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THE LEGAL FRAMEWORK OF ORPHANAGE TRAFFICKING IN UGANDA:

Enhancing Identification, Prosecution & Prevention

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Disclaimer

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

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Table of Contents

Acknowledgements	3
Section One: Introduction and Background	5
The link between orphanage trafficking and illegal and fraudulent intercountry adoption	5
Closing the loopholes for fraudulent adoptions	7
Profiting from orphanage trafficking	8
Section Two: Overview of the Ugandan Legal System	11
Treatment of international human rights treaties	12
Section Three: Overview of the Ugandan Criminal Justice System	14
Relevant criminal provisions	14
Criminal procedure	15
Reporting criminal offences	15
Process for commencing investigations and laying charges	16
Role of the police	17
Role of the prosecutor's department and prosecutors	17
Role of the judiciary	18
Initial trial proceedings	20
Extradition provisions	21
Section Four: Analysis of Laws and Offences Relevant to Orphanage Trafficking	23
The Constitution of the Republic of Uganda	23
Prevention of Trafficking in Persons Act and Regulations	24
The Children Act and Children Amendment Act	32
Penal Code Act (Cap. 120)	44
Section Five: Detecting and Reporting Cases of Orphanage Trafficking	49
Indicators of orphanage trafficking	49
Detection of orphanage trafficking indicators	50
Section Six: Formal Processes for Trafficking Victim Identification and Rescue	54
Identification and referral	54
'Rescue'/removal	55
Identification and rescue in transnational cases	56
Section Seven: Conclusion	58
Section Eight: Annexes	60
Annex One: Matrix of ratification and domestication of international treaties	60
Annex Two: Matrix of domestic laws relevant to orphanage trafficking	61
Annex Three: Matrix of regulations relevant to orphanage trafficking	63
Annex Four: Duty bearers and responsibilities	64

Section One: Introduction and Background

Orphanage trafficking is defined as the recruitment or transfer of children to residential care institutions, for a purpose of exploitation and/or profit. It is a form of child trafficking that has been documented as occurring in Uganda for well over a decade, in conjunction with the growth of the orphanage and intercountry adoption industries.

The irregular admission of children who were not orphaned into institutional care where profit was a motivation was identified as a concern in the 2012 Baseline Study of Institutional Care in Uganda commissioned by the Ministry of Gender, Labour and Social Development.¹ Whilst the precise terminology of ‘orphanage trafficking’ was not used, the report noted the prevalence of institutions ‘exploiting children for economic reasons through child sponsorship schemes and international adoption’ and identified this as an imperative for the development of an alternative care policy.² The baseline study included an in-depth assessment of a randomised sampling of institutions identified during the mapping. Concerningly, these results showed that 78% of institutions were operating without the required government approval and 52% were facilitating irregular admission of children into institutional care (admission of children without a care order).³ In addition, 52.5% of sampled institutions did not facilitate reintegration, meaning children were kept in the institutions long-term without resettlement prospects, despite most having family.⁴ 40% of sampled institutions facilitated intercountry adoption with over half doing exclusively, meaning that children were offered up for intercountry adoption without first exhausting domestic alternative care prospects.⁵ This was in contravention of eligibility requirements established under law, which require for domestic options to first be explored.⁶ The results of the analysis indicated the presence of a highly unregulated orphanage industry in Uganda, operating for profit related motives, and with strong connections to illicit intercountry adoption.

THE LINK BETWEEN ORPHANAGE TRAFFICKING AND ILLEGAL AND FRAUDULENT INTERCOUNTRY ADOPTION

Some of the earliest investigations of orphanage trafficking in Uganda date back to 2007, when two orphanages were suspected of trafficking girls in connection with an intercountry

¹ Riley, M. (2012) ‘Baseline Study on Institutional Care in Uganda’, MoGLSD <https://bettercarenetwork.org/sites/default/files/Baseline%20Study-%20The%20state%20of%20Institutional%20Care%20in%20Uganda.pdf>.

² Ibid p. 6.

³ Ibid p.19.

⁴ Ibid.

⁵ Ibid.

