacy of these laws in the protection of children trafficked for domestic work in Uganda.

1.3 Objectives of the study

The purpose of this study is to examine the problem of trafficking of children for the purpose of domestic work in Uganda from a legal perspective, focusing mainly on the adequacy of the international and national legal framework to offer protection from exploitation. Thus the principal objectives of the study include;

⁴¹ Section 32(2) of the Employment Act of Uganda permits the employment of a child under the age of fourteen years to perform light work which does not affect his or her education under the supervision of an adult above the age of eighteen years. Section 2 of the Same Act defines ‘Light work’ as work that is not physically, mentally and socially injurious to the child and domestic work has been considered light work .

1. Highlight the plight of trafficked children and show that children trafficked for the purpose of labour exploitation, especially domestic labour, are equally entitled to protection under the law.
2. Explore the relevant International, Regional and National legal framework and examine their effectiveness in protecting children trafficked for domestic work in Uganda
3. Examine the practice in Uganda and make recommendations on how to use the law to prevent, punish and protect, as appropriate, in response to the problem of trafficking of children for domestic work.

1.4 Research questions

The study is premised on the fact that the prevalence of trafficking of children for the purpose of labour exploitation in domestic work in Uganda is mainly due to the absence of an adequate legal framework to deal with the problem. Therefore, it seeks to answer the following questions;

1. Whether the International and the domestic legal framework on trafficking of persons adequately deals with the problem of trafficking of children for the purposes of performing domestic labour?
2. Whether the International and domestic legal framework on child labour effectively addresses the exploitation of children trafficked for the purpose of performing domestic work?
3. Whether the International and domestic legal framework on children's rights is effective in protecting children working as domestic workers from exploitation?

1.5 Significance of the study

This study is significant as it is, from a general overview of available literature, the first in-depth study of its kind in the area of trafficking of children for the purpose of domestic labour. Particularly, it is the first study of its kind that exhaustively considers the link between the law on trafficking of children and the law on child labour in Uganda. Whereas studies have been done on trafficking of persons for the purpose of sexual exploitation, very few studies have looked at the aspect of trafficking of children for purposes of domestic work in Uganda. As was mentioned above, where the problem of trafficking for domestic work purposes has been dealt with, studies have been limited to cross border trafficking and the issue of migrant domestic workers in Asia and Europe.

This study provides a comprehensive analysis of how the international legal framework on human rights, human trafficking, child labour and children's rights is applicable in Uganda and how the laws of Uganda have approached the problem. It highlights the intricate nature of the problem of trafficking of children for domestic work and the need for a multi pronged approach to deal with it. Therefore, it provides some valuable and insightful information to the Government, and other organisations dealing with children's rights. It is also useful to academics and researchers interested in the field of children's rights.

1.6 Methodology

Desk research, through the examination of available literature, jurisprudence and legal instruments, was primarily used as the research methodology applied in the study. In order to conduct an in-depth analysis of the issues discussed in the study, a wide range of sources were consulted, including among others, international global and regional instruments on trafficking of children, and Ugandan domestic laws. Mindful of the fact that there is very limited academic literature on the subject, the study had to rely on the little available literature, including government reports, and such other relevant reports and studies from international organisations. Given the complexity of the subject matter, interviews were used to inform the study. These were semi-structured interviews with relevant stake-holders, including government officials from

the law enforcement departments, children's rights advocates, and officials of civil society organizations focused on children's rights issues were applied.

1.7 Structure of the Dissertation

The dissertation is structured in five main chapters excluding the introduction, which forms the first chapter, where its objectives and aims are defined. Chapter two sets out the ambit of the study and provides an overview of its context. It discusses the magnitude and trends of trafficking of persons in the world. Chapter two also evaluates the factors, which make children vulnerable to trafficking and places special emphasis on gender inequality and culture as underlying factors. In addition, this chapter considers the phenomenon of trafficking of children in Uganda, taking into account the socio-economic conditions of Ugandan families, and how these increase the vulnerability of children to trafficking.

Chapter three provides an overview and historical development of the international law on trafficking in persons. It traces the development of slavery and evolvement of trafficking of persons to a most recent understanding of slavery. It explores the similarities between domestic work and forced labour, slavery or practices similar to slavery and the need to address these. This chapter also evaluates the existing international legal framework on trafficking of persons and how it can be used to address the issue of trafficking of children for domestic labour in Uganda. It also discusses relevant children's rights issue found in the international law on child labour. Most importantly, chapter three underscores the difficulty in defining the concept of 'child labour' and domestic labour.

Chapter four explores the adequacy of the Ugandan legislation to address the problem of trafficking of children for purposes of domestic labour. It analyses the application of international law in the domestic jurisdiction and examines the compliance of domestic legal system in relation to international human rights law standards. It discusses Ugandan laws dealing with trafficking of children, including, among others, the Constitution, the Act on Prevention of Trafficking in Persons, the Penal Code, the Employment Act and the Children's Act.

Chapter five elaborates on how the law can be used to effectively protect child domestic workers. In this chapter, it is argued that the international and domestic laws prohibiting child labour have been in existence for a long time, however, they have not been used effectively to address the problem of child labour in Uganda. I note that the failure of the relevant Ugandan law is due to its blanket abolition of child labour without appreciating the varying concepts of childhood and the role of children in different communities. I also note that whereas children below the age of admission to work need to be protected from child labour, there are many children above the age of fourteen working as domestic workers with no protection from exploitation. I argue that it is this loophole in the law that has created fertile ground for trafficking of children for domestic work.

In this chapter I further discuss various ways in which the law could be applied to protect children in domestic work, including through the recognition of the rights of working children, the criminalisation of only the worst forms of child labour, the development of an appropriate concept of child labour and safeguards that distinguish it from light work, and lastly, by providing some child friendly, accessible and sufficient means of redress. I also note that most child domestic workers are found in the informal sector, which is outside regulation of the law, and suggest ways in which children in the informal sector in Uganda may be protected.

Chapter six provides the findings and concluding remarks of the study. It advocates for a paradigm shift from regarding trafficking of children and child labour as a criminal or labour issue mainly, to considering it in a holistic manner. In this concluding chapter, I argue for a child centred approach that values the full range of children's rights, and one which focuses on understanding the reasons children work, the conditions under which they work and recognises their rights as workers. I advocate that such approach will go a long way to ensuring that children, especially those performing domestic service in homes, are not hidden and forgotten by the law as they work under the pretext of doing 'light work'.

CHAPTER TWO: CHILD TRAFFICKING - SETTING THE CONTEXT

2. Introduction

This Chapter sets the context of the study by providing the global and national dimensions of the problem of trafficking in persons. While considering the global perspective of the problem, this chapter also provides the scope and magnitude of the problem of trafficking of persons in Uganda. Using available literature, this chapter also draws attention to the various forms of exploitation to which trafficked children in Uganda are subject.

As was mentioned in the introductory part of the study, this chapter also explores the causes of trafficking of persons and the factors that make people vulnerable to trafficking. It argues that the root causes of trafficking are complex and often interrelated. Whereas it is acknowledged that poverty, lack of education, and lack of opportunities in the countries or region of origin are among the major causes of human trafficking, in this part of the study I defend that gender inequality, cultural practices and the ‘feminization of poverty’ also contribute to rendering women and children more vulnerable to being trafficked. It is no coincidence therefore that majority of victims of trafficking of persons are women and children, particularly, girls, as the gender dimension of the problem cannot be overstated.

2.1 Scope and magnitude of the problem at the international level

As was mentioned above, the trafficking of persons and children especially is an international human rights issue that has recently gained notable attention at both international and domestic levels. There has been a surge of domestic legislation recognising trafficking in persons as a criminal offence and treating the trafficked person as a victim. Despite the growing international interest in human trafficking, there are no universally agreed upon statistics on the scope and magnitude of the problem.

The U.S. Department of State, which publishes a report on the state of trafficking of persons in the world annually, has attributed this lack of information to the hidden nature of trafficking in persons which prevents a precise count of the number of victims around the world.⁴² The International Organization for Migration (IOM) has also attributed the lack of information to the illegal nature of the phenomenon, the lack of anti-trafficking legislation in many countries, the reluctance of the victims to denounce their traffickers and the low priority given by governments to research activities and data collection in this field.⁴³ Laczko *et al* argue that the lack of clear data is also attributable to the fact that, for a long time, before the adoption of the UN Trafficking Protocol, there was no definition of trafficking. Consequently, as stated in Chapter one, many states still confuse data on trafficking in persons, smuggling in migrants and irregular immigration.⁴⁴

Most of the available information has been provided by the media, International organizations and Non-Governmental Organizations.⁴⁵ This research has primarily focused at establishing the existence of the problem and its magnitude in particular region of the world. For example, Calandruccio, in his review of recent research on trafficking of persons in the Middle East, expressed concern about the scarcity of targeted research on trafficking of persons occurring in the Middle East region. He noted that most of the available information is not obtained from specific field research, but from press coverage or other indirect sources.⁴⁶

⁴² US State Department (note 4) at 7.

⁴³ International Organization for Migration 'New IOM Figures on the Global Scale of Trafficking' (2001) No. 23 *Trafficking in Migrants Quarterly Bulletin* 1 at 1.

⁴⁴ Frank Laczko and Marco A Gramegna 'Developing Better Indicators of Human Trafficking' (2003) Volume X, Issue 1 *The Brown Journal of World Affairs* 170 at 179.

⁴⁵ Research on human trafficking has been done by the U.S State Department and UN Agencies such as UNICEF, IOM, ILO, UNODC, UNHCHR and international Organizations such as Human Rights Watch and Institute for Security Studies among others.

⁴⁶ Giuseppe Calandruccio 'A review of recent research on human trafficking in the Middle East' in International Organisation for Migration *Data and research on human trafficking, A global survey* (2005) vol 43 (1/2) at 271.

Even where statistics have been provided by international organizations and other relevant bodies interested in the areas of trafficking in persons, they have been criticised for lack of accuracy and consistency. It has been argued that these statistics do not constitute the outcome of any sort of detailed and investigatory research. Among the critiques raised, it has been argued that data provided by such organisations is a result of quick and exploratory studies meant to feed policy debates, advocacy strategies and counter trafficking programs.⁴⁷ Others have argued that these statistics are exaggerated for political agendas and as means of fundraising for international organizations working on issues of migrant workers. Gozdziaik *et al* have argued that the figures given by the U.S. reports are used by a number of international organizations, including the United Nations and IOM, as authoritative, yet there has been no release of information with respect to the methodology used to obtain the baseline data.⁴⁸

While it may be true that there is minimal accuracy and consistency, it should be noted that the crime of trafficking of persons is complex, relatively new and hidden, which makes it difficult to obtain definite figures. Tyldum *et al* agree that research in the field of trafficking of persons is difficult for many reasons. They argue that perhaps the most challenging factor is the fact that most of the populations relevant to the study of human trafficking, such as prostitutes, traffickers, victims/survivors, or illegal immigrants constitute what is known as the *hidden populations*.⁴⁹ Given the stigma and the illicit nature of the activities undertaken by members of such hidden populations, affected individuals often refuse to cooperate or provide unreliable answers questions to protect their privacy.⁵⁰ It is argued that the trafficking of persons constitutes three stages, which include the recruitment, the transportation and exploitation phase. Often, these phases take place in different countries and at different times, which makes it complex to

⁴⁷ Robyn Pharoah *Getting to grips with trafficking: Reflections on human trafficking research in South Africa* (2006) at 15.

⁴⁸ Elzbieta M Gozdziaik and Elizabeth A Collett (note 20) at 108.

⁴⁹ A hidden population is a group of individuals for whom the size and boundaries are unknown, and for whom no sampling frame exists.

⁵⁰ Guri Tyldum and Anette Brunovskis 'Describing the Unobserved' in 'Methodological Challenges in Empirical Studies on Human Trafficking' in International Organisation for Migration *Data and research on human trafficking A global survey* (2005) Vol. 43 (1/2) at 18.

attain reliable follow up statistics. In addition, Pharaoh argues that the constituent elements of trafficking – such as coercion, deception and exploitation – are themselves difficult to define and delineate. In this context, for example, there is no definition of what constitutes exploitation.⁵¹ In all, the complex nature of the practice makes it difficult to obtain accurate and reliable statistics. Therefore, statistics provided by various organisations are illustrative rather than accurate.

While, the available statistics may not clarify or indicate the actual degree and extent of the problem, they surely emphasize the existence of such phenomenon. Most importantly, the critiques surrounding the figures related to the number of persons trafficked do not contest that children in different parts of the world are being trafficked across borders or within their own countries. Therefore, while the exact numbers may neither be known nor agreed upon, it is beyond the scope of this thesis establish the magnitude of the problem.

2.1.1 Scope and magnitude of the problem in Uganda

Uganda is a landlocked country in the Eastern region of Africa. It is bordered by Kenya on the east, Tanzania and Rwanda on the south, Democratic Republic of Congo on the west and Sudan in the north. It has many different ethnic groups, the majority of which do not form part of the larger population of the country. It is estimated that forty different languages are spoken in the country. It is geographically divided into four parts namely the central, the eastern, the northern, and the western regions each of which embraces a number of districts with similarities ranging from ethnic groupings to ecological factors. The country is also divided into 112 administrative areas called districts. The districts are further subdivided into counties, sub counties, parishes and villages. In addition, there is a parallel system of administration starting at the lowest level consisting of elected administrators referred to as Local Councils (LCs). Local Councils operate at the district (LC5), county (LC4), Sub County (LC 3), parish (LC 2) and village (LC1) levels. The role of these local governments is to implement and monitor government programmes at each respective level.

⁵¹ Robyn Pharaoh (note 47) at 14.

While it is established that trafficking of persons and children particularly has existed for many years, research shows that in Uganda very little is known about this practice. Available literature indicates the existence of child trafficking, although there is limited in-depth research and information on the scope and magnitude of the problem. However, the little literature available indicates that in Uganda, trafficking occurs at two levels, namely at the internal level and at the international level across the border of the country. At the internal level, trafficking of children is mainly characterized by the unlawful transportation of children (mostly young girls) from the rural to the urban areas of the country. At the international level, trafficking involves the transporting children across borders for purposes of engaging them in domestic work and prostitution and other illegal activities. Apart from being trafficked to other African countries, Ugandan children are mainly trafficked to the Middle East and to Europe for predominantly to undertake domestic work and for prostitution.⁵² Some examples of countries to which Ugandan children are trafficked include Canada, Egypt, the United Arab Emirates, and Saudi Arabia.⁵³

Research also showed that Uganda is a destination for men, women, and children trafficked from other countries for purposes of forced labour and sexual exploitation. It should also be noted that recruitment agencies have played an important role in the process. Reports indicate that they have taken advantage of the economic hardship of many Ugandan families to recruit and place their children in hazardous work in other countries. A leading newspaper in Uganda reported that eight women were rescued by some guards from the American bases and the United States Marines serving in Iraq. The report said that the victims had been recruited by an organization called Veterans Development Limited to work in Iraq as secretaries or supermarket attendants but on arrival they were forced into doing domestic work.⁵⁴ In order to address the problem, the Government placed a ban on the recruitment of nationals to undertake domestic work in other countries, including the Iraq, Yemen, Sudan, Saudi Arabia, Afghanistan and the United Arab Emirates. This measure was taken after the Government had received reports that many Ugandan women were being recruited to do domestic work in those countries,

⁵² Elaine Pearson *Study on Trafficking in Women in East Africa* (2003) at 3. Available at <<http://www.gtz.de/traffickinginwomen>> [Accessed on 20 March 2009].

⁵³ United States State Department Report (note 4) at 15.

⁵⁴ The Daily Monitor *US Marines rescue eight Ugandan slaves in Iraq* 11 July 2009.

and that they were working in conditions which were similar to slavery.⁵⁵ Further, the unsecure situation in Iraq has created a demand for more security guards. In order to meet such demand many companies resorted to recruiting both men and women to provide security work in Iraq. A total of 12 Ugandan companies have been licensed to recruit staff for deployment in Iraq.⁵⁶ It is estimated that more than 6,000 Ugandans have been employed as security guards for American military bases, hospitals, airports, bridges and road checkpoints in Iraq since 2005.⁵⁷ However, the working conditions for the guards are not satisfactory. Reports indicate that at times their travel documents and pay are withheld to prevent them from returning to home or seeking other job opportunities.⁵⁸ However despite available evidence of possible trafficking, these cases have not been investigated to establish whether or not they constitute trafficking in persons.

There have also been reports of young men and women from Asia trafficked into Uganda and forced into prostitution and other forms of forced labour. Some of them work under harsh conditions in the factories while others work in conditions that are akin to slavery.⁵⁹ It is argued that Pakistan and China nationals are the main victims trafficked to Uganda. However, it is also believed that Indian children are also being trafficked to Uganda for purposes of sexual exploitation.⁶⁰

The trafficking of persons and in particular the trafficking of children for use in armed forces has fast become an alarming issue in Uganda. Research showed that since 1986 the Lords Resistance Army (LRA) and the Allied Democratic Forces (ADF) rebels abducted more than 10,000 children. It is alledged that young boys were inducted into the rebels ranks to commit atrocities like killing, looting, ambush and raping women in the villages. Girls were raped and

⁵⁵ The Daily Monitor *Government bans exportation of labour to Iraq* 6 August 2009.

⁵⁶ The New Vision *Ugandan askaris in Iraq ripped off* 17 August 2007.

⁵⁷ Alexis Okeowo 'The new surge: Ugandan guards in Iraq' 24 April 2008. Available at <www.middle-east-online.com/english/?id=25527> [Accessed on 14th June 2010].

⁵⁸ United States Department *Trafficking in Persons report* (2009) country report on Uganda. Available at <<http://www.state.gov/g/tip>>[Accessed on 27 August 2009].

⁵⁹ The Sunday Vision *Security hunts Indian over sex slavery* 23 April 2006. Sunday Pepper *Indians arrested for Trafficking in Persons* 2 July 2006.

⁶⁰ United States State Department Report (note 58) at 17.

sometimes forced to marry the rebels and to cook for them or to carry looted property.⁶¹ It is reported that girls as young as fourteen or fifteen years were forced into sexual slavery and serve as ‘wives’ of the LRA commanders.⁶² Presently, the LRA is still known to use brutal tactics to instill obedience in children. It threatens them with killing them if they attempted to escape and uses them to force, to beat or even to kill other children who attempted to escape.

In so far as internal trafficking is concerned, there are reports that children are being trafficked from rural areas for purposes of sexual exploitation, domestic work and use in witchcraft and other related rituals. While it may be true that detailed research has not been done on trafficking for body parts in Uganda, it is evident from newspaper reports that children are being trafficked for removal of their body parts and sexual organs for purposes of undertaking rituals, sacrifice and other witchcraft related activities.⁶³ It has also been reported that the witchdoctors look for human body parts of live victims for traditional medical concoctions. Allegedly, they use them to heal illnesses, foster economic advancement or to harm enemies.⁶⁴

Several newspapers have also reported that children, mostly girls, were being sold in an open market in Katakwi to work as domestic workers, but were later turned into sex slaves.⁶⁵ According to the 2006 survey on child protection by Save the Children International Uganda (SCIU) in the districts of Moroto, Kotido and Nakapiripirit, it was observed that brokers at the weekly cattle markets in the neighbouring Katakwi district sold children. These brokers also extended their trafficking of children activities to other districts in Uganda and across the border in Kenya, especially in the town of Eldoret.⁶⁶ In order to address this problem, the Government of Uganda set up an adhoc committee to investigate the sale of the girls. The result of the work

⁶¹ United Nations Children’s Fund *Country Programme Progress Report* (1999) at 23.

⁶² Human Rights Watch *Stolen Children: Abduction and Recruitment in Northern Uganda* (2003) at 12.

⁶³ New Vision *Children Kidnapping is on the increase: I found my daughter prepared for sacrifice* 24 July 2006 at 20.

⁶⁴ United States Department Report (note 58) at 15.

⁶⁵ New Vision *Girls sold in Katakwi* 3 July 2006 at 1.

⁶⁶ Save the Children International Uganda *Survey on child protection in the districts of Moroto, Kotido and Nakapiripirit* (2006) at 13.

done by the committee indicated that the police had arrested a number of suspects involved in human trafficking. It also showed that four girls had been rescued from the different web of traffickers.⁶⁷

As already mentioned, the use of children for domestic work is a widespread practice in Uganda. However, due to the hidden nature of trafficking for labour purposes and given that domestic work is not regulated in Uganda it becomes difficult to determine the exact number of children involved in the practice. As was mentioned early, the rough estimate from the Uganda National Bureau of Statistics places the figure at approximately one and a half million children, majority of which are thought to be between five to seventeen years.⁶⁸ The problem, however, is that statistics did not disaggregate between children working in the informal sector and those within the sphere of domestic work, thus there are no definite statistics of children trafficked for domestic work in Uganda.

Given that the purpose for which children are trafficked depends greatly on the existing socio-economic conditions and cultural norms of a particular community or region, it becomes important that all efforts aimed at dealing with trafficking of children should appreciate the factors that make children vulnerable and create demand for their services. These factors are discussed below.

2.2 Causes of the trafficking of children

In order to adopt measures to prevent human trafficking, one needs to appreciate the underlying causes of trafficking in persons. Chuang argues that most legal frameworks address trafficking as an act (or a series of acts) of violence, requiring the perpetrators to be punished and the victims to be protected and reintegrated into society. She further argues that while such responses might

⁶⁷ Uganda Human Rights Commission *9th Annual Report* (2009) at 96.

⁶⁸ Uganda Bureau of Statistics *Child Labour in Uganda: A report based on the 2000-2001 Uganda Demographic and Health Survey* (2003) at ix.

account for the consequences of trafficking, they tend to overlook its causes pillared in the broader socio-economic conditions that feed the problem.⁶⁹

The trafficking of persons has been analyzed as precipitated by demand and supply forces. On the supply side, also regarded as the ‘push’ factors, poverty, gender inequality, culture, lack of education, lack of employment opportunities and the desire to improve one’s life make people vulnerable to the lures of trafficking. On the demand side, also regarded as ‘pull’ factors, market demand for sexual services, the needs of free or cheap labour and availability of unskilled labour in some countries create a fertile ground for trafficking of persons to flourish. The debate in the following parts of the thesis will focus on the push factors that make people, especially children, vulnerable to trafficking. It is argued that whereas several factors such as poverty, lack of education and lack of employment opportunities do make people vulnerable, their effect is embedded in gender inequality and the cultural practices that perpetuate gender discrimination.

2.2.1 Globalisation and the trafficking of children

Globalisation has been closely linked to trafficking of children as it has resulted in the world becoming ‘one global village’ and allowed greater and easier access to goods and services. It may therefore be argued that globalisation has played a critical role in providing a platform for the growth of trafficking in persons. The globalisation of markets and the development of regional markets have resulted in an increased demand for goods and services. This has in turn led to an increased demand for cheap or free labour in order to increase production with minimal costs. Nagle argues that the opening of trade barriers and the emergence of new regional and global markets has created a huge demand for cheap or free labour for the service and manufacturing sectors. She further argues that the ability of many businesses to remain competitive in a globalising economy depends on the capacity to assemble and retain a labour

⁶⁹ Janie Chuang (note 8) at 138.

force for the least amount of investment.⁷⁰ It is for this reason that children and women with limited marketable skills have become increasingly vulnerable to trafficking for purposes of exploiting their labour.

Moreover, it is argued that globalisation has created glaring inequality among nations and within communities. It has deepened the wealth gap between the rich and the poor nations. It is this wealth gap that has enticed people from poor nations to move to richer ones in search of better opportunities, thus increasing their vulnerability to trafficking. Chuang also notes that, notwithstanding its general economic benefits, globalisation has created a spate of 'survival migrants' who seek employment opportunities abroad as a means of survival as jobs become scarce in their countries of origin.⁷¹

Globalisation has also brought the growth of information technology and the introduction of the internet. This has facilitated increased access to vulnerable persons and led to the development of various means of sexually exploiting women and children for profit. Shifman contends that traffickers and pimps no longer need to rely on the traditional routes into sex work, as women and girls can now be sold through the Internet.⁷² In addition, the internet has led to an increase in the number of consumers benefitting from the sexual exploitation of trafficked victims and thus created a demand for more. In this respect, it is noted that it has increasingly become easy to move people, just like goods, across borders. Globalisation has resulted in an unprecedented flow of capital, goods and services, and labour from a continent or country to the other. It is the ease with which people move from one country to another that has made it easy for traffickers to transport their victims with minimal suspicion of law enforcement agents.

⁷⁰ Luz Estella Nagle 'Selling souls: the effect of globalisation on human trafficking and forced servitude' (2008) 131 *Spring Wisconsin International Law Journal* 131 at 139.

⁷¹ Janie Chuang (note 8) at 138.

⁷² Pamela Shifman 'Trafficking and Women's human rights in a globalised world' (2003) 11 No. 1 *Gender and Development* 125 at 125.

2.2.2 Poverty, inequality of wealth and trafficking of children

In most cases, the trafficking of children is directly linked to deteriorating economic conditions in countries or regions of their origin. Poverty affects the ability of an individual, family or community to obtain the basic commodities required for their living and thus increases their vulnerability to trafficking and exploitation. Dottridge argues that poverty is a central factor in the decision of parents to send their children away to work. The prospect of good wages in a wealthier country makes sending children away seem acceptable.⁷³ Chaung also argues that trafficking generally arises in conditions of poverty and in locations that lack viable economic opportunities relative to other countries.⁷⁴

In Uganda, statistics showed that about nine million people are unable to meet their basic needs. They face what is often called ‘absolute poverty’. Another twenty-five per cent of the population is unable to meet their daily food requirements. These people live under the ‘line of poverty.’⁷⁵ Presently, Uganda’s macro-economic statistic has not helped much to solve the problem. Despite the country’s economic advancements, it remains among the least developed countries in the world. An analysis of the population living below the poverty line illustrated that poverty affected women more than it affected men. It showed that about thirty-three per cent of women were affected by poverty and lived below the consumption poverty line as opposed to an estimate of thirty per cent of men that were affected.⁷⁶

In many rural areas poverty has affected the ability of families to have access to family planning information. This has led them to grow into very large families which are not able to provide for all its members. This situation is worse in African countries where the concept of extended families is widespread. In this regard, Celek contends that developing States are mainly characterised by poor households, which tend to have more children and thus more mouths to

⁷³ Mike Dottridge ‘Trafficking in Children in West and Central Africa’ (2002) 10 No.1 *Gender and Development* 38 at 38.

⁷⁴Janie Chuang (note 8) at 141.

⁷⁵ The Government of Uganda *The Participatory Poverty Assessment* (2000) at 19.

⁷⁶The Government of Uganda *Final Report on the Social Development Sector Strategic Investment Plan* (2003) at 4.

feed. Such households have a greater need to send their children to work so that they can help support the family or repay the parents' debts.⁷⁷ Families in such African communities are vulnerable to trafficking of persons as they search for survival.

