

## THE PLAINTIFFS v. ATTORNEY GENERAL AND UGANDA VETERANS DEVELOPMENT LTD: A CRITIQUE

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### Abstract

This article provides a critique of the High Court of Uganda's Decision in the *Plaintiffs v Attorney General and Uganda Veterans Development Ltd*. It argues that the Court's dismissal of the plaintiffs' case was the result of the Court's failure to analyse the legal relationship between trafficking, slavery and forced labour from both Ugandan and international law perspectives. This failure resulted from the Court's inability to discern the legal difference between the "nature of work" and "conditions of work" and partly in the "withholding of information" by the 2<sup>nd</sup> defendant. Had the Court appreciated this difference, it would have affirmed that as a part of the means element, fraud and deception operated to completely negate the plaintiffs' initial consent. This Article provides the legal analysis of these issues in the hope that similar legal shortcomings will not be repeated again in the future.

**Key Words:** *Conditions of Work – Enslavement - Forced Labour - Nature of Work  
- State Responsibility - Trafficking in Persons, Uganda.*

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## 1. INTRODUCTION

On 14 April 2020, the Civil Division of the High Court of Uganda at Kampala delivered its decision on a case concerning the trafficking in persons of the plaintiff victims from Uganda to Iraq.<sup>1</sup> In that case, the twelve (12) plaintiffs alleged that through the negligence of the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant trafficked them to Iraq, by means of fraud and deception, where they were subjected to hard and forced labour, slavery, servitude, sexual harassment and abuse, torture, cruel and inhuman and degrading treatment and non-payment of wages. Consequently, they brought the civil suits for the High Court to order the 2<sup>nd</sup> defendant pay them general and punitive damages for their suffering, pain, indignity, slavery, rape and sexual harassment. They also requested the High Court to order the defendants to pay them compensation for non-payment of their wages and money paid for visas, air tickets and medical examinations.

While the High Court accepted the breach of duty on the part of the 1<sup>st</sup> defendant for failure to effectively supervise the recruitment agencies in Uganda through the responsible ministry, it asserted, in very strong terms, that the plaintiffs “were never trafficked by the 2<sup>nd</sup> defendant” for exploitation. The Court simply argued that the mistreatment and exploitation the plaintiffs suffered in Iraq were not part of their contract of employment. Instead, their mistreatment and exploitation simply arose out of the “new employment in Iraq which they voluntarily sought to be employed.” The High Court reasoned that the plaintiffs are not or could not be trafficked

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<sup>1</sup> Civil Division of the High Court of Uganda at Kampala, *C, E, H, I, J, K, L, V, W, X, Y, Z v. Attorney General & Uganda Veterans Development Ltd*, Civil Suit Judgement, 14 April 2020, Civil Suits No. 278, 280, 283, 284, 285, 286, 289, 290, 291, 292, 293, 296 of 2013 (Unreported). Hereinafter: *The Plaintiffs v. Attorney General & Uganda Veterans Development Ltd Case*. The case is available from the official website of Uganda Legal Information Institute at <<https://ulii.org/ug/judgment/hc-civil-division-uganda/2020/55>> (accessed 18 November 2020).

because the exploitation they experienced while in Iraq, however “absurd”, was not part of their contract of employment. Thus, the High Court considered this a purely labour case that lacks any connection with trafficking in persons as defined in the Ugandan and international law.

In this critique, the article challenges the decision of the High Court of Uganda based on elaborate principles laid down in the Uganda’s Prevention of Trafficking in Persons Act 2009, some court decisions decided in Uganda and the authoritative legal principles found in the international anti-trafficking law. Although this Article also points out certain positive elements found in the decision, it is the negative precedent the decision sets that forms the paramount basis for authoring this critique. In achieving the objective, this article contains six parts. Part 1 introduces the factual background which lays foundation for this critique. Part 2 provides a general overview of the legal framework on trafficking in persons under international law and in Uganda. Part 3 looks at some of the positive aspects of the decision, especially on state responsibility for human rights violations committed by state and non-state actors and criminal jurisdiction for trafficking cases. Part 4 analyses and critiques the Court’s approach to understanding trafficking in persons. Part 5 considers and critiques the Court’s reasoning on the relationship between trafficking in persons and forced labour. Finally, Part 6 offers a considered conclusion of the critique.

## **2. LEGAL FRAMEWORK GENERAL OVERVIEW**

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime is an anti-trafficking specialty legal instrument in international law.<sup>2</sup> The UN Anti-Trafficking

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<sup>2</sup> United Nations Convention against Transnational Organised Crime, opened for signature 15 November 2000, 2222 UNTS 209 (2000), entered into force 29 September 2003. Hereinafter: UN Organised Crime Convention; the Protocol to

Protocol supplements the UN Organised Crime Convention.<sup>3</sup> The Protocol intends to prevent and combat trafficking in persons, protect and assist victims of trafficking and promote cooperation among the states parties in the fight against trafficking and protection of victims.<sup>4</sup> In the achievement of these objectives, the UN Anti-Trafficking Protocol puts emphasis on the protection of human rights of the victims, with a paramount consideration of the vulnerability of women and children.<sup>5</sup> Besides, there exists several other specialty legal instruments at the regional level that also supplement the UN Anti-Trafficking Protocol.<sup>6</sup> Together, these instruments form the international anti-trafficking legal framework.

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Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, opened for signature 15 November 2000, 2237 UNTS 319 (2000), entered into force 25 December 2003. Hereinafter: UN Anti-Trafficking Protocol.

<sup>3</sup> UN Anti-Trafficking Protocol, art. 1(1); UN Organised Crime Convention, art. 37(1). This means that, unless otherwise the Protocol provides, the provisions of the UN Organised Crime Convention applies, *mutatis mutandis*, to the Protocol, UN Anti-Trafficking Protocol, art. 1(2). As a result, all the offences the UN Anti-Trafficking Protocol establishes and criminalises in art. 5 are considered as offences also criminalised in the UN Organised Crime Convention, UN Anti-Trafficking Protocol, art. 1(3).

<sup>4</sup> UN Anti-Trafficking Protocol, art. 2(a), 2(b), 2(c).

<sup>5</sup> UN Anti-Trafficking Protocol, art. 2(b).

<sup>6</sup> These are: ASEAN Convention Against Trafficking in Persons, Especially Women and Children, opened for signature 21 November 2015, entered into force 8 March 2016. Hereinafter: ASEAN Anti-Trafficking Convention; SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, opened for signature 5 January 2002, entered into force 15 November 2005; Council of Europe Convention on Action against Trafficking in Human Beings, opened for signature 16 May 2005, CETS-No. 197, Warsaw 16.V.2005, entered into force 1 February 2008. Hereinafter: CoE Anti-Trafficking Convention; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims, and Replacing Council Framework Decision 2000/629/JHA, opened for signature 5 April 2011, OJ L 101, 15.4.2011, P.1 entered into force 15 April 2011. Hereinafter: European Union Anti-Trafficking Directive.

Uganda is a State Party to the UN Organised Crime Convention. It ratified this Convention on 9 March 2005.<sup>7</sup> Concerning the UN Anti-Trafficking Protocol, Uganda has merely signed this instrument.<sup>8</sup> Notwithstanding this lack of ratification, in 2009, Uganda enacted the Prevention of Trafficking in Persons Act<sup>9</sup> to give effect to its international commitments undertaken under these two legal instruments.<sup>10</sup> Uganda enacted the Anti-Trafficking Act to “provide for the prohibition of trafficking in persons, creation of offences, prosecution and punishment of offenders, prevention of the vice of trafficking in persons, protection of victims of trafficking in persons, and other related matters.”<sup>11</sup>

Therefore, the Uganda Anti-Trafficking Act envisages several anti-trafficking legal obligations.<sup>12</sup> In the first place, the Act obligates the government to criminalise trafficking in persons. The Act criminalises the offence of

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<sup>7</sup> Ratification Status, available at <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en)> (accessed 14 September 2020).

<sup>8</sup> Uganda signed the UN Anti-Trafficking Protocol on 12 December 2000, this being the same day it signed the UN Organised Crime Convention. Information available at, <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XVII-I-12-a&chapter=18&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVII-I-12-a&chapter=18&clang=_en)> (accessed 14 September 2020).

<sup>9</sup> No. 7 of 2009. Hereinafter: Uganda Anti-Trafficking Act, Anti-Trafficking Act or simply, the Act. This legislation is available at the official website of the Uganda Legal Information Institute at <<https://ulii.org/node/24737>> (accessed 18 November 2020).