⁶ Children Act 1997 (Uganda)

for exploitative purposes and in connection with intercountry adoption.⁸ The audit findings showed a 400% increase in intercountry adoptions between 2010–2011, and indicated the phenomenon was being driven by market demand rather than children’s best interests.⁹ The audit revealed that the poorly regulated and highly discretionary use of guardianship orders had enabled otherwise ineligible prospective adoptive parents to adopt internationally and bypass more stringent adoption safeguards in the process. A startling 70% of all guardianship orders examined in the course of the audit were awarded for the purpose of onward grants of permission for intercountry adoption in the PAPs country of origin.¹⁰ This finding led the Auditor General to declare the granting of Legal Guardianship Orders a ‘venture full of risk to children’.¹¹

In addition, widespread failures of mandated authorities to properly carry out their statutory obligations in ascertaining the eligibility of children for intercountry adoption were noted. This included failures to ascertain the status and whereabouts of parents, secure consent, verify claims of orphaned or legal abandonment, and explore domestic options, including kinship care. As such the report concluded that the lack of regulation to operationalise provisions for legal guardianship within the Children Act coupled with the failures to appropriately implement existing adoption regulations, had created an environment conducive to the exploitation of children by unscrupulous persons seeking to profit from adoption.¹² Explicit links were made by the Auditor General between this form of exploitation and the rapidly increasing number of institutions being established to facilitate the removal and transfer of children from their families to institutions where they are proffered for intercountry adoption.¹³ Nearly half of all children adopted internationally resided in orphanages at the time of application, despite the requirement for PAPs to foster for an extended period of time prior to application, and the assumption of credibility of children’s homes was often a factor leading courts to accept affidavits confirming parental consent without scrutiny.¹⁴

There have been a number of media reports outlining the links between orphanages, intercountry adoption and child trafficking in Uganda. One such scenario occurred in a small district of Kamuli where three children whose mothers were struggling to raise them

⁷ ReliefWeb (2007) ‘Ugandan police investigates orphanage for alleged child trafficking’ <<https://reliefweb.int/report/uganda/ugandan-police-investigates-orphanage-alleged-child-trafficking>>.

⁸ Office of the Auditor General, (2014) *Value for Money Audit Report on the Management and Handling of Child Adoption Process in Uganda*, Kampala p. 2.

⁹ Ibid p. iv.

¹⁰ Ibid p. 15.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid p. 16.

¹⁴ Among, H. (2014) *A Study on Legal Guardianship and Adoptive Practices in Uganda, Republic of Uganda*, UNICEF, p. viii.

were taken in by a third party to assist with their education.¹⁵ The third party facilitated the children's illegal adoption to families in North America and they are currently facing charges of trafficking in children.

In August 2020, *The Guardian* published an article detailing the recently exposed scandal involving collusion between orphanages, law practitioners and judicial officers to facilitate irregular adoptions.¹⁶ The victims were removed from their families by means of deceit or fraud (usually under the guise of offering the vulnerable children education sponsorships) and transferred to orphanages, and subsequently offered to unsuspecting foreign couples seeking to adopt children from Uganda. It was reported that orphanages went so far as to host 'viewing parties' where foreigners visited to select children. One child reported being told to lie about being an orphan in order to lure the foreigners into accepting the child.¹⁷ Thirty Ugandan children whose families were tricked into releasing their children and then having their parental rights stripped from them. Those implicated in the scam – 2 High Court judges, 2 lawyers and an orphanage – reportedly earned over UGX 3,200,000,000 (approximately US \$900,000) in processing the adoptions.¹⁸

CLOSING THE LOOPHOLES FOR FRAUDULENT ADOPTIONS

This precise problem of illegal adoptions, unscrupulous adoption brokers and weak institutions led to the amendment of the Children Act in 2016. The amendments strengthened legal protections for child rights, improved regulation for guardianship, intercountry adoption, and aspects of alternative care, increased provisions for the prevention of separation and provided the legal basis for the establishment of the National Children's Authority. Importantly, with respect to orphanage trafficking and its links to profiting from intercountry adoption, the amendments to the Act closed the 'legal guardianships' loophole, which had been used prolifically to expediate intercountry adoptions. By restricting guardianship to Ugandan citizens,¹⁹ foreign nationals seeking to adopt, could no longer apply for guardianship as a means of circumventing the requirement to foster a child in-country for an extensive period of time, prior to seeking to adopt internationally. Under the amendment, the mandatory three-year pre-adoption fostering period was reduced to 12 months²⁰ and a rescission of adoption order

¹⁵ Cavell, A. "Those kids are no longer yours": An investigation into Uganda's adoption market' *The Nation* (11 October 2018) <<https://www.thenation.com/article/archive/those-kids-are-no-longer-yours-ugandas-adoption-market/>>.

¹⁶ McCool, A., 'Uganda to US adoption scam: judges and lawyers sanctioned' *The Guardian* (online, 19 August 2020) <<https://www.theguardian.com/global-development/2020/aug/18/uganda-to-us-adoption-scam-judges-and-lawyers-sanctioned>>.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Children Act s 43C.