In Uganda particularly, the high population outburst has increased the vulnerability of children to trafficking as they seek out alternative means of survival. Statistics show that Uganda has a rapidly growing population. The latest national population and housing census done in 2002 showed that Uganda's population was at 24.2 million people.⁷⁸ However more recent estimates have put the population at 33 million people.⁷⁹ The high fertility rate has been cited as the reason for the rapidly growing population. Fertility rates have persistently remained very high, with an average estimate that each woman bears up to seven children.⁸⁰

It has been argued that the high birth rates in Uganda are attributed to poverty, high illiteracy rates and gender inequality. Research indicates that there is a link between the level of education, birth and fertility rates. It was established that women with no education have a total fertility rate (TFR) of approximately seven point eight, while those with some primary education stood at seven point three. Women with more than primary education have shown TFR dropping dramatically from above five in 1988 to three point nine in 2000, which resembles a difference of nearly four children when compared to women without education and those with secondary education.⁸¹ However, some scholars have argued that the lack of information and tools, the lack

⁷⁷ Bozena Maria Celek: 'The International Response to Child labor in the Developing world: Why are we ineffective?' (2004) Vol. 11 No.1 Winter *Georgetown Journal on Poverty Law and Policy* 87 at 93.

⁷⁸ Uganda Bureau of Statistics *The 2002 Uganda Population and Housing Census, Analytical Report* (2006) at 9.

⁷⁹ Central Intelligence Agency *The World Fact Book*. Available at < <https://www.cia.gov/library/publications/the-world-factbook/geos/ug.html> > [Accessed on 30 June 2010].

⁸⁰ Uganda Bureau of Statistics (note 78) at 46.

⁸¹ Ministry of Finance, Planning and Economic Development *Gender inequality in Uganda: The Status, Causes and Effects* (2006) at 13.

of resources, and women's lack of bargaining power within families played a significant role in keeping the fertility rates of Ugandan women among the highest in the world.⁸²

The high fertility rate has resulted in children constituting a large percentage of the population compared to adults. Statistics indicate that almost fifty six per cent of the population of Uganda are children below the age of 18 years, of which forty nine per cent are below fifteen years.⁸³ With the deepening poverty, especially in the rural areas, educating these children has become a major challenge. Attempts to survive have led these children to be caught up in activities that in one way or the other require them to provide their labour. In fact, statistics shows that in Uganda about two point seven million children are working or involved in some form of labour. More than half of these children (about fifty-four per cent) are aged between ten and fourteen years. It is also noted that about one third of the children who work are less than ten years old.⁸⁴

The economy of Uganda is primarily based on the agricultural sector, with over seventy per cent of the working population being employed in the sector.⁸⁵ Most of the agricultural activities are carried out on small scale farms using rudimentary tools and old machinery. Both food and cash crops such as coffee, tobacco, and cotton are grown on the farms. Most of these crops are labour intensive. Given that most of the farming is done for subsistence, most of it relies on family labour with women and children playing key roles in providing their labour to the family farm. Often, children and mainly girls are victimised and required to provide such labour. Some recent statistics show that ninety-six per cent of economically active children aged between seven and fourteen years work in agriculture.⁸⁶

⁸² Amanda Ellis, Claire Manuel and Mark Blackden *Gender and Economic Growth in Uganda: Unleashing the power of Women: How are Growth and Gender linked?* (2006) at 32.

⁸³ Uganda Bureau of Statistics (note 78) at 37.

⁸⁴ Uganda Bureau of Statistics *Child Labour in Uganda: A report based on the 2000-2001 Uganda Demographic and Health Survey* (2003) at ix.

⁸⁵ Uganda Bureau of Statistics *Uganda National Household Survey* (2005/06) at 29.

⁸⁶ Uganda Bureau of Statistics *Understanding children's work in Uganda: characteristics of children's work* (2008) at 27.

The high reliance on agriculture as one of the main activities undertaken by children, increases their vulnerability to human trafficking. This is likely to happen when there is poor crop yields or poor harvest caused by draughts or weather patterns, which are less favourable for agriculture. This kind of situation leaves many families desperate and seeking to send their children away to reduce the burden incurring expenses of feeding them. Reports showed that in the North-Eastern districts of Uganda which were facing famine such as Moroto, Kotido and Nakapiripirit districts, young girls were taken to trading centres in the Teso region in the east part of the country to be sold.⁸⁷

This state of desperation of these families and of many communities is further compounded by unequal distribution of wealth in many nations and regions in the world. Manzo asserts that in convincing the victims, traffickers rely on such perceptions of uneven development “that while there is poverty ‘here’ there is wealth and prosperity ‘there’.”⁸⁸ Such unequal distribution of wealth persuades those living in the economically less advantaged countries to seek opportunities in wealthier countries.

2.2.3 HIV/AIDS and the trafficking of children

HIV/AIDS can be both a cause and consequence of trafficking in persons. For instance, in some communities, the prevalence of HIV/AIDS has directly led to the increase in child trafficking. Research in southern Africa, indicates that there is a perception that having sexual intercourse with a young girl reduces the risk of contracting HIV/AIDS. This belief has increased the demand for young sex workers, and the trafficking of young girls to southern African countries.⁸⁹

⁸⁷ The Daily Monitor *K'jong children now sold in Kenya* 23 October 2006.

⁸⁸ Kate Manzo ‘Exploiting West Africa’s children: trafficking, slavery and uneven development’ *Royal Geographical Society and the Institute of British Geographers* (2005) 393 at 399.

⁸⁹ Aderanti Adepoju ‘Review of research and data on human trafficking in Sub Saharan Africa’ in International Organisation for Migration *Data and research on human trafficking, a global survey* (2005) at 84.

African patriarchal societies are pillared on the belief that men head the household and they are the main providers for their families. In situations, where HIV/AIDS results in death of the head of the family, the family becomes more vulnerable to trafficking as women take over the sole responsibility of providing for the other family members. Burdened with increased responsibilities and limited resources, some women opt for migration in search of employment to improve their families' well-being only to fall prey to traffickers. Children orphaned by AIDS are said to be even more vulnerable to trafficking due to the increasing poverty of their households and communities and as a result of the stigmatisation, rejection, or marginalization, which they are exposed to in their communities.⁹⁰

In Uganda particularly, notwithstanding the reported decline in the HIV prevalence rate from 18.8 per cent in early 1990s to 6.5 per cent,⁹¹ AIDS related cases have remained high. According to a study conducted in 2002, more than 1 million people are estimated to be living with HIV/AIDS in Uganda.⁹² In Uganda, the HIV/AIDS pandemic has escalated the problem of child labour and the trafficking of children, specifically because it has orphaned many children and led them into poverty. Research indicates that fifteen per cent of Uganda's children are orphans.⁹³ Many child headed households have emerged as a result of the impact of the HIV/ADS. It is estimated that there are approximately 42,000 child headed families across various districts of the country.⁹⁴

In most cases, children affected and those infected with HIV/AIDS, and in particular, orphaned children have been forced to leave school due to lack financial capacity to afford school related costs. Majority of these children are being forced to work in order to be able to

⁹⁰ United Nations Children's Fund (UNICEF) *Trafficking in Human Beings Especially Women and Children in Africa* (2003) at 7.

⁹¹ Ministry of Health, Government of Uganda *A Rapid Assessment on the drivers of the HIV/AIDS Epidemic and effectiveness of preventions in Uganda* (2006) at 32.

⁹² Ministry of Gender, Labour and Social Development and the Uganda AIDS Commission *Situation analysis of orphans in Uganda, orphanages and their households* (2002) at 16.

⁹³ Uganda Bureau of Statistics *Uganda National Household Survey* (2005/06) at 123.

⁹⁴ *Idem*.

meet their basic needs and to support their siblings. There are also cases where children especially girls have left school to take care of sick parents and relatives. The enormous responsibilities placed on these children have led them to get engaged in small cash activities, including, among others, the selling of vegetables and fruits in the streets in order to raise money for survival. The search for alternative means of survival has exposed these children to greater risks, including chances of being trafficked or forced into exploitative activities. The research found that children leaving in the streets and those orphaned or affected by HIV/AIDS fall within the category of the risk group prone to trafficking for prostitution and for domestic work.⁹⁵

2.2.4 Lack of education opportunities and trafficking of children

It is universally recognized that education is an important investment in human capital and an essential tool in the development of an individual and the community. It plays a critical role in fighting poverty and child labour therefore, where there are limited education opportunities, children are left vulnerable to trafficking. In several communities, children especially girls are denied the right to education and formal training. Poverty has affected the capacity of families to provide education to their children. In many cases, families are forced to choose between educating boys or girls. Instead of sending girls to school, parents opt to give them informal training in areas like agriculture, domestic work, knitting and cooking. This, they argue, helps them to prepare for their future roles as mothers and as wives.⁹⁶

Where girls are permitted to attend school, they are required to manage both school activities and domestic responsibilities. This affects their performance and leads to a high number of girls dropping out of school at an early stage. Children with limited or no access to education often have little alternative, but to look for work at a very early age. Consequently, most girls that are left with no formal skills are relegated to work in the informal sector of their societies where they earn very little and are often do not benefit from legal protection.

⁹⁵ United Nations Integrated Regional Information Network *Uganda: NGOs Alarmed by High Rates of Child Sex Abuse* (2002) at 11.

⁹⁶ Alice Peace Tuyizere 'Gender and Sustainable development' *Gender and Development: the role of Religion and Culture* (2007) at 195.

Research on trafficking of domestic workers indicates that there is a strong correlation between the trafficking of girls for prostitution and low levels of education, inadequate training and educational opportunities. For example, research on trafficking of Ethiopian domestic workers indicates that women trafficked to work as domestic-workers are overwhelmingly uneducated, unexposed to divergent cultural and normative systems, and most importantly, have had no formal educational or vocational training. Domestic work is theoretically an extension of work they perform at home.⁹⁷ A study in Nigeria established that a considerable number of trafficked victims in prostitution in the country have only completed primary school or have dropped out of secondary school.⁹⁸

In Uganda, the education system consists of both formal and informal education. The 1995 Constitution of Uganda provides that every child shall have a right to education which shall be the responsibility of both the State and the parents.⁹⁹ In recognition of this right, the Government of Uganda in 1997 introduced the Universal Primary Education (UPE) programme to offer free primary education. In 2007 Universal Secondary Education (USE) was introduced to offer free secondary education. Since UPE was established, primary school enrollment has drastically risen from about three million pupils in 1997 to approximately seven and a half million in 2003. Between 2005 and 2006 the figure was established at approximately seven point six million.¹⁰⁰ The universal secondary education programme is still limited to a few pilot districts, which makes it difficult to assess its impact. Noteworthy, where children have not had the opportunity of enrolling into the formal education system or where they dropped out of school, informal education is provided to compliment the formal education system. Importantly, in the informal education system, teaching includes a wide range of practical activities such

⁹⁷ Khaled Ali Beydoun 'The trafficking of Ethiopian domestic workers into Lebanon: navigating through a novel passage of the international maid trade' (2006) 24 *Berkeley Journal of International Law* 1009 at 1012.

⁹⁸ Pannuda Boonpala and June Kane *Unbearable to the human heart: Child trafficking and action to eliminate it* (2002) at 26.

⁹⁹ Article 34 (2) of the 1995 Constitution of the Republic of Uganda.

¹⁰⁰ Uganda Bureau of Statistics (note 93) at 14.

tailoring, welding, catering, carpentry and many others. However, this type of education is limited to urban areas and is not spread across other regions of the country.

While it has been reported that the Government has made tremendous efforts to improve literacy levels in the country, illiteracy rate still remains very high. The 2002 census established an illiteracy rate of thirty-two per cent¹⁰¹ and also showed that nineteen per cent of the population aged six years and above had never attended school.¹⁰² It also indicated that twenty per cent of the population aged fifteen and above had not benefited from any form of formal education. Lastly, it showed that the proportion of people without any formal education is higher in the rural areas (twenty-three per cent) than in urban areas (nine per cent).¹⁰³ As already noted, poverty has also been cited as a major reason for the escalating levels of illiteracy in Uganda. Whereas the UPE programme is supposed to be free, parents are required to meet other requirements such as food, clothing and transport which are costly for many. Research indicates that although forty-three per cent of children had attained some primary education, they had not completed basic primary education. The survey findings also indicate that the forty per cent of children who dropped out of school did so because it was too expensive for them remain in the educational system.¹⁰⁴ Cultural practices and gender discrimination have also contributed to increasing illiteracy levels among girls and women.

2.2.5 Gender inequality and trafficking of children

Gender disparity is often motivated by unequal economic status of most women, and is perpetuated through structures based on systematic inequality, which discriminate against women. ‘Gender’ is in itself a social construct, which is used to ascribe different roles to women and men based on their sex. It differs from ‘sex’ which refers to the biological and genetic makeup and differences between men and women. Therefore, gender roles reflect different social constructions of the female and male identities which result from their different social positions.

¹⁰¹ Uganda Bureau of Statistics (note 78) at 57.

¹⁰² Idem.

¹⁰³ Uganda Bureau of Statistics *Uganda Demographic and Health Survey* (2006) at 23.

¹⁰⁴ Uganda Bureau of Statistics (note 93) at 20.

It is nothing linked to the innate female or male behavior. Brautigam argued that gender roles are contingent on the socio-economic, political and cultural contexts and are thus usually specific to a given time and space. They vary according to the specific context in which they occur and are affected by other variables such as class, age, race and ethnicity.¹⁰⁵

In most communities in Africa, gender roles are characterized by male dominance and female subordination. In many patriarchal societies, male dominance is based on control of resources and prime factors of production. Tuyizere contends that patriarchy is a social system based on male privilege and power, in which women are regarded as secondary and as created to serve men.¹⁰⁶

Gender ascriptions have lead to a point that in many societies women continue to lag behind, both in terms of economic growth and development. Their situation is worsened because they do not have access to land and other relevant resources, and they earn very little. In most cases women have little or no assets and they are denied the right to inherit land or property. The lack of land and control of other resources have barred women from accessing credit facilities, leaving them in abject poverty, highly dependent on men and vulnerable to trafficking and other abuses. The United Nations Special Rapporteur on Violence against Women explained the predominance of women as victims of trafficking of persons as follows:

‘... the lack of rights afforded to women serves as the primary causative factor at the root of both women’s migration and trafficking in women. The failure of existing economic, political and social structures to provide equal and just opportunities for women to work has contributed to the feminisation of poverty, which in turn has led to the feminisation of migration, as women leave their homes in search of viable economic options.’¹⁰⁷

¹⁰⁵ Christine Brautigam ‘International Human Rights Law, the relevance of Gender’ *Human rights of women, International instruments and African experiences* (2002) at 23.

¹⁰⁶ Alice P Tuyizere (note 96) at 133.

¹⁰⁷ Report of the United Nations Special Rapporteur on Violence against Women at 4. Available at <<http://www.unhchr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.2000.68.En?Opendocument>>. [Accessed 28th May 2010].

Although the Ugandan Government offers free primary and secondary education, many children especially girls still lack access to formal education. Thirty-seven point six per cent out of a total illiterate population of thirty-two per cent in the country are female. Only twenty-three point six of that figure are males while the remaining sixty three per cent are disabled persons.¹⁰⁸ In addition, statistics on education indicated that the proportion of females who had never had any formal education is higher (twenty-eight per cent) than that of males (eleven per cent).¹⁰⁹ The disparity results from gender inequality and continuous discrimination against women in society. Girls born in households with economic hardship and limited resources are required to stay home and work in the plantations while their brothers go to school.¹¹⁰ While it is true that both boys and girls are affected by poverty, it is uncontested that girls are even more vulnerable to its adverse effects. Addressing the root causes of gender inequality and cultural practices that are prejudicial to women and to girls in particular becomes an issue of paramount importance to ensure the realization of their rights. The lack of formal or the supplementary informal training places children in a position where their vulnerability to exploitation is exacerbated. Their opportunities to access quality employment is limited and they are left to perform less skilled activities in the informal sector with no protection in labour law.

Gender inequality has in many communities contributed to the existence of gender based violence which has enhanced the vulnerability of women and girls to trafficking. Gender violence is often intended to keep women in a subordinate and submissive position. In many African communities, domestic violence is regarded as a ‘normal’ practice. Tuyizere contends that in Africa, domestic violence has its origins in customary norms and enrooted traditional practices which allow husbands to beat their wives as an exercise of their right.¹¹¹ In this respect, it is accepted that the bride price paid before marriage (in most cases traditional marriage) gives the husband extensive rights over his wife, automatically placing women in the position of being the property of their husbands.

¹⁰⁸ Uganda Bureau of Statistics *Uganda population and housing Census report* (2002) at 33.

¹⁰⁹ Uganda Bureau of Statistics (note 93) at 16.

¹¹⁰ Alice Tuyizere (note 96) at 197.

¹¹¹ *Idem* at 147.

Women and girls experiencing gender based violence are more likely to surrender themselves to traffickers in attempt to escape violence and oppression from their homes and communities. In this regard, Chuang has argued that, while in some parts of the world women migrate in response to economic hardship, in order parts they migrate to flee gender-based repression. She contends that they will accept dangerous migration arrangements in order to escape the consequences of the entrenched discrimination which affects them, some of which include unjust or unequal employment, gender-based violence, and the lack of access to basic resources.¹¹² It can thus be argued that gender based violence in the public and private spheres increases the vulnerability women and girls' and it makes them easy targets of traffickers.

2.2.6 Culture and the trafficking of children

In some cases, traditional norms and cultural practices have been described as hindrances to attempts to achieve gender equality and to address the root causes of child trafficking and the exploitation of children. Culture refers to the norms and practices of a society as defined by a particular prevailing ideology. It encompasses socially acquired behavior, including the material and the intangible practices passed from one generation to another.¹¹³ In this sense, it represents both, the transmissible and cumulative practices.¹¹⁴ It is thus evident that the culture and the integral values of any given society are not static. They can be modified or some of their elements can be discarded.

The cultural practices and traditions of various communities have inadvertently increased women and children's vulnerability to trafficking by perpetuating gender discrimination and inequality. In this respect, culture has been viewed as key obstacle to the enjoyment of women's human rights. The main reason that explains such perpetual denial of fundamental rights to women is the fact that most communities are resistant to changes and they do not show interest

¹¹² Janie Chuang (note 8) at 141.

¹¹³ Alice Tuyizere (note 96) at 45.

¹¹⁴ Idem.

in abdicating from such negative cultural practices.¹¹⁵ As was mentioned earlier, the ‘placement of children’¹¹⁶ is an example of such pervasive African cultural practice, which impacts negatively on their wellbeing. Many African communities are pillared on the notion of extended families, where the immediate members of a family live together with other relatives and friends in the same household. In the context of extended families, children are seen to belong to the community as a whole, and their upbringing is a responsibility of any member family. The notion of extended families has contributed to the placement of children in the households of ‘relatives’ and friends, where they are required to work in exchange for education and other gains. Dottridge contends that, as a cultural practice, placement of children is largely responsible for the large number of West African children living in Britain with families other than their own. In this regard, he estimates that about 10,000 children are affected.¹¹⁷

It should also be noted that placement of children, and in particular the placement of girls for purposes undertaking domestic work, is a practice that has been common in several regions and for centuries. Acceptably, there are cases where this practice has benefitted children, and in particular in cases where they are orphaned and given a home. However, in other cases, placement has contributed to the exploitation of children subjecting them to numerous abuses, including slavery and forced labour under the pretext that they would receive vital training required for their future lives. Given that some countries have not regulated the use of children for domestic activities and where regulation has been put in place it seldom includes any form of monitoring, it becomes difficult to curb the problem. It is argued that placement of children is similar to slavery, where it results in their exploitation for labour purposes, and it therefore falls within the scope of trafficking of persons defined under the UN Trafficking Protocol. The foregoing links the debate to the provision of Article 1(d) of the UN Supplementary Convention on Slavery.¹¹⁸ This provision defines ‘[p]ractices similar to slavery’ to include *inter alia*: ‘any

¹¹⁵ Esther M Kisaakye ‘Women, culture and human rights: female genital mutilation, polygamy and bride price’ *Human Rights of Women, International Instruments and African experiences* (2002) at 269.

¹¹⁶ ‘Placement’ is the sending of children to stay with other wealthier families to have the opportunity to receive an education in exchange for domestic work.

¹¹⁷ Mike Dottridge (note 73) at 39.

¹¹⁸ UN Supplementary Convention on Slavery, adopted on 30 April 1956

institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.’¹¹⁹

The bride price constitutes another traditional practice which increases the vulnerability of children and enhances risks for trafficking. In many sub-Saharan Africa countries, traditional or customary marriage is regarded as a valid form of marriage. The practice requires that, the groom or the groom’s family gives the bride’s family gifts such as animals, money, and agricultural products as an expression of the intention to marry their daughter. In some countries like Uganda, the payment of bride price is compulsory before the traditional or customary marriage is entered. In essence, the practice symbolises appreciation for raising the girl. Research data revealed that in some cases, the practice resulted in increased forced marriages as parents compel their daughters to conclude early marriages in order to get the bride price. Research also revealed that early marriage is generally more prevalent in Central and Western Africa, where about forty to forty-nine per cent of girls below nineteen years are affected, respectively. The figure pointed out that about twenty-seven and twenty per cent of girls are affected by the practice in East, North and Southern Africa, respectively.¹²⁰ Early marriage exposes young girls to sexual exploitation and HIV/AIDS. They also die when giving birth as some are not biologically prepared for early delivery. In this regard, bride price under forced marriage is a practice similar to slavery as defined under Article 1(c) of the UN Supplementary Convention on Slavery.¹²¹

Whereas bride price has been viewed by many men as wife purchase or an acquisition of proprietary rights over women, it does not deny that the fact others see it as a way of creating

¹¹⁹ Article 1(d) UN Supplementary Convention on Slavery.

¹²⁰ UNICEF (note 90) at 5.

¹²¹ The Convention under Article 1 (c) defines ‘*Practices similar to slavery*’ to include *inter alia*: ‘any institution or practice whereby a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group’.

stronger bonds between families, hence a stable marriage.¹²² However, ideas evolving around the owning of a woman are often used in many societies to justify domestic violence and other negative practices such as polygamy, widow inheritance and denying women the right to inherit property from their husbands. It strengthens the argument that in societies where the bride price is paid as a practice, women are regarded as property and they are not allowed to own or inherit property from their husbands. When their husbands die, the widows and their children are evicted from their homes as the in-laws invade to get hold of their possessions. In cases where they are allowed to inherit property, they are subject to the discretion and constant supervision of the male customary heir. However, in some cases, they will only be allowed to retain their husband's property if they accept to submit to certain customary practices, including widow inheritance or the ritual cleansing practice, which entails being coerced to have sex with a social outcast. Supposedly, this practice is meant to cleanse the widow of her deceased husband's evil spirits. Conversely, widow inheritance entails that the male relative of the deceased husband takes over the widow as a wife as she is regarded as property of her deceased husband's family. This practice is also similar to slavery and thus fits under the definition of '[p]ractices similar to slavery' set out under the UN Supplementary Convention on Slavery.¹²³

Dottridge found that the majority of children trafficked in West Africa were girls, and he argued that:

'[t]he custom of girls marrying out, leaving their families and often their community when they get married, means that families are accustomed to daughters leaving the household and community at some point. Secondly, in communities where girls work in the home and are not kept in school to learn other skills, domestic service and early marriage become the only career paths available for many. Thirdly, rules of inheritance - particularly rules that exclude girls and

¹²² Esther Kisaakye (note 115) at 281.

¹²³ Article 1(c) of the UN Supplementary Convention on Slavery defines 'Practices similar to slavery' to include *inter alia*: 'any institution or practice whereby the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or a woman on the death of her husband is liable to be inherited by another person'.

women from owning or inheriting land - tend to marginalize girls and women in their communities of origin'.¹²⁴

Dottridge noted that the continued observance and adherence to cultural and traditional values, which perpetuate gender discrimination, creates enormous challenges for women and children. When coupled with poverty, lack of education and unemployment, it has a limiting effect on women and children's capacity and ability to take advantage of opportunities available to them. Consequently, women and children are caught up in the web of poverty and oppression, which increases their vulnerability to being trafficked. Children are mostly affected because they are placed under the responsibility of mothers and other women affected by poverty and oppression. In this regard, Todres stated that the practical reality is that women bear the primary burden of child rearing in almost every country in the world today. He argued that when women's rights are violated or are at a risk of being violated, children are placed at greater risk.¹²⁵ It cannot be overstated that when women are subjected to political, social, cultural and economic discrimination, they are denied opportunities which would have enabled them to provide for their children and protect them from trafficking and economic exploitation.

2.3 Conclusion

This Chapter indicates that whereas most forms of trafficking of children such as labour and sexual exploitation are generally hidden from the public view, making it almost impossible to detect and quantify, available research indicates that trafficking of children exists in almost every region of the world. The Chapter discusses the forms of trafficking in Uganda and demonstrates that there is clear evidence that trafficking of children for domestic work especially is prevalent although the magnitude and scope may not be established.

The Chapter also highlights that the trafficking of children is a demand-driven phenomenon. First and foremost, it occurs because there is a market for children in labour and in

¹²⁴ Mike Dottridge (note 73) at 40.

¹²⁵ Jonathan Todres 'Women's rights and children's rights: a partnership with benefits for both' (2004) 10 *Cardozo Women's Law Journal* 611.

the sex trade which is matched by an abundant supply of children, most often from poor families, who are easy prey for those who seek to make a profit by exploiting their vulnerability. Secondly, there are some complementing forces of supply and demand that underlie trafficking and make children vulnerable. Examples of such forces include poverty, lack of access to education, lack of employment opportunities, culture and traditions, gender discrimination and conflicts. The effect of these factors is exacerbated by gender inequality and cultural practices that keep women and girls in a subordinate position.

Whereas this Chapter was intended to set the context of the study by providing the scope, magnitude and causes of trafficking of children in the world and Uganda particularly, the next chapter will consider the international legal framework that seeks to address the problem.

CHAPTER THREE: TRAFFICKING OF CHILDREN - THE INTERNATIONAL LEGAL REGIME

3. Introduction

Having discussed the magnitude of the problem of trafficking of children and its causes, this chapter focuses on examining the international legal framework to deal with the issue. It explores the development of the law on human trafficking. It traces its evolution from the law on slavery to the white slave traffic and finally to human trafficking. It weighs the obligations under the UN Protocol on trafficking against the fact that children trafficked for purposes of labour exploitation have not been given adequate protection. It argues that there are two main reasons for such lack of protection, the lack of definition of 'exploitation' in the UN Protocol and its limited scope that covers only transnational crimes.

Given the importance of addressing the problem of trafficking of children as a matter of protecting children's rights, the chapter explores international law norms on children's rights, including the United Nations Convention on the Rights of the Child (CRC), as well as, instruments that protect children from trafficking. It addresses the problem of use of children as domestic workers. The chapter also argues that whereas various instruments have been adopted to deal with child trafficking, child labour, and children's rights, they have not addressed the working terms and working conditions of children involved in domestic work. The chapter shows that the lacunae represents an opportunity for the adoption of an international law instrument which provides for the protection of children involved in domestic work.