<sup>10</sup> It is important to note that the UN Anti-Trafficking Protocol has to be read together with the Convention because according to art. 37(2) of the Convention: “In order to become a Party to a protocol, a State or a regional economic integration organisation must also be a Party to this Convention.”

<sup>11</sup> See the Long Title to the Uganda Anti-Trafficking Act.

<sup>12</sup> Generally on the comprehensive analysis of the international anti-trafficking obligations and the legal basis for their characterisation as such, see Gallagher A.T., *The International Law of Human Trafficking*, Cambridge: Cambridge University Press, 2010, at pp. 267-460.

trafficking in persons, aggravated trafficking in persons, trafficking in children, engaging the labour or services of the victim of trafficking and promoting trafficking in persons. The Act also proscribes offences related to trafficking in persons. These are failure to disclose one's conviction for trafficking when applying for employment which places one in a position of authority or care of children or when offering or agreeing to take care or supervise children, and failure to report trafficking in persons.<sup>13</sup> In the second place, the Anti-Trafficking Act requires Uganda to prevent trafficking in persons. The Act contains provisions on preventing trafficking through addressing and eradicating vulnerabilities, preventing trafficking by eradication of demand, and preventing trafficking through acting lawfully based on national and international human rights law standards.<sup>14</sup> In the third place, the Anti-Trafficking Act contains provisions on the protection, assistance and support of the victims of trafficking. The Act provides for victims' identification, non-punishment of the victims, victims' repatriation, protection of victims' privacy and protection from further harm, victims' physical and psychological care and support, legal assistance for victims, and victims' access to available, effective and appropriate remedies.<sup>15</sup> Finally, this Act contains supplementary provisions on interpretation, jurisdiction, extradition, confiscation and forfeiture of trafficking proceeds and establishment and designation of the Prevention of Trafficking in Persons Office.<sup>16</sup>

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<sup>13</sup> See Uganda Anti-Trafficking Act, Part II which covers sections 3-10. See further, Gallagher A.T., *The International Law of Human Trafficking*, 2010, at pp. 370-381.

<sup>14</sup> Uganda Anti-Trafficking Act, sections 11(1), 11(2), 12(6), 12(9), 13, 14(2), 14(3). Further see, Gallagher A.T., *The International Law of Human Trafficking*, at pp. 414-460.

<sup>15</sup> Uganda Anti-Trafficking Act, sections 2(r), 2(s), 12, 13, 14, 15, 16, 17 and 21 or simply Parts III and IV. Further see, Gallagher A.T., *The International Law of Human Trafficking*, at pp. 276-369.

<sup>16</sup> Uganda Anti-Trafficking Act, Parts I and IV.

### 3. POSITIVE ASPECTS OF THE DECISION

Although this decision presents several legal setbacks, there are some positive aspects in relation to trafficking in persons. These aspects have to do with the Court's approach to the issues of jurisdiction, cause of action and state responsibility. Regarding the issue of jurisdiction and cause of action, the Court stated the basic principle that the proper forum to adjudicate a dispute is the jurisdiction which has "the most real and substantial connection with the dispute."<sup>17</sup> The Court also noted that it takes into account other important factors such as the convenience of the parties and the interests of justice, without necessarily judging "the competence or independence of another country's judiciary."<sup>18</sup>

The Court found that the cause of action arose partly in Uganda and partly in Iraq. It found that the employment contracts were all signed in Uganda, the plaintiffs were all recruited from Uganda and the recruitment agency itself or the 2<sup>nd</sup> defendant is based and registered in Uganda. Although duties were to be done in Iraq, the Court still found that the law regulating the plaintiffs' recruitment was the law of Uganda and any disputes or interpretation of the contractual obligations were all based on the law of Uganda.<sup>19</sup> Thus, the Court considered that it is the law of Uganda that governs the transaction and the place where the parties reside or carry their business.<sup>20</sup> The Court even reasoned that it has jurisdiction "as long as the victims are citizens of Uganda."<sup>21</sup> It considered these other factors of territoriality or cause of action as secondary or even "irrelevant" as far as the victims are Ugandan citizens. This is a highly commendable approach. The decision gives the High Court greater legal autonomy to deal with similar cases in the future on the issue of jurisdiction.

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<sup>17</sup> The Plaintiffs v. Uganda Veterans Development Ltd Case, at p. 4.

<sup>18</sup> Ibid, at p. 5.

<sup>19</sup> Ibid, at p. 5.

<sup>20</sup> Ibid, at p. 4.

<sup>21</sup> Ibid, at p. 6.

Notwithstanding this observation, the Court did not actually take time to analyse the law that deals with issues of jurisdiction, especially for offences of trafficking in persons. It was the plaintiffs who sought to invoke art. 139 of Uganda's Constitution and sec. 19 of the Anti-Trafficking Act to claim that the High Court has jurisdiction to entertain the case. Indeed, sections 18 and 19 of the Anti-Trafficking Act deal with the question of jurisdiction for cases of trafficking in persons. The Act sets a general rule that the High Court of Uganda or any court with competent jurisdiction in Uganda can try or prosecute a case of trafficking in persons where the entire offence occurred in any part of Uganda. Courts also can try a trafficking case where any part of its components occurred in any part of the territory of Uganda.<sup>22</sup> Further, courts in Uganda have jurisdiction where the trafficked person resided in any part of Uganda at the time of the commission of the offence.<sup>23</sup>

The Anti-Trafficking Act also contains specific provisions on extra-territorial jurisdiction of the High Court for trafficking cases. The Act stipulates that its provisions confer jurisdiction on the High Court where Ugandan citizens or its permanent residents commit acts of trafficking in persons outside Uganda which if committed in Uganda constitute an offence.<sup>24</sup> The Act also confers jurisdiction where the citizen of Uganda is the victim of trafficking in persons that happened outside the territory of Uganda.<sup>25</sup> Besides, the Act allows the

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<sup>22</sup> See, Art. 10(1)(a) of the ASEAEN Anti-Trafficking Directive; Art. 31(1)(a) of the CoE Anti-Trafficking Convention; Art. 15(1)(a) of the UN Organised Crime Convention; Art. 10(1)(a) of the European Union Anti-Trafficking Directive.

<sup>23</sup> See Art. 31(3) of the CoE Anti-Trafficking Convention; Arts 15(3) and 16(10) of the UN Organised Crime Convention; Arts. 10(3) and 19(4) of the ASEAN Anti-Trafficking Convention.

<sup>24</sup> Section 19. International anti-trafficking law places this as a soft obligation on the states, Art. 10(2)(c) of the European Union Anti-Trafficking Directive; Art. 15(2)(b) of the Un Organised Crime Convention; Art. 10(2)(b) of the ASEAN Anti-Trafficking Convention.

<sup>25</sup> See Art 31(1)(e) of the CoE Anti-Trafficking Convention; Art. 10(2)(a) of the European Union Anti-Trafficking Directive; Art. 15(2)(a) | of the UN Organised Crime Convention; Art. 10(2)(a) of the ASEAN Anti-Trafficking Convention.



Court to assert jurisdiction where the offence was partly committed in Uganda and partly outside Uganda. Finally, the Court has jurisdiction where a substantial proportion of the effects of the offence have occurred or have taken place within Uganda while others have taken place in another territory.

Section 19, therefore, takes into account the transnational nature of trafficking in persons. The Anti-Trafficking Act intends to ensure that there is no any impediment to the effective prosecution of cases of trafficking in persons. It also indicates that Uganda is not a safe haven for traffickers and exploiters of victims of trafficking. In the discharge of these provisions on jurisdiction, the Anti-Trafficking Act sets two important rules. The Act requires a prior, written consent of the Attorney General of Uganda. Once the written consent has been obtained, the Act allows a case to be instituted and prosecuted in any appropriate court of Uganda as if the entire case was committed within its jurisdiction. Secondly, the Act prohibits double jeopardy.<sup>26</sup> It lays down a rule that a person should not be prosecuted in Uganda for the same offence in which he was acquitted or convicted in another country.<sup>27</sup> The provisions of sections 18 and 19 are in agreement with the provisions of the international anti-trafficking law which require states to establish various forms of jurisdiction to ensure that all cases of trafficking in persons are prosecuted effectively so as not to afford traffickers safe havens. Although the High Court's reasoning that led to its assertion of jurisdiction is sound and legally founded, the Court did not consider these provisions and the underlying principles.