²⁰ Previously three years, see Children Act s 46.

provision was introduced for cases of adoption obtained through ‘fraud or misrepresentation’.

²¹ These amendments sought to make it harder for foreigners to adopt Ugandan children and quash fraudulent intercountry adoptions. Despite these measures and the recognition of fraudulent adoption and its links to the unlawful recruitment and transfer of children into institutions, the cloak of legality offered by the court orders of guardianship and adoption, still makes it difficult to identify the offence of orphanage trafficking and the part it plays in the process of fraudulent intercountry adoption.²²

PROFITING FROM ORPHANAGE TRAFFICKING

In addition to exploiting children for profit associated with guardianship and intercountry adoption, children are also trafficked into institutions in Uganda for profit generated through foreign funding, child sponsors and orphanage tourism. The orphanage industry, as it has come to be known, is a highly lucrative industry, often predicated upon false claims of orphanhood, which serve to arouse sympathetic and protective responses from well-meaning donors and elicit support. A situation analysis of residential care institutions in Uganda, conducted in 2015, found that 80% of funding for institutions came from foreign donors, including child sponsors and overseas charities.²³ The study also noted that only 13% of the children in these institutions were indeed orphans,²⁴ despite prevailing donor perceptions that all of the children were orphaned. It drew attention to the prevalence of inaccurate or inadequate documentation of children and the fact that in some cases inconsistencies were found between children’s stories and information in their case files.²⁵ Active recruitment of children from their families for admission in institutions was also noted, and found to be most prevalent in the district of Jinja,²⁶ which incidentally had the third highest number of institutions in operation.²⁷ Whilst the report did not explicitly note the discovery of cases of orphanage trafficking, it evidenced

²¹ Children Act s 46A states that an adoption order may be rescinded in the best interest of the child; or if the order was obtained through fraud or misrepresentation.

²² Parents report relinquishing parental rights based on fraudulent behaviour, false information about education through sponsorship, and inability to comprehend documentation as factors in the creation of ‘paper orphans’, see Cavell ‘Those kids are no longer yours’. See also U.S. Department of State *Adoption Alert Uganda’s Residency and Fostering Requirement* (February 2, 2017) <<https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/adoption-alert-ugandas-residency-and-fostering-requirement.html>> stating that in an effort to fulfil requirements of the recent amendments to the Children Act some adoption service providers *may be arranging for Ugandan residents to foster children on behalf of U.S. prospective adoptive parents*.

²³ Walakira, E.J., Dumba-Nyanzi I, Bukenya B., (2015) *Child Care Institutions in Selected Districts in Uganda and the Situation of Children in Care: A Baseline Survey Report for the Strong Beginnings Project*. Kampala: Terres des Hommes Netherlands.

²⁴ Ibid p. 11.

²⁵ Ibid p. 22.

²⁶ Ibid p. 27.

²⁷ Riley ‘Baseline Study on Institutional Care in Uganda’ (n1) p. 12.

the typical indicators for orphanage trafficking, and as such revealed the extent of risk to children in institutional care settings.

The risk of orphanage trafficking has increased in tandem with the growth in international tourism, and in particular, the popularity of voluntourism.²⁸ According to ECPAT International, growth in voluntourism has caused the orphanage industry in Uganda to boom, as volunteers willingly part with thousands of dollars in fees and donations to volunteer with orphaned children.²⁹ This incentivises the establishment of for-profit orphanages and child institutionalisation, including through recruitment and deceptive transfer, and puts 'children at risk of sexual exploitation and other harm'.³⁰ An investigative journalism piece conducted by the Guardian in 2016 identified 150 planned mission trips valued at an estimated \$5.4 million, and found that orphanage visits were a common element of these trips and 'usually the most significant and certainly the most emotionally compelling part of the trip'.³¹

A 2018 mapping of orphanage tourism providers and destination countries identified Uganda as in the top five destination countries for orphanage tourism.³² Research amongst Care Leavers provides further insight into just how widespread orphanage tourism in Uganda is likely to be. A report produced by the Uganda Care Leavers in 2019 showed that 84% of care experienced young people had regularly interacted with volunteers and tourists during their time in residential care institutions.³³ They also reported institutions continuing to use their details and profiles to solicit funds from overseas donors long after they had left care.³⁴ These factors expose the profit motives of many institutions and their willingness to resort to means that range from unethical and deceptive, through to those that meet legal definitions of child trafficking and exploitation.