3.1 Development of international law norms on trafficking of persons

Presently, the trafficking of persons is described by many as 'modern day slavery' pursuant to the fact that it involves acts that constitute slavery or practices that are similar to slavery. The United Nations report, *Abolishing Slavery and its Contemporary Forms*, suggests that today 'the trafficking of persons can be viewed as a modern practice equivalent to the slave trade of the

nineteenth century'.¹²⁶ The International Court of Justice found that States have an *erga omnes* arising from international law to ensure the protection of their nationals from slavery. It also found that the protection from slavery is an obligation owed by a State to the international community as a whole.¹²⁷

In many communities, slavery and practices that are related or similar to it are not new phenomenon. In this regard, Scarpa contended that slavery is a practice that has existed for several centuries. She argued that many societies were founded on slavery and through the exploitation of people who were considered inferior by others. She noted that the ancient Greek society had practiced slavery and they considered it both a natural and morally acceptable practice. She quotes Aristotle as having said that 'just as some are by nature free, so others are by nature slaves, and for these latter the condition of slavery is both beneficial and just'.¹²⁸ Notwithstanding the injustice caused by slave trade and the practice of slavery, it was only many centuries later that slavery and slave trade were considered immoral and unjust practices that had to be abolished.

In 1926, the League of Nations adopted the Slavery Convention. It was the first international instrument which defined slavery. Under this Convention slavery was defined as:

*'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.*¹²⁹

The Convention also included a definition of slave trade, which encompassed illicit practices, including:

¹²⁶ Office of the United Nations High Commissioner for Human Rights 'Abolishing Slavery and its Contemporary forms' (2002) HR/PUB/02/4 at 19. Available at <<http://www.ohchr.org/Documents/Publications/slaveryen.pdf>> [Accessed on 18 May 2009].

¹²⁷ See the case of *Belgium v. Spain* in *Barcelona Traction, Light and Power Co, Ltd. (Belgium v. Spain)*, Judgment of 5 February 1971, I.C.J. Reports 1970 at 32.

¹²⁸ Silvia Scarpa (note 29) at 434.

¹²⁹ Article 1(1) of the Slavery, Forced Labour and Similar Institutions and Practices Convention (1926 Slavery Convention). Adopted in 1926 and entered into force on 9 March 1927.

‘all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.’¹³⁰

The 1926 Convention further required States to bring about progressively and as soon as possible, the complete abolition of slavery in all its forms. The Convention also recognised that slavery was closely linked with forced labour, hence under the Convention; States were required to prevent compulsory or forced labour from developing into conditions analogous to slavery.¹³¹ While it is accepted that the 1926 Slavery Convention made significant steps to address the problem, it is contended that major challenges remained. The Convention did not abolish slavery and practices that are similar to it completely. It also failed to protect enslaved persons from being exploited. Bales and Robbins argued that the shortcomings in the Convention were mainly related to the fact that it did not provide for procedures for determining the existence of slavery and it did not establish an international body that could evaluate and pursue allegations of violations.¹³²

In 1948 the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR),¹³³ which has become the mother document inspiring all United Nations human rights instruments. The UDHR prescribes against the holding of persons in slavery or servitude, and it outlaws slavery and all forms of slave trade.¹³⁴ It reaffirmed the international community’s commitment to resolve and to end slave trade, and practices that are similar to slavery.

¹³⁰ Idem.

¹³¹ Article 2 (b) and Article 5 of the 1926 Slavery Convention.

¹³² Kevin Bales and Peter T Robbins ‘No one shall be held in slavery or servitude: A critical analysis of International slavery agreements and concepts of slavery’ (2001) January - March *Human Rights Review* 18 at 22.

¹³³ Universal Declaration of Human Rights (UDHR), adopted by General Assembly on 10 December 1948.

¹³⁴ Article 4 of the UDHR.

In 1956 the United Nations adopted a new treaty supplementing the 1926 Convention on Slavery. The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (Supplementary Convention on Slavery)¹³⁵ expanded the definition of slavery. In its definition of slavery, the Supplementary Convention on Slavery included: debt bondage, serfdom, and any other institution or practice whereby a woman or a child may be transferred by a person to another.¹³⁶ It was this definition that expanded the notion of slavery from slave trade to all practices similar to slavery.

Notwithstanding the development in the law, the term 'slavery' for many people, still connotes the practice of buying and selling people and conjures up images of the historical transatlantic slave trade and the gross ill treatment of slaves. Although slave trade or slavery was abolished in the 19th century, the reality is that slavery as a form of social and economic activity has never ceased to exist. It has rather evolved into other methods of exploitation such as forced labour, forced marriage, widow inheritance, child labour, debt bondage and the trafficking of persons. In its traditional sense, slave trade and the traditional 'slavery' involves the forceful capture or acquisition of a person in order to sell or exchange that person for some form of economic gain. Slavery is hardly distinguished from the trafficking of persons which involves the recruitment of persons by various means such as use of threat or force or other forms of coercion, abduction, fraud, deception for the purpose of exploiting that person for economic gain.

Considering the practices of trafficking of persons and slavery, Dottridge argues that, in many parts of the world the reality of today's slave trade is that adults and children fleeing poverty or seeking better prospects are manipulated, deceived, and bullied into working in conditions that they would not choose. Given the dimensions of the problem, he argues that it is most appropriate to use the term 'trafficking' in place of 'slavery', although some children and

¹³⁵ Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (Supplementary Convention on Slavery). Adopted in 1956 and entered into force on 30 April 1957.

¹³⁶ Article 1 of the Supplementary Convention on Slavery.

adults certainly do end up as slaves.’¹³⁷ The relationship between slavery and trafficking of persons is also highlighted in the definition of enslavement in the Statute of the International Criminal Court (Rome Statute), which defines enslavement as:

*‘the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.’*¹³⁸

The Rome Statute also lists enslavement as a crime against humanity falling within the jurisdiction of the International Criminal Court (ICC). This position follows the decision of the Trial Chamber of the International Criminal Tribunal for former Yugoslavia (ICTY) in the case of *Prosecutor v Kunarac*. The defendants in the case were charged with enslavement for keeping two girls in a house for several months and treating them as their personal property. The girls were required to do all household chores and comply with all sexual demands of the defendants. The ICC Trial Chamber held, *inter alia*, that enslavement as a crime in customary international law was a crime against humanity and it included trafficking in human beings.¹³⁹

Unlike practices similar to slavery, slavery and enslavement contain an element of ownership. Obokata asserts that the key element of enslavement as defined under the Rome Statute, akin to the definition of slavery under the Slavery Convention, is the right to ownership.¹⁴⁰ Under the 1926 Slavery Convention, the right to ownership and complete control over the victim determined if one was a slave or not. The owner of a slave could treat him as a possession; he had the authority to use, sell or transfer the slave to another person.

¹³⁷ Mike Dottridge (note 73) at 38.

¹³⁸ Rome Statute of the International Criminal Court, adopted on 17th July 1998 and entered into force on 1 July 2002.

¹³⁹ See the case of *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Vukovic Zoran*, Case No. IT-96-23&23/1, judgment of 22 February 2001 at 541-542.

¹⁴⁰ Tom Obokata ‘Trafficking of human beings as a crime against humanity: some implications for the International legal system’ (2005) *The International and Comparative Law Quarterly* 445 at 449.

The European Court of Human Rights in the case of *Siliadin v France* considered the question of ‘ownership’ in relation to the definition of slavery. The applicant in the case had arrived in France from Togo in 1994 at the age of 15. Her father had arranged that she worked for a family there, in return for attending school and having her visa regularized. In reality, she became an unpaid housemaid for the family of Mr. and Mrs. B. and her passport was taken from her. In considering whether the victim was held in slavery, the Court held that the definition of slavery was inapplicable, because Mr. and Mrs. B. had not ‘exercised a genuine right of legal ownership over her’.¹⁴¹ It is clear from the judgment of the Court that for an act to be regarded as slavery or enslavement, there has to be an element of ownership of the person. Although this traditional form of slavery, where the element of ownership is present, is not as prevalent as it was in the past, human beings continue to be placed under the complete control of another person and they are made to work against their will. The question thus arises as to whether such complete control, rather than ownership, can constitute slavery.

Despite the position of the European Court of Human Rights, it is submitted that it is not required that there should be an element of ownership in order for a person to be held in slavery. It is contended that a person may be held as a slave even where there is no clear element of ownership. Proof of ownership can be deduced from the conditions under which a person is made to work. Where the trafficker exerts restriction over the victim’s freedom of movement and association, among other rights, ownership can be said to be exercised. Therefore the circumstances under which a victim of trafficking of persons is placed are crucial to identifying whether the right of ownership is actually exercised.

In the case of *Hadijatou Mani Koraou v. The Republic of Niger*,¹⁴² the Court of Justice of the Economic Community of West African States held unequivocally that Hadijatou, a national

¹⁴¹ See the case of *Siliadin v. France*, 73316/01 Council of Europe, European Court of Human Rights judgment of 26 July 2005. Available at < <http://www.unhcr.org/refworld/docid/4406f0df4.html>> [Accessed on 19 July 2010].

¹⁴² See the cases of *Hadijatou Mani Koraou v. The Republic of Niger*, ECW/CCJ/JUD/06/08, Economic Community of West African States (ECOWAS), Community Court of Justice judgment of 27 October 2008. Available at: <<http://www.unhcr.org/refworld/docid/496b41fa2.html>> [Accessed on 19 July 2010].

from Niger, had been held as a slave for almost ten years that she had been subjected to psychological abuse, physical violence, sexual exploitation, forced house and fieldwork, and control over her movements. The Court noted that the characteristics of Hadijatou's condition met the definition of slavery found in the 1926 Slavery Convention and the requirements of enslavement, including *control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour* as interpreted by the ICTY Appellate Chamber in its *Kunarac* decision.¹⁴³

The Court also cited the judgment in Trials of Major War Criminals before the Nuremberg Military Tribunals for the holding that slavery can exist without torture or ill treatment. The Tribunal noted that:

*'[s]laves may be well fed, well clothed and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill treatment, over look the starvation, beatings, and other barbarous acts, but the admitted fact of slavery-compulsory uncompensated labour -would still remain.'*¹⁴⁴

This judgment reinforces the argument that slavery can exist even where there is no clear element of ownership of the person as a slave. For children trafficked for domestic work, especially, the element of ownership and the state of slavery can be deduced from the conduct of the parties. In order to enhance the relevancy of the law on slavery, the test of slavery should be the amount of control exercised over the victim as deduced from the conduct and not the existence of the element of ownership.

As was mentioned in the first chapter of this study, in the beginning of the twentieth century the international community moved its focus from the abolition of slave trade and

¹⁴³ See the case of *Prosecutor v Kunarac* (note 205) at para 119.

¹⁴⁴ See the case of *United States v Oswald and Others*, quoted by the ICTY Trials of Major War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 Vol.5 1997 at 958.

slavery to the need to address a new phenomenon known as “the white slave traffic”. This shift of focus negatively affected the development of international law on issues related to slavery and the trafficking of persons. This historic trajectory of international law on trafficking has shaped current limitations of the UN Trafficking Protocol. It is noted in particular that the trafficking of persons became synonymous with prostitution. Consequently, debate on trafficking of persons began to center on prostitution and women as victims and on whether women could consent to any form of prostitution. Since then, international efforts, advocacy and research conducted on trafficking of persons focused on women and in some instances children trafficked for sexual exploitation. This was very detrimental to the development of research and law on other forms of exploitation such as forced labour and it was also detrimental to development of research and the law on other victims of human trafficking, and in particular to men and children who were victimized. Resultantly, trafficking for domestic work was neglected despite evidence of its prevalence.

In response to the limitation of the 1949 Convention on the Suppression of Traffic in Persons, as well as the changed forms of trafficking, in 2000 the United Nations adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention against Transnational Organized Crime.¹⁴⁵ The contours of this instrument are fairly examined in the next section.

3.2 The UN Protocol on Trafficking in Persons

The 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children brought the first internationally recognised and accepted definition of trafficking in persons. The definition of trafficking in persons under the 2000 UN Protocol will be discussed in this part of the study with an attempt to distinguish it from smuggling of persons. Whereas, a trafficked person is a victim under the control of the perpetrator of the crime, a smuggled person is a criminal under the law.

¹⁴⁵ The Convention against Transnational Organized Crime, adopted by United Nations General Assembly resolution A/RES/55/25 of 15 November 2000 and entered into force on 29 September 2003. Available at <<http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>> [Accessed on 27 April 2009].

The discussion will also consider the elements and stages of the crime of trafficking of persons. It will argue that the need to prove all the elements of trafficking of persons which may take place in different countries makes it extremely difficult to prosecute perpetrators of the offence. Worse still, exploitation, which is the main element in the crime, is not clearly defined, thus making its interpretation very subjective.

Lastly, the section discusses how the UN Trafficking Protocol deals with the problem of children trafficked for the purpose of performing domestic work. It argues that trafficking of children for domestic work is mostly done internally, within the country's borders and on an *ad hoc* basis. Where trafficking of children lacks a transnational element, it is not covered by the Protocol which limits its efficacy.

3.2.1 Definition of trafficking of persons

As already noted in chapter one, Article 3(a) of the UN Trafficking Protocol defines trafficking in persons as:

'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.'

It defines exploitation as:

'Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.'

The definition of trafficking of persons under the UN Trafficking Protocol clearly requires proof of the three elements of the offence of trafficking in persons. In essence, the elements required include:

1. The act, consisting of: recruitment, transportation, transfer, harboring or receipt of persons; which could also be regarded as the *actus rea*;
2. The means, consisting of: the use of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, giving or receiving payments or benefits to achieve consent of a person having control over another; and
3. The purpose of: exploitation (including, at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs) which is the *mens rea*.

As was mentioned earlier, the requirement to prove all these three elements makes the offence of trafficking of persons quite challenging to prosecute. In particular it has proved to be difficult to prove the second element namely, the means used to recruit a victim. In the rare case of *Public Ministry v. Wang Li Kang, Wang Qi et al*¹⁴⁶ prosecution was able to prove human trafficking. In this case, a Chinese couple in Belgium recruited two irregular Chinese migrants. The migrants were accommodated in extremely undignified and unsanitary living conditions. They were subjected to physical and moral mistreatment. They were made to work 12 to 13 hours per day every day, including weekends. They were paid irregularly and the amounts of pay were disputed. Furthermore, the workers did not speak French and had no identity papers. They were under pressure never to leave the building and told to flee if the police came to the premises. The Court of Appeal of Liege found that all the elements of trafficking were present.

The court found it easy to prove the offence of trafficking of persons in this case as the definition of the offence of trafficking of persons in Belgium as provided in Article 433 of the Law of 13th of April 1995 containing Provisions to Combat Trafficking in Human Beings and Child Pornography is based on the UN Trafficking Protocol. However, the definition of trafficking under this Belgian law excludes the requirement of the need to prove the ‘means’ employed for trafficking, such as coercion, threats, violence or abuse and vulnerability. Instead the use of these ‘means’ have been listed separately as aggravating circumstances. The

¹⁴⁶ See the case of *Public Ministry v. Wang Li Kang, Wang Qi et al*. Court of Appeal of Liège, Decision No. 2007/245, judgment of 24 January 2007.

Prevention of Trafficking in Persons Act of Uganda has a similar definition as the UN Trafficking Protocol, however, being a newly enacted law its use in prosecution of offences cannot be analysed. Nonetheless, it is evident that where the elements of the offence are separated to create other offences such as aggravated and attempted human trafficking, it lessens the burden on the prosecution and makes trafficking of persons easier to prosecute.

The dispensation of the requirement to prove the means is applied to the trafficking of children under the UN Trafficking Protocol. The Protocol provides that:

'the recruitment, transportation, transfer, harbouring, or receipt of a child for the purpose of exploitation shall constitute trafficking even if this does not involve any of the means set forth in subparagraph (a) of this article .'¹⁴⁷

By disregarding the need to prove the means used for recruitment of victims, this provision places focus on the element of exploitation associated to the offence of trafficking of children making it easier to prosecute perpetrators and protecting children.

3.2.2 Stages of trafficking of persons

In addition to the three elements, the offence of trafficking of persons is one that involves three stages namely, the recruitment, transportation and exploitation of the victims. It is these stages that do distinguish the offence of trafficking of persons from similar offences such as smuggling of persons.

a) Recruitment and consent

The definition provides comprehensive coverage of the means by which recruitment could take place, including not only force, coercion, abduction, deception, but also less explicit means, such as the abuse of power or the abuse of the vulnerability of the victim or giving and receiving payments or benefits to obtain the consent of a person and placing the victim under the control of another person. The main issue as regards recruitment is whether one can consent to being

¹⁴⁷ Article 3(c) of UN Trafficking Protocol. A child is defined under the Protocol to mean any person under eighteen years of age.

trafficked or not. The different positions on the question of consent made it difficult during the drafting phase of the Protocol to adopt a definition of trafficking. Since trafficking had been traditionally associated with prostitution, the debate on consent and the definition of trafficking of persons was centered mainly on how to deal with the issue of prostitution. Janice Raymond noted that at the heart of the debate was the question whether the actionable conditions under which trafficking takes place could be limited to force, coercion, abduction, or whether it could be extended to include other related means. For example, if women consented to prostitution and to being transported from one country into another, could this still be defined as trafficking?¹⁴⁸

The Coalition against Trafficking in Women (CATW) argued that the definition of 'trafficking' should include all forms of recruitment and transportation for prostitution, regardless of whether any force or deception took place. This was in line with their understanding that prostitution constituted violation of women's human rights.¹⁴⁹ On the other hand, the Human Rights Caucus, which viewed the practice of prostitution as some sort of work activity, argued that force or deception was a necessary condition in the definition of trafficking for sex work and for other types of labour. They also argued that trafficking for prostitution should not be treated as a different category in relation to trafficking for other types of work. This was based on the recognition that men, women, and children are trafficked for a large variety of services, including sweatshop labour and agriculture.¹⁵⁰

The negotiating parties resolved their differences by including the provision of Article 3 (b) of the Protocol, which states that:

'The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.'

¹⁴⁸ Janice G Raymond 'The New UN Trafficking Protocol' (2002) 25 No.5 *Women's Studies International Forum* 491 at 493.

¹⁴⁹ Jo Doezenia 'Who get to choose: coercion, consent and the UN Trafficking Protocol' (2002) 10 No.1 *Trafficking and Slavery, Gender and Development* 1 at 21.

¹⁵⁰ *Idem*.

This provision intends that the victim's consent requirement for purposes of trafficking is irrelevant where any of the means of recruitment as listed in Article 3 are used. Consent is required only where none of the means listed in Article 3 is used. This approach recognizes a degree of individual choice or discretion. However, such degree of individual discretion or individual margin of appreciation does not apply where the victim is a child as children lack the legal capacity to give consent. Thus under the UN Trafficking Protocol, a child will be regarded as trafficked even where the parent or guardian of such a child consents to the trafficking.¹⁵¹

b) Transportation, smuggling and internal trafficking

While it is accepted that both the trafficking of persons and smuggling are offences that include an aspect of transportation of persons from one place to another, it is undisputed that they constitute different crimes. The trafficking in persons involves facilitated movement of some kind, which according to the definition may include transportation, transfer, harbouring or receipt of persons. Smuggling of migrants is defined under the Protocol Against the Smuggling of Migrants by Land, Sea and Air.¹⁵² It is the

*'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.'*¹⁵³

The transnational nature of the trafficking of persons and smuggling makes it difficult to distinguish the two. However, the distinction of these offences is important in light of the fact that a trafficked person is a victim whereas a smuggled person is a criminal under international law. Aronowitz argues that there are four elements that can be used to differentiate smuggling from trafficking. In his view, the distinguishing elements include the fact that:

¹⁵¹ Article 3 (c) of the UN Trafficking Protocol.

¹⁵² The Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000 (not in force).

¹⁵³ Article 3 of the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air

(firstly) a smuggled persons always travel voluntarily, while a trafficked persons can either begin their trip voluntarily or may have been coerced or kidnapped; (secondly) unlike smuggled persons, trafficked persons are used and exploited over a long period of time; (thirdly) unlike smuggled persons, an inter dependency occurs between the trafficked person and organized crime groups; and; (fourthly) trafficked persons are eligible for further networking (recruitment for criminal purposes).¹⁵⁴

Despite such attempts by Aronowitz to set out the elements that constitute the main differences between smuggling and trafficking, in practice such differentiation is not very clear and obvious. Gallagher suggests that some additional elements, including the use of force or coercion for the purposes of exploitation, may be asserted to differentiate trafficking from migrant smuggling. This position seems to be the most appropriate to uphold when considering the differences between these offences. It may be difficult though to prove the use of any of the additional elements without active investigation as it appears that international law places the burden of proof squarely on the individual seeking protection.¹⁵⁵ The difficulty relates to the fact that an individual may begin a journey as a smuggled migrant, only to be forced at the end of journey into some sort of exploitative situation, which falls within the definition of trafficking.

Whereas smuggling involves the crossing of borders, the trafficking of persons may occur within the territorial borders of a country. However, situations involving internal trafficking were not properly addressed in the UN Trafficking Protocol. Article 4 on the scope of the Protocol provides that the Protocol shall apply to offences which are transnational in nature and involve an organized criminal group. From the reading of this provision, it is clear that the Protocol limits itself to transnational or cross border trafficking of persons and does not cover situations where trafficking is within borders. In discussing the notion of trafficking of persons, Bhabha argues that the transportation of victims across the borders of a country is not the main element

¹⁵⁴ Alexis A Aronowitz 'Smuggling and trafficking in human beings: the phenomenon, the markets that drive it and the Organizations that promote it' (2001) 9 No.2 *European Journal on Criminal Policy and Research* 163 at 165.

¹⁵⁵ Anne Gallagher 'Human rights and the new UN Protocols on trafficking and migrant smuggling, a preliminary analysis' (2001) 23 No.4 *Human Rights Quarterly* 975 at 1001.

of the offence. She submits that what is most important under the Protocol is that the victim is subjected to some form of exploitation and the fact coercion is asserted.¹⁵⁶

Again, Bhabha positioning that the crime of trafficking does not necessarily require the transportation of the victims across the border of a country seems to be the most adequate. However, this position does not override the fact that the UN Trafficking Protocol excludes internal trafficking by limiting its scope to transnational crimes. The position in the UN Trafficking Protocol is clear in that it defines the nature of this crime to include the fact that it is committed (a) in more than one States; or (b) in one State but a substantial part of its preparation, planning, direction or control takes place in another State; or it (c) while it is committed in one State it involves an organized criminal group that engages in criminal activities in more than one State; or (d) the crime is committed in one State but has substantial effects in another State.¹⁵⁷

Further, sub paragraph (c) of Article 3 of the UN Trafficking Protocol requires that the transnational component of the offence involves an organized criminal group that engages in criminal activities in more than one State. The definition of ‘organized criminal group’ is provided under the UN Convention against Transnational Organized Crime to include:

‘(...) a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly, or indirectly, a financial or other material benefit.’¹⁵⁸

It is clear from the reading of Article 3 of the UN Trafficking Protocol that any form of trafficking of persons that is not committed in more than one State, or where the preparation, planning or control takes place in one State and has no substantial effects in another State or does not involve an organized criminal group is not a transnational crime and is thus excluded from the operation of the Protocol. There is no doubt that the ‘internal’ trafficking of children for domestic work is excluded from the ambit of the UN Trafficking Protocol.

¹⁵⁶ Jacqueline Bhabha ‘Trafficking, Smuggling and Human Rights’ (2005) *Migration Policy Institute, Harvard University* at 3.

¹⁵⁷ See Article 3 of the UN Trafficking Protocol.

¹⁵⁸ Article 2(1) of the UN Convention against Transnational Organized Crime.

c) Exploitation

Exploitation is the most important ingredient of the offence of trafficking of persons. If it were not for the malicious intent of exploiting people for various purposes, trafficking of persons would not have taken place. The European Union Expert Group on Trafficking in Human Beings contends that the third element of the crime of trafficking, namely, the exploitative element, is the key element of trafficking, as it distinguishes trafficking from other crimes. The core element of trafficking is thus the exploitative and abusive situation in which a person is forced, and not necessarily the transporting of victims across borders.¹⁵⁹

Although it is asserted that exploitation is one of the main elements in the crime of human trafficking, it has not been defined and is thus left to be determined on a case by case basis. The fact that international law did not define ‘exploitation’ places the burden on the prosecution to prove not only the intention to exploit at recruitment but that the actual exploitation of the victim took place. Given the absence of definition of ‘exploitation’ in international law, it is difficult to distinguish it from situations where a person works under poor working, which at times is determined by the level of economic development of a particular society. In the case of *The Public Prosecution Service v The Accused*,¹⁶⁰ the Netherlands district court considered the issue of exploitation. The case concerned some Indian nationals, who had been living illegally in Netherlands and had been employed to work in a tofu factory. They did not speak Dutch, nor did they have any identity documents. They worked long hours and were not paid for overtime. They had no health insurance, and taxes and social security contributions were not paid for them. The court found that the victims had not been exploited. The judgment relied heavily on the Fifth Report of the National Rapporteur on Trafficking in Human Beings,¹⁶¹ which set out a list of elements which had to be considered to determine whether exploitation

¹⁵⁹ European Commission, *Report of the Expert Group on Trafficking in Human Beings* (2004). Available at <http://www.unitarny.org/mm/File/9%20EC%20report_expert_group.pdf>, > pg. 52, [Accessed on 12 May 2009].

¹⁶⁰ See the case of *The Public Prosecution Service v The Accused* case No. 07.976405-06, District Court of Zwolle, Judgment of 29 April 2008.

¹⁶¹ Report of the Dutch National Rapporteur on Trafficking in Human Beings (2007).

had occurred or not. The Court held that although “socially undesirable” the situation the victims had been subjected to did not amount to exploitation within the meaning of Article 273f.

Clearly the reasoning in the judgment showed that not all socially undesirable working conditions should be regarded as exploitation. However, it made it clear that there is a need for an agreed upon definition of the minimum elements that constitute exploitation. It is submitted that without an agreed upon definition of exploitation, or without the minimum parameters required to establish what constitutes exploitation the UN Trafficking Protocol fails in its objective to protect trafficked persons, especially women and children.

While the elements and the content of sexual exploitation of children are clearly defined, the same cannot be said about child labour exploitation. Research shows that the elements which constitute the latter offence are highly contested, yet criminal law requires that a person can only be charged where the crime and its constitutive elements are clearly defined. The UN Trafficking Protocol lists at a minimum several acts which may constitute exploitation, including forced labour, slavery and servitude. However, it does not define any of these acts, which makes it an imperative to look at the definition given to these under other existing international law instruments.