Regarding the issue of state responsibility, the Court took considerable time to analyse the law.<sup>28</sup> The High Court found that the Employment (Recruitment of Uganda Migrant Workers Abroad) Regulations 2005

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<sup>26</sup> See as well, Art. 20 of the Rome Statute of the International Criminal Court, 17 July 1998, 37 ILM (1998), 999.

<sup>27</sup> Anti-Trafficking Act, sec. 19(4), the proviso thereto.

<sup>28</sup> *The Plaintiffs v. Uganda Veterans Development Ltd Case*, at pp. 15-17.

requires the Minister of Gender, Labour and Social Development to establish “Labour Assistance Centres” at international airports and other exit points in Uganda that will facilitate and assist the deployment and reception of overseas migrant workers and also monitor and provide appropriate advice to workers and foreign principals and employers on employment, travel and recruitment procedures. The Court held that “The Ministry was supposed to perform the duty as laid down in the law, and failure on its part to do so may result in the breach of the said statutory duty.”<sup>29</sup> In the end, the Court found that the Ministry of Gender, Labour and Social Development had breached or failed in its statutory duty for not establishing the Labour Assistance Centres. The Court reasoned that had the Ministry established these centres, it would have prevented not only the unfortunate mistreatments which the plaintiffs experienced, but more importantly, such centres, would ensure “that there are no possible human trafficking of persons under the guise of labour.”

This reasoning on the part of the Court is commendable. It reflects the position under international law quite clearly. International law in general and international human rights law in particular recognise circumstances in which states are responsible for actions of private persons that impair the human rights of other persons, including trafficked persons as in this case.<sup>30</sup> It also recognises that the state is responsible not for the private acts themselves but for failure to prevent, investigate or prosecute or meet their statutory and international legal obligations in relation to alleged violation of human rights committed by private persons.<sup>31</sup> The decision of the Court also confirms that

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<sup>29</sup> Ibid, at p. 17.

<sup>30</sup> United Nations Human Rights Committee, “General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2006, at para. 10.

<sup>31</sup> Gallagher A.T., *The International Law of Human Trafficking*, at pp. 442-449; Noortmann M. and Sedman D., “Transnational Criminal Organisation and Human Rights”, in: Hauck P. and Peterke S. (eds.), *International Law and Transnational Organized Crime*, Oxford, Oxford University Press, 2016, at p. 406.

indeed states, as international juridical persons, can only act through their agents, representatives and institutions.<sup>32</sup> In this case, the Court clearly found that the Ugandan law imposed a duty which if implemented would have prevented acts of trafficking from occurring in Uganda. Due to non-action and passivity of the Government Ministry, the Court found that the responsibility of the 1<sup>st</sup> defendant and, therefore, the state, was engaged.

#### 4. ANALYSIS AND CRITIQUE OF THE COURT'S APPROACH TO TRAFFICKING IN PERSONS

The plaintiffs cited arts. 24, 25(1) and 25(2) of the Constitution of Uganda to argue that the legal framework of Uganda prohibits slavery or servitude and forced labour and that the right to be free from slavery is non-derogable according to art. 44(b) of the Constitution. Further, they submitted that art. 1 and 4 of the Universal Declaration of Human Rights as well as art. 8 of the International Covenant on Civil and Political Rights both recognise that all human beings are born free and equal in dignity and rights.<sup>33</sup> According to the plaintiffs, these instruments prohibit slavery, servitude and forced labour. Importantly, the plaintiffs cited sections 2(r), 2(p), 3(1)(a) and 3(1)(b) of the Anti-Trafficking Act not only to define what amounts to slavery and trafficking in persons, but also to indicate that according to these provisions taken in their totality, there is a clear case of trafficking in persons committed against them. They submitted that the 2<sup>nd</sup> defendant recruited them by means of fraud and deception by not disclosing to them that they were to work as

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<sup>32</sup> See commentary on Art. 2, at paras. 6-7, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of Its 53rd Session, UN GAOR, 56th Sess. Supp. No. 10, at 43. UN Doc. 1/56/10 (2001); *Velasquez Rodriguez v Honduras*, Inter-American Court of Human Rights, Judgment of 29 July 1988, Series C, No. 4 (1988), at para. 170.

<sup>33</sup> Universal Declaration of Human Rights, United Nations General Assembly Resolution 217A(III), UN Doc. A/810, 10 December 1948; International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (1966), entered into force 23 March 1976.

housemaids in Iraq and by taking advantage of their desparacy and vulnerability for work in order to lead them to despicable forms of exploitation.<sup>34</sup>

The High Court dealt with this issue in just two pages of the entire judgement.<sup>35</sup> The Court treated the plaintiffs' claim of being trafficked with the issue of consent or voluntarily agreeing to work as maids in Iraq. Concerning the issue of consent, the Court had earlier on in the judgement determined that the plaintiffs voluntarily and with freely given consent agreed to work as housemaids in Iraq. It rejected the plaintiffs' argument that they were tricked, deceived and manipulated into working as housemaids because the various professional and non-professional jobs which the 2<sup>nd</sup> defendant had advertised in the media were not actually what they had hoped, agreed and signed for.<sup>36</sup> The Court found, through a thorough consideration of the documentary evidence, that the plaintiffs' witness on this point was not credible. It determined that upon a proper consideration of all the available documentary evidence, the plaintiffs voluntarily signed the Employment Agreement and agreed to work in Iraq as housemaids.<sup>37</sup>

In determining whether the plaintiffs were trafficked or not, the Court first set itself to define the key legal terms, these being slavery, forced labour and trafficking in persons. It accepted their definitions as found in the Black's Law Dictionary 11<sup>th</sup> Edition, the 1926 Slavery Convention, the ILO Convention No. 29, and section 2(p) of the Anti-Trafficking Act. The Court considered that trafficking has the main purpose of subjecting persons to exploitation for the profit of the exploiters and traffickers. It stated that international law and Uganda Anti-Trafficking Act prohibit this heinous

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<sup>34</sup> *The Plaintiffs v. Attorney General & Uganda Veterans Development Ltd Case*, at pp. 18-20.

<sup>35</sup> *Id.*, at pp. 21-22.

<sup>36</sup> *Id.*, at p. 8

<sup>37</sup> *Id.*, at pp. 10-13.

practice. It also considered trafficking as a crime involving an element of involuntary acts carried on against the will of the trafficked person. Besides, the Court indicated that the horrible experience the plaintiffs went through in Iraq was a very “heinous ordeal.”<sup>38</sup>

Notwithstanding this indication, the Court reasoned that the plaintiffs were not trafficked. Instead, they only suffered mistreatments “in new employment in Iraq which they voluntarily sought to be employed.”<sup>39</sup> Put it differently, the High Court reasoned that although it is true that the plaintiffs suffered mistreatments while working in Iraq, their mistreatments came after the fact. It was not part of the Employment Agreement they had signed while in Uganda. In the opinion of the Court, because the Plaintiffs signed the Agreement voluntarily to work as housemaids and they were not tricked or deceived on the nature of their work, the mistreatments which rose outside the Employment Agreement cannot be pleaded to vitiate their consent to sustain a claim of recruitment by deception or fraud, and, as a consequence, a claim that they have been trafficked. Thus, the Court detached trafficking in persons from their official employment simply because the plaintiffs’ mistreatments were not in the Employment Agreement itself. Simply put, the Court considered this a purely labour case that had nothing to do with trafficking in persons whose exploitation arose independently of the terms and conditions of the Employment Agreement.

The UN Anti-Trafficking Protocol is the first international instrument that comprehensively and consistently defines trafficking in persons as a crime.<sup>40</sup> The Protocol defines trafficking in persons to include three distinctive yet related elements. These are the action element of “recruitment,

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<sup>38</sup> Id, at p. 21.

<sup>39</sup> Id, at p. 22.

<sup>40</sup> For earlier attempts to define what amounted to trafficking in persons, see Gallagher A.T., *The International Law of Human Trafficking* Cambridge: Cambridge University Press, 2010, at pp. 13-25.

transportation, transfer, harbouring or receipt of persons”; the means element 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”; and the purpose element of “exploitation.”<sup>41</sup> The UN Anti-Trafficking Protocol considers as forms of exploitation, at a minimum, the “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.”<sup>42</sup> Further, the Protocol lays down the most distinguishing feature of trafficking offences that the victim’s consent is always vitiated whenever any part of the means element is present in the trafficking process.<sup>43</sup> Where trafficking involves children, the Protocol requires only the establishment of

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<sup>41</sup> UN Anti-Trafficking Protocol, art. 3(a). Further see, Kranrattanasuit N., *ASEAN and Human Trafficking: Case Studies of Cambodia, Thailand and Vietnam*. Leiden: Brill Nijhoff, 2014, at p. 1; Aronowitz A.A., *Human Trafficking, Human Misery: The Global Trade in Human Beings*, Westport: Praeger Publishers, 2009, at p. 1; Richards K. and Lyncham S., “Bride Traffic: Trafficking for Marriage to Australia” in Dragiewicz M., (ed.), *Global Human Trafficking: Critical Issues and Contexts*, New York: Routledge, 2015, at p. 108.