In addition to exploitation for profit in conjunction with adoption or foreign funding and orphanage tourism, cases have also been reported of sexual exploitation of children in orphanages. A study conducted by Ugandan Care Leavers found that 21% of care experienced young people had experienced sexual abuse in the institutions, most often at the hands of orphanage directors, staff and visitors.³⁵

²⁸ ECPAT (2019) *Country Overview Uganda: A Report On the Scale, Scope and Context of Sexual Exploitation of Children*.

²⁹ Ibid p. 16.

³⁰ Ibid p. 15.

³¹ Riley, M. (2016) 'Volunteers are fueling the growth of orphanages in Uganda. They need to stop.', *The Guardian* (16 May 2016) <<https://www.theguardian.com/global-development-professionals-network/2016/may/16/volunteers-stop-visiting-orphanages-start-preserving-families>>.

³² BCN (2019) Orphanage Tourism Research.

³³ Ddumba-Nyanzi, I., Fricke, M., Hong Max, A., Namboozee, M., Riley, M (2019) *The Care Leaver Experience: A Report on Children and Young People's Experience In and After Leaving Residential Care in Uganda*, p. 17.

³⁴ Ibid p. 14.

³⁵ Ibid p. 16.

SCOPE OF THE REPORT

Having described the context of orphanage trafficking in Uganda, the remainder of this paper will seek to examine Uganda's legal and policy framework to identify the relevant offences and mechanisms that could contribute towards the development of a prosecutorial strategy for orphanage trafficking in Uganda. The report will include a brief analysis of the Ugandan legal system, incorporation of international norms and criminal justice system as a means of understanding the operational framework for human rights and criminal law and in the country. This will be followed by a deeper analysis of child protection and human trafficking laws, as the legal nexus where orphanage trafficking occurs. The purpose of this analysis is to identify how and when orphanage trafficking constitutes an offence under Ugandan law, including at what point so-called child protection interventions are deemed unlawful and criminal offences, and what charges could potentially be brought against perpetrators of orphanage trafficking and related offences, and in which specific circumstances. The final sections of the report will seek to briefly describe how orphanage trafficking could be detected and the formal mechanisms for victim identification and rescue.

Section Two: Overview of the Ugandan Legal System

As a result of its colonial history, many of Uganda's laws and legal precedents originate from or are based on the English common law system. At independence, a Constitution was enacted to provide for local governance of the country. It created a hybrid system which means that aspects of the colonial system of governance were continued in form and substance while new systems were devised to address the issues specific to Uganda for development and independence.

Today, the law in Uganda can be found in the following instruments³⁶:

1. The Constitution of the Republic of Uganda, 1995

The Constitution is the supreme law of the land, with which all other sources of law, every enactment or judicial decision must be in conformity.³⁷

2. Acts of Parliament

Acts of Parliament, collectively referred to as the 'Laws of Uganda', are the primary source of written law in Uganda and are enacted by an elected Parliament.³⁸ The Parliament employs a committee system where all proposed legislation – known as Bills – go through committees for scrutiny (including public participation) and debate before the Bill is passed into law on the floor of Parliament. Acts of Parliament only come into force once they have been assented to by the head of the executive arm of government

3. Statutory instruments and other subsidiary legislation

Parliament has the power to delegate its power to make laws to other bodies when necessary. This can include Ministers and municipal authorities among others. Laws made by entities other than Parliament are considered to be subsidiary legislation and are referred to as 'statutory instruments'. These are often enacted to enhance the implementation of the primary legislation to which the instrument relates.

4. Common law and the doctrines of equity

As mentioned above, the Ugandan legal system is based on the English common law system but has enacted laws devised to address the issues particular to the country. The common law system – as opposed to the civil law system, operates in many countries globally and refers to the law created out of the customs of the people and embodied in the decisions of judges. It consists of:

³⁶ Judicature Act s 14.

³⁷ Constitution Art 2.

³⁸ Constitution Art 79(1).

- judge-made law
- adherence to the doctrine of precedent, and
- an adversarial system of litigation.

5. Applicable customary law

For a custom to qualify as source of law in Uganda, it must be of immemorial antiquity, not repugnant to the primary legislation, and certain and reasonable. Customary law must operate. The Constitution provides for the exercise of judicial power by the courts in conformity with the law and with ‘the values, norms and aspirations of the people’ referring to customs.³⁹

6. Case law (precedent)

One of the distinguishing features of a common law system is the doctrine of precedent, which is designed to ensure consistency in quality and uniformity in the judicial process. Precedent is generally referred to as a judicial decision which contains an underlying principle – *the ratio decidendi* – that has the force of law which subsequently either binds or is persuasive to future courts when considering matters similar to the one decided. In order for the doctrine to apply, the facts of a case must be similar in material respects with those in the case being relied on as a precedent.