3.3 Trafficking of persons and forms of exploitation under the Protocol

The lack of definition of the acts that constitute exploitation under the UN Trafficking Protocol created enormous difficulties. The main problem as was noted relates to the fact that it becomes practically impossible to prosecute perpetrators where the constitutive elements of the offence committed are not clearly defined. However, research showed that reliance is made on other international law instruments to fill the gap found in the UN Trafficking Protocol, which does not include any clear definition of acts which amount to exploitation in the context of trafficking. Likewise, the definition of such acts amounting to exploitation found in such other international law instruments will be explored to help to determine whether exploitation has taken place where children have been trafficked for domestic work. In order to facilitate the understanding of the subject, each of the acts which allegedly constitute exploitation, including forced labour,

servitude, slavery and practices similar to slavery as listed in the UN Trafficking Protocol, will be explored separately.

3.3.1 Forced labour

Article 2(1) of the ILO Convention Concerning Forced or Compulsory Labour defines forced labour as:

*'(...) all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.'*¹⁶²

In essence, three main elements including work or service, the presence of menace of any penalty and lack of consent, must be proved to show the existence of forced labour. Inglis argues that the test into whether a person is subjected to forced labour must take into account the voluntariness or consent of the victim to the coercive labour situation. She defends that such a test is required pursuant the fact that, when fully informed about the situation or condition of work, the victim may opt to work in exploitative circumstances because other options are less socially and economically attractive.¹⁶³

It is contended that Inglis may be right in her view as the definition of forced labour in the law seems to create a situation where a person may consent to forced labour. Hence, it is important that the consent must be given in an express manner and by someone who is fully informed about the situation or condition of the work. It is only then that the coercive nature of the work to be performed will fall outside the definition of forced labour. There are various indicators which show the lack of express and informed consent. The ILO Global Report on Forced Labour points out that lack of consent may include, among others, physical confinement in the workplace, psychological compulsion, physical abduction, deception or false promises about types of work and terms of work, withholding or nonpayment of wages, retention of

¹⁶² See Article 2(1) of the ILO No. 29.

¹⁶³ Shelley Case Inglis 'Expanding International and national protections against trafficking for forced labour using a human rights framework' (2001) 7 No. 55 *Buffalo Human Rights Law Review* 54 at 68.

identity documents, birth or descent into slave or bonded status, sale of person into the ownership of another, and induced indebtedness.¹⁶⁴ Therefore, in alleged cases of forced labour it is wise to ensure thorough investigation to establish whether the victim consented to such harsh working conditions and terms.

In the *Siliadin* case, the Court considered the issue of consent. In this case Siwa-Akofa Siliadin arrived in France from Togo in 1994 at the age of 15. Her father had arranged that she work for a family in return for attending school and having her visa regularized. It turned out that Siliadin became an unpaid housemaid and her passport was taken by her employers. The Court noted that it is clear from the facts of the case that it cannot seriously be maintained that she performed this work of her own free will. On the contrary, it is evident that she was not given any choice. The Court concluded that Siliadin was subjected to forced labour in terms of Article 4 of the European Convention on Human Rights.¹⁶⁵

In determining whether particular working conditions constitute forced labour, apart from consent, it is necessary to consider whether there is any menace of penalty. The ILO Committee of Experts noted that the ‘menace of any penalty (...) need not be in the form of penal sanctions, but might take the form also of a loss of rights or privileges.’¹⁶⁶ The ILO in its report on Forced Labour gave some examples of menace of penalty. The list included, among others, physical violence against worker or family or close associates, sexual violence, threat of supernatural retaliation, imprisonment or physical confinement, financial penalties, denunciation to police or immigration authorities and deportation, dismissal from current employment, exclusion from future employment, exclusion from community and social life, removal of rights or privileges,

¹⁶⁴ International Labour Office (note 2) at 53.

¹⁶⁵ The European Convention on Human Rights, ETS 5; 213 UNTS 221, entered into force on 3rd September 1953.

¹⁶⁶ International Labour Conference, 1979 General Survey of the Reports relating to the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1975 (No. 105), Report of the Committee of Experts on the Application of Conventions and Recommendations, 65th Session, Geneva, 1979, Report III, para. 21.

deprivation of food, shelter or other necessities, shift to even worse working conditions, and loss of social status.¹⁶⁷

In the *Van der Mussele* case, the European Court of Human Rights considered the issue of whether there was a menace of penalty. In this case a Belgian lawyer argued that his uncompensated *pro bono* service required as part of his training as an *avocat* (lawyer) violated Article 4 of the European Convention on Human Rights. The Court was guided by both, the manner in which the term ‘any’ is used in the ILO definition and the comments of the Committee of Experts. It found that the prospect of being struck from the roll of pupils or being rejected in his application for entry on the register of *avocats* were both “sufficiently daunting” to be capable of constituting the menace of a penalty.¹⁶⁸ Considering that children lack the capacity to give consent to any form of labour, where a child is trafficked for forced domestic work, it is only necessary to prove that the work performed by the child amounts to work done under the menace of penalty. However, even when forced labour is not proved, the person exploiting the child may still be held accountable for servitude, slavery or for placing the child in conditions similar to slavery.

3.3.2 Servitude

As was mentioned above, Article 4 of the UDHR prohibits slavery or servitude and slave trade in its all forms. Article 8(2) of the International Covenant on Civil and Political Rights (ICCPR) also prohibits servitude. However, the term “Servitude” is not defined in any international legal instrument.

The question of servitude was considered in the *Siliadin* case. The applicant approached the European Court of Human Rights alleging that French criminal law did not afford her sufficient and effective protection against the “servitude” she had been subjected to, or at the

¹⁶⁷ International Labour Office *A Global Alliance Against Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights of Work* (2005) at 5-6, Box 1.1.

¹⁶⁸ See *Van der Mussele v Belgium*, Application No. 8919/90 (23 November 1983).

very least against the “forced and compulsory” labour she had performed. The Court relied on the definition of servitude of the European Commission and found that Siliadin had been held in servitude. In supporting its findings on the question of servitude, the Court said that Siliadin’s labour lasted almost fifteen hours a day, seven days a week. It said that she had not chosen to work for her employers and as a minor. Siliadin had no resources and was vulnerable and isolated, and had no means of subsistence other than in the home of her employers. The Court further said that Siliadin was entirely at her employer’s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularized, which was never done. In addition, the Court noted that Siliadin was also afraid of being arrested by the police, and was not permitted to leave the house, except to take the children of her employers to attend classes and few other activities. The Court said this had affected her freedom of movement. Lastly the Court noted that Siliadin was not given any free time, she had not been sent to school, despite the promises made to her father, and it said that in light of the situation she was being held in, Siliadin could not hope that her situation would improve and was completely dependent on her employers.

From the reading of *Siliadin*’s case, it can be argued that most children trafficked to work as domestic servants are held in servitude by their employers and thus exploited. While the boldness of the European Court in the *Siliadin* case is commendable, it should not be ignored that where servitude is defined it would make it easier for the prosecution to advance with such cases involving the violation of children’s rights.

3.3.3 Practices similar to slavery

Article 1 of the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery defines “*Practices similar to slavery*” to include *inter alia*:

‘(a) [d]ebt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;

(...)

*(d) [a]ny institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.*¹⁶⁹

Debt bondage or bonded labour is a condition in which individuals are pledged to work either for a money lender or landlord to repay a debt or loan. The interest on the loan can be so high that it may never be paid off in a lifetime. Sometimes children may inherit the loan. They are either forced to work for the money lender or for the landowner as bonded labour to pay off the debts of family.¹⁷⁰ Children trafficked to perform domestic work may be held in bonded labour to pay off credits or loan amounts which were given to their parents, guardians or other family members.

The provision of Article 1(d) of the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery is the most applicable to children trafficked for domestic work. This provision covers situations where a child is delivered by either or both of his or her natural parents or by his or her guardian to another person for purposes of labour exploitation, whether any reward was given to the parents or guardian or not. The inclusion of ‘practices similar to slavery’ in the acts of exploitation expands the spectrum of the forms of exploitation to children trafficked for domestic work. However, the term ‘exploitation of a child of his or her labour’ is not defined by either the Protocol or the Convention and thus the need to resort to other international legal instruments that deal specifically with child labour.

¹⁶⁹ Article 1 of the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956 and done at Geneva on 7 September 1956.

¹⁷⁰ Geraldine Van Bueren *The Right of the Child to be protected against Exploitation: International Law on the Rights of the Child* (1998) at 272.

3.4 Trafficking of children and the economic exploitation of children

As already noted, the Trafficking Protocol criminalises the trafficking of children for the purpose of exploitation. It defines exploitation to include *inter alia* slavery or practices similar to slavery. The Supplementary Convention on Slavery lists among practices similar to slavery the exploiting of a child of his or her labour. However the Supplementary Convention does not define the term exploiting a child of his or her labour.

The most adequate protection of children whose labour is exploited requires a clear definition of notion of exploitation of a child for purposes of his or her labour. Other international law instruments which deal with relevant issues of child labour and children's rights are explored to help understand the notion of exploitation of a child for purposes of his or her labour. Reference is made to the United Nations Convention on the Rights of the Child (CRC), the ILO Convention 138 on the Minimum Age for Admission to Employment and the ILO Convention 182 on the Worst Forms of Child Labour.

3.4.1 Child exploitation under the CRC

The call for children to be protected against all forms of exploitation because of their vulnerability first appeared in the Declaration on the Rights of the Child in 1924 and was reiterated and expanded in the 1959 Declaration with the same name.¹⁷¹ The 1989 Convention on the Rights of the Child developed the concept further. It highlights specific forms of exploitation of children and incorporates a general provision on the prohibition of all forms of exploitation.

Article 1 of the CRC defines a child as 'every human being below the age of eighteen years.' All State parties to the Convention are required to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.¹⁷² Although the Convention does not define what

¹⁷¹ U.N. Doc. A/4354.

¹⁷² Article 19(1) of the CRC, Document A/RES/44/25 (12 December 1989).

trafficking of children constitutes, it obligates States Parties to take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.¹⁷³ In so far as the exploitation of a child for his or her labour is concerned, the Convention calls upon State parties to recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education or which is harmful to the child's health or physical, mental, spiritual, moral or social development.¹⁷⁴

However, the CRC does not define economic exploitation of children, but it recommends that States parties provide for a minimum age or ages for admission to employment. It requires that States provide for appropriate regulation related to the hours and conditions of employment of children. It also requires States to provide for appropriate penalties or other sanctions to ensure effective enforcement of the provisions of the Convention in order to prevent economic exploitation of children.¹⁷⁵ The Convention does not prescribe the minimum age for admission to work. This is established in the ILO Conventions relating to child labour which is discussed immediately below.

3.4.2. Child exploitation in the ILO Convention Concerning Minimum Age for Admission to Employment¹⁷⁶

The ILO Convention Concerning Minimum Age for Admission to Employment (the ILO Convention on Minimum Age) seeks to protect children from labour related economic exploitation. In order to achieve its objectives it regulates the age for admission of children to employment or work. Its main aim is to ensure that the minimum age for admission to employment or work is at a level that is consistent with the fullest physical and mental

¹⁷³ Article 35 of the CRC.

¹⁷⁴ Article 32(1) of the CRC.

¹⁷⁵ Article 32(2) of the CRC.

¹⁷⁶ ILO Convention Concerning Minimum Age for Admission to Employment 1973 (ILO Convention No. 138) adopted on 26 June 1973 by the General Conference of the International Labour Organization at its fifty-eighth session and entered into force 19 June 1976.

development of young persons.¹⁷⁷ The Convention requires member States to specify the minimum age for admission to employment or work and to ensure that no one under the specified age shall be admitted to employment or work in any occupation. Under the Convention such minimum age as specified by member States shall not be less than the age of completion of compulsory schooling and, it shall not in any case be less than 15 years.¹⁷⁸ However, in situations where the economy and educational facilities are insufficiently developed, the Convention allows for the establishment of such minimum age for admission for employment at 14 years.¹⁷⁹

The ILO Convention on Minimum Age also provides that in situations where the type of employment or work by its nature or the circumstances in which it is carried out, is likely to jeopardize the health, safety or morals of young persons, the minimum age shall not be less than 18 years.¹⁸⁰ Under the Convention, member States are left with the discretion to determine the type of work that is likely to jeopardize the health of children.¹⁸¹ Unlike the CRC, the ILO Convention on Minimum Age distinguishes between economic exploitation and work performed by a child. It provides that national laws or regulations may permit the employment or work of persons 13 to 15 years of age to perform light work, so long as such light work is not likely to be harmful to their health or development.¹⁸² It defines light work as any such work that does not prejudice the children's attendance at school, their participation in vocational orientation or training programmes approved by the competent authority or their capacity to benefit from the instruction received.¹⁸³

Van Bueren contends that in general terms 'light work' may be divided to two categories, including the assistance of children in the family economy and the engagement of children

¹⁷⁷ Article 1 of ILO Convention No. 138.

¹⁷⁸ Article 2 ILO Convention No. 138.

¹⁷⁹ Article 2 (4) ILO Convention No. 138.

¹⁸⁰ Article 3 ILO Convention No. 138.

¹⁸¹ Article 3 (2) ILO Convention No. 138.

¹⁸² Article 7 of the ILO Convention No. 138.

¹⁸³ Article 7 of the ILO Convention No. 138.

outside of school hours in order for them to earn extra money or gain experience.¹⁸⁴ The ILO Convention on Minimum Age has clearly stated that children's or adolescents' participation in work that does not affect their health and personal development or interfere with their schooling, is generally regarded as being something positive and thus light work. This includes activities such as helping their parents around the home, assisting in a family business or other light works that helps them earn some pocket money outside school hours and during school holidays.

It is argued that children's participation in child care, cooking, and cleaning as activities that constitute part of their development may be considered as light work. However, such types of activities cease to be light work when they are done on a regular basis by children who have been separated from their families and find themselves forced to perform them in conditions akin to slavery. The presumption that domestic chores constitute 'light work' and are permissible for children has created room for manipulation of children and their continued exploitation.

Article 4 of the ILO Convention on Minimum Age permits member States to exclude certain types of employment or work in respect of which special and substantial problems concerning the application of the Convention arise. The General Survey of the Committee of Experts on the Minimum Age Convention noted that within such discretion, member States often exclude work done by children within the family environment, as well as, domestic work done by children.¹⁸⁵ The exclusion of domestic service and work done by children in family undertakings creates opportunities for their unhindered and unmonitored exploitation. Van Bueren argued that while there are understandable reasons for excluding these categories from the scope of work done by minors, it is not coincidental that in both of these areas children are subject to economic exploitation.¹⁸⁶ She also noted that the exclusion of domestic service is done on the presumption that children are working in their own homes under adult supervision. However, she argues that this is not always the case. In this regard, the Special Rapporteur on the Exploitation of Child Labour noted that in many developing countries 'maids-of-all-work' leave rural areas to work in the home of an urban 'relative'. Their situation is described as virtual

¹⁸⁴ Geraldine Van Bueren (note 170) at 267.

¹⁸⁵ Geraldine Van Bueren (note 170) at 266.

¹⁸⁶ *Idem*.

slavery, being on call virtually the whole day. Girls are widely employed in domestic service and their vulnerability to exploitation is increased by both, due to their invisibility within domestic service and by the discrimination which persists against women in general.¹⁸⁷

Importantly though, the ILO Convention on Minimum Age provides that employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety or morals of young persons shall not be excluded from the ambit of application of its provisions. This creates further protection for children working as domestic workers in homes other than their own, where the work carried out is likely to jeopardize their health, safety or morals.

Although the notion of work used in the ILO Convention on Minimum Age differs from that used by the Convention on the Rights of the Child, which does not distinguish between light work and the exploitation of children of their labour, in their objectives these instruments seek to protect children from any form of economic exploitation, including child labour. Further, the ILO Convention on Minimum Age specifically places an obligation on member States to pursue a national policy designed to ensure the effective abolition of child labour. However, the aims of both the ILO Convention on Minimum Age and the CRC to protect children against economic exploitation remain to be achieved pursuant the fact that these instruments lack a definition of child labour.

There does not seem to be an internationally agreed upon definition of child labour. The concept of child labour and child work differs from community to community. This is perhaps due to the complexity surrounding the concept of childhood and work that is permitted for children. As already noted, the CRC defines a child under Article 1 as every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. Because the definition of a child has been a frequent source of debate and controversy, the CRC gives State parties discretion to set their upper limit of childhood at an age lower than 18 years.

¹⁸⁷ Idem.

Nonetheless, by prescribing eighteen as the upper limit for the age of majority, the CRC seeks to define childhood and the specific rights which attach to children as a class.

However, several scholars have argued that childhood cannot be defined as a fixed period. Franklin argues that ‘being a child is not a universal experience of any fixed duration, but is differently constructed expressing the divergent gender, class, ethnic or historical locations of particular individuals. Distinctive cultures, as well as histories, construct different worlds of childhood. Also the definition of childhood can differ from one country to another, from one culture to another and even within the community. It is very difficult to reconcile the Western notion of ‘*childhood*’ with that of developing countries.’¹⁸⁸

It seems uncontested that Franklin was right to say that the notion of childhood varies with existing cultures and socio-economic factors and that it cannot be within a fixed duration. In developing countries in particular, the role of children and their participation in the family’s subsistence is more pronounced than it is in the most developed nations. It may not be suitable, therefore, to prescribe a universally fixed duration of childhood.

The ILO Convention on Minimum Age does not treat childhood as a fixed period as it recognizes the role of work in the life and development of a child and right of children to work. It does so by prescribing different ages for admission to work and only seeks to protect the child from harmful work or economic exploitation. However, the dilemma of permitting children to work and seeking to protect them from exploitation has made it difficult for the law to agree on a definition of child labour. These differing ages of majority coupled with diverse understanding of the role of children and work make it difficult to achieve consensus on the definition of child labour. Smolin rightly argues that the term ‘abolition of child labour’ unlike the term ‘abolition of slavery’ does not clearly indentify the targeted evil. Unlike ‘abolition of child labour’,

¹⁸⁸ Bob Franklin ‘The case for children’s rights: A progress report’ *The Handbook of Children’s rights, Comparative Policy and Practice* (1995) at 7.

‘abolition of slavery’ clearly connotes the elimination of property interests in human beings as well the alteration of the class circumstances of particular group of people.¹⁸⁹

The ILO Convention on Minimum Age suggests that child labour is any type of employment or work which by its nature or the circumstances in which it is carried out, is likely to jeopardize the health, safety or morals of young persons. Even then, without clear parameters to determine or measure harm, it would be difficult to establish which work is harmful to a child. Domestic work, for instance is not necessarily harmful to children, but it can be harmful where trafficking is involved. Smolin rightly argued that the degree of harm is difficult to determine because of the difficulties created by complexity in the relationship between the development of the child and complexity or nature of the work.¹⁹⁰ The question that needs to be answered, therefore, is at what point does domestic work become harmful as to be categorized as child labour.

3.4.3. Child exploitation under the Worst Forms of Child Labour Convention, 1999

The Worst Forms of Child Labour Convention¹⁹¹ (the Worst Forms Convention) was adopted to supplement the efforts of the ILO Convention on Minimum Age for Admission to Work and the Convention on the Rights of the Child. It also envisions the protection of children from economic exploitation and mobilizes efforts to deal with the worst forms of child labour. Article 1 of the Worst Forms Convention requires that each Member State shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency. However, the Convention does not define what constitutes child labour either.

Like the CRC this Convention defines a child as any person under the age of 18,¹⁹² however, it differs from the CRC in that it does not allow the exception under domestic laws which establish an earlier age of majority. Hence it requires that any person below the age of 18

¹⁸⁹ David M Smolin ‘Strategic choices in the international campaign against child labour’ (2000) 22 No.4 *Human Rights Quarterly* 942 at 956.

¹⁹⁰ Idem

¹⁹¹ ILO Convention No. 182.

¹⁹² Article 2 of the Worst Forms of Child Labour Convention.

years, whether the municipal law establishes an earlier majority age, must be protected from the worst forms of child labour. The Convention defines ‘the worst forms of child labour’ to include:

‘(a) All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

(b) The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) The use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.’¹⁹³

Domestic work performed by children could depending on the circumstances fall under category (a) and (d) as a practice similar to slavery and work which is likely to harm the health, safety or morals of children. Similar to the ILO Convention on Minimum Age, the Worst Forms Convention provides that the types of work referred to under Article 3 (d) shall be determined by national laws or regulations or by the competent authority, after consultation with the organizations of employers and workers concerned, taking into consideration relevant international standards, in particular paragraphs 3 and 4 of the 1999 Worst Forms of Child Labour Recommendation.¹⁹⁴ The aforementioned, 1999 Recommendation¹⁹⁵ provides that when determining what constitutes hazardous work or work that falls under category Article 3 (d) of the Worst Form Convention, attention should be paid to, among other factors, the extent to which the work ‘exposes children to physical, psychological or sexual abuse’ or involves ‘particularly difficult conditions such as work for long hours or during the night or work where the child is

¹⁹³ Article 3 of the Worst Forms of Child Labour Convention.

¹⁹⁴ Article 4 of the Worst Forms of Child Labour Convention.

¹⁹⁵ Recommendation Concerning the Prohibition and Immediate Elimination of the worst forms of Child labour Adopted on 17 June 1999 by the General Conference of the International Labour Organization at its eighty-seventh session.

unreasonably confined to the premises of the employer.’¹⁹⁶ The 1999 Recommendation in particular urges States to give ‘special attention’ to ‘the problem of hidden work situations, in which girls are at special risk.’¹⁹⁷

As already noted, domestic work is in most cases hidden, unregulated and unmonitored, making it very difficult to detect abuse and exploitation. Research indicates that child domestic workers are under the control and at the mercy of their individual employers. They rarely have access to education. Children who run away report abuse – physical, sexual, and psychological – at the hands of their employers. There are incidents of girls being forced into sexual relationships with male members of the household, deprived of freedom of movement, and even locked up and subjected to slavery-like conditions.¹⁹⁸ In most cases, these children are far away from home, with very little contact with the outside world, and sometimes with no way of contacting their families. Consequently, according to the 1999 Recommendations, domestic work performed by children in homes other than their own is deemed as hazardous work and thus a worst form of child labour.

This Worst Forms Convention and its 1999 Recommendation are very important as they are the only international legal instruments that give benchmarks for determining hazardous or harmful work for children. In addition, in its attempt to address problems affecting children, the Worst Forms Convention also targets slavery or practices similar to slavery, trafficking of children and sale of children among the worst forms of child labour.¹⁹⁹ These elaborate provisions covering aspects of slavery and trafficking makes the Worst Forms Convention the best tool to fight both trafficking of children and harmful domestic work. Smolin noted that the ILO Worst Forms of Child Labour Convention does not necessarily expand international law norms and standards. In his view the Convention simply mobilizes and prioritises certain aspects of international law. He argues that the contents the Worst Forms Convention such as slavery, child trafficking and drug trafficking among others are generally regulated in other international

¹⁹⁶ Paragraph 3 of the 1999 Worst Forms of Child Labour Recommendation.

¹⁹⁷ Paragraph 2 (c) (iii) of the 1999 Worst Forms of Child Labour Recommendation.

¹⁹⁸ Pannuda Boonpala and June Kane (note 98) at 19-20.

¹⁹⁹ Article 4 of the Worst Forms of Child Labour Convention.

instruments. In his view the Convention is unusual as an ILO instrument as it focuses on areas of criminal law, other than in labour matters.²⁰⁰

Although Smolin's argument carries considerable merit, it should be settled that the Worst Forms Convention made significant contributions to international labour law. Undoubtedly, it is the only convention that offers parameters to determine what constitutes harmful or hazardous work and exploitation of a child of his or her labour. In addition, it clearly demonstrates the need for criminal, labour and children's rights law to work together in order to offer children the protection they need. Law cannot afford to be rigid and keep within specific boundaries especially when it comes to protecting children from exploitation or any other forms of abuses. All the forms of abuses against children included in the Worst Forms Convention, whether of criminal law or labour law nature, are hazardous to children and should be treated as such.

It can be argued that the continued treatment of child labour, child trafficking and children's rights as separate issues has resulted in the failure of the law to adequately address the issue of children trafficked for labour exploitation especially domestic work. Therefore the struggle to address the problem of trafficking of children, in particular for the purpose of domestic work, requires a close link of criminal law, labour law and human rights law.

International law instruments discussed above recognise the right of the child to work after obtaining the required minimum age for admission to work. They only condemn the economic exploitation of children and the performing of work that is harmful or hazardous to the children's health and morals. The CRC recognizes the right of children to protection from economic exploitation and it recommends that State parties regulate on, among others, the age of admission to work, the conditions of work and ensure that there are penalties for perpetrators. The ILO Convention on Minimum Age seeks to protect children from economic exploitation by regulating the age of admission to work. The Worst Forms Convention seeks to address and protect children from the worst forms of child labour. Nevertheless, these Conventions seem to shy away from the need to recognize the rights of working children as a means of protecting them from

²⁰⁰ David M Smolin (note 189) at 947.

economic exploitation. In the case of domestic work it is not necessarily the work itself that is harmful but rather the hazardous conditions under which children work and the fundamental rights denied as a result of the exploitation. It is not enough for the law to regulate age of admission to work or to prohibit the worst forms of child labour, in its attempt to prevent child exploitation; it needs to explicitly address the rights of children permitted to work.

3.5 Rights of working children under the International conventions

The CRC is one of the most significant instruments which regulate children's rights. As already discussed above, the CRC does not address the question of rights of children who are working. Instead, it recommends State parties enact legislation which provides for the minimum age of admission to work. It also requires them to regulate the working conditions and to impose penalties and sanctions to prevent economic exploitation of children. The ILO Convention on Minimum Age attempts to regulate the minimum age of admission to work, as discussed in the previous section, however, it did not specifically address the question of working conditions of children. Although working children require more protection than working adults, one can argue that the omission by law to provide specific rights for working children means that children in employment are entitled to the same protections as adults without any discrimination based on age.

The Universal Declaration of Human Rights (UDHR),²⁰¹ the first ever internationally recognised human rights instrument, provides that all human beings are equal before the law and are entitled without discrimination to equal protection of the law.²⁰² The UDHR provides that everyone has the right to work, the right to free choice of employment, the right to just and favourable conditions of work and the right to protection against unemployment.²⁰³ In addition, it

²⁰¹ The Universal Declaration of Human Rights UN Doc A/810 at 71 (1948), adopted by the General Assembly of the United Nations on 10th December 1948.

²⁰² Article 7.

²⁰³ Article 23 (1).

provides that everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.²⁰⁴

These rights are reiterated in the International Covenant on Civil and Political Rights (ICCPR)²⁰⁵ and in the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁰⁶ The ICESCR recognises the right to work and the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.²⁰⁷ In addition, it recognises the right of everyone to the enjoyment of just and favourable conditions of work, including, among others, remuneration with a minimum fair wage, safe and healthy working conditions and rest, leisure and reasonable limitation of working hours.²⁰⁸ Although these rights are also applicable to working children in their employment, as will be discussed in Chapter four, majority of children who are working are denied of these basic labour rights. The failure to protect the rights of working children is based on the fact that in many cases children are regarded as helpers rather than workers who are capable of having labour rights.