<sup>42</sup> UN Anti-Trafficking Protocol, art. 3(a). See further, Dottridge M., “Trafficked and Exploited: The Urgent Need for Coherence in International Law”, in Kotiswaran P., (ed.), *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, New York, Cambridge University Press, 2017, at p. 61; United Nations Office on Drugs and Crime, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, 2006, at pp. 343-344.

<sup>43</sup> UN Anti-Trafficking Protocol, art. 3(b). See further, Piotrowicz R., “The European Legal Regime on Trafficking in Human Beings”, in Piotrowicz R., Rijken C. and Uhl B.H., (eds.), *Routledge Handbook of Trafficking of Human Trafficking*, London, Routledge, 2018, at p. 42; Heintze H-J. and Lülff C., “The UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons 2000”, in Hauck P. and Peterke S., (eds.), *International Law and Transnational Organized Crime*, Oxford, Oxford University Press, 2016, at pp. 157-158.

the action and purpose elements of trafficking in persons.<sup>44</sup> Its rationale is simple—children are vulnerable persons who, due to their immaturity, lack the ability to make informed and freely given consent.

As this article indicates, the Uganda Anti-Trafficking Act takes this approach. The Act defines trafficking in persons by copying verbatim the definition of the UN Anti-Trafficking Protocol.<sup>45</sup> It criminalises the general offence of trafficking in persons in two alternatives. In the first alternative, the Act criminalises the action of a person who “recruits, transports, transfers, harbours or receives a person,” 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 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.”<sup>46</sup> It considers exploitation as envisaging, at a minimum, sexual exploitation, forced marriage, child marriage, forced labor, harmful child labour, use of a child in armed conflict, use of a person in illegal activities, debt bondage, slavery or practices similar to slavery or servitude, human sacrifice, the removal of organs or body parts for sale or for purposes of witchcraft, harmful rituals or practices.<sup>47</sup>

In the second alternative, the Anti-Trafficking Act proscribes the action of a person who either “recruits, hires, maintains, confines, transports, transfers

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<sup>44</sup> UN Anti-Trafficking Protocol, art. 3(c). See further, Piotrowicz R., “States Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations”, 24(2) *International Journal of Refugee Law* 2012, 181-201, at p. 190; Muller T., “Transnational Organised Crime and the Sale of Children, Child Prostitution, and Pornography”, in Hauck P. and Peterke S., (eds.), *International Law and Transnational Organized Crime*. Oxford, Oxford University Press, 2016, at p. 287.

<sup>45</sup> Uganda Anti-Trafficking Act, sec. 2(r).

<sup>46</sup> Sec. 3(1)(a).

<sup>47</sup> Sec. 2(d).

or receives a person” or “facilitates the aforementioned acts,” by means of “force or other forms of coercion” for engaging the trafficked person in “prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude, death bondage, forced or arranged marriage.”<sup>48</sup> Further, the Anti-Trafficking Act takes the same position as the UN Anti-Trafficking Protocol that the trafficking of children does not require proving the means element.<sup>49</sup> Concerning the question of consent, the Act takes a more progressive position compared to the UN Anti-Trafficking Protocol or other instruments.<sup>50</sup> The Act states that the victim's consent cannot be used as a defence in all cases of trafficking in persons, regardless whether the victim is an adult or a child.<sup>51</sup>

The High Court, however, took its own approach to trafficking in persons. The Court started its determination by defining what amounts to slavery under Ugandan and international law. Despite the verbatim production of the definitions contained in the Black's Law Dictionary 11<sup>th</sup> Edition and the Anti-Trafficking Act, the Court did not explain these ingredients at all. The Court did not show how slavery and its constituent elements relate to the issue whether the 2<sup>nd</sup> defendant trafficked the plaintiffs to Iraq for exploitation. The Court did not even consider the international legal understanding of what amounts to slavery. Instead, it only proposed that “see also Slavery Convention.”

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<sup>48</sup> Sec. 3(1)(b).

<sup>49</sup> Sec. 3(3).

<sup>50</sup> Apart from art. 3(b) of the UN Anti-Trafficking Protocol, other specialty anti-trafficking instruments take similar legal positions. See for example: ASEAN Anti-Trafficking Convention, art. 2(b); CoE Anti-Trafficking Convention, art. 4; European Union Anti-Trafficking Directive, art. 2(4).

<sup>51</sup> Uganda Anti-Trafficking Act, sec. 3(4).



Nonetheless, it is beyond dispute that trafficking in persons and slavery are related concepts.<sup>52</sup> The law, both Ugandan and international, admits that trafficking in persons can lead to slavery or to subjecting one to practices similar to slavery.<sup>53</sup> The Rome Statute of the International Criminal Court provides the clearest manifestation on this relationship between trafficking in persons and slavery.<sup>54</sup> Art. 7(1)(c) criminalises the crime against humanity of enslavement. It defines enslavement to mean “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.”<sup>55</sup> In its definition of enslavement, the Rome Statute copies almost verbatim the definition of slavery as defined in art. 1(1) of the 1926 Slavery Convention.<sup>56</sup> Art. 1(1) defines slavery to mean “the status or

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<sup>52</sup> In fact, it is this close relationship that has caused certain authors to treat trafficking in persons the same thing as slavery. For such approaches, see Bales K. and Soodalter R., *The Slave Next Door: Human Trafficking and Slavery in America Today*, California, University of California Press, 2009; Bales K., *Ending Slavery: How We Free Today’s Slaves*, Berkeley: University of California Press, 2007; Munk R., “Slavery: Exception or Rule?”, in Wylie G. and McRedmond P., (eds.), *Human Trafficking in Europe: Character, Causes and Consequences*, Palgrave Macmillan, 2010, at p. 23.

<sup>53</sup> Uganda Anti-Trafficking Act, sec. 3(1)(a) read together with sec. 2(d) and UN Anti-Trafficking Protocol, art. 3(a).

<sup>54</sup> Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3 (1998), entered into force 1 July 2002, arts. 7(1)(c), 7(1)(g); 8(2)(b)(xxii); 8(2)(e)(vi). Hereinafter: Rome Statute.

<sup>55</sup> On the relationship between trafficking in persons and the crime against humanity of enslavement, see generally Mahmood F., “Prosecuting Human Trafficking for the Purpose of Sexual Exploitation under Article 7 of the Rome Statute: Enslavement or Sexual Slavery?”, 3(1) *Journal of Trafficking and Human Exploitation*, 2019, at pp. 35-57; Moran C.F., “Human Trafficking and the Rome Statute of the International Criminal Court”, 3 *Age of Human Rights Journal*, 2014, at pp. 32-45; Obokata T., “Trafficking in Persons as Crime against Humanity: Some Implications for the International Legal System”, 54(2) *International and Comparative Law Quarterly*, 2005, at pp. 445-457;

<sup>56</sup> Convention to Suppress the Slave Trade and Slavery, opened for signature 25 September 1926, 60 LNTS (1926), entered into force 7 July 1955. See also Art. 7(1) of the Supplementary Convention on the Abolition of Slavery, the Slave

condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.” In essence, international criminal law states that trafficking in persons can amount to the crime against humanity of enslavement when conditions develop in a particular case of trafficking in which the trafficked person is reduced into a status or condition over whom the trafficker exercises powers akin to ownership of property and treats the said person as a thing or property subjected to the powers which generally attach to the right of ownership.<sup>57</sup>

Besides, it needs to be shown that in addition to the first condition, there is present also the contextual element of the crimes against humanity—the widespread or systematic attack directed against any civilian population, with knowledge of the attack pursuant to or in furtherance of a state or organisational policy against the said civilian population.<sup>58</sup> Thus, while trafficking in persons is a general offence, slavery is a very specific crime. Despite the two crimes being legally different,<sup>59</sup> international anti-trafficking law and international criminal law set legal principles and individual

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Trade, and Institutions and Practices Similar to Slavery, opened for signature 7 September 1956, 226 UNTS 3 (1956), entered into force 30 April 1957.