For an opinion to have the weight of a binding precedent it must be established that:

- the decision was an opinion given by a judge of a court of record
- it must be an opinion the formation of which is necessary for the decision of a particular case, and
- it must be a position of law and not simply comment or observation.

On the latter point, such comment or observation – also known as *obiter dicta* – does not form part of the *ratio decidendi* and can be considered merely as an expression made in passing by the judicial officer. It does not form part of a precedent, and is therefore not binding; however, *obiter dicta* can be taken to be persuasive depending on factors such as the reputation or seniority of the judicial officer and the hierarchy of the courts.

TREATMENT OF INTERNATIONAL HUMAN RIGHTS TREATIES

Uganda employs a dualist (as opposed to a monist) system of applying international law, which means that all international treaties must be domestically approved by Parliament before they can be regarded as applicable. This process is governed by the Constitution⁴⁰ and The Ratification of Treaties Act Chapter 204.

³⁹ Art 126(1).

⁴⁰ Art 123(2).

International treaties are incorporated into domestic law by enacting primary legislation in accordance with the provisions of the international treaties. For instance, the Universal Declaration of Human Rights is enshrined in Chapter 4 of the 1995 Constitution; the Protocol to Prevent, Suppress and Punish Trafficking in Persons as contained in the United Nations Convention against Transnational Organised Crimes was domesticated with the enactment of the Prevention of Trafficking in Persons Act in 2009; and the United Nations Convention on the Rights of Children was domesticated by the enactment of the Children Act and its amendments.

However, the requirement to ratify an international treaty does not necessarily invalidate the unratified treaties and conventions – they are still relied upon to provide guidance on best practices and prevailing standards. For instance, the *Protocol against the Smuggling of Migrants by Land, Sea and Air* – which supplements the *United Nations Convention against Transnational Organized Crime* and was endorsed together with the *Protocol to Prevent, Suppress and Punish Trafficking in Persons* – has not been ratified by Uganda but is often relied upon by stakeholders as a guiding tool when dealing with matters that present as smuggling of persons.⁴¹

Notable regional instruments include the African Charter on Human and Peoples' Rights, which prohibits all forms of exploitation and protects the rights of children as enshrined in other international instruments. The African Charter on the Rights and Welfare of the Child follows the UN Convention on the Rights of Children protection provisions and centres the best interest of the child as the primary consideration. Of particular relevance for the protection of children is that governments are to 'take appropriate measures to prevent the abduction, the sale of, or traffic of children for any purpose'. It prohibits child labour and requires protection from all forms of abuse. Non-binding regional action plans also feature in the Ugandan framework, with the Ouagadougou Action Plan to Combat Trafficking in Human Beings, especially Women and Children (2006) one example. This plan is used to enhance regional cooperation and collaboration among countries that feature as origin, transit and destination (and push/pull) components in the trafficking puzzle. However, a recent review of the implementation of the Plan points to significant gaps in regional policy and operational responses to address trafficking in persons in the continent.⁴²

⁴¹ An example of the court relying on the CRC is in *Re: Nicholas Mwanje & Anor (Children)* (HCT-00-FD-FC-2009/78) [2009] UGHC 45 (01 July 2009) where the High Court disregarded specific provisions in the Children Act to uphold Uganda's obligations under the UN Convention on the Rights of Children regarding the best interest principle of the child in a matter of interstate adoption.

⁴² African Union, Draft Report of The Evaluation of the Implementation Status of The African Union's Ouagadougou Action Plan to Combat Trafficking in Human Beings, especially Women and Children (2006) in Africa (January 2019) <<https://www.giz.de/en/downloads/2019%20Draft%20Evaluation%20Report%20on%20Ouagadougou%20Plan%20of%20Action%20ENG.pdf>>.

Section Three: Overview of the Ugandan Criminal Justice System

Uganda's criminal justice system has had a turbulent history. When Britain assumed control of Uganda, the judicial system consisted of a number of local authorities, tribal chiefs, and kin group elders, who worked primarily to enforce local customary law. Islamic law was also practiced in parts of northern Uganda,⁴³ and during the twentieth century, British jurisprudence was gradually imposed. At independence, the resulting legal system consisted of the High Court, which heard cases involving murder, rape, treason, and other crimes punishable by death or life imprisonment, and subordinate Magistrates Courts, which tried cases for crimes punishable by shorter terms of imprisonment, fines, or whipping. Magistrates Court decisions could be appealed to the High Court.