Apart from being discriminated against on the basis of age, they are also discriminated on the basis of sex. As was noted in Chapter two, young girls make up the majority of children trafficked to perform domestic work. The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)²⁰⁹ binds States to actively combat discrimination against women in all aspects of social and economic life. It specifically provides that States

²⁰⁴ Article 24.

²⁰⁵ International Covenant on Civil and Political Rights (ICCPR) 6 ILM 368 (1967), adopted in 1966 and entered into force in 1977.

²⁰⁶ International Covenant on Economic, Social and Cultural Rights (ICESCR) 6 ILM 368 (1967), adopted in 1966 and entered into force in 1977.

²⁰⁷ Article 6 of the ICESCR.

²⁰⁸ Article 7 of the ICESCR.

²⁰⁹ The Convention on the Elimination of All forms of Discrimination against Women (CEDAW) 19 ILM 33 (1980). Adopted by General Assembly resolution GA res 34/80 on 18 December 1979 and entered into force 3 September 1981.

Parties shall take all appropriate measures, including legislative measures, to suppress all forms of traffic in women and their exploitation, and to address prostitution.²¹⁰

Children trafficked to perform domestic work are also discriminated against on the basis of their status and place of work. Children working in the formal sectors, where there are laws and regulations, have better protection than children who work in the informal sector of the economy. Both the CRC, the ILO Convention on Minimum Age and the Worst Forms Convention have general provisions on protection of children which do not target specifically the informal sector. The African Charter on the Rights and Welfare of the Child (African Children's Charter) on the other hand, places an explicit obligation on State parties to protect children from economic exploitation in both the formal and informal sectors.²¹¹ It shows that the African Children's Charter takes into consideration that the majority of children who are working in Africa, undertake activities within the informal sector where there is little or no protection.

In order to protect children from exploitation, it is not enough to prohibit their economic exploitation and to provide for the minimum age of admission to work, or to list the worst forms of child. It is important that international law recognises that children who work constitute a special category, and it must regulate the conditions in which they work and provide for their rights as workers. This provision of rights should target both children working in the formal and informal sectors. The fact that global international law instruments do not specifically regulate for the protection of the rights of children who work in the informal sector raises a number of concerns. Most importantly, it places children working as domestic workers in a more precarious situation and increases their vulnerability to exploitation.

3.6 Conclusion

This Chapter discusses broadly the crime of child trafficking. It considers the development of the international law on trafficking in persons and how it is closely linked to slavery and the white slave traffic. The white slave traffic was focused on protecting white women from forced

²¹⁰ Article 6 of the CEDAW.

²¹¹ Article 15 of the CEDAW.

prostitution and as such most of the Conventions adopted to address this matter were limited to women and prostitution as the form of exploitation.

This chapter shows that unlike the Conventions on trafficking in women, the definition of trafficking in persons as laid out in the UN Trafficking Protocol was a great achievement in the development of International law as it dealt with both the issue of sexual exploitation and other forms of exploitation such as slavery, forced labour and removal of organs. However, the definition has been greatly criticized for making the offence too complex to prosecute, for restricting itself to transnational crimes and for failing to define the term ‘exploitation’.

This Chapter also shows that, despite the fact that the UN Trafficking Protocol is a primary instrument meant to combat the growth of transnational organized crime, it does not offer much in terms of protection of children’s rights. The only specific reference to children’s rights is found in Article 6(4) of the Protocol, which emphasizes that, ‘in granting assistance to and protection of trafficking victims, special attention should be paid to children, in particular insofar as this concerns housing, education and care’. In addition, the Protocol does not offer much protection to children trafficked internally for domestic work. The absence of substantive provisions regulating on the rights of children favours reliance on other international human rights instruments, which contain provisions that oblige States to protect the rights of children.²¹²

Among these instruments, the CRC and the ILO Convention on Minimum Age and Worst Forms Convention are the most prominent. Most importantly, they contain provisions which seek to protect children from any form of economic exploitation. This chapter also revealed that the ILO Convention on Minimum Age for Admission to work seeks to protect children from economic exploitation by regulating the different ages at which children may be admitted to work. The study shows however that children trafficked for domestic purposes are not

²¹² See Article 14 of the UN Trafficking Protocol. This provision establishes, inter alia, nothing in the Protocol ‘shall affect the rights, obligations and responsibilities of States and individuals under International law including International human rights law.’ Impliedly, it means that the Protocol only establishes the basic minimum standards, which do not take away State duties contained in other international law instruments.

adequately covered pursuant to the belief that in some communities domestic work is seen as some form of 'light work' used for teaching children and to prepare them for better future. The chapter also showed that the gaps found in such international law instruments contributed towards the growing vulnerability of children to a wide variety of abuses, including trafficking for domestic work. It was further proved that in light of the existing gaps children are left with slim choices, other than to be subjected to work in conditions that are hazardous to their health. Drawing from the ILO Convention on the Worst Forms of Child Labour and from its Recommendation, the Chapter shows that there are a number of indicators, which can be used to determine if work is harmful or hazardous to a child. From the reading of the recommendations, it is clear that domestic work may in some cases be hazardous or harmful to children even where it is considered as 'light work.' It can deprive children of their basic and most fundamental rights.

While trafficking of children has in many cases been considered a purely criminal issue, the study reveals that by treating matters concerned with the trafficking of children as purely criminal and as a separate issue from other important issues, it may result in over regulation of the subject area with total neglect of other gross violations committed against children. It is undoubted that children trafficked for domestic work are denied many fundamental rights, including, among others, the right to education and health, parental care, and rights within the work place. Certainly if these instruments recognised rights for working children, these children would be less vulnerable to trafficking and other exploitative abuses.

The chapter clearly shows that the objective of the law is to protect children from economic exploitation and not deny them their right to work especially where the work is for their benefit and proper development. The chapter highlights the need for an international instrument on the employment of children and the rights of working children that adopts a holistic approach, one that takes into consideration labour standards, human rights provisions, the best interests of the child with sanctions that ensure that the perpetrators are held accountable.

While this chapter has focused on the protection offered by international law to children trafficked for domestic work, the next chapter will consider how the laws of Uganda have incorporated the principles of international law to protect children especially those trafficked for domestic work.

CHAPTER FOUR

TRAFFICKING OF CHILDREN IN UGANDA, AN ANALYSIS OF THE LEGAL FRAMEWORK

4. Introduction

Uganda is a State party to several international and regional human rights instruments. These include among others, the Convention on the Rights of the Child (CRC), the Convention against the Elimination of All Forms of Discrimination Against Women (CEDAW), the ILO Conventions on Forced Labour, on Minimum Age, and on the Worst Forms of Child Labour and the African Charter on the Rights and Welfare of the Child (African Children's Charter).²¹³ These instruments as discussed in the previous chapter impose binding obligations on all State parties, including Uganda. These obligations ascribe to the principle *pacta sunt servanda* under Article 26 of the Vienna Convention on the Law of Treaties,²¹⁴ which requires that agreements entered into between parties are binding and must be performed by them in good faith.

As a State party to these treaties and other international law instruments, Uganda is required to fulfil the obligations that arise from their provisions. Despite such obligations arising from ratification of these treaties, Uganda has established a dualist system in the relation between international law and its domestic norms. This means that international law norms can only attain domestic legal force after they have been incorporated or translated into municipal law through the enactment of domestic laws by the national legislature. To this effect, the Parliament of Uganda has enacted several laws to domesticate the principles set out in many of the treaties mentioned above. Among others, the Parliament has enacted the Prevention of Trafficking in Persons' Act of 2008, the Children's Act Cap 59, the Penal Code Act Cap 120 and the Employment Act Cap 219.

²¹³ Uganda ratified the CRC in 1990, CEDAW in 1985, ILO No. 138 in 2003 and ILO No. 182 in 2001.

²¹⁴ See Article 26 of the Vienna Convention on the Law of Treaties, 8 ILM 679 (1969). Adopted on 23rd May 1969 and entered into force on 27 January 1980.

This chapter critically examines the domestic laws of Uganda applicable to children, including the aforementioned legislative instruments. I argue that despite the enactment of such laws, Uganda has not fully met its obligations arising from international human rights instruments concerning child trafficking, child labour and children's rights. The laws have not been adequately used to protect children against trafficking and exploitation.

It is noted in this part of the study that the Prevention of Trafficking in Persons Act has included provisions which criminalise the trafficking of children for the purpose of exploitation and defines exploitation to include, among others, harmful child labour. The inclusion of the concept of 'harmful child labour' as a form of exploitation in the Act is highly commended as it seeks to address the situation of children trafficked for domestic work. However, the main criticism is that the Act does not provide any definition for that concept. This chapter also shows that the Constitution of Uganda, the Children's Act and the Employment Act have all recognised the right of the child to be protected from economic exploitation and hazardous work, but they do not define 'child labour', nor do they give any benchmark for determining what constitutes hazardous work.

In addition, this chapter shows that the law is not clear on the age of admission to work. It highlights the problems in various laws that address the question of the age of admission to employment. It shows that while the Constitution has placed the minimum age of admission to work at sixteen years, the Employment Act has placed it at fourteen years and the Children's Act at eighteen years. The chapter shows that such inconsistency is a reflection of the dilemma that the law faces in seeking to incorporate international law principles while at the same time trying to address the cultural and traditional perceptions of childhood in Uganda. The chapter also argues that it is this inconsistency in the law, coupled with the lack of a concise definition of child labour, which has made the implementation and enforcement of the existing laws difficult, thus creating a fertile ground for trafficking of children and for their continued exploitation.

I further argue that for the law on child trafficking to be effective in the prevention and prosecution of trafficking, and the protection of children trafficked for domestic work, it needs to address the legality and working conditions of children. Whereas the Constitution and the

Employment Act permit children above the age of sixteen and fourteen years respectively to work, children above these age limits who are working are being discriminated against on the basis of age. They are regarded as ‘helpers’ and resultantly denied the right to rest, leave, adequate remuneration, social security and join trade unions among others. Their predicament is exacerbated by their lack of capacity to enter into legally binding employment contracts and the failure to recognise domestic work as a legitimate form of employment.

4.1 Uganda’s legal framework on the trafficking of children

Considering that trafficking of children for domestic work is a cross-cutting issue which touches on criminal, child labour and children’s rights issues, this section of the chapter examines the existing legal framework governing child trafficking, child labour and children’s rights in Uganda. It assesses the extent to which the provisions of international human rights instruments on child trafficking, child labour and children’s rights are incorporated into the national legislation and how effective that legislation is.

Since the Prevention of Trafficking in Persons Act was only enacted by the Parliament in April 2009 and assented to by the President on 1 October the same year, thus coming into force, there are no reported cases that this study can analyse. Therefore, the use and impact of the Prevention of Trafficking in Persons Act cannot be fully ascertained. Despite the challenge to ascertain the use and impact of the aforementioned Act, this section examines its provisions and explores how they can be effectively used to protect children who are trafficked for purposes of domestic work.

4.1.1. Definition of child trafficking

The Prevention of Trafficking in Persons Act defines trafficking in persons to mean:

‘the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, fraud, of deception, of the abuse of power or a position of vulnerability or of the giving or receiving of payments or benefits

*to achieve the consent of a person having control over another person, for the purpose of exploitation’.*²¹⁵

The Act recognises the vulnerability of children and the need to protect them from any form of trafficking. It regards the trafficking of children for sexual or labour exploitation or for whatever other purpose as an aggravated offence to the trafficking in persons, and imposes a life imprisonment punishment for the perpetrators.²¹⁶ It also provides for strict liability in the offence of promoting child trafficking which punishes any person who recruits, transports, harbours or receives a child without the authority of the parent or guardian.²¹⁷

4.1.2 Recruitment of children

Unlike the Trafficking Protocol which requires the offence of trafficking of persons to have a transnational element, the Ugandan Prevention of Trafficking in Persons Act does not specifically state that trafficking should be transnational or involve an organised criminal group. As such, the movement of a child from his or her home or familiar surroundings, whether within or outside the borders, for the purpose of exploitation, is seen as recruitment. Notwithstanding, this, the majority of law enforcement agents still see child trafficking as a transnational crime. The Head of Child and Family Protection Unit of the Uganda Police Force noted that only two cases of trafficking of children were reported between January and June 2009.²¹⁸ She explained that both cases concerned the trafficking of children across borders. One involved the trafficking of a child from eastern Uganda to work as a domestic worker in Kenya and the other related to the selling of a child to a family in Rwanda. She further explained that cases that lack a cross border element are reported as child labour, child abduction, child stealing, domestic violence or child sacrifice. She also noted that no investigation was done to determine if these are actual cases of trafficking of children, which shows that it is difficult to have accurate statistics of trafficking of children in Uganda.

²¹⁵ Section 2 (n).

²¹⁶ Section 4 (a).

²¹⁷ Section 6.

²¹⁸ Interview with Florence Kirabira, Head of Child and Family Protection Unit of the Ugandan Police Force on 10th December 2009.

In relation to the recruitment of children, the Act does not require proof of the means used in the process. These may include the use of deceit, fraud, abduction or abuse of power or position in relation to the child or its family. The reasoning in the Act is that children lack the capacity to consent, hence, where they are recruited for the purpose of exploitation, the Act concludes that they have been trafficked. The Act expressly provides that ‘the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall constitute trafficking in persons even if this does not involve any of the means set (...) above.’²¹⁹ This provision was transplanted from the UN Trafficking Protocol as a means of offering more protection to children. In a essence, the provision evaluates the offence of child trafficking based on the elements of transportation and exploitation. Therefore, to prove child trafficking under this provision of the Act, it is only necessary to prove that a child was transported from his or her home for the purpose of exploitation. It then becomes necessary to establish what constitutes transportation and exploitation under the Act.

4.1.3 Transportation of child domestic workers

The listing of acts, such as transportation, transfer, harbouring or receipt of persons in the definition of trafficking in persons, in the Act suggests that these acts constitute the process of transportation. Consequently, the understanding under the Act is that a child will have been transported where he or she is transferred, harboured or received by another person for the purpose of exploitation. As noted earlier, research on domestic workers in Uganda indicates that the majority of domestic workers are children who are recruited from the rural areas. It has been reported that in Uganda, parents, guardians and friends deceive children by convincing them that they are going to school or to work. On reaching the urban areas, many children are shocked to find themselves working as domestic servants, with some being forced into prostitution or commercial sex work, particularly in border towns like Malaba and Busia.²²⁰ As already indicated, the means used to recruit children such as deceit, fraud, and the abuse of the vulnerable position of children or their families, are irrelevant for purposes of establishing

²¹⁹ Section 3 (3) of the Prevention of Trafficking in Persons Act.

²²⁰ Ministry of Labour and Social Welfare *Report and position on child labour* (1998) at 28.

trafficking under the Ugandan Prevention of Trafficking in Persons Act as the mere transportation of children for the purpose of exploitation constitutes trafficking under the Act.

In order to ensure adequate protection of children from trafficking, the law places the major responsibility for protecting children from being trafficked on their parents and family. The Act provides that:

‘where a person recruits, transports, transfers, harbours or receives a child for any purpose without authority of the parent or guardian of such child unless where it is done lawfully, in good faith and in the best interests of the child, he or she commits the offence of promoting trafficking in persons and is liable to imprisonment for five years.’²²¹

By providing the exception of acquiring the permission of the parent or guardian, the Act seems to suggest that a parent or guardian of a child can consent to the trafficking of the child. In the Protocol, it is clearly stated that the consent of a victim or his or her parent or guardian to the trafficking shall be irrelevant.²²² However, while the Act seems to be misleading, it clears the confusion by establishing in section 3 (4) that ‘the consent of the trafficked person to the intended acts of exploitation or if a child the consent of his or her parent or guardian shall be irrelevant’.²²³ Therefore, where parents authorise, encourage or consent to their children being recruited to work under exploitative conditions, the children will still be regarded as trafficked and the consenting parents will be held accountable for aggravated trafficking under section 4 of the Ugandan Prevention of Trafficking in Persons Act.

From the reading of other sections in the Act, it is clear that transportation of a child is the removal of a child from his or her home, parents, guardians or familiar surroundings. However, the issue often arises as to whether a child can be trafficked by his or her family or within familiar surroundings. The law clearly covers such situations. It addresses, for example, cases

²²¹ Section 6 of the Prevention of Trafficking in Persons Act.

²²² Article 3(b) of the UN Trafficking Protocol.

²²³ Section 3 (4) of the Prevention of Trafficking in Persons Act.

where adoption, guardianship or fostering is undertaken for purpose of exploiting children. In so far as such cases are concerned, the Act provides that

*‘where adoption, guardianship, fostering is undertaken for the purpose of exploitation, or where the offence is committed by a close relative or a person having the parental care, authority or control over the victim, the offence is to be regarded as aggravated trafficking in persons’.*²²⁴

This provision clearly illustrates that a child can be trafficked even where he or she is moved to the home of a close relative or any other person on the pretext of receiving parental care under an adoption or guardianship order. Whereas this may sound obvious in cases of inter-country adoption and guardianship applications, it is not as clear-cut in cases of *quasi* adoption and guardianships within the borders of the country. This is mainly due to the culture or practice of giving away children by their parents or guardians or persons acting in *loco parentis* under ‘placement’ to live and work with another family as a means of attaining some form of training.

As noted in Chapter Two, factors such as HIV/AIDS and poverty have compelled many Ugandan families and parents to offer their children to live with wealthier ‘relatives’ and friends to perform domestic work in exchange for food, accomodation and education. Bourdillon argues that such strategies are important for the families concerned and may benefit the children by providing a home and adult care when their parents are unable to provide for them. However, he contends that such fostering arrangements can result in severe abuses, transforming a child into a virtual domestic slave.²²⁵

In addition, the Act seeks to protect children further by criminalising abandonment of a child where it facilitates the trafficking of that child. The Act provides that:

²²⁴ Section 4 (b) and (e) of the Prevention of Trafficking in Persons Act.

²²⁵ Micheal F C Bourdillon ‘Translating standards into practice: confronting local barriers’ in Burns H. Weston (ed) *Child labour and Human Rights: Making Children Matter* (2005) at 149.

*where any person abandons a child, in circumstances likely to cause fear, isolation, injury, pain or other harm or to facilitate the trafficking of that child, he or she commits the offence of promoting trafficking in persons and is liable to five years imprisonment.*²²⁶

This provision is very similar to that in the Penal Code Act which provides that:

*‘any person who being a parent or guardian or other person having lawful care or charge of a child under the age of fourteen years, and being able to maintain such child, wilfully and without lawful or reasonable cause deserts the child and leaves it without means of support commits a misdemeanour’.*²²⁷

This provision however does not offer much protection either, as it limits itself to children below the age of fourteen and does not hold accountable any parent who can prove that he or she does not have the ability to maintain a child. Both the provision in the Prevention of Trafficking in Persons Act and the Penal Code Act are not in line with the Constitution, which provides that children shall have the right to know and be cared for by their parents or those entitled by law to bring them up, and defines a child as a person below the age of eighteen years.²²⁸

Importantly, even where children attain the minimum age of admission to work and are permitted to work by the law, the parents or persons with parental responsibility will still be required to know the nature, terms and conditions of the work and give their consent under the Trafficking Act.²²⁹ This is a prevention mechanism meant to ensure that parents or persons with parental responsibility consent to, and are aware of, their children’s employment terms and

²²⁶ Section 6 (i) of Prevention of Trafficking in Persons Act.

²²⁷ Section 156 of the Penal Code Act.

²²⁸ See Article 34 (1) of the Uganda Constitution.

²²⁹ See Section 7 (d) of the Prevention of Trafficking in Persons Act. Section 7 (d) *‘any person who recruits a person below 18 years in any form of employment without the prior knowledge and consent of the parent or guardian of that person about the nature, terms and conditions of the employment commits an offence and shall be liable to imprisonment for five years.’*

conditions so as to prevent exploitation. Evidently, the law acknowledges the need of children above the minimum age of admission to work and the right to work under fair terms and conditions. It is clear from the provision in the Trafficking Act that the law does not only need to eliminate harmful child labour, but it also needs to ensure adequate protection for children permitted to work in order to prevent exploitation. However the issue that needs to be considered is when domestic work performed by children amount to exploitation.

4.1.4 Domestic work as exploitation under the Prevention of Trafficking Act

The Prevention of Trafficking in Persons Act defines exploitation to include *inter alia* sexual exploitation, forced labour, harmful child labour, debt bondage, slavery or practices similar to slavery or servitude.²³⁰ It is worth noting that although the definition of trafficking in persons in the Act is similar to the definition provided under the UN Trafficking Protocol, the Act does not limit itself to the forms of exploitation provided in the Protocol. It extends its definition to include practices which are peculiar to the Uganda society. In this regard, it includes practices such as forced marriages, child marriages, harmful child labour, human sacrifice, the removal of organs or body parts for sale or for purposes of witchcraft, harmful rituals or practices.²³¹ Some of these forms are considered in detail below.

a) Debt bondage

Debt bondage is defined in the Prevention of Trafficking in Persons Act as:

*‘the status or condition arising from a pledge by the debtor of his or her personal services or labour, or those of a person under his or her control as security or payment for a debt, when the length and nature of services is not clearly defined or when the value of the services as reasonably assessed is not applied towards the liquidation of the debt’.*²³²

This definition is similar to the definition in the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. As was

²³⁰ Section 2 (c) of the Prevention of Trafficking in Persons Act.

²³¹ *Idem*.

²³² *Ibidem*.

noted, domestic work may not necessarily involve debt bondage, although it may result in such a situation when certain conditions are attached to the work. For instance, where children are required to pay the heavy and unreasonable placement fees or where employers of domestic workers impose heavy and unreasonable fines for damage items within the house, or when they charge the employee relevant fees for medical care, clothing, meals and accommodation paid in advance by the employer.

Although there are no reported cases of traditional forms of debt bondage in Uganda, there are instances where child domestic workers are required to work under conditions similar to debt bondage. For instance, some children are unfairly fined for loss of household items and forced to remain in exploitative work to repay. Namara noted that many children reported that their salaries were deducted when they broke tableware and when they damaged fabrics when doing laundry, or when they damaged other items in household.²³³ Rukooko also noted that 70 of the 100 respondents interviewed in research conducted in Uganda reported that medical bills were deducted from their wages.²³⁴ Where the salaries paid are extremely minimal, fines and charges unreasonably imposed on domestic workers convert their work into some form of debt bondage, as they are made to work for an indefinite period of time with no remuneration. In other cases, child domestic workers, who were charged an unreasonable fee for placement in employment, were required to work for lengthy periods without pay in order to pay the placement fee. Considering that child domestic workers are often paid very little, and in some cases are not paid at all, the unreasonable deductions, fines or charges place them in a situation similar to debt bondage.

However, it is very unlikely that children who are placed in debt bondage will report their cases, given the fact that these children are often very vulnerable and highly dependent on their employers. Hence, in the absence of a vigilant labour department to monitor the the situation of these children, it can be argued that such children will remain vulnerable to further exploitation.

²³³ Agrippinah Namara 'The invisible workers paid domestic worker in Kampala City, Uganda', Centre for Basic Research, Working paper No. 74/2001 at 23.

²³⁴ Rukooko Byaruhanga 'Gender and Labour: Understanding the status of the paid domestic worker in urban areas of Bushenyi and Kampala' Centre for Basic Research Uganda 2001, CBR Working paper No. 74 at 26.

b) Forced labour

In providing that no person shall be forced to work against his or her will, the Ugandan Constitution clearly outlaws all forms of forced labour within the boundaries of the Ugandan territory.²³⁵ Both the Employment Act and the Prevention of Trafficking in Persons Act define forced labour as:

*‘all work or service which is extracted from any person under the threat of a penalty, including the threat of any loss of rights or privileges and for which that person has not offered himself or herself voluntarily’.*²³⁶

This definition is derived from the ILO Convention Concerning Forced or Compulsory Labour. As was noted earlier, domestic work *per se* is not forced labour although it can degenerate into forced labour where trafficking of children is involved. In some cases, children may be compelled by the socio-economic factors to work in very harsh conditions. Mansoor contends that sometimes economic circumstances can compel people to haggle their freedom only to end up in labour exploitation. Having noted that forced labour can occur in various forms, she contended that where child domestic labourers are not free to leave their place of work, they are subject to a form of forced labour.²³⁷ Hence, it is submitted that where children are made to work in homes in isolation, with various restrictions on their movement, and kept in submission by the constant use of threats of violence or some form of punishment or torture, these may constitute a threat of a penalty and turn the employment into forced labour.

Further, it should be noted that, under the Penal Code Act, forced labour is also a criminal offence. This Act provides that any person who unlawfully compels another person to labour against his or her will commits a misdemeanor.²³⁸ The Employment Act also provides that any

²³⁵ Article 25 of the Constitution of Uganda.

²³⁶ Section 2.

²³⁷ Farkhanda Zia Mansoor ‘Exploitation of child domestic labourers: the limits of the current law’ (2006) 8 *International Journal of Discrimination and the Law* at 171.

²³⁸ Section 252.

person who uses or assists another person in the use of forced labour commits an offence and is liable to be convicted to a fine not exceeding forty eight currency points or two years imprisonment, or he or she is liable for both and to a fine of four currency points for each day or part of the day on which the breach continues.²³⁹ These provisions can be used to penalize persons who recruit children for forced labour and to punish those who use them in forced domestic labour or in forced labour under other sectors of the economy. While these provisions can be used effectively to protect children who are subjected to forced labour, there have not been any cases where offenders have been prosecuted on the basis of these provisions.

c) *Slavery, practices similar to slavery and servitude*

The Constitution prohibits the holding of persons in slavery or servitude and states that people should not be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment.²⁴⁰ In order to emphasize the importance of these freedoms, the Constitution further provides that there shall be no derogation from the enjoyment of, among others, the freedom from slavery or servitude and the freedom from torture and cruel, inhuman or degrading treatment or punishment.²⁴¹ The Constitution does not define the terms ‘slavery’ or ‘servitude’.

The Prevention of Trafficking in Persons Act does not define the terms ‘servitude’ or ‘practices similar to slavery’ but defines slavery as:

*‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.*²⁴²

As was the case of with the previous concepts, this definition was also adopted from the UN Slavery Convention and incorporated into the domestic law. Conversely, the Penal Code Act does not define the term ‘slavery’ but it provides that:

²³⁹ Section 5.

²⁴⁰ Article 24 and 25 of the Constitution of Uganda.

²⁴¹ Article 44 of the Constitution of Uganda.

²⁴² Section 2 (1) of the Prevention of Trafficking in Persons Act.