<sup>57</sup> On this argument, see further, Allain J., *The Definition of “Slavery” in General International Law and the Crime of Enslavement within the Rome Statute*, Office of the Prosecutor of the International Criminal Court, The Hague, 2007; Duffy H., “Hadijatou Mani Koroua v Niger: Slavery Unveiled by the ECOWAS Court”, *Human Rights Law Review* 2008, at pp. 1-20; Research Network on the Legal Parameters of Slavery, Bellagio-Harvard Guidelines on the Legal Parameters of Slavery, 2012, at guidelines 2 and 3; Allain J. and Hickey R., “Property and the Definition of Slavery”, 61(4) *International and Comparative Law Quarterly*, 2012, at pp. 915-938.

<sup>58</sup> Rome Statute, art. 7(1), 7(2)(a).

<sup>59</sup> Hall C.K. and Stahn C., “Crimes against Humanity”, in Triffterer O. and Ambos K., (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, (3<sup>rd</sup> Edn), Oxford, Beck/Hart, 2016, at p. 261; Feingold D.A., “Trafficking in Numbers: The Social Construction of Human Trafficking Data”, in: Andreas P. and Greenhill K.M., (eds.), *Sex, Drugs, and Body Counts: The Politics of Numbers in Global Crime and Conflict*, Ithaca, Cornell University Press, 2010, at p. 49.

ingredients of each offence and circumstances upon which one might be established in the other. In substance, when one establishes that a person has been recruited through deception to be subjected to slavery, he should be able to indicate that the specific elements of the crime of slavery are manifested as a specific form of exploitation in the trafficking chain. Unfortunately, the High Court did not consider these issues nor provide any detailed legal analysis on the relationship between the two in the context of the Ugandan legal framework and whether, in the present case, this legal relationship was present. It is important to note that Uganda ratified the Rome Statute on 14 June 2002.<sup>60</sup> It domesticated the Rome Statute by enacting the International Criminal Court Act.<sup>61</sup> The Act makes the Rome Statute as part of its law by including it in the Schedule to the Act. Specifically, the International Crimes Division of the High Court of Uganda has jurisdiction to prosecute international crimes, including the crime against humanity of enslavement as found in the Act.<sup>62</sup> Thus, it was possible for the Court to correctly interpret the legal position.

Thereafter, the Court considered trafficking in persons itself. It reasoned that “trafficking in persons, the primary objective of which is to gain profit through exploitation of human beings is prohibited by international law and criminalised by our national legislation.” The Court did not state which specific international law it did refer to. It did not consider the UN Anti-Trafficking Protocol nor its definition of trafficking in persons nor its three constituent elements of trafficking. The decision did not consider the underlying principles that govern the criminalisation of trafficking under the

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<sup>60</sup> Ratification Status, available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XVII-I-10&chapter=18&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVII-I-10&chapter=18&clang=_en) (accessed 20 October 2021).

<sup>61</sup> Act No. 11 of 2010.

<sup>62</sup> International Crimes Division, information available at <http://www.judiciary.go.ug/data/smnu/18/International%20Crimes%20Division.html> (accessed 20 October 2021).

UN Anti-Trafficking Protocol or international law in general. It is only considered that trafficking intends to benefit exploiters through the exploitation of human beings. It is true that since the purpose element of trafficking is exploitation, it is the exploiters and traffickers that form its primary beneficiaries. This statement, however, is, in essence, a factual rather than a legal analysis of what trafficking in persons is.

In law, trafficking in persons does not depend upon establishing that the traffickers or exploiters benefited from the exploitation of their victims. The International Crimes Division of the High Court of Uganda has held that all it matters is for the prosecution to establish that the trafficker used any of the action element through any of the means element in order to exploit or lead to exploitation. In that case, the Court found the element of exploitation established “even if it was not to the advantage or benefit of or in the knowledge and with the consent of the accused, all of which are not necessary to prove exploitation.”<sup>63</sup>

Further, the High Court did not consider in substance the Anti-Trafficking Act. All the Court did was to state in very general terms that trafficking in persons is “prohibited by international law and criminalised by our national legislation – Prevention of Trafficking in Persons Act, 2009.” The Court did not consider which part of the Anti-Trafficking Act criminalises trafficking or what actually the law criminalises. Thus, Part II of the Anti-Trafficking Act, which establishes several offences of trafficking, the Court presumed to be common knowledge that did not warrant any legal analysis or discussion. The Court did not even cite any of its previous decisions on this subject. In

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<sup>63</sup> International Crimes Division of the High Court of Uganda at Kampala, *Prosecutor v Umutoni Annet*, Criminal Case Judgement, 16 October 2014, Criminal Case No. HCT-01-ICD-CR-SC-No. 003 of 2014 (Unreported), p. 29. This decision is available at Uganda Legal Information Institute’s official website at <<https://ulii.org/ug/judgment/high-court-international-crimes-division/2014/1>> (accessed 18 November 2020).

the opinion of the Court, the issue of trafficking in persons was not even supposed to be raised at all. This was after it had made a finding in its earlier determination regarding the issue of whether the plaintiffs voluntarily accepted to go to Iraq to work as maids. In resolving that issue, the Court found that the plaintiffs had actually voluntarily accepted to go to Iraq to work as housemaids without coercion, deception or under influence or advantage from the 2<sup>nd</sup> defendant. The Court reasoned that the issue of trafficking in persons was brought up in this case simply because the plaintiffs wanted to give the case a human rights and international law perspective.”<sup>64</sup>

It is legally true that trafficking in persons relate to human rights and international law in general.<sup>65</sup> This is because while trafficking is a criminal offence in many jurisdictions around the world, it is also a human rights violation under international law.<sup>66</sup> When the state, through its responsible representatives, agents or institutions, takes an active part in trafficking, or fails, acquiesced, condones, or encourages acts of trafficking perpetrated by non-state actors within its jurisdiction, or does not take due diligence measures to address or prevent cases or situations of trafficking, international human rights law considers the state responsible for those acts of

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<sup>64</sup> *The Plaintiffs v. Attorney General & Uganda Veterans Development Ltd Case*, at p. 21.

<sup>65</sup> See for example, Hua J., *Trafficking Women's Human Rights*, Minneapolis, University of Minnesota Press, 2011; Gallagher A.T., “Human Rights and Human Trafficking”, in: Nollkaemper A. and Plakokefalos I., (eds.), *The Practice of Shared Responsibility in International Law*, Cambridge, Cambridge University Press, 2017, at pp. 556-581; Obokata T., *Trafficking in Human Beings from a Human Rights Perspective: Towards a Holistic Approach*. Leiden, Martinus Nijhoff Publishers, 2006.

<sup>66</sup> Bachaka A.M., “Human Trafficking, the Rights of Victims and Government Obligations under the International Laws”, 67 *Journal of Law, Policy and Globalization*, 2017, 34, pp. 34-36; Bruckmüller K. and Schumann S., “Crime Control versus Social Work Approaches in the Context of the “3P” Paradigm Prevention, Protection, Prosecution” in Winterdyk J., Perrin B. and Reichel P. (eds.), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* Borca Raton: CRC Press, 2012, at pp. 104-105.

trafficking.<sup>67</sup> Further, trafficking in persons relates to human rights because the mistreatments the victims of trafficking experience impair the equal and effective exercise of their human rights which Uganda's national as well as international law guarantees and enshrines. Besides, studies have shown not only that trafficking in persons results in the violation of the human rights of the victims, but also that the violation of human rights itself, both by state and non-state actors, can result in subjecting persons to vulnerabilities that lead to trafficking in persons.<sup>68</sup> It is for this reason that international anti-trafficking law imposes obligations on the states to protect, assist and support victims of trafficking in persons, while also taking into account their human rights and paying particular attention to women and children.<sup>69</sup> This is because women and children are the most vulnerable and susceptible groups to trafficking compared to men. Thus, the plaintiffs did not just want to give the case a human rights and international law perspective, as the High Court reasoned. Instead, that is its actual legal position—that trafficking in persons is not only a national matter but also a human rights and international law issue.

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<sup>67</sup> Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, 'Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child.' UN Doc. CMW/C/GC/3-CRC/C/GC/22, 16 November 2017, para. 46.

<sup>68</sup> Ikeora M., *Bilateral Cooperation and Human Trafficking: Eradicating Modern Slavery between the United Kingdom and Nigeria*, Cham: Palgrave Macmillan, 2018, at pp. 2, 30; Office of the United Nations High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking, UN Doc. E/2002/68//Add.1, 20 May 2002, at Guideline 1.