Uganda has judicial independence and the rule of law is observed. Legislation was enacted to establish court circuits all over the country in a bid to bring justice closer to the people. The criminal justice system is based on the presumption of innocence of all accused persons⁴⁴ and the tenets of natural justice.⁴⁵ With regard to the rules of evidence in criminal matters, the burden of proof is on the state,⁴⁶ and the prosecution must prove its case beyond reasonable doubt.⁴⁷

Decisions of the High Court or Magistrates Courts are appealable to the Court of Appeal⁴⁸ and the Supreme Court⁴⁹ on matters of law and fact or matters of law respectively.

RELEVANT CRIMINAL PROVISIONS

The criminal laws of Uganda are primarily contained in the Penal Code Act (Cap. 120), 1950 (the Penal Code Act). Uganda's Penal Code Act was passed to establish a code of criminal law in Uganda and commenced on 15 June 1950. It lays out the various offences, establishes rules as to criminal responsibility and punishments, including for attempted crimes, and also outlines general principles relating to criminal responsibility such as ignorance of the law, intent and motive, as well as defences and presumptions in law. Offences relevant to trafficking generally and orphanage trafficking more specifically include those relating to kidnapping,

⁴³ *Uganda Criminal Justice System* <<http://www.country-data.com/cgi-bin/query/r-14174.html>>.

⁴⁴ Constitution Art 28(3)(a).

⁴⁵ Constitution Art 28.

⁴⁶ Evidence Act ss 101 and 102.

⁴⁷ Constitution Art 28.

⁴⁸ Art 134(2) of the Constitution.

⁴⁹ For the jurisdiction of the Supreme Court, see the Constitution Arts 132(1) and (2).

child stealing, abduction, desertion of a child, wrongful confinement, unlawful detention for the purposes of sexual exploitation, prostitution offences, and compelling a person to labour against their will. The Penal Code also contains offences relevant in cases where orphanage trafficking involved paper orphaning, including offences related to corruption, abuse of office and forgery.⁵⁰

Other pieces of legislation create offences and prescribe penalties and are discussed further below. Those particularly relevant to this report include the Prevention of Trafficking in Persons Act, 2009, the Children Act (Cap. 59), 1997 and the Children (Amendment) Act, 2016.

CRIMINAL PROCEDURE

Criminal procedure is governed by the Constitution, the Criminal Procedure Code Act, 1950, the Trial on Indictments Act (Cap. 23), 1971, and the Magistrates Courts Act, 1971. The Criminal Procedure Act provides for the procedure in criminal cases. The Act opens with provisions on arrests and detention; searches by police of persons, buildings and vehicles; prevention of offences and preventive arrest and procedure; and power of the appellate courts for criminal appeals.

The Trial on Indictments Act Chapter 23 came into force in 1971 and provides for the law relating to trial of criminal cases before the High Court and connected matters. This Act is divided into twelve parts. It sets out the rules of procedure for the High Court as a court with unlimited original jurisdiction and describes the court's sentencing powers. The Act covers warrants, remand and bail provisions and the procedures for indictment. Witnesses and evidence, and inquiry into the incapacity of an accused person are detailed in the Act, as are trial proceedings.

The Magistrates Courts Act consolidates the law relating to the establishment, constitution and jurisdiction of, and the practice and procedure before, the Magistrates Courts and to make provision for other relevant matters.

REPORTING CRIMINAL OFFENCES

The detection and reporting of a criminal offence is the starting point of criminal proceedings. Criminal proceedings can be initiated in various ways in Uganda depending on the nature of the offence and where it has been committed. An offence may be reported by:

- the person against whom the offence was committed (in other words, the victim)
- a witness to the commission of the offence, or

⁵⁰ Penal Code Chapter IX, XXXIV.

- any person who suspects or has reason to suspect that an offence has been committed.

Any of the above people may report the commission of an offence to any one of the following entities:⁵¹

- a magistrate
- a local council authority
- an immigration official
- a child welfare and probation officer
- a prosecutor, or
- a police officer.

The above entities are then mandated to ensure that the report is transmitted to the police which is then tasked with investigating the complaint.⁵²

PROCESS FOR COMMENCING INVESTIGATIONS AND LAYING CHARGES

Investigations are conducted to ascertain the veracity of a complaint or claim laid against an accused person in order to determine whether to lay a formal charge against the accused. It involves interviewing witnesses, collecting physical evidence and examining the circumstances surrounding the incident to determine whether:

- the act or omission complained of occurred
- the act or omission complained of constitutes an offence in accordance with the relevant legal framework
- the person accused of the offence is *prima facie* guilty, and
- the evidence collected reflects the elements of the offence.