*‘any person who imports, exports, removes, buys, sells or disposes of any person as a slave, or accepts, receives or detains against his will any person as a slave, commits a felony and is liable to imprisonment for ten years’.*²⁴³

In addition, the Penal Code provides that ‘any person who induces another person to give up himself or herself as a slave commits a felony and is liable on conviction to imprisonment for ten years’.²⁴⁴

As argued in Chapter Three, the controlling of the child domestic worker by the employer is an indication of the exercise of a right of ownership over the child, which turns the employment into slavery or servitude. Employers control children through different ways. One way is through constant verbal abuse or insults that drain the employee of any self-confidence and keep them in servile status. In Uganda, words like ‘house girl’ and ‘house boy’, which were originally coined by European and Indian employers during colonialism as a way to label African domestic servants as immature and insignificant, are still being used today to humiliate child domestic workers and to keep them submissive.²⁴⁵

Employers also deny their employees minimal movements or contact with any person outside the work environment to avoid possible access to other better opportunities or any possibility of getting assistance. Rukooko describes the denial of the right to freedom of movement and the denial of the right to freedom of association as oppressive acts, which create an image of an employee who is a prisoner. Namara agrees with Rukooko and contends that the prohibition of domestic workers’ freedom of movement amounts to an act of imprisonment within the home.²⁴⁶ It should also be noted that the provisions of the Penal Code, which criminalise persons who wrongfully confine others by charging them with committing a

²⁴³ Section 249 of the Penal Code Act.

²⁴⁴ Section 251 of the Penal Code Act.

²⁴⁵ Rukooko (note 234) at 31.

²⁴⁶ Rukooko (note 234) at 31, and Namara (note 233) at 21.

misdeemeanor,²⁴⁷ has not been adequately used to prosecute employers of children who are working as domestic workers within confined premises and in conditions akin to slavery.

d) *Harmful child labour*

The Constitution sets out that children are entitled to be protected from social or economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education or to be harmful to their health or physical, mental, spiritual, moral or social development.²⁴⁸ Under the Constitution, harmful child labour can be interpreted to mean work that is likely to be harmful to children's health or physical, mental, spiritual, moral and social development. While the aforementioned constitutional provision is a replication of a similar provision in the Convention on the Rights of the Child, one can argue that it is too ambiguous to be effectively implemented. The terms used in the provision lack the clarity required for implementation and seem ambiguous and, to a certain extent, very subjective. While it is easy to identify work that interferes with a child's education, it becomes difficult to identify any such work which is harmful to health, physical or mental, spiritual, moral or social development of the child. For instance, the law does not set out clearly the standards that can be applied objectively to all children. Indeed, one can argue that work affects children differently depending on their age, health, social background, location and any other factor. For example, children in rural areas are required to fetch and carry heavy pots of water and firewood for long distances, unlike those in urban areas. The consequences may vary depending on environment and habits that children from rural and urban areas are subjected to. Hence, what may be considered harmful child labour in urban areas may not be seen in the same way in the rural settings.

As mentioned earlier, the Prevention of Trafficking in Persons Act defines exploitation to include *inter alia* harmful child labour.²⁴⁹ Although the inclusion of 'harmful child labour' as a form of exploitation in the Prevention of Trafficking in Persons Act is commendable, as it addresses the the problem of children trafficked for purposes of domestic work, the law does not

²⁴⁷ Section 248 of the Penal Code Act.

²⁴⁸ Article 34(4) of the Constitution of Uganda.

²⁴⁹ Section 2 (c) of the Prevention of Trafficking in Persons Act.

define the term ‘harmful child labour’. The gap left by the omission to define ‘harmful child labour’ makes it difficult to prosecute perpetrators of the child trafficking offence. In most cases the difficulties relate to the fact that it is difficult to prove what constitute harmful child labour. Such omission also amounts to a breach of the Constitution, which sets out in Article 28(12) that except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law.

In the case of *Salvatori Abuki and Another vs Attorney General*,²⁵⁰ the petitioners challenged their convictions under the Witchcraft Act Cap 108 of the Laws of Uganda for being inconsistent with the Constitution. They challenged Section 3 (1) of the Witchcraft Act, which provides that:

‘Any person who directly or indirectly threatens another with death by witchcraft or by any other supernatural means shall be guilty of an offence and on conviction shall be liable to imprisonment for life.’

They argued that the aforementioned provision is very vague in so far as it does not create an offence. They also said that it contravenes Article 28 (1) and (12) of the Constitution. In interpreting this clause, the Constitutional Court held that sections 2 and 3 of the Witchcraft Act are void for being vague and ambiguous and do not meet the requirements of Article 28(12) of the Constitution.

Quoting Gonthier J of the Canadian Supreme Court in the case of *Canadian Pacific Ltd*, Justice J.P.M. Tabaro observed that:

*‘(...) a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This requirement of legal precision is founded on two rationales: the need to provide for notice to citizens of prohibited conduct and the need to prescribe enforcement discretion’.*²⁵¹

²⁵⁰ Constitutional Case No.2 of 1997, [1997] UGCC5 (13 June 1997).

²⁵¹ Idem.

Tabaro J. concluded by finding that the legislation in question was vague and ambiguous, in the sense that witchcraft is understood differently by different people and thus, the lack of a clear definition was unconstitutional. It is evident from this judgement that for child trafficking for harmful child labour to constitute a criminal offence, the term ‘harmful child labour’ must be clearly defined. The definition of the offence must be clear enough to enable a clear distinction between permissible and prohibited work for children. Any use of vague and subjective terms will not satisfy the requirements of Article 28 (12) of the Constitution.

Nevertheless, criminal law can rely on the provisions of labour law to establish harmful child labour. For instance, where children below the minimum age of admission to employment are required to work, it can be said to be a case of harmful child labour and thus exploitation. Where children above the minimum age of admission to work are required to work, the prosecution could argue that where general provisions of labour protections are not adhered to, then it is harmful child labour and thus exploitation. Some of the labour law provisions which can be used in criminal law matters to protect children are fairly discussed below.

4.2 Protection of working children under the law

As a way of protecting children from economic exploitation, labour law provides for a minimum age or ages for admission to employment. It also regulates the amount of hours of work, the terms and conditions of employment, and it prescribes appropriate penalties or other sanctions for perpetrators. This section examines the Ugandan labour law and it explores how the law protects children against harmful child labour and in particular, how it protects them from domestic work.

4.2.1 Age of admission to work in Uganda

The Constitution, Employment Act and Children’s Act seek to protect children from harmful child labour by regulating the age of admission to work. The manner in which age is regulated in the law is premised on the fact that children should be given an opportunity complete their basic education. Hence, where there is need for them to work, the terms and conditions must be

carefully regulated. In this regard, the Constitution prohibits the social or economic exploitation of children below the age of sixteen.²⁵²

Convensly, the Employment Act prohibits the employment of children below twelve years in any kind of business, undertaking or work place.²⁵³ However, the Act permits the employment of a child under the age of fourteen years to perform light work which does not affect his or her education under the supervision of an adult, thought to be a person above the age of eighteen years.²⁵⁴ The Employment Act defines ‘light work’ as work that is not physically, mentally and socially injurious to the child’.²⁵⁵ The impression is that, where children below twelve years are forced to work, or where those above twelve but below fourteen years are forced to perform work that is not ‘light work’, these will clearly constitute situation of harmful child labour prohibited under both the Prevention of Trafficking in Persons Act and the Employment Act.

The sad reality is that many Ugandan children are required to work to supplement family incomes, it has become common that many of them from various households are engaged in agriculture and in activities related to domestic work. As was noted in Chapter two, their engagement in these activities is seen as part of the process of their socialisation, education and training, which is allegedly intended to instill and to impart capabilities, skills, cultural values and practices which will be beneficial in their future adult lives.

Some research data showed that most domestic work in Uganda is done by children. It highlighted that some of the children were below the age of twelve. Some of these children started working as domestic workers as early as at the age of six and others did not know whether they were workers or not.²⁵⁶ Research also showed that the majority of employers do not weigh the age of the child against the responsibilities and tasks assigned to them. In many cases,

²⁵² Article 34 (5) of the Constitution of Uganda.

²⁵³ Section 32 (1) of the Employment Act.

²⁵⁴ Section 32 (2) of the Employment Act.

²⁵⁵ Section 2 of the Employment Act.

²⁵⁶ Rukooko, (note 234) at13.

children working as domestic workers were found to be looking after other children that were older than them. Further, the research showed that many children involved in domestic service are aged from five to eighteen years, with many of them starting to work at the age of nine.²⁵⁷ However, many of them are below the age of eighteen years.

While it is evident that ‘harmful child labour’ or ‘economic exploitation of children’ is prohibited, it is not clear whether domestic work undertaken by children may also be considered harmful to them. The Employment Act places the responsibility to determine which kind of work is harmful and to inform the parties concerned rests on the labour officer.²⁵⁸

4.2.2. Regulation of hours and conditions of work

The labour law provides for, and protects a number of rights of workers, which by implication could be extended to children who are serving as domestic workers. Among other rights and freedoms, the labour law sets out the right to freedom from forced labour, the right to freedom from discrimination in employment, the right to rest and leisure including *inter alia* weekly rest, annual leave and public holidays. It also grants workers protection from sexual harassment. The relation between these rights and how they can be used to protect the right of children involved in domestic work is discussed in the sections that follow.

(a) Right to food and shelter

In the context of Uganda, many domestic workers are ‘live-in’ workers in the sense that they live within the households where they work. It applies equally to children who provide domestic services and live with their employers. Their live-in condition creates an adequate environment for these workers to rely on their employers for food and shelter. The Employment Act does not specifically provide for any right to food, clothing and lodging. However, the Penal Code provides that:

²⁵⁷Ugandan Women Lawyers Association (FIDA) *Report on the Survey on children in domestic service in Kampala district* (1999) at 17.

²⁵⁸ Section 32 (3) and (4).

*'any person who, being a parent or guardian or other person having lawful care or charge of any child of tender years and unable to provide for itself, refuses or neglects being able to do so to provide sufficient food, clothes, bedding and other necessities for such child so as thereby to injure the health of the child commits a misdemeanour'.*²⁵⁹

This provision should be interpreted to place responsibility on the employer of children subjected to domestic labour to provide for them. In that sense, employers are also bound to another provision in the Penal Code which states that:

*'any person who, being legally liable either as master or mistress to provide for any apprentice or servant necessary food, clothing or lodging, willfully and without lawful excuse refuses or neglects to provide the same, or unlawfully and maliciously does or causes to be done any bodily harm to such apprentice or servant so that the life of such apprentice or servant is endangered or that his or her health has been or is likely to be permanently injured, commits a misdemeanour'.*²⁶⁰

Hence, whether they employ children from economically disadvantaged families, or their own relatives to provide them with domestic work services, employers may not justify any such failure to provide for the children pursuant the obligations arising from the penal legislation. Despite such express and clear provisions in the law, research shows that there are examples of cases where children providing services as domestic workers have been discriminated against and denied their right to the most basic commodities. Namara observed that some domestic workers, including children, were denied accomodation, sleeping facilities and basic food.²⁶¹ She further observed that, in some cases, where children and other domestic workers had been provided with facilities to sleep, they were placed in open spaces where they became vulnerable to, among others, sexual abuse. In respect of meals, they were denied some basic nutritious foods as these, including eggs, milk and fruits, were seen as luxuriuos. Others were made to eat last and after everyone else had had their meals independently of the times when they were available

²⁵⁹ Section 157 of the Penal Code Act.

²⁶⁰ Section 158 of the penal Code Act.

²⁶¹ Namara, (note 233)at 31.

to have such meals.²⁶² While the provisions of labour law instruments and, in particular, those entrenched in the Employment Act do not address the question of providing food, shelter and other basic commodities to workers that live with their employers: it is clear that there are obligations deriving from criminal law instruments. In order to address the vulnerabilities of live-in workers, such criminal law instruments and their provisions should be applied to fill in the gaps of the labour legislation.

(b) Right to rest and leisure

The law recognises the need for working children to rest and have leisure time in order to ensure full development. The Employment Act specifically prohibits the employment of a child between 7 pm and 7 am and it places an obligation on anyone who comes across such situation to report the breach of this section to the relevant labour officer.²⁶³ The Act provides in very general terms that an employee is entitled to weekly rest and shall not be required to work for an employer for more than six consecutive days without a day of rest, which shall be taken on any day which is customary or as shall be agreed between the parties.²⁶⁴

Research indicates that, all too often, domestic service becomes a twenty four hour job with the child perpetually on call and subject to the whims of all family members of his or her employer.²⁶⁵ It showed that children in domestic service are required to work more than fifteen hours a day in order to complete the assigned activities and extra chores. In most cases, children engaged in domestic work are required to wake up earlier than everyone else and they retire to bed last.²⁶⁶ Research shows that it is practically difficult to enforce the provisions of the law on hours of work, where the work done is confined to the household environment, completely hidden from public scrutiny and regulation.

²⁶² *Idem*, at 33.

²⁶³ Section 32 (5) and (6) of the Employment Act.

²⁶⁴ Section 51 of the Employment Act.

²⁶⁵ UNICEF (note 90) pg. 52.

²⁶⁶ FIDA, (note 257) at 28.

In many cases, children who demand their right to rest risk losing their jobs or they may suffer deductions from their incomes, even where the Employment Act sets out that deductions of wages payable are not supposed to be made on account of not working on the weekly rest day.²⁶⁷ In addition, they are only paid for 48 hour of work per week, with complete disregard for any extra hours worked. The Employment Act provides that employees should not exceed ten hours of work per day or fifty six hours in a week. Where the maximum hours of work exceed eight hours a day, the law provides that there should be a thirty minutes additional daily break to employees.²⁶⁸

However, research shows that ‘house girls’ and other children engaged in domestic work are made to work fifteen hours a day with no extra payment for working beyond the prescribed time limits. It also indicates that some employers cannot even afford time off for their domestic workers to rest when they are sick. Namara rightly observed that, domestic workers continued working even when they felt unwell. She noted that, they preferred to continue working than to stop as they would be seen as lazy and consequently dismissed.²⁶⁹

Further, the Employment Act provides for entitlement to annual leave every calendar year with full pay for employees who work for sixteen or more hours a week and those who have worked uninterrupted with the same employer for at least six months.²⁷⁰ Regardless of the entitlements given to workers under this provision, child domestic workers are not benefiting of these rights. They continue to suffer in silence as they are denied their right to rest and annual leave. In most cases, these children are required to work fifteen hours a day, seven days a week and for a whole year without rest. Albeit the injustice suffered by these children, perpetrators remain unpunished.

²⁶⁷ Section 52 of the Employment Act.

²⁶⁸ Section 53 (4) and (6) of the Employment Act.

²⁶⁹ Namara, (note 233) at19.

²⁷⁰ Section 54 (1) of the Employment Act.

The Employment Act specifically provides for wages to be paid in legal tender to the employee entitled to the payment.²⁷¹ Despite this provision, many child domestic workers continue to be paid in kind in the form of accommodation and meals. This practice is as a result of people living in urban areas calling on their poor relatives in rural areas to assist them by providing domestic service. As such their terms of employment and payment are not defined clearly. Besides being very minimal, their remuneration is often established arbitrarily by the employer, and it does not balance with the work they do. Namara observed that some employers describe their workers as ‘helpers’, ‘members of the family’ or ‘relatives’ so as to weaken the employer-employee’s relationship. She noted that this practice does not benefit children as they are denied certain rights under the cover of such designations. In fact, Namara argued that pursuant to the practice there is no motivation to pay, and workers are not motivated to demand fair wage that matches the services rendered.²⁷²

The Employment Act also requires that wages are to be paid at the lapse of the contracted period specified, that is to say, it must be paid within the hourly, weekly or daily time intervals as agreed by the parties involved.²⁷³ However, in many cases child domestic workers do not know how much they are supposed to be paid, with negotiations done for them by third parties or left to the discretion of the employer. The Act provides that except where expressly provided, no person can receive wages due to an employee on behalf of the employee without his or her written permission.²⁷⁴ However, in many cases children undertaking domestic work are not paid and employers claim that they send the payment due to their families in the villages. While there are few cases where they receive part of their pay, in many extreme cases, these children are not paid at all.²⁷⁵ In cases of non or delayed payment of remuneration, the Act empowers the labour

²⁷¹ Section 41(1) of the Employment Act.

²⁷² Namara (note 233) at 7.

²⁷³ Section 43(3) of the Employment Act.

²⁷⁴ Section 44 of the Employment Act.

²⁷⁵ United Nations Children’s Fund (UNICEF) *‘The state of the world’s children: excluded and invisible’* (2006) at 51.

officer to terminate the contract of employment on application by the affected employee but without prejudice to outstanding rights under the contract of service or any other law.²⁷⁶

Given the limited number of labour officers, cases of this nature are addressed to Local Councils which are found at the county level. Research highlights that most cases reported to the Local Councils relate to non-payment or delayed payment of salaries.²⁷⁷ Local Council Committees have quasi judicial powers as it is believed that they are embedded in the communities with greater possibilities of handling issues involving children's rights at a faster pace than the formal judicial system. However, the fact that harmful child labour and other categories of hazardous work has not been defined under Ugandan law limits Local Councils ability to protect children from various forms of exploitation.

The predicament suffered by child domestic workers and workers in general is exacerbated by the fact that the Government has not revised the minimum wage since 1984. The current statutory minimum wage is Ug shs 6,000 (approximately US \$ 3) according to the Minimum wages Order of 1984. Although in practice, the majority of employees have managed to negotiate for better wages; those without marketable skills have been left vulnerable to exploitation. Despite the critical role of minimum wage in prevention of exploitation, the law on minimum wages in Uganda has not been utilised to set a minimum wage for all workers. It left out workers in the informal sector of the economy, including among others, domestic workers. Efforts to lobby for a minimum wage for domestic workers have fallen on deaf ears as it is thought that the minimum wage requirement reduces employment opportunities and defeats the principles of a liberal economy.²⁷⁸ The lack of an adequate minimum wage requirement prescribed by the law places domestic workers, including children undertaking domestic services, at the mercy of their employers to determine their wages. In the shadow of such legislative gap, cases do arise where employers are left unpunished after they have failed to pay their workers.

²⁷⁶ Section 31 of the Employment Act.

²⁷⁷ FIDA (note 257) at 32.

²⁷⁸ Interview with Mr. Otim from the Ministry of Gender and Labour, on 2nd December 2009.

(d) Right to social security

In its guiding principles and objectives, the Constitution of Uganda requires the State to make efforts to ensure that all citizens enjoy, among others, the rights, opportunities and access to pension and retirement benefits. In line with the objective set in the Constitution, Parliament passed the National Social Security Fund Act²⁷⁹ which provides for payment of contributions to the fund and the benefits that accrue. Specifically, the Act requires employers to remit an equivalent of fifteen per cent of employees salaries, while employees contribute with five per cent of their salaries to the fund. Whereas, this legislation seeks to ensure that citizens enjoy pension and retirement benefits, its scope of application is limited to the private sector and it only applies to companies with more than five employees.²⁸⁰ It makes it practically impossible to ensure that contributions are also made in favour of domestic workers, in particular to child domestic workers who often undertake activities in an invisible environment, with no contracts or other forms of supporting documentation.

Barya argues that the right to social security plays an important role in supporting the realisation of many of the rights in the International Covenant on Economic, Social and Cultural Rights.²⁸¹ In line with this thinking it can be argued that the exclusion of domestic workers from contributing to the social security fund denies them the right to access and enjoy pension and retirement benefits. With no access to social security schemes, these domestic workers are denied social protection and left vulnerable to situations of unemployment, sickness, disability, death, old age or other lack of livelihood in circumstances beyond their control.

(e) Right to protection from sexual exploitation

Besides the fact that children who work as domestic workers are paid the least, sometimes they suffer sexual harassment and other forms of abuses. These children are made to sleep in open areas where they are vulnerable to continued sexual abuse.²⁸² The reason behind such continued

²⁷⁹ National Social Security Fund Act. Cap 222.

²⁸⁰ Section 11 and 12 of the National Social Security Fund Act.

²⁸¹ John Jean Barya *'Interrogating the right to social security and social protection in Uganda'* (2009) HURIPEC Working Paper No. 23 at 11.

²⁸² Uganda Child Rights NGO Network *'The situation of child labour in Tororo district'* (1998) at 32.

sexual harassment is mainly due to the fact that domestic workers provide their services in private arena, which are often hidden from the public scrutiny and regulation. Sometimes the unequal power relation between domestic workers and their employers, and the gender inequality and discrimination, is manifested through sexual relationships between the workers and employers. Often children undertaking domestic work are sexually harassed and women within the setting do not provide them with the needed moral and psychological support. In fact, they worsen the situation by subjecting the children to intimidation to keep them from reporting any such related cases.²⁸³ Namara observed that where cases are reported domestic workers, especially children are accused of being 'loose' and 'ambitious'.²⁸⁴

The definition of sexual harassment of an employee by the employer or his or her representative is provided in the Employment Act.²⁸⁵ However, within the context of the Employment Act and its various provisions, domestic workers are not catered for. It is also noted the Act only obligates employers with more than twenty-five employees to put in place measures to prevent sexual harassment which may occur at the workplace.²⁸⁶ Given that domestic worker employers often contract one employee at a time, the absence of such measures in the private home environment cannot be over emphasised.

Despite the absence of such regulations within the provisions of the Employment Act, the provisions of the Penal Code Act can be applied to protect child domestic from sexual harassment. Perpetrators can be held accountable by prosecuting them through the provisions of the Penal Code. The Penal Code provides that any person who, being the owner or occupier of

²⁸³ FIDA Report (note 257) at 34.

²⁸⁴ Namara (note 233) at 34.

²⁸⁵ Section 7 (1) provides that an employee shall be sexually harassed in that employee's employment if that employee's employer or a representative of that employer directly or indirectly makes a request of that employee for sexual intercourse, sexual contact or any other form of sexual activity, uses language whether written or spoken of a sexual nature, uses visual material of a sexual nature or shows physical behavior of a sexual nature which directly or indirectly subjects the employee to behavior that is unwelcome or offensive to that employee and that either by its nature or through repetition, has a detrimental effect on that employee's employment, job performance, or job satisfaction.

²⁸⁶ Section 7 (4).

premises or having or acting or assisting in the management or control of the premises, induces or knowingly suffers any girl under the age of eighteen years to resort to or be upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, commits a felony and is liable to imprisonment for five years.²⁸⁷ This provision places a duty on all employers of children to ensure that children, and in particular the girl child, are not sexually abused or exploited. In the cases of abuses committed against the male child, other provisions can be used to ensure their protection against sexual harassment. These include provisions relating to the crimes of defilement and indecent assault, which are also defined under the Penal Code Act.²⁸⁸

Notwithstanding the major role that these provisions can play in protecting child domestic workers, cases that involve sexual exploitation of child domestic workers are hardly reported. Also, it is seldom that these cases are dealt with accordingly when they are reported. The reluctance to report such cases is mainly due to the high dependency of children undertaking domestic work on their employers. Research revealed that some children who were involved in domestic work were dismissed after they had been harassed sexually and they were in most cases not paid compensation. In other cases girls undertaking domestic work were left pregnant and infected with sexually transmitted diseases, including HIV/AIDS. This has contributed to the increased vulnerability of children for trafficking and other abuses, specially in cases where they are not welcome at their homes or when they are rejected by their communities.

(f) Right to work in safe conditions

Domestic work includes working in various conditions, some of which may not be safe. There are no minimum standards of hygiene and safety applicable to the home environment, hence, it is becomes difficult to ensure that domestic workers work in safe conditions. The Occupational Health and Safety Act provides that it is the duty of the employer to take as far as is reasonably practicable all measures for the protection of his or her workers from the dangerous aspects of the employer's undertaking at his or her own cost.²⁸⁹

²⁸⁷ Section 133 of the Penal Code Act.

²⁸⁸ Sections 180 to 190 of the Penal Code Act.

²⁸⁹ Section 13 of the Occupational Safety and Health Act, 2006 (No. 9).

Despite the provisions of the law on ensuring the safety of workers, child domestic workers are made to do dirty and dangerous work with no protective gear thus exposing them to various diseases. According to Rukooko, domestic workers are made to wash dirty clothes which contain waste matter without any form of protection.²⁹⁰ It is argued that those in the rural or peri-urban areas are required to carry heavy loads of farm harvest and firewood on their heads for long distances. Others who work in kitchens inhale large quantities of soot, while those who are involved in cleaning sanitary places do dirty and dangerous work, without any protective clothing.²⁹¹ As a result, domestic workers, including children, are exposed to a variety of occupational hazards.

The law requires that workers are compensated when they contract injuries during the course of the work activities. With explicit exception of the armed forces, the Workers Compensation Act requires that workers, in all sorts of employment, are compensated for injuries and diseases contacted in the course of the employment.²⁹² Among others things, it also provides for medical treatment in case of accident and insurance by employers. However, child domestic workers are seldom given any form of medical aid or compensation for injuries suffered in the course of their work. These children are constantly exposed to various diseases and they are required to seek medical services using their salaries, otherwise they are dismissed from the employment.²⁹³

(g) Right to notice on termination

As was mentioned earlier, the majority of child domestic workers are ‘live-in’ workers. When they are dismissed arbitrarily they lose their rights to shelter and food and to other benefits which they may be entitled to. In order to protect workers from this precarious situation, the law prescribes various mechanisms of terminating a contract of employment. The Employment Act provides for the notification and hearing of the employee before termination of a contract on the

²⁹⁰ Rukooko, (note 234) at 31.

²⁹¹ Idem at 25.

²⁹² Section 2 of the Workers’ Compensation Act 2000, (No.8 of 2000) Chap. 225.

²⁹³ Rukooko, (note 234) at 26.

grounds of poor performance or misconduct. The employer is required to explain to the employee the reason for dismissal in a language he or she understands and in the presence of any person of his or her choice.²⁹⁴

Research indicates that contrary to the law, termination of services of domestic workers is often as irregular as the recruitment and largely depends on the method of recruitment. Rukooko observed that in most cases the employer has the advantage over the employee in recruiting, determining the employment conditions and its nature and in settling for termination of the contract or dismissal of the employee.²⁹⁵ When employees are dismissed their vulnerability to trafficking is increased. It is also suggested that dismissal greatly affects children trafficked for domestic work as it eventually leads them to begging in the streets or doing activities related to prostitution.²⁹⁶ In respect to child domestic workers, their situation is exacerbated either because they do not have a place to stay, or because they do not recall on how to return to their homes of origin where they were recruited.

(h) Right to join trade unions

The predicament suffered by child domestic workers is exacerbated by the non existence of a trade union to voice their concerns and advocate for their rights. The Trade Union Act Cap 224 provides for the right of every worker to join a trade union. It defines a minor as a person who is under the apparent age of 21 years, but above the apparent age of 16. It provides that ‘a minor can be a member of the union and shall enjoy all rights as a member except that he or she shall not be a member of the executive or a trustee of National Organisation of Trade Unions (NOTU) or a registered trade union.’²⁹⁷ While the law permits children above the age of sixteen to join a trade union, there is no trade union of domestic workers in Uganda. It has been argued that their social and political isolation discourages collective attempts to negotiate better working conditions. This is mainly because child domestic workers are casual labourers who provide their services within the home environment, which makes it difficult to mobilise them into unions.

²⁹⁴ Section 66 of the Employment Act.

²⁹⁵ Rukooko (note 234) at 30.

²⁹⁶ Interview with Harriet Luyima from the Ministry of Labour held on 23rd December 2009.

²⁹⁷ Section 20 of the Trade Union Act Cap 224.