<sup>69</sup> Arts. 2 and 6 of the UN Anti-Trafficking Protocol; Arts. 1, 11, 12 and 28 of the CoE Anti-Trafficking Convention; Arts. 11, 12, 13, 14, 15 and 16 European Union Anti-Trafficking Directive; Arts. 1 and 14 of the ASEAN Anti-Trafficking Convention.

The High Court reasoned further that “trafficking in person involves an element of involuntary acts against the will of the person being trafficked.” It is legally true that trafficking involves this element of involuntary acts perpetrated against the will of the trafficked person.<sup>70</sup> These involuntary acts, under Uganda and international law, would qualify into being part of the action, means and purpose elements. The recruitment, transportation, hiring, transfer, harbouring, maintaining or receiving a person, through the means element, is done with the intention to lead to exploitation.<sup>71</sup> The constitutive acts of the exploitation element are all involuntary. Naturally, a person does not voluntarily accept to be sexually exploited, subjected to slavery or servitude, forced labour or services, armed conflicts, use in illegal activities or have his body parts or organs removed for sale or used in witchcraft. These acts can be perpetrated on the victim of trafficking only against one’s will. It is for this reason that the offence of trafficking in persons includes the means element.

The means element, whenever present, operates to vitiate any meaningful consent from the victim.<sup>72</sup> As already stated, section 3(4) of the Anti-

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<sup>70</sup> While the acts forming the action element might appear positive, it is the means and purpose elements which show the element of involuntariness, Moser R., “Addressing the Failures of International Asylum Law in Regard to Victims of Human Trafficking”, 4 *Journal of Global Justice and Public Policy*, 2018, 1, at p. 2; Sigmund J.N., “Combating Modern-Day Slavery: Issues in Identifying and Assisting Victims of Human Trafficking Worldwide”, 3 *Victims and Offenders*, 2008, 245, at p. 253.

<sup>71</sup> All the international anti-trafficking instruments use the language of “for the purpose of exploitation”, clearly indicating that the action and means elements have the ultimate goal to lead to exploitation. See Art. 3(a) of the UN Anti-Trafficking Protocol; Art. 2(a) ASEAN Anti-Trafficking Convention; Art. 2(1) of the European Union Anti-Trafficking Directive; Art. 4(a) of the CoE Anti-Trafficking Convention.

<sup>72</sup> Art. 3(b) of the UN Anti-Trafficking Protocol; Art. 4(b) of the CoE Anti-Trafficking Convention; Art. 2(4) of the European Union Anti-Trafficking Directive; Art. 2(b) of the ASEAN Anti-Trafficking Convention.

Trafficking Act completely and without exception rejects the defence of the victim's consent in all trafficking circumstances. This is a position far progressive than international anti-trafficking law admits. While this is clearly the legal position and rationale generally the international and Ugandan law takes, the Court simply made a presumption that this is only a common legal matter. It cannot be overemphasised that it is not the work of the Court to make legal presumptions when it is required to analyse the law and make legal determinations.<sup>73</sup> The work of the High Court is to set consistent, legally binding and sound principles for lower courts in Uganda. In turn, this impacts how a particular country develops its legal jurisprudence.

Therefore, the High Court was supposed to ask itself, based on its own very preambular reasoning, did the plaintiff's consent to subject themselves to threats, beatings and confiscation of their passports? Did the plaintiffs voluntarily subject themselves to hard and forced labour, slavery, servitude, sexual harassment and abuse, torture, cruel and inhuman and degrading treatment, non-payment of wages, indignity or rape? While the Court correctly found that the plaintiffs voluntarily accepted to work in Iraq as housemaids, it also held that the mistreatments the plaintiffs experienced in Iraq were "absurd" and in fact "heinous." Put it differently, the Court itself admits that the human rights-violating experience the plaintiffs experienced in Iraq was a list of involuntary acts against their will.

Notwithstanding its own observations, the Court reasoned that it "cannot take a complaint of a few of them who were mistreated by the employers to conclude that all the 145 were trafficked." In substance, the Court is reasoning that there would have been a strong case of trafficking in persons if all the 145 Ugandan employees in Iraq had claimed mistreatment. This

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<sup>73</sup> With respect to trafficking in persons, see Esser L.B. and Dettmeijer-Vermeulen C.E., "The Prominent Role of National Judges in Interpreting the International Definition of Human Trafficking", 6(2) *Anti-Trafficking Review* 2016, at pp. 91-106.



reasoning, for all intents and purposes, is wrong. There is no basis to sustain such a finding, whether from the anti-trafficking or even labour laws of Uganda, let alone international anti-trafficking law.<sup>74</sup> To bring a case before the court of law that one has been exploited due to trafficking is not dependent upon other persons in somehow related circumstances sustaining the same claim that they have been exploited and therefore, trafficked.

In other words, it is not a legal requirement that a court should at least consider a person trafficked only when all other persons in a similar situation claim to have also been trafficked.<sup>75</sup> In the second place, the High Court reasoned that the case that the plaintiffs have been trafficked should be dismissed because the mistreatment arose while in Iraq and was not part of the contracts of employment which they all had voluntarily signed to work as housemaids and which did not include the element of the alleged mistreatments. In the words of the Court itself, “All the above notwithstanding, the plaintiffs were never trafficked but rather suffered in new employment in Iraq which they voluntarily sought to be employed.”

It seems the Court missed to understand the nature of trafficking in persons as a crime. Trafficking is more than a single individual act. Although a charge for the commission of an offence of trafficking can only be sustained upon the prosecution establishing at least one constitutive component from each of the three elements of trafficking in cases of adults, and two elements in cases of children, the crime itself is a process.<sup>76</sup> It encompasses a wide range

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<sup>74</sup> A purposive reading of all the provisions of the Anti-Trafficking Act of Uganda and international anti-trafficking instruments all admit that a single person can bring a case of being trafficked independently.

<sup>75</sup> The law only requires an individual to show that the experience he has gone through in the hands of the traffickers and exploiters clearly has the action, means and purpose elements.

<sup>76</sup> Gallagher A.T. and Skrivankova K., *Human Rights and Trafficking in Persons*, 15<sup>th</sup> Informal ASEM Seminar on Human Rights: A Background Paper. 24-26 November 2015 Montreux, Switzerland, at pp. 4-5; Piotrowicz R., “Human Security and

of acts and several chains or processes of causes, effects and participation. Trafficking encompasses the action element first. In the action element, several persons are involved or do participate. While possible, it is not necessary that a person who recruited victims should be the person who also transferred, transported or harboured them. It is not even a legal requirement that all these acts should be established at once in order to prove the action element.<sup>77</sup>

Trafficking also comprises the means element. The way international law, and by extension Ugandan law, crafts the means element, there is a clear indication that it applies both to the achievement of the action element as well as to maintaining victims in exploitation once obtained, which is an aspect of the purpose element.<sup>78</sup> Thus, while a recruiter uses deception to obtain a person, the exploiter might use coercion or threats of force to maintain a recruited person in an exploitative condition. Coercion, deception and threats or use of force are all part of the means element. Like the action element, all the components of the means element itself do not need to be established cumulatively at once to sustain a case.

The last element the offence of trafficking encompasses is the purpose element which explains why the action and the means elements have been used, or with respect to the means element, continues to be employed. The purpose is to exploit victims in a myriad forms of exploitation. In fact, the UN Anti-Trafficking Protocol considers art. 3(b) “the consent of the victim

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Trafficking of Human Beings: The Myth and the Reality”, in Edwards A. and Ferstman C., (eds.), (2010) *Human Security and Non-Citizen: Law, Policy and International Affairs*, New York: Cambridge University Press, 2010, at p. 407.

<sup>77</sup> Stoyanova V., *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law*, New York: Cambridge University Press, 2017, at p. 34.