Investigations are ordinarily in the purview of the police⁵³ and are conducted locally. The police record witness statements and collect and analyse physical evidence (sometimes with the help of experts). Once the police are of the view that it has collected evidence sufficient to lay a charge, the case file is forwarded to the Director of Public Prosecutions (DPP) for sanctioning of the proposed charge(s) and filing of the case before a court of competent jurisdiction.

⁵¹ Prevention of Trafficking in Persons Act 2009 (PTIP Act) s 10(1).

⁵² Police Act 1994.

⁵³ Constitution Arts 212 (c) and 120(3)(a).

ROLE OF THE POLICE

The Ugandan Police Force derives its mandate from the Constitution.⁵⁴ It has the following functions:

- to protect life and property
- to preserve law and order
- to prevent and detect crime, and
- to cooperate with the civilian authority and other security organs established under this Constitution and with the population generally.⁵⁵

The Police Act Cap 303 provides for the organisation structures, functions and powers of the police force. It also contains the police disciplinary code of conduct.

The Police Force is made up of departments called 'Directorates' through which the roles of police are executed. The different Directorates address everything from traffic and road safety to police health services. Some of the Directorates are dedicated to investigating criminal activity, including the Directorate of Crime Intelligence (who manages crime intelligence including monitoring crime trends and patterns) and the Directorate of Criminal Investigations (whose role is to detect, investigate and prevent crime).⁵⁶ There is also a specialised Child and Family Protection Unit, which investigates cases including child abuse and neglect, child labour and trafficking in children.⁵⁷

ROLE OF THE PROSECUTOR'S DEPARTMENT AND PROSECUTORS

The Office of the Director of Public Prosecutions (ODPP) is established by the Constitution.⁵⁸ According to the Constitution, the functions of the ODPP are:

- to direct the police to investigate any information of a criminal nature and to report to the Office expeditiously
- to institute criminal proceedings against any person or authority in any court with competent jurisdiction other than a court martial
- to take over and continue any criminal proceedings instituted by any other person or authority (such as in the case of private prosecutions), and
- to discontinue criminal proceedings at any stage before judgment is delivered where necessary (though this must with the consent of the court if proceedings were commenced by another person or authority).

⁵⁴ Constitution Art 211.

⁵⁵ Constitution Art 212.

⁵⁶ Uganda Police Force, Directorates <<https://www.upf.go.ug/directorate/>>.

⁵⁷ Center for Domestic Violence, Uganda Police Force *Prevention Responding to Domestic Violence: A Handbook for Police* (2007) 3.

⁵⁸ Constitution Art 120.

The functions are performed by the DPP – who must be qualified to be a Justice of the High Court – either in person or through state attorneys who review and prosecute the cases.

In practice, the police and DPP work closely together as they have a common goal to ensure that justice is done. In recent years, the concept of prosecution-led investigations has been advanced and embraced by the police and DPP;⁵⁹ especially in the fight against trafficking in persons. This has had the effect of cutting down on the duration of investigations and helped to achieve a higher quality of case investigations and prosecutions.

The Constitution of Uganda mandates the ODPP ‘to direct the police to investigate any information of a criminal nature and to report to them expeditiously’.⁶⁰ Accordingly, a prosecution-guided investigation is led by the prosecutor, but involves a collaborative effort with law enforcement and victim advocates.

Investigation of criminal activity remains under the authority of law enforcement even when engaging in a prosecutor-led investigation. Combining the expertise of law enforcement with prosecutors at an early stage of the proceedings allows for collaboration on strategic decisions and legal guidance for the investigation.⁶¹

As trafficking can often be ‘hidden in plain sight’, it can be more complex to investigate and prove than other crimes.⁶² This is compounded when dealing with forms like orphanage trafficking which can appear to have a cloak of legality and altruism. A coordinated and collaborative approach to the investigation and prosecution of trafficking in persons is necessary to overcome challenges such as difficulty in identifying victims and offenders, the likelihood of intersecting offences, and the resulting need to (re)assess evidence to determine appropriate charges.⁶³

Prosecution-led investigations are implemented as matter of policy and should be done by local police with the local prosecution units; however, as this is a fairly new concept in criminal investigations, implementation has not been consistent but is improving, especially within units that handle human trafficking offences.

ROLE OF THE JUDICIARY

Under the Constitution, the judiciary is one of the arms of government and exercises its functions in the name of the people⁶⁴ in conformity with the law and with the values, norms

⁵⁹ Roberson, L. and Currier, A. (2020) *Best Practices for Prosecution Led Trafficking in Persons Investigations in Uganda*, Human Trafficking Institute.

⁶⁰ Constitution Art 120, and as described in *ibid*, p. 6.