Furthermore, the prescribed fees for joining a trade union is high and so is the minimum number of members in the trade union, which makes it difficult for child domestic workers to form a trade union. Barya argues that the phenomenon of unemployment continues to be the biggest threat to unionisation and to union recognition. He also contends that with such high levels of unemployment, employers have an upper hand in the employment relationship. Those employed want to retain their jobs at any cost.²⁹⁸ This helps to understand the abundance of rights granted to employees under the labour instrument as it seeks to ensure fairness in the contractual relationship by requiring adequate working conditions and prevent the exploitation of workers. Notwithstanding the fact that these rights can be extended to domestic workers, they are often denied the enjoyment of such rights with the excuse that they are not covered by the Employment Act.

On the one hand, it is contended that an employee is any person who has entered into a contract of service or an apprenticeship contract, except those who are members of the Uganda People's Defence Forces (UPDF).²⁹⁹ A contract of service is defined as:

*'any contract, whether oral or written, whether express or implied, where a person agrees in return for remuneration to work for an employer and includes a contract of apprenticeship.'*³⁰⁰

The overall impression is that, even in the absence of a written contract, the oral agreement between the employee and the employer, suffices to address the need for a contractual relationship between employer and employee for child domestic workers. The problem, however,

²⁹⁸ John-Jean Barya 'Freedom of Association and Uganda's new labour laws: A critical analysis of worker's organizational rights' (2007) *HURIPEC, Working Paper* No.4 at 31.

²⁹⁹ Section 2 of the Employment Act.

³⁰⁰ *Idem*. Contract of apprenticeship is a contract of service where there is an obligation on the employer to take all reasonable steps to ensure that the employee is taught and acquires the knowledge and skills of that industry, by means of practical training received in the course of the employer's employment; and where there is provision for formal recognition of the fact that the employee has acquired the knowledge and skills, intended to be acquired when the employee has done so.

arises where majority of child domestic workers are unaware of their labour rights making it difficult to enforce the rights accruing under oral contracts.

Under the Contract Act Cap 73, the common law of England relating to contracts is applicable to Uganda. The English common law on contracts provides that a child does not have the legal capacity to enter into a contract and where he or she has entered a contract it shall be regarded as void.³⁰¹ Under section 2 of the Contract Act , a child is any person below the age of eighteen years. The only exception to this rule applies where the contract is entered to ensure the availability of ‘necessaries’ items such as food, medicines, accomodation, clothing or for apprenticeship, employment, education and service where they are rightly said to be for the benefit of the child.³⁰² In light of this dispensation, child domestic workers are legally incapable of entering into any such contracts which do not fall within the exceptional norms of common law.

The exception under common law has not been used to encourage children, in particular, child domestic workers, to enter written contracts. The reluctance is mainly a result of failure to recognize domestic work as a form of employment. As was noted in Chapter two, child domestic workers are not seen as ‘workers’, but ‘helpers’ who undertake activities within the confinement of employers house. This situation is largely favoured by the practice of ‘placement’, which entails the placing of children under the responsibility of their ‘relatives’ under the pretext that they will receive better education and training opportunities.

Nevertheless, the oral agreements between minor employees and their respective employers must be seen as valid and legally binding contracts as they are entered into to fulfill the ‘necessaries’ of child domestic workers from less advantaged families, and fall within the exception of the common law rule. It is therefore, important to enforce the rights of child domestic workers to ensure the protection against exploitation, and to apply the necessary penalties where employers breach their obligations as provided under the law.

³⁰¹ *Edward v Carter* [1893] A.C 360.

³⁰² *Idem*.

4.2.3 Penalties and other sanctions

Under the Employment Act the responsibility to protect children from exploitation is placed on labour officers. The Act provides that except where expressly provided for, the only remedy available to a person who claims infringement of any rights granted under the Act shall be by way of a complaint to the labour officer.³⁰³ With regards to children, the Employment Act provides that every person who thinks that a child is being made to work in contravention of the law has the duty to report the incident to the labour officer.³⁰⁴

The labour officer has the powers to investigate the complaint and to settle the matter through, among others, conciliation, arbitration or adjudication or through any other procedure deemed appropriate by the parties involved.³⁰⁵ Officers have been placed at various district level to help resolve disputes involving domestic workers.³⁰⁶ The Ministry of Labour has also placed a complaint desk where domestic workers can report their grievances.³⁰⁷ Research showed that, among others, the majority of cases reported relate to grievances concerning non payment of wages, and grievances related to mistreatment and dismissal without notice. While the law requires all labour disputes should be reported to the labour officer, for various reasons, child domestic workers may not be able to travel to the district headquarters to submit their complaints to the designated labour officer. Research revealed that many cases involving grievances of child domestic workers are instead reported to the Local Councils.

Among other relevant functions attributed to labour officers, they are mandated to institute civil or criminal proceedings before the industrial court in respect of a contravention or alleged contravention of the Employment Act or its regulation. A labour officer is also empowered to prosecute and appear in his or her own name in respect to such proceedings.³⁰⁸ However, it

³⁰³ Section 93 (1) of the Employment Act.

³⁰⁴ Section 32 (6) of the Employment Act.

³⁰⁵ Section 13 of the Employment Act.

³⁰⁶ Interview with Mr. Kiberu from the Ministry of Labour held on the 23rd November 2009.

³⁰⁷ Idem.

³⁰⁸ Section 14 (1) of the Employment Act.

should be noted that there are few labour offices available, which are mostly located at the regional level. At the sub-regional level and in other remote areas where these are needed to address the questions at hand, labour offices have not been established. In this regard, it was observed that there are approximately thirty labour officers in the entire country, which makes it very difficult to ensure compliance with the labour standards. Each officer is required to cover about eight districts. It makes it practically impossible for them to carry out their duties effectively. In addition, there is only one industrial court located far from the reach of the most needy people.

It should also be noted that, there are some practical difficulties, even where labour officers intend to institute criminal charges against perpetrators of child labour as the offence requires that the employer must receive a written notice, especially in cases where the child has been working in hazardous and dangerous environment.³⁰⁹ The other practical constraint to address the problem relates to the fact that there are minimal penalties for persons who are found guilty of any such abuses or crimes against children. Such minimal penalties have little impact in addressing the problem of harmful child labour. Perhaps the heavier punishment would apply where the employer repeats the infringement in respect of which a caution has been given as he or she is liable on conviction to a fine or to imprisonment not exceeding one year or to both.³¹⁰

It is evident that the labour law does not provide adequate remedies to working children in event of breach of their rights. The minor penalties prescribed by the law for the offence of child labour is an indicator of how the community perceives child labour. As was noted, many Ugandan communities do not perceive child domestic work as a form of child labour or as work that is harmful to the child. Instead, domestic work is considered part and parcel of the child's development and upbringing, and children are expected to undertake domestic chores to contribute towards the family well-being. The overall impression is that children are regarded as part of family labour force and are therefore required to work so as to supplement the income of their respective families.

³⁰⁹ Section 96 (2) of the Employment Act.

³¹⁰ *Idem*.

At this point, it is important to recall that in an attempt to protect children and to prevent them from being trafficked, the Ugandan Prevention of Trafficking in Persons Act places a duty on every member of the community who knows that any person has committed or intends to commit any offence related to trafficking in persons to report the matter to the police or other authority for appropriate action.³¹¹ Despite all these provisions, children continue to be recruited from rural areas to work in urban areas. In most cases, the practice continues unreported. Unless the penal and labour legislative instruments are clear about what constitutes acceptable domestic work, the conditions under which it can be performed, and the recognition of rights of persons undertaking domestic work, in particular children, the trafficking of children for purposes of domestic work will continue undeterred.

4.3 Conclusion

This chapter clearly demonstrates that the Ugandan Prevention of Trafficking in Persons Act considers the trafficking of children for any form of exploitation, whether sexual or labour as aggravated trafficking in persons. The study shows that despite the existence of such legal instrument, the trafficking of children for domestic work in Uganda has neither been regarded as trafficking nor has it received sufficient attention of the competent authorities. Although it is evident that there are various cases of domestic work in Uganda, including situations where children are being held in forced labour, or in conditions similar to debt bondage, or slavery or other forms of harmful child labour, domestic work undertaken by children continues to have insignificant weight.

This chapter also shows that the Ugandan Employment Act aims to protect children from child labour and economic exploitation. However, it shows that the Act falls short in many respects. It is highlighted that it is a constraint in the Act that it does not define the term ‘harmful child labour’ and yet it places on labour officers the burden of identifying such practices. Whereas it is not contested that labour officers are competent, the chapter notes that they are limited in their numbers which makes it challenging for them to address the problems they are

³¹¹ Section 9 of the Prevention of Trafficking in Persons Act.

entrusted with. It is difficult and logistically impossible for a labour officer to visit each home where a child is working to determine whether the work being performed by the child is ‘light work’ or ‘harmful child labour.’

Importantly, the chapter reveals that, having criminalised the trafficking of children for harmful child labour, the Prevention of Trafficking in Persons Act places the responsibility of protecting children on law enforcement agencies such as the police. While it is accepted that these agencies are more effective than the labour officers, the lack of a definition of ‘harmful child labour’ in the Employment Act and in the Prevention of Trafficking in Persons Act, impacts negatively on the mandate of these officers as the law prohibits the prosecution of a crime whose ingredients are not clearly spelt out. In this respect, it was shown that not all domestic work is harmful child labour or economic exploitation of children. Domestic work becomes harmful or exploitative for children, when the child is required to work while below the minimum age of admission to work, or where he or she is trafficked or made to work under terms and conditions which are harmful. In cases where children above the minimum age are working, it is mainly the conditions of work and not the kind of work done that turns the work into forced labour, slavery, servitude, debt bondage or exploitation. It is defended that in order to protect children from harmful child labour, the law needs to regulate both the age of admission to work, as well as, the conditions of work.

The Employment Act and other relevant labour legislation seek to ensure fair and decent working conditions and protect employers and employees from labour abuses. However, domestic workers have been excluded from the application of the law. The situation is worse in the case of child domestic workers as they are seen as ‘helpers’ rather than workers. Even where child domestic workers are recognised as workers, they are denied the most basic rights as most of the rights and benefits of employment are centred around the idea of a written employment contract. The Chapter shows that while children under the Contract Act do not have the capacity to enter into a contract, there are exceptional circumstances under which children may enter contracts under the Common law which is also applicable in Uganda. For instance children can enter contracts for ‘necessaries’ or employment where it is for their benefit. In this respect, the

Chapter argues that children should be encouraged to enter into binding employment contracts to prevent exploitation.

The Chapter also notes that domestic work is not recognised as a legitimate form of employment and occurs in the informal sector of the economy outside any form of adequate regulation of the law. It argues that in order to remedy the precarious situation of children involved in domestic work, the law needs to recognize domestic work as a form of employment and it must acknowledge that domestic workers are worthy of labour rights. Resultantly children will be regarded as workers and not as 'poor' children who are being helped by the employing family. In addition, it is important that perpetrators of offences against child domestic workers are punished with heavy sanctions to discourage them from unlawful practices. This chapter reveals that in order to address the problem of trafficking of children for domestic work, efforts must not only focus on the need to eliminate child labour, but they should also consider protecting the rights of working children and recognising them as workers entitled to labour rights. The next Chapter therefore focuses on how the law can be utilised to protect children from exploitation.

CHAPTER FIVE: CHILDREN AND THE LAW: USING THE LAW TO PROTECT CHILD DOMESTIC WORKERS

5. Introduction

As it is an intricate and dynamic crime, the trafficking of children needs to be understood and addressed in all its complexities. As already stated, the trafficking of children for the purpose of performing domestic work should not only be tackled as a criminal issue, but as a multi-disciplinary issue involving relevant labour and children's rights issues. Myers argued that most governments tend to define the problem of working children in a piecemeal fashion, approaching it as a series of separate issues rather than as an issue as a whole. He contends that in some instances the problem is primarily addressed as an issue of labour policy, ignoring its fundamental connections to economic, education, health, law enforcement, social assistance and family policies.³¹² Therefore I would agree with Myers that there is no single or simple approach which can be applied to address the problem satisfactorily.

The trafficking of children for domestic work specifically is seldom considered a crime as domestic work is hidden, clandestine and in some communities considered socially acceptable. As was noted earlier, the UN Trafficking Protocol requires State Parties to adopt a three pronged approach to curb child trafficking. Translating the provisions of the protocol into practice, States are required to enact specific laws to prosecute offenders, adopt policies and measures to prevent trafficking in persons and offer protection and assistance to the victims of trafficking especially women and children. In line with its international law obligations, the Government of Uganda has enacted the Prevention of Trafficking in Persons Act to prosecute all persons that traffic children. Whereas trafficking of children for sexual exploitation is easier to address since the targeted evil is clearly defined and definite, trafficking of children for labour exploitation particularly domestic work cannot be dealt with so easily.

In this chapter, it is argued that mainstream approaches of eliminating child labour or trafficking of children, without appreciating the socio-economic, cultural and political factors

³¹² William E Myers 'Defining and Understanding the Problem: Protecting Working children' (1991) at 4.

that force children into work, are grossly inadequate. This kind of approach, often based on the dominant western concept of childhood and child development, tends to criminalise child labour and treat all working children as victims. This kind of approach to child labour is premised on a labour market ideology that aims primarily to keep children away from the labour market and confined to schools. From this perspective, children's work is viewed largely as labour exploitation that must be abolished.³¹³

In order to discourage children from working, efforts have focused mainly on providing compulsory education and keeping children in school. However, this approach has been criticized for being shortsighted. Some scholars contend that solving the education problem in the absence of a solution to the problem of poverty and economic dependency to eliminate child labour problem is both myopic and ludicrous.³¹⁴ The obligation to provide compulsory, universal education for all children has been accepted by most countries which are State parties to the CRC. However, many Governments have not delivered free primary education for all children. The few exception include Uganda, where the Government provides free primary education, but there are concerns that in some cases parents or children have to work to meet additional expenses or pay for their secondary education.

Given that child domestic work has been primarily considered an issue of child labour, efforts to address the problem as such have been futile. It was shown in the previous chapters that despite the adoption of several laws abolishing the vice, child domestic work has continued to grow and instead evolved into severe forms of exploitation such as child trafficking, slavery, debt bondage among others. In addition the previous chapters revealed that elsewhere; childhood is seen as a time for school and play, however, in developing countries in Africa, including countries like Uganda, domestic work is seen as the most suitable means for children to learn self

³¹³ Victor P Karunan 'Working children as change makers: Perspectives from the south' in Burns H. Weston (ed) *Child labour and Human Rights: Making Children Matter* (2005) at 295.

³¹⁴ Hugh Cunningham and Sheldon Stormquest 'Child labour and the Rights of Children: Historical Patterns of Decline and Persistence' in Burns H. Weston (ed) *Child labour and Human Rights: Making Children Matter* (2005) at 76.

reliance and responsibility. Boyden observed that many families in developing countries need their children's economic contribution for basic survival. Children must either work to contribute to the family income or they must take the adult's place in domestic duties such as child care provision so that the adult can work.³¹⁵

This Chapter advocates for a child-centered approach that values the full range of children's rights and considers exploitation of children's labour not only as a criminal or labour issue but also as children's rights issue. Children have for a long time been treated as victims of exploitation and in need of protection. Whereas this approach may address problems related to the worst forms of child labour, including child trafficking, prostitution, pornography, bonded labour, or child soldiers, it does not necessarily address the situation of children caught up in domestic work. Many children above the age of fourteen, who are permitted to work, work in deplorable conditions with no protection under the law. Therefore, the Chapter shows that there is a need for a child-centered approach that considers children as subjects of rights and work as a purposeful human effort. For the law to be adequate in its protection of children, it should not focus entirely on the desperate need to eliminate child labour but also focus on protecting the rights of working children and recognising them as workers entitled to labour rights.

The Chapter also advances the idea that, in order to protect working children from exploitation, the law needs to make clear distinctions between work that is acceptable and work that is prohibited, rather than leaving this question to the discretion of labour officers. In addition, the law needs to recognise domestic work as a form of employment and it needs to acknowledge that domestic workers are also worthy of labour rights, so that child domestic workers can also be recognised as employees and not as 'poor' children who are being helped by the employing family.

³¹⁵ Jo Boyden 'The Relationship between Education and Child work' (1994) No. 9 Innocenti Occasional papers *Child Right Series* at 9.

5.1 Definition of a child and the concept of childhood

As was discussed in Chapter three, the definition of a child has been a matter of controversy and debate. The Convention on the Rights of the Child (CRC) gives State parties the discretion to set their upper limit of childhood at an age lower than 18 years.³¹⁶ However, some countries have decided to establish the majority age at different ages for varying purposes. The Ugandan Constitution and Children's Act defines a child as a person under the age of eighteen years.³¹⁷ For the purpose of employment, the Constitution of Uganda has permits children above the age of sixteen to undertake gainful employment.³¹⁸ In essence, the Constitution recognizes that persons under the age of eighteen years are children, but allows children who are above the age of sixteen to work or to be employed. It follows that the Constitution acknowledges children above sixteen are mature enough to undertake work activities. This categorization of children for the various purposes is an indication that childhood consists of evolving stages.

Childhood is a socially constructed phenomenon whose boundaries are usually determined by the cultural background; the context in which the child lives and the responsibilities given to the child among others. Moore has defended this view. While arguing that childhood is a socially constructed phenomenon, he noted that a person is considered a child when the characteristics attributed to him or to her coincide with the local perceptions of childhood.³¹⁹ In some Ugandan communities, for instance in Bagisu and in Samya, children transit from childhood to adulthood not by attaining the age of majority but by the performance of rituals, including cultural practices such as circumcision. In other areas, once a child is nominated as customary heir and he or she is then given adult responsibilities. In most cases, after observing these cultural and traditional practices, persons below the age of eighteen are allowed to participate in community activities that are usually reserved for adults.

³¹⁶ Article 1.

³¹⁷ Section 2 Cap 59 of the Children's Act.

³¹⁸ Article 34 of the Constitution.

³¹⁹ Karen Moore 'Supporting children in their working lives: Obstacles and opportunities within the international policy environment' (2000) 12 *Journal of International Development* 530 at 536.

Despite the existence of such diverging realities concerning the manner in which each community attributes childhood or adulthood to its members, the CRC establishes a prescribed period of childhood. It has been argued that the Convention adopts a universalist approach to children and their rights.³²⁰ The CRC adopted a definition of a child based on the ‘western concept of childhood’ that regards a child as vulnerable person dependent on his or her family and childhood as a golden age characterised by school and leisure. Despite the culturally and contextually variable nature of childhood, this western model of the developing child has assumed universal status.³²¹

It is accepted however that it is imperative to define the concept of child. It is from such a notion that it becomes practically possible to determine the specific rights attached to the status of childhood and to children. However, it should not be underestimated that it would be detrimental not to acknowledge the various stages of childhood and their differing needs. The law needs to distinguish between an infant, a toddler, the youth and adults. A person of sixteen years does not require the same protection as a person below the age of five. The absence of such differentiation would be very fatal to the development and participation of children in various societal activities, including economic activities. The law can protect children by providing for minimum obligations that State parties must comply with and by placing measures of holding them accountable when those obligations are not met.

An example of such measures imposed on States by the law is the obligation to provide free primary education for all. Ugandan laws have also incorporated this international standard. However, due to the high levels of poverty and HIV/AIDS, most Ugandan children do not attend schools and they do not enjoy leisure activities. Children are compelled to work to meet the necessary costs of food, stationary where their parents have failed to do so. As mentioned previously in Chapter Two, the death of parents due to the HIV/AIDS scourge has left many children orphaned and resulted in an increase in child headed homes. These children have had to take on roles and responsibilities of adults. They are compelled to work in order to meet their

³²⁰ Micheal Freeman ‘The sociology of childhood and children’s rights’ (1998) 6 *International Journal of Children’s rights* 427 at 438.

³²¹ Karen Moore (note 319) at 536.

needs and the needs of their ‘siblings’, including providing them with food and shelter. In most cases, children become involved in domestic activities to fulfill those needs. The mere fact that domestic work may involve the living with the employers means that it has become the most attractive option for such needy children, even where it involves gross violation of their rights.

It should also be noted that, cultural and traditional practices play a critical role in the development of a child and in determining what roles children play in the family, community and society. It is imperative to appreciate the various culture and traditions that inform the different concepts of childhood and that no model can be universally imposed or applied. In its preamble, the African Charter on the Rights and Welfare on the Rights of the Child notes that a child occupies a unique and privileged position in the African society and should grow up in a family environment in an atmosphere of happiness, love and understanding.³²² In Africa, although children are given special value and often viewed as community blessings, often they are not seen as ‘victims’. They are given duties and responsibilities in relation to these values. As was mentioned in Chapter two, they are often required to work to assist their families and their siblings, especially when their parents are unable to provide for them for various reasons, including in situations where they are infected with HIV/AIDS and other diseases.

Unlike the CRC, under the African Children’s Charter children have duties and responsibilities to their families and communities. The Charter provides that:

‘every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty:

(a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;

(b) to serve his national community by placing his physical and intellectual abilities at its service;

and

³²² African Charter on the Rights and Welfare of the Child (African Children’s Charter), OAU Doc. CAB/LEG/24.9/49 (1990), entered into force on 29 November 1999.

*(d) to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society; among others.*³²³

It is against this background that, according to their age and abilities, African children are required to work and contribute to the family income. Some scholars argue that children in developing countries tend to be of economic value and, as a result, become a desirable asset for struggling parents. The assertion that children can contribute significantly to family income makes child labour an intrinsic component of survival in a developing country.³²⁴

Despite the existence of such norms, children that are working have not been provided with adequate protection. Instead, the law views them as ‘victims’ who need to be removed from their ‘situation of exploitation’. Moore contends that rather than being considered as capable, responsible, resourceful and hardworking, working children tend to be pitied because they are not enjoying a proper (western, middle-class) childhood.³²⁵

5.2 Recognition of the rights of the working child

Despite the official recognition of children’s rights by the international community through the adoption and wide ratification of the CRC, the world is still grappling with the question of whether children may be said to have rights or not. Jane Fortin suggested that the idea that children enjoy rights is not a new one. She argued that the question of enjoyment of children’s rights has been the topic of speculation and comment for over 30 years.³²⁶

³²³ Article 31 of the African Children’s Charter.

³²⁴ Farraz Siddiqi and Harry Anthony Patrinos, ‘Child labour: Issues, causes and interventions’, Human Capital Development and Operations Policy Working Paper No. 56 HCOWP at 10.

³²⁵ Karen Moore (note 319) at 537.

³²⁶ Jane Fortin ‘Children’s rights and the developing law: Theoretical perspectives’ (2005) at 3.

Liberationists such as Holt, Farson and Cohen argue that children should have all the rights that are accorded to adults.³²⁷ Other writers, however, have voiced considerable concerns over the liberals' failure to give sufficient attention to the physical and mental differences between children and adults. Some have argued that the status of children is not the same as adults and that talking about the human rights of children is therefore erroneous and even dangerous for children.³²⁸ In fact, many have questioned the idea that children are holders of rights. They argue that the ascription of rights to children is inappropriate because it displays a misunderstanding of what childhood entails.³²⁹ They suggest that where children are seen to be right holders, they are seen to being forced into adulthood before they are sufficiently mature; hence there is a need to protect them from such situations.³³⁰

It is not contested that children have a right to childhood, nonetheless, recognising that children are holders of rights helps them to acquire the ability to make decisions and facilitate their development into responsible adults by way of exercise of the rights to which they are entitled. In addition, as already indicated, the perception of childhood based on a western stereotype where there is a clear transition between childhood and adulthood does not necessarily apply to non-western societies. Freeman rightly argued that seeing childhood as a golden age, as the best years of our life and synonymous with innocence, is a myth. He contended that this way of thinking is an ideal state of affairs that ill -reflects the lives of many children and adolescents.³³¹

As noted above, Ugandan children who are above the age of fourteen are permitted to work or to find employment. If these children are presumed to have the required competence to work, they should not be denied labour rights on the pretext that they are still children. The denial of

³²⁷ Children's Rights: Stanford Encyclopedia of Philosophy October 2006. Available at <www.plato.stanford.edu/entries/rights-children/> at 2 [Accessed on 20 July 2010].

³²⁸ Holly Culen 'Child labour standards: From treaties to labels' in Burns H. Weston (ed) *Child labour and Human Rights: Making Children Matter* (2005) at 92.

³²⁹ Children's rights (note 327) at 7.

³³⁰ Jane Fortin, (note 326) at 5.

³³¹ Micheal Freeman 'Taking children's rights more seriously: *Children rights and the law*' (1992) at 56.

rights to children, on this account, only serves to artificially maintain them in a state of dependence, vulnerability and thus increases their chances of exploitation.

Over the years, many scholars have used the issue of lack of capacity to argue against the granting of rights to children. In most cases these scholars have based their arguments on the will or choice theory to defend that a right is a protected exercise of choice. They have argued that to have a right is to have the power to enforce or waive the duty of which the right is the correlative.³³² Under the will theory children are required to have the capacity to exercise choice in order to possess rights. However, not all rights require one to have the capacity to choose. A distinction must be made between liberty rights, which require the capacity to exercise, and welfare rights which do not require any such capacity. While examples of liberty rights include, among others, the right to vote, the right to religion, and the right to associate freely, welfare rights include, among others, the right to health, education, and the right to protection from exploitation.

As is the case with children, it should also be noted that not all human beings have cognitive abilities. Persons with mental disability are legally incapable of choice but are still holders of rights. Therefore, such argument that children cannot be holders of rights because they lack the required legal capacity is not worth of any merit at all. Others have argued that children can still be protected even without being rights holders. In this regard, O'Neil argued that children can be assured of adequate moral protection by other means. She contended that it is important to seek to improve children's lives by indentifying what obligations parents, teachers and indeed the wider community have towards children. These, as she argued, are perfect obligations which correlate with rights.³³³

Whereas it is ideal for every child to have parents, or persons with moral obligation to protect them, it is not always the case. As such, it is better for children to be holders of rights than for them to depend on the kindness of adults as where rights exist, redress is possible. Some

³³² Children's Rights (note 327) at 3.

³³³ Onora O'Neill 'Children's rights and children's lives' in Philip Alston et al (eds) *Children, rights and the Law* (1992) at 26.

scholars, including Weston, have defended that rights are not matters of charity or a question of favour or kindness to be bestowed or taken away at will. They are high level public order values or goods that carry with them a sense of entitlement on the part of the rights holder and obligatory implementation on the part of the rights-protector.³³⁴

This is the approach that is required to take when dealing with situations involving children, and in particular when it concerns children who undertake domestic work. It is important that children are not viewed as innocent and vulnerable beings requiring protection, but as active social actors who can be empowered to participate actively in the improvement of their lives and those of their communities. Karunan was probably most correct when he said that:

*‘we must bring into being a mind shift from traditional notions and values that we cherish about children as vulnerable and non productive to a child centered approach that is rights-based, viewing children positively and as contributors to social development.’*³³⁵

Like human rights, children’s rights are inter-dependent and indivisible. The violation of one right will often have an effect on the realization of other rights. This should apply even in the context of ensuring adequate protection to children who undertake domestic work. It would be senseless to provide in the Employment Act, among others, for the right to rest, the right to annual leave and public holidays, freedom from forced labour, freedom from discrimination in employment, and the right to freedom from sexual harrasment, without empowering the right holders, including children engaged in domestic work, to resist to acts of violation of these rights and to seek redress where appropriate.