<sup>78</sup> Sigmond J.N., “Combating Modern-Day Slavery: Issues in Identifying and Assisting Victims of Human Trafficking Worldwide”, at p. 253; Aronowitz A.A., *Human Trafficking, Human Misery: The Global Trade in Human Beings*, at pp. 50-60.

of trafficking in persons to the intended exploitation.” The law has in mind “the intended exploitation.” In essence, therefore, international law does not say that exploitation has to take place at all.<sup>79</sup> Instead, exploitation should be the intended result of the action and the means elements employed if the trafficking chain was left undisturbed. For this matter, the purpose element or the intention to traffic, is a very special intention, otherwise known as the *dolus specialis*, which the trafficker forms at the very early stage of the trafficking chain.<sup>80</sup>

The Court did not consider these underlying legal principles for its reasoning that led to the rejection of the victims’ claim that they had been trafficked. The Court did not reason that the exploitation the plaintiffs experienced in Iraq was part of the trafficking process that started from Uganda to Iraq. The Court did not consider or analyse the relevant legal provisions. In short, therefore, the decision of the Court on this matter not only does not follow the international law position on the matter, the decision actually goes against the clearest stipulations of the Uganda Anti-Trafficking Act. This is because section 3(4) of the Uganda Anti-Trafficking Act rejects the defence of consent or voluntary acceptance when one has been recruited and ends up being exploited. While there was no deception or fraud, still the means element was used to maintain the plaintiffs in an exploitative environment in Iraq. They were coerced to work long hours, beaten when they refused, raped, their passports confiscated, sexually harassed and even their wages denied sometimes. While the 2<sup>nd</sup> defendant knew these allegations, there was

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<sup>79</sup> Jovanovic M., “The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance”, 1 *Journal of Trafficking and Human Exploitation* 2017, 41, at p. 49.

<sup>80</sup> Gallagher A.T. and McAdam M., “Who’s Who at the Border? A Rights-Based Approach to Identifying Human Trafficking at International Borders”, in Piotrowicz R., Rijken C. and Uhl B.H., (eds.), *Routledge Handbook of Trafficking of Human Trafficking*. London, Routledge, 2018, at p. 186; Siller N., “Modern Slavery: Does International Law Distinguish between Slavery, Enslavement and Trafficking?”, 14 *Journal of International Criminal Justice*, 2016, 405, at p. 418.

nothing done to rectify the same. The 2<sup>nd</sup> defendant was actually an active recruiter or at least, in the words of the Uganda Anti-Trafficking Act, “facilitated the aforementioned acts.” This is a clear case of trafficking in persons according to the Uganda Anti-Trafficking Act.

As this article also indicates, this decision goes against several other trafficking in persons cases the High Court of Uganda has decided. In 2012, the Civil Division of the High Court of Uganda at Kampala considered a case, *The El Termeny Case*,<sup>81</sup> whose material facts relate to the one critiqued in this article. In *The El Termeny Case*, the 4<sup>th</sup> defendant recruited the plaintiff from Lebanon to come and work in Uganda as its manager. He signed the employment contract dated 6 May 2011 which stipulated terms of the contract, including an entitlement to housing, transport, telecom and the costs of living allowance. Nonetheless, upon his arrival in Uganda, the plaintiff was assigned different duties “amidst appalling and inhuman working conditions,” his passport was confiscated, his emolument denied when he chose to resign, security organs were used to harass and threaten him, and frivolous cases were opened against him. Further, he was assigned different erratic duties to work as a marketer, imports manager, shop attendant and distributor and he was accommodated in a warehouse.<sup>82</sup> He brought this case before the Court seeking a declaration that he has been trafficked and therefore entitled to special, general, aggravated and punitive damages, interest and costs of the suit for breach of his service contract, unpaid wages, exploitation and infringement of his rights.<sup>83</sup>

In its determination, the Court found the plaintiff a victim of trafficking in persons. It reasoned that the plaintiff was trafficked because he was recruited

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<sup>81</sup> *Ahmed El Termeny v Hassan Awdi, Ali Wadi, Advan Fanjan Redhi & Awdi Sonic (U) Ltd*, Civil Division of the High Court of Uganda at Kampala 30 January 2015, Civil Suit No. 95 of 2012 (Unreported).

<sup>82</sup> *Ibid*, at pp. 3-5.

<sup>83</sup> *Ibid*, at p. 1.

and entered the employment contract “under the belief” of working as a manager but was assigned different duties. Further, the plaintiff was “deceived” that he will be “provided with housing, transport and food allowance which according to his witness statement were never availed to him.” The Court concluded that the plaintiff was recruited through deception and was exploited and that this, based on the Uganda Anti-Trafficking Act, qualifies him into being a victim of trafficking in persons.<sup>84</sup> In fact, the plaintiffs in *The Plaintiffs v. Uganda Veterans Development Ltd Case* cited *The El Termeny Case* to prove they were trafficked.<sup>85</sup> Nonetheless, the Court neither considered nor followed the approach and reasoning of *The El Termeny Case*.

In other cases, the High Court of Uganda has followed a similar approach as in *The El Termeny Case*, although facts were different.<sup>86</sup> In the cases of the *Prosecutor v Accused*, *Prosecutor v Umutoni Annet* and *Prosecutor v Mudeega Ali*, the High Court of Uganda decided cases that required it to consider the Uganda Anti-Trafficking Act. In the three cases, the High Court of Uganda took considerable time to analyse not only the facts of the cases but also the required legal ingredients of each charged offence – the prosecution needed to establish for a finding that trafficking in persons has happened to succeed. In these cases, the High Court did not presume the law. Instead, the Court gave a reasoned analysis of the law according to criminal law and law of evidence standards. In the end, the cases were decided on the strength or

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<sup>84</sup> Ibid, at pp. 4-5.

<sup>85</sup> *The Plaintiffs v. Uganda Veterans Development Ltd Case*, at pp. 20.

<sup>86</sup> These include: High Court of Uganda at Arua, *Prosecutor v Accused*, Criminal Judgement, 7 August 2017, Criminal Sessions Case No. 0052 of 2017 (Unreported). Hereinafter: *Prosecutor v Accused*; International Crimes Division of the High Court of Uganda at Kampala, *Prosecutor v Umutoni Annet*, Criminal Judgement, 16 October 2014, Criminal Case No. HCT-01-ICD-CR-SC-No. 003 of 2014 (Unreported). Hereinafter: *Prosecutor v Umutoni Annet*; High Court of Uganda at Iganga, *Prosecutor v Mudeega Ali*, Criminal Judgement, 25 May 2013, Criminal Session Case No. 166 of 2011 (Unreported). Hereinafter: *Prosecutor v Mudeega Ali*.

weakness of the prosecution evidence rather than on the Court's own presumption of the crime and its factual reality. Thus, there were several persuasive legal precedents the High Court in *the Plaintiffs v. Uganda Veterans Development Ltd Case* could follow or distinguish. Although even these cases have their own legal pitfalls, the High Court provided reasonable analyses of the law. Further, although these cases were criminal in terms of their subject matters, this did not prevent the Court in *The Plaintiffs v. Uganda Veterans Development Ltd Case* from following their approach, considering that the issue of whether the plaintiffs were trafficked featured prominently in its determination as a criminal matter.

## 5. TRAFFICKING IN PERSONS AND FORCED LABOUR

In the decision of the High Court in *the Plaintiffs v. Uganda Veterans Development Ltd Case*, the relationship between trafficking in persons and forced labour was brought up. The Court dealt with this issue in the context of whether the plaintiffs voluntarily agreed to go to Iraq and work as maids.<sup>87</sup> The plaintiffs pleaded that they were “tricked, deceived and manipulated into working as housemaids.” They claimed the jobs they had applied for as advertised by the 2<sup>nd</sup> defendant in the media were not what they had signed for. Thus, they claimed deception regarding the nature of the work.

In its determination, the Court found that all the documentary evidence indicated the plaintiffs had accepted to work as house-keepers or maids in Iraq. According to the Court, the plaintiffs had enough and separate time to read the contents of the contracts before signing. The Court observed that “a court of law cannot rewrite a contract between the parties. The parties are bound by the terms of the contract unless coercion, fraud or undue influence are pleaded and proved.”<sup>88</sup> Thus, the Court accepted the doctrine of the sanctity of contract and argued that the contract between the plaintiffs and

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<sup>87</sup> *The Plaintiffs v. Uganda Veterans Development Ltd Case*, at pp. 2, 8-13.

<sup>88</sup> *Ibid*, at p. 13, citing *National Bank of Kenya v Pipe Plastic Sankolit (K) Ltd & Another* [2001].

the 2<sup>nd</sup> defendant could only be questioned if the plaintiffs successfully pleaded and proved deception, coercion, fraud or undue influence. The Court found that the plaintiffs failed to prove and establish these elements. Therefore, the Court concluded that the plaintiffs signed the contracts knowing the “nature” of the work they will be doing in Iraq—that of being housemaids.