⁶¹ Roberson, L. and Currier, A. (2020) *Best Practices for Prosecution Led Trafficking in Persons*, p. 3.

⁶² *Ibid*, p. 5.

⁶³ *Ibid*.

⁶⁴ Constitution Art 126(1).

and aspirations of the people. The judiciary is independent of any control or direction of any person or authority⁶⁵ and its role is to adjudicate cases brought before it.

The judiciary is composed of the following courts:

- **Magistrates Court** – the subordinate court established to try offences that are not capital offences⁶⁶
- **High Court** – has unlimited original jurisdiction in all matters and serves as an appellate court for decisions from the Magistrates Courts
- **Court of Appeal** – hears appeals from decisions of the High Court and is presided over by the deputy Chief Justice
- **The Constitutional Court** determines matters of interpretation of the Constitution and is constituted by a bench five justices of the Court of Appeal,⁶⁷ and
- **The Supreme Court** is the final court of appeal in Uganda and hears appeals from the Court of Appeal and the Constitutional Court and is presided over by the Chief Justice.

The core role of the judicial officer is to promote the rule of law and contribute to the maintenance of order in society in Uganda. A judge or magistrate's focus is on administering justice through resolving disputes between individuals, and between the state and individuals.

All courts adjudicate cases in accordance with the laws in force and are mandated to apply the following principles:

- justice shall be done to all irrespective of their social or economic status
- justice shall not be delayed
- adequate compensation shall be awarded to victims of wrongs
- reconciliation between parties shall be promoted, and
- substantive justice shall be administered without undue regard to technicalities.⁶⁸

Special courts also play an important part of Uganda's judicial system. Over the past 20 years, various specialised courts have been established such as the Family Division, the Anti-Corruption Division, the Criminal Division and the International Crimes and War Crimes Divisions of the High Court, which cater to specific areas of law. For instance, the Family Division of the High Court hears all matters relating to family – marriage and divorce, children, succession, childcare and the like. The International Crimes Division handles cases with an element of

⁶⁵ Art 128.

⁶⁶ Magistrates Courts Act s 161.

⁶⁷ Constitution Art 126(2).

⁶⁸ Constitution Art 126(2).

international criminal activity, including transnational trafficking in persons. According to the Fourth Strategic Investment Plan,⁶⁹ the establishment of ‘special courts for children and other marginalized and vulnerable groups is seen as one of the activities that can foster access to justice’.

INITIAL TRIAL PROCEEDINGS

The trial process is initiated by the filing of charges on behalf of the state by the DPP. Cases are filed in the Magistrates Court where the suspect is formally charged. The charges are read to the accused person in a language they understand, and their plea is recorded.

Where a plea of guilty is entered, the court will proceed to hear submissions relating to sentencing and deliver its ruling.⁷⁰ Where a plea of not guilty is entered, then pre-trial procedures are commenced, including an application for bail, disclosure (discovery), and appointment of assessors.⁷¹ Trials are presided over by the judicial officer – either a magistrate or a judge depending on the nature of charges preferred – who is solely responsible for judgment and sentencing in the case.

Uganda’s judicial system follows the Commonwealth system where the facts at hand are presented and evaluated according to law and precedence. Once the preliminary matters are dispensed with, the court with competent jurisdiction will begin to hear the case on its merits beginning with the prosecution’s case. The prosecution is responsible for adducing evidence, which may be in the form of witness testimony, or physical or documentary evidence. Children (including victims) may be asked to provide evidence which, depending on the age of the victim, will have to undergo a process of *voir dire*⁷² and must be corroborated.⁷³ All evidence is subject to scrutiny such as cross-examination. Where a child is involved in a trial, the Children Act requires that child-friendly procedures are used.⁷⁴ What this means is not specified by

⁶⁹ Referring to the then-Principal Judge Justice Bamwine at the National Symposium on ‘Strengthening Access to Justice for Women and Girls in Uganda’ Judiciary Considers Special Courts for Handling GBV Cases <<http://judiciary.go.ug/data/news/435/6700/Judiciary%20Considers%20Special%20Courts%20for%20Handling%20GBV%20Cases%20.html>>.

⁷⁰ Trial on Indictments Act 1971.

⁷¹ The appointment of assessors who operate as a jury would has since become optional in Uganda and is often ignored.

⁷² The Black’s Law Dictionary, 2nd edition, defines a *voir dire* to mean: ‘To speak the truth. This phrase denotes the preliminary examination which the court may make of one presented as a witness or juror, where his competency, interest, etc., is objected to. A *voir dire* is a trial within a trial’.

⁷³ This was the position held in *Kizza Samuel v. Uganda*, Criminal Appeal