Where working children are enabled to realise their labour rights, an environment is created where they can enjoy other rights such as the right to survival, the right to protection, the right to development and the right to participation. Work that is not harmful has the potential of helping children realize their rights to survival and development where they earn income to meet their

³³⁴ Burns H Weston and Mark B Teerink ‘Rethinking child labour: a multidimensional human rights problem’ in Burns H. Weston (ed) *Child labour and Human Rights: Making Children Matter* (2005) at 7.

³³⁵ Victor P Karunan (note 313) at 302.

basic needs such as food, shelter and medical services. In addition, it can increase their sense of self worth as their contribution to family survival is valued and recognised. In some cases, this can pave way for the realization of children's right to participation as they are given a greater role in decision making in the homes as well as the communities.

5.3 'Harmful child labour': Definition and criminalisation

Since not all work done by children is harmful to their health or physical well being, it is not necessary to criminalise all forms of work performed by children. Criminalising child labour which is not harmful would mean penalizing employers of children who provide work which is not harmful and have willingly chosen to work due to factors beyond their control. This would have a serious impact in the realisation of these children's right to survival as discussed above. Bourdillon asserts that much of the language against child labour assumes that employers are simply exploiting a cheap and pliable form of labour. While this is frequently the case, it is also true that some employers take on children in response to requests from the children and their communities.³³⁶ Therefore the law needs to balance the need to protect children from exploitation against the need for children to work.

In order to protect children from exploitation, the law should criminalise the employment of children below twelve years of age and the worst forms of child labour as spelt out in the ILO Convention on the Worst Forms of Child Labour. In Uganda, offences such as child trafficking, slavery, forced labour, the use of children for illicit purposes including drug trafficking, and the use of children for prostitution and pornography are already criminal offences prescribed in various laws, including the Prevention of Trafficking in Persons Act and the Penal Code Act as discussed in Chapter Four. However, the use of children in hazardous work which constitutes a worst form of child labour, such as domestic work, which will most likely endanger their health, safety, or morality, is merely prohibited under the Constitution and the Employment Act. As is the case with other worst forms of child labour, it is required that the law criminalises these practices. However the law will not meet its objectives by simply prohibiting these practices, it is

³³⁶ Micheal F.C Bourdillon (note 225) at 150.

important that it prescribes penalties and sanctions, which are more deterrent than the simple cautions prescribed in the Employment Act.

In criminalising these practices, the responsibility of protecting children from exploitation would be shifted from the labour officers to the law enforcement agents like police officers. In the context of Uganda, where the police is present in all districts and in most villages of the country, this institution is rather better suited to protect children from trafficking and exploitation than the labour officers. However, it would still be important that the law provided a clear and unambiguous definition of certain concepts, including the notion of the trafficking of children for purposes of harmful child labour. This would also help to prosecute the perpetrators of these and other related offences. Further, it is noted that, in communities where domestic work is considered socially acceptable, the definition of child labour or harmful child labour is pivotal in the fight against trafficking of children for domestic work. As Karunan rightly observed:

*‘if the right of children to have their best interests served is to be effectively realized, it therefore behooves us to approach childhood and child development in a manner that seeks to understand and interpret accurately the specific cultural environment within which working children and their families or communities function-and thereby arrive at a definition of child labour that is relevant and support interventions that are sustainable’.*³³⁷

Hence, other than relying on the discretion of labour officers, the law needs to define clearly the term ‘child labour’ or ‘harmful child labour’, and it needs to provide parameters that will help to determine what constitutes harmful child labour. Finally, where it is proved that the work is not harmful to children; the law needs to regulate the working conditions of these children to prevent exploitation.

5.4 Regulating domestic work by children

As mentioned in Chapter one, domestic service is one of the oldest occupations and one in which children have traditionally played a significant role. Despite the educational components of domestic work, where it is unregulated it may lead to practices such as slavery or practices

³³⁷ Victor P Karunan (note 313) at 309.

similar to slavery, including debt bondage and harmful child labour. Some of these forms of abuses generated by the lack of regulated domestic activities have been discussed in detail in Chapter Three and Four. As was noted in the previous chapters, the Ugandan Employment Act neither excludes domestic workers from, nor includes them within, the scope of its application. However, given the particular situation of vulnerability of these workers, especially because many of them are women and children, domestic work needs to be considered as a form of employment and thus regulated by law.

In regards to children engaged in domestic work, besides express recognition of the extension of the provisions of the Employment Act to domestic workers, it is necessary that the law takes into account the fact that children lack general legal capacity required for them to enter into contracts. Hence, the common law exception entailing situation where children can enter into contract, would be most relevant to address the problem. As was noted in Chapter Four, the exception could be used to ensure that children undertaking activities in the field of domestic activities enjoy minimal protection. Another alternative would be to explore the provision in the Employment Act which permits the relevant Minister to enact regulations to cater for specific issues such as employment of children.³³⁸ These regulations could include provisions on the aspects discussed below to ensure adequate protection of children under the law.

(a) Regulating recruitment agencies

It was noted in the first Chapters of this study that, in Uganda, the trafficking of children for the purpose of performing domestic work is a complex process, which begins with their recruitment and transportation from rural areas to undertake work in urban and semi urban areas. In Chapter Two it was observed that many recruitment agencies were established with the sole purpose of recruiting children and adults for prospective employers, who engaged them in domestic work related activities. The high demand for domestic workers in Ugandan urban centres as seen many of those recruited become domestic workers in homes of the economically advantaged employers in the towns.

³³⁸ Section 34 of the Employment Act.

It is important to recall that the Ugandan Prevention of Trafficking in Persons Act seeks to prosecute perpetrators of trafficking.³³⁹ The aforementioned instrument is a mechanism, which can be applied for purposes of regulating the activities of the recruitment agencies and the conduct of their officials. Therefore, officials of recruitment agencies who are found to have committed activities related to trafficking, or any such activities which are abusive of the rights of children as defined in the Prevention of Trafficking in Persons Act, can be prosecuted and punished under the terms of the Act. However, note should be made that it is not enough to prosecute the offending officials of these agencies. Rather, it is important that the activities of such recruitment agencies are also regulated by law. This will help define the scope and nature of their activities, and it will also help prevent these agencies from being involved in trafficking of children or other related activities.

The Ugandan Employment Act requires recruitment Agencies to obtain a valid recruitment permit in order to operate.³⁴⁰ It seems though that this requirement concerns the recruitment of workers for the formal sectors. There is no such express legal requirement under the Employment Act, which binds recruitment agencies in relation to the recruitment of domestic workers.³⁴¹ However, this gap is partly addressed under the 2005 Regulation on the Recruitment of Ugandan Migrant Workers Abroad,³⁴² where recruitment agencies are explicitly required to have an operating license, and clear regulations concerning the recruitment of migrant workers from Uganda.

Problems still remain with respect to recruitment of domestic workers within the country. The law did not devise clear mechanisms for protection of such workers. As is suggested by its designation, the 2005 Regulation on the Recruitment of Ugandan Migrant Workers is mainly

³³⁹ Section 3 of the Act provides that where the offender is a legal person it shall be liable to a fine of one thousand currency points and temporary or permanent closure, deregistration, dissolution, or disqualification from practice of certain activities.

³⁴⁰ Section 38 of the Employment Act.

³⁴¹ *Idem*.

³⁴² This instrument was enacted after reported cases of economic exploitation of Ugandan nationals recruited to the Middle East.

applicable to workers recruited to perform activities abroad. Those recruited to perform activities within the territorial jurisdiction of the country are not covered by this instrument. Hence, it remains pertinent that the law provides for the registration, licensing and monitoring of all recruitment agencies in a sense to include even the recruitment of domestic workers entailed to perform activities abroad and within the country. This will also help to prevent internal and cross border trafficking of persons. Such measures will also contribute to protect the most vulnerable groups, including women and children involved in domestic work.

To protect children specifically, recruitment agencies should be required to maintain records of the child and his or her employer. The employer should be required to provide his or her address, a photograph and undertake to meet the terms and conditions as per the standard contract. Where necessary, these agencies should be permitted to monitor the progress of the child and intervene with appropriate measures. They should report any matter of concern either to labour officers or to the police. Given that domestic service falls under the informal sector, beyond the reach of law, regulations incorporating the measures suggested above should be extended to the employers so as to prevent trafficking of children and to protect children from exploitation. However such protections will be limited to children recruited through recruitment agencies. Therefore to extend protection to all children, it is suggested that other measures such as the use of a standard contract be adopted as well.

(b) Use of standard contracts

As was shown in the previous Chapter, the definition of contract under the Ugandan law captures both, the oral and the written agreement. Seemingly, domestic work contracts fit within the oral agreements entered into between the employees and their respective employers. However, as was noted, children do not have the legal capacity to enter into any kind of contracts, save for the exceptional circumstance when they can enter contracts for ‘necessaries’ such as food, medicines, accomodation, clothing, and other contracts related with apprenticeship, employment, education and service as long as they are beneficial to the child.

Such exceptional circumstance could also be used to advance the situation of children involved in domestic work. However, reaserch observed that the competent authorities are very

reluctant to advance the rights of these children mainly because domestic work is not recognised as a form of employment. Hence, there is immediate need to develop a standard form of contract which can be used by all workers, including child domestic workers. Such contract should stipulate the minimum labour rights taking into consideration the abilities and best interests of the child. It could facilitate the formalization of the domestic work relationship, while clearly putting the onus of responsibility on the party with greater bargaining power. In cases where children are recruited from recruitment agencies, these should be required to provide a standard agreement prescribing the rights, terms and conditions of employment which should be signed by the employer and child domestic worker. Examples from other jurisdictions, including the new law regulating domestic work in South Africa can also be used to strengthen the system. In 1998, the South African Basic Conditions of Employment Act (BCEA) came into effect, providing domestic workers with the necessary protections. Section 51 of the BCEA empowers the relevant Minister to establish sectoral determination with basic conditions for the employees in a particular sector and area.

In September 2002, Sectoral Determination 7 came into force to regulate working conditions of domestic workers. Section 9(1) of that instrument requires employers to give domestic workers a written list with detailed particulars of the activities they will undertake, when they commence work. A template of such written list is included as an annex to Determination. Section 9 (2) of the legal instrument in analysis requires employers to ensure that domestic workers understand the content of the particulars given to them by explaining to them their meanings in a language known by the worker.

Using such a standard contract helps children who have attained the age required to undertake work to be protected and to work in an environment with respect and dignity. However to ensure compliance, other measures such as inspections, need to be developed and used to complement the use of formal contracts.

(c) Inspection of premises of work

An efficient system of inspection is critical for the effective administration of the labour law. Continuous inspection can be a useful tool to enforce labour regulations and act as a warning

mechanism in the protection of children's rights. As already stated in Chapter Four, the Employment Act mandates labour officers to inspect the premises where children work and it also commands them intervene with appropriate measures if necessary. Given that domestic work takes place in private homes hidden from public scrutiny, the law needs to adopt specific measures to inspect these homes to ensure that children working as domestic servants are not exploited.

Whereas it is ideal for labour officers to be given the responsibility to inspect premises, as already noted in Chapter Four, the labour office lacks the personnel and logistics to enter and inspect homes where children are working as domestic workers. Considering that child trafficking for domestic work is not just a child labour issue but also a criminal and children's rights issue, the mandate to inspect premises where child domestic workers are employed should be extended to other persons such as the welfare officer, secretary for children, local council leaders and to the police officer where necessary.

The main challenge would be to establish a balance between children's right to protection and employer's right to privacy. Examples of situations where the law could require inspection of private homes and other places where children undertake domestic work include, among others, cases where the officer responsible has reasons to believe that a child who is undertaking domestic work is being exploited or where a complaint has been reported. Arguably, the labour officer or the Magistrate must authorise the inspection. It must be done regularly to ensure the most adequate protection of child domestic workers and the respect for their rights.

(d) Prescribing an adequate Minimum wage

As already noted, the isolation of child domestic workers from their families coupled with their vulnerability undermines the ability of children to negotiate fair terms of employment, in particular an adequate wage which is commensurate to the amount of work they perform. Hence, it is often the case that these children are left at the mercy of their employers. As already noted in Chapters two and four, these children are mostly paid in kind through provision of accommodation and meals. It is usually the case that the payment in kind which they receive is

not enough to meet the basic needs of these children. While advocating for decent work for domestic workers the ILO noted that:

*'In many parts of the world, payment in kind has traditionally been considered part of the remuneration of domestic workers. Although there is evidence that such payments may enable some domestic workers to weather economic crises better, they can be open to considerable abuse. In an employment model that seeks to foster domestic workers' autonomy and ensure that their wages are sufficient for them to provide for themselves and for their family, payments in kind need to be analysed carefully to ensure that, if permitted by law, they do not undermine minimum wage provisions.'*³⁴³

In an attempt to address the issue of payments in kind, the Government of South Africa has determined that not more than ten per cent of the employee's wages may be deducted for purposes of payment of a room or other accommodation where the employee stays with the employer during the period of his or her work.³⁴⁴ This kind of provision, included in the Sectorial Determination 7, is admirable as it clearly indicates that payment in kind should only constitute a small percentage of the wages. However, to apply this provision reasonably there must be a satisfactory minimum wage requirement. In Uganda, as already noted in Chapter Four, the current minimum wage for unskilled labour in Uganda was set at Shs 6,000 in 1984 by Statutory Instrument No. 38/1984. This amount has not been revised despite the changes in the economy and inflation. The absence of a law which prescribes an adequate minimum wage renders Ugandan children undertaking domestic work vulnerable to poor working conditions and exploitation.

The Platform for Labour Action filed a Constitutional Petition³⁴⁵ under Article 137(1)³⁴⁶ of the Constitution challenging the current minimum wage of Shs 6,000. It was argued in the

³⁴³ International Labour Office 'Decent work for domestic workers' Report IV (1) Fourth Item on the Agenda, International Labour Conference 99th Session (2010) at 40.

³⁴⁴ See Section 8 of Sectorial Determination 7.

³⁴⁵ See the case of *Platform for Labour Action v The Attorney General*, Constitutional Petition No. 20/2007.

³⁴⁶ Article 137(b) of the Constitution of Uganda states that any person who alleges that an Act of Parliament or any other law or anything in or done under the authority of any law; Any act or omission by any

petition that the current minimum wage fixed at Ug Shs 6000 per month under the Currency Reform Statute is a mockery of economic and social justice guaranteed under the Constitution, Objective No. 14(a) and Article 8 (a) of the Constitution require the State to direct all development efforts at ensuring maximum social and cultural well being of the people. However, the case was dismissed on the grounds that the petition did not comply with Article 137(a) and (b) of the Constitution.

Advocacy and lobbying efforts aimed at revising the minimum wage have not met any success either. Some writers have argued against the use of a minimum wage to protect workers. For instance, Basu argues that using minimum wage legislation in developing countries as a form of international labour standard has the risk of exacerbating the problem of child labour.³⁴⁷ Rautenbach argues that if Government increases minimum wage, it will cause employers to incur more expenses which will force them to increase labour productivity. He further argues that being forced to improve productivity in order to offset rising labour costs can easily result in capital deepening which will lead to unemployment.³⁴⁸ These arguments against minimum wage have been relied on by the Government of Uganda to discourage all efforts aimed at lobbying for a minimum wage. It is accepted that these arguments have significant merits, but they apply to workers in formal sectors where there are other mechanisms for negotiating for reasonable wages. For those in the informal sector, including child domestic workers, where there are no marketable skills and where there are no trade unions or collective bargaining clauses, the role of the minimum wage cannot be over stated. Fandl rightly noted that given the unstable nature of informal work and the fact that it is often unregulated work, low wages and lack of benefits

person or authority is inconsistent with or in contravention of this Constitution may Petition the Constitutional Court for a declaration to that effect and for redress where appropriate.

³⁴⁷ Kaushik Basu *'The intrinsuing relationship between adult minimum wage and child labour'* Department of Economics, Cornell University Vol. 110 Issue 462 (2000) at 16.

³⁴⁸ Frans Rautenbach *'Fighting unemployment, Liberating South African Labour from the Law'* (1999) at 23.

maintain the limited individual economic growth opportunities already endured by these workers.³⁴⁹

South Africa is a good example of a country where regulation on minimum wage has been used to reduce poverty and improve working conditions. In November 2002, the Government of South Africa introduced minimum wage for domestic workers. Three years later a study revealed that the hourly wages, the average monthly earnings and the total earnings of both South African male and female domestic workers had risen after the minimum wage regulations came into force.³⁵⁰

In countries like Uganda, where the Government does not provide children with the basic needs such as food, shelter, free education, medical treatment among others, the responsibility to meet these needs falls entirely on the family. In situations where children are orphaned, they become responsible for providing for themselves. Therefore, without a reasonable minimum wage such families and children are left vulnerable to trafficking into exploitative work like domestic work, where they are able to get employment they are left at the mercy of the employers.

(e) Making use of trade unions

Some of the fundamental principles of international labour law include the freedom of association and the right to bargain collectively. Trade unions are an avenue that can be used by domestic workers to advocate and lobby for a fair wage and improved terms and conditions of work. As already noted in Chapter Four, the Constitution provides for the right to freedom of association. This right is granted to both children and adults.³⁵¹ The Trade Unions Act permits children to be members of trade unions.³⁵² Therefore children should be encouraged to join and

³⁴⁹ Kevin J Fandl 'The role of informal legal institutions in economic development' (2008) December *Fordham International Law Journal* 1 at 6.

³⁵⁰ T Hertz '*The effect of minimum wages on the employment and earnings of South Africa's domestic service workers*' Development Policy Research Unit Working Paper 05/99 (October 2005).

³⁵¹ Article 29 and 40(3) of the Constitution of Uganda.

³⁵² Section 20 of the Trade Union's Act.

participate in trade unions as these associations have been acknowledged as one of the mechanisms for protecting children from exploitation. They can do this by organising adult workers and young domestic workers to lobby for decent working conditions, clearly defined and enforceable conditions.³⁵³

However, trade unions are not very accessible to children undertaking domestic work. There are many obstacles which keep them from making use of trade unions. Among other things, the nature of work, which isolates them and restricts them in their movements and interaction with other, is often pointed out as an obstacle to children joining trade unions. Being in the informal sector has also been argued to be a cause of the failure to join trade unions. Some scholars have argued that trade unions tend to have enough on their hands fighting retrenchments and employment issues in the formal economy, let alone free up resources and time to devote to the hard to organize informal economy.³⁵⁴

While it is accepted that there is a lot to the work that trade unions handle within the formal sector of the economy of a country, it is undoubted that they also have a major role to play in advocating for the rights of workers in the informal sector. However, as mentioned in Chapter Four, Ugandan trade unions have not been used maximally to improve working conditions of workers of both formal and informal sectors. It is important that efforts should seek to mobilize domestic workers into unions so as to give a face and voice to their vocation. Through these unions, domestic workers would have greater strength and increased bargaining power to lobby for a minimum wage and to improve their working conditions.

It should be noted that the effectiveness of all these provisions in the law will depend on the existence of accessible and effective channels for obtaining redress and compensation in cases of infringement of labour and human rights.

³⁵³ ILO-IPEC: Inter regional workshop report on Child domestic labour and Trade Unions. 1-3rd Feb 2006 Geneva at 3.

³⁵⁴ Ravi Naidoo and Isobel Frye 'The role of workers' organizations in the extension of social security to informal workers: Social protection and decent work - New prospects for International Labor Standards' (2006) *Winter Comparative Labor Law and Policy Journal* at 1.

5.5 Conclusion

The role of international and national legislation in the prevention and protection of children from trafficking and exploitation cannot be understated. International legal instruments on trafficking in persons, child labour and children's rights play a critical role in determining how national legislation is enacted. Any loopholes or ambiguities in international law trickle down to national law, making it more difficult to enforce or implement the very standards of international law incorporated in domestic legislation. Therefore, it is of grave importance that international instruments address the issue of children caught up in domestic work and guide State Parties on this issue.

Nevertheless, this Chapter shows that various options can be explored by Uganda to protect the rights of children caught up in domestic work. Mainly the options proposed focus on how to use the law to attain the desired outcome. It was pointed out that the law can be used to criminalise the worst forms of child labour and recognize the rights of child domestic workers. It was also pointed out that domestic work is usually in the informal sector beyond regulation, hence the law needs to be innovative to protect children in the informal sector. It was proposed that the activities of recruitment agencies must be regulated, that trade unions may be used effectively to protect the right of domestic workers, including children undertaking such domestic activities, and that the law must set out a reasonable minimum wage.

This Chapter reiterates that law by itself cannot solve the problem of trafficking of children for domestic work without addressing other existing socio-economic factors such as poverty, education, gender inequality and culture, which make children vulnerable to trafficking. This chapter has considered how the law can be utilised to protect children working as domestic workers so as to prevent their exploitation and consequently prevent the trafficking of children for domestic work. The next Chapter will conclude the study.

CHAPTER SIX

CONCLUSION

Trafficking of persons affects practically every region of the world. Despite the growing international interest in the subject, there are no agreed statistics of its prevalence. Indeed, a wide range of estimates exist on the scope and magnitude of child trafficking because most forms of trafficking of children are generally hidden from the public view, making it almost impossible to detect and quantify. Available research on trafficking of persons in Uganda indicates that it occurs on two levels: internal and cross border trafficking. The internal trafficking involves the recruitment of children and young women from rural to urban areas for domestic work and prostitution. Cross-border trafficking involves trafficking of persons especially women to other African countries, the Middle East and Europe for prostitution, and to the Middle East predominantly for domestic labour.

Child trafficking is a demand-driven phenomenon. In Uganda, trafficking of children for domestic work is facilitated by existing socio-economic conditions. Conditions such as poverty, a high population, HIV/AIDS, low levels of education, high fertility rates, reliance on agriculture as the only economic activity and armed conflict have increased children's vulnerability to trafficking and exploitation. It is argued that while these factors provide a fertile ground for the crime of human and child trafficking to flourish, their effect is exacerbated by gender inequality and cultural practices that keep women and girls in a subordinate position.

To address the issue of trafficking of children, the United Nations adopted the UN Trafficking Protocol in 2000, which provided the first agreed upon definition of trafficking in persons. The study highlighted the shortcoming of the Protocol as seeking to curb transnational crimes carried out on a large scale by organized criminal groups. As such, where the trafficking of children for domestic work is not transnational or carried out by an organized criminal group, it is not adequately covered by the Protocol. In addition, the Protocol fails to define the term 'exploitation', and instead lists acts that could be considered exploitation such as slavery, practices similar to slavery, servitude, debt bondage and forced labour. By so doing, the Protocol

only addresses situations of trafficking for domestic work, where the work amounts to slavery, servitude, debt bondage or forced labour.

Unlike the UN Trafficking Protocol, the Ugandan Prevention of Trafficking in Persons Act defines exploitation to include *inter alia* forced marriage, child marriage, harmful child labour, human sacrifice, the removal of organs or body parts for sale or for purposes of witchcraft, harmful rituals or practices.³⁵⁵ Although the inclusion of harmful child labour is commendable, as it addresses the situation of children trafficked for domestic work, it is not defined in the Act either. This omission makes it difficult to prosecute anyone for the offence of trafficking children for harmful child labour. Article 28 of the Constitution of Uganda provides that for a person to be charged with an offence under criminal law, it must be one provided for under the law with its ingredients clearly spelt out.

The study also shows that the Employment Act of Uganda, relying on the provisions of the ILO Convention on Minimum Age, permits children above the age of fourteen to work. Because domestic work as a sector is characterized by people with few marketable skills, low wages, limited education with no alternative opportunities of employment, there are many children above the minimum age employed as domestic workers in homes other than their own. The study argues that, although it has been rightly argued that domestic work performed by children is not necessarily harmful and exploitative to the child, the law has not drawn a clear line between acceptable work and work that is harmful or hazardous to children. This is partly because there is no internationally agreed upon definition of ‘child labour’. ‘Child labour’ as a term is difficult to define because of the inherently complex issues that relate to the determination of age of majority and the categorization of work that is harmful to children and thus prohibited.

The study argues that domestic work is, in most cases, hidden, unregulated and unmonitored, making it very difficult to determine if the work done is likely to harm the health, safety and morals of children. In order to protect the rights of children in employment, the

³⁵⁵ Section 2 (d).

Employment Act regulates the hours and conditions of work by providing for a number of rights for workers which are also of benefit to the child domestic worker. These include, among others, freedom from forced labour, freedom from discrimination in employment, the right to rest and leisure including inter alia weekly rest, annual leave and public holidays and protection from sexual harrassment.

The study further argues that these rights, if adhered to, would improve the working conditions of children and prevent their exploitation. However, these rights are limited to persons who fall within the definition of an ‘employee’ and their enforcement usually depends on the presence of a contract of service. The Employment Act recognises both oral and written contracts and may thus seemingly appear to address the unique situation of domestic worker. However, children under the law of contract lack the capacity to negotiate and enter into any kind of binding contract except for ‘necessaries’ and employment which is for their benefit. The study notes that the lack of capacity to enter into contracts is premised on the fact that children are regarded as lacking the capacity to choose and thus can not be regarded as rights holders. Despite the official recognition of children’s rights, the world is still grappling with the question of whether children may properly be said to have rights. Those arguing against children having rights have equated attributing rights to children to denying them a childhood. Whereas it is not contested that children have a right to childhood, recognizing that children can have rights will not deny them that right but rather enable them acquire the ability to make decisions and facilitate their development into responsible adults. The denial of rights to children, on this account, only serves artificially to maintain them in a state of dependence, vulnerability and thus increasing their chances of exploitation.

The recognition of rights of the child domestic worker, although important, needs to be complemented by efforts to regulate domestic work as a sector. The study showed that the Employment Act does not expressly include domestic workers in its application. It can be argued that their exclusion from the application of law is mainly because domestic work is considered as being in the informal sector. However, the non regulation of the informal sector creates a fertile

ground for the continuous exploitation of children. The Employment Act permits the Minister responsible to enact regulations to cater for specific issues such as employment of children.³⁵⁶

Using the South African law on domestic workers, the study makes recommendations on how the law can be utilised to protect children working as domestic workers. The study noting that the law needs to be innovative, proposes measures such as regulation of activities of recruitment agencies, use of standard contracts, use of minimum wage, encourage use of trade unions, inspection of premises of work and increase children's access to effective channels for redress in the regulations. However, the study also notes that whereas laws can be enacted to prosecute offenders, their role is limited where factors that facilitate the crime are not addressed. As such, the study highlights the need to address the socio-economic factors that make children vulnerable to trafficking. Specifically the study suggests that efforts be directed at addressing factors such as child poverty, gender inequality and discrimination which are embedded in the culture and traditions of the various communities in Uganda as so to prevent the trafficking of children for domestic work.

³⁵⁶ Section 34

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