It is submitted that the decision of the Court on this matter is faulty. The Court did not fully consider what amounts to forced labour or its relationship with trafficking in persons and how fraud, deception, coercion or undue influence come into play.<sup>89</sup> International law defines forced labour or compulsory labour to mean “all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”<sup>90</sup> Thus, forced labour consists of three main elements. These are work or service, presence of menace of any penalty, and lack of consent or voluntariness on the part of the person offering his labour or services.<sup>91</sup> The High Court cited this Convention and its definition of forced or compulsory labour without any explanation or analysis.<sup>92</sup>

Concerning the first element of work or services, it is not the type of work or service or the poor working conditions or benefits or even economic necessity that determine the existence of forced or compulsory labour or services. Instead, it is the nature of the relationship existing between the person rendering service or labour and the person exacting the said service

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<sup>89</sup> Sections 2(d), 2(e), 2(r), 3(1)(a) of the Anti-Trafficking Act; Art. 2(a) of the ASEAN Anti-Trafficking Convention; Art. 3(a) of the UN Anti-Trafficking Protocol; Art. 4(a) of the CoE Anti-Trafficking Directive; Art. 2(3) of the European Union Anti-Trafficking Directive.

<sup>90</sup> Article 2(1) of the Convention Concerning Forced or Compulsory Labour, 39 UNTS 55 (1930), C029.

<sup>91</sup> International Labour Organisation, *Forced Labour and Human Trafficking Casebook of Court Decisions: A Training Manual for Judges, Prosecutors and Legal Practitioners*. Geneva, ILO, 2009, at pp. 12-13.

<sup>92</sup> *The Plaintiffs v. Uganda Veterans Development Ltd Case*, at p. 21.

or labour.<sup>93</sup> Regarding the second element of menace of any penalty, this requires a thoughtful consideration. First, the penalty goes beyond penal sanctions to include other aspects such as loss of privileges, rights, benefits or advantages.<sup>94</sup> Second, the menace of a penalty includes serious extreme forms of penalties as well as subtle forms. Treatments such as physical violence or threats of force or actual use of force against the victim or persons close to him are examples of serious, extreme forms. On the other hand, subtle forms can be financial or psychological in nature. They can include threats or actual confiscation of travel or identity documents, loss or non-payment of wages or other payments, threats of incrimination to the police or immigration departments for illegal or unverified employment status, threats of dismissal from work and other economic penalties.<sup>95</sup>

Regarding the third element of involuntariness, the deciding consideration is whether the worker gave an informed, willing and free consent and whether he still retains the ability to give or refuse consent during any time of his work or service.<sup>96</sup> Taking forced labour in the context of trafficking in persons entails a recognition that where a person was recruited or employed or maintained or harboured in an exploitative situation through unlawful means such as deception, fraud, abuse of power or of authority or under influence,

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<sup>93</sup> Working Group on Trafficking in Persons, “Analysis of the Key Concepts of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime”, UN Doc. CTOC/COP/WG.4/2010/2, 9 December 2009, at para. 18; International Labour Organisation, *ILO Global Estimates of Forced Labour: Results and Methodology*, Geneva, ILO, 2012, at p. 18.

<sup>94</sup> International Labour Organisation, 2009, at p. 12.

<sup>95</sup> United Nations Office on Drugs and Crime, *Model Law against Trafficking in Persons*. Vienna, UNOD, 2009, at p. 15.

<sup>96</sup> International Labour Organisation, *A Global Alliance against Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principle and Rights at Work*. Geneva, ILO, 2005, at p. 6.



or force or coercion, the consent is negated completely.<sup>97</sup> When a person recruits a worker who gives consent voluntarily but later to only be kept in an exploitative situation through unlawful means, the worker's consent is negated.

Another matter the Court did not take time to consider is how fraud, deception or any other part of the means element relate to forced labour and trafficking in persons. While fraud is limited to deception for financial or economic gain of the exploiter, deception itself goes further. Deception encompasses other personal advantages or gains.<sup>98</sup> In relation to trafficking in persons and forced labour, fraud and deception relate, on the one hand, to misleading persons to be trafficked about the nature of the work or services they will be doing and/or, on the other hand, the conditions under which they will be working or forced to undertake the work or services.<sup>99</sup> Furthermore, it is accepted that misleading can relate to both aspects—the nature of the work or the conditions of work as well as withholding information that otherwise would have operated to change the worker's consent regarding the work.<sup>100</sup> For this reason, some have argued that, due to fraud and deception, and other unlawful means for that matter, the victim

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<sup>97</sup> Kane J., “Making Money Out of Misery: Trafficking for Labour Exploitation”, in Burke M.C., (ed.), *Human Trafficking: Interdisciplinary Perspectives*, New York: Routledge, 2013, at p. 119.

<sup>98</sup> Definition of Fraud from Cambridge Online Dictionary, available at <<https://dictionary.cambridge.org/dictionary/english/fraud>> (accessed 15 October 2015); definition of deception from Cambridge Online Dictionary, available at <<https://dictionary.cambridge.org/dictionary/english/deception>> (accessed 15 October 2020).

<sup>99</sup> Gallagher A.T., *The International Law of Human Trafficking*, at p. 31; Aronowitz A.A., *Human Trafficking, Human Misery: The Global Trade in Human Beings*, at p. 2.

<sup>100</sup> Cameron S., “Trafficking of Women for Prostitution”, in Cameron S. and Newman E., (eds.), *Trafficking in Human Beings: Social, Cultural and Political Dimensions*, New York: United Nations University Press, 2008, at p. 81.

or worker's consent at one stage of the trafficking or forced labour chain does not entail consent at all stages of the exploitation process.<sup>101</sup>

In *the Plaintiffs v. Uganda Veterans Development Ltd Case*, the Court itself offered the rationale for including these exceptions, although it did not take time to discuss and analyse these underplaying principles and rationales. The Court observed that "It is important to note that although the doctrine of undue influence is not intended to save a person from their own folly, it is clear that it is intended to prevent victimisation."<sup>102</sup> Thus, the Court noted indirectly that the means element results in victimisation and these exceptions were put in place to prevent victim's exploitation and victimisation. The Court went on to observe that the undue influence could only be imputed where the defendant's conduct can be found to be improper or unconscientious if it resulted in an impairment of the free exercise of the plaintiffs' will and the free exercise of the plaintiffs' will can only be said to have been impaired by the defendant's conduct if the latter's conduct has been improper or unconscientious.<sup>103</sup> Contradictory, however, the Court exonerated the 2<sup>nd</sup> defendant on this matter. While it found some element of undue influence, it did not find any improper conduct on the part of the 2<sup>nd</sup> defendant. Instead, it found an absence of desperacy and that the plaintiffs had fully understood the terms of the contracts of employment regarding the nature of the work they were called to perform in Iraq. It concluded that the plaintiffs were actually required to be extra careful as they were going outside the country to work so as to avoid "recklessly signing documents without knowing the implications and consequences."

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<sup>101</sup> Williams P., "Trafficking in Women: The Role of Transnational Organised Crime", in Cameron S. and Newman E., (eds.), *Trafficking in Human Beings: Social, Cultural and Political Dimensions*, New York: United Nations University Press, 2008, at p. 129.

<sup>102</sup> *The Plaintiffs v. Uganda Veterans Development Ltd Case*, at p. 13.

<sup>103</sup> *Ibid*, at p. 13.

I argue that the High Court was correct in stating that the plaintiffs were not deceived in relation to the work they were going to do in Iraq. From the evidence the Court went through, it is clear the plaintiffs signed to work as housemaids. The plaintiffs were not deceived or there was no fraud or undue influence in relation to the “nature of work” they were supposed to do. They all knew they would work as housemaids in Iraq. The Plaintiffs were deceived and defrauded in relation to the “conditions of work” and partly on the “withholding of information” by the 2<sup>nd</sup> defendant. This was actually what the plaintiffs were arguing in their case that they did not sign, in effect, to be raped, beaten, sexually harassed, their identity and travel documents taken, tortured, treated inhumanely, denied their wages and threatened. Unfortunately, the plaintiffs made this argument from the point of view of the “nature of work” instead of the “conditions of work.”

## 6. CONCLUSION

This article has sought to critique the High Court’s decision in the case of *the Plaintiffs v. Uganda Veterans Development Ltd Case*. It has pointed out major legal and jurisprudential shortcomings of the High Court’s decision. It has indicated the Court’s failure to analyse the basic principles underlying trafficking in persons under international and Ugandan law. The Court failed to consider other legal frameworks on the relationship between trafficking, forced labour and slavery. The article has shown that it was the Court’s failure to relate deception and fraud with the “nature of work” instead of the “conditions of work” that lead to the Court’s rejection of the plaintiffs’ claim that they have been trafficked. In this critique, the article has provided a considered analysis in the hope that the High Court of Uganda will provide better, consistent legal analysis of cases of trafficking in persons in the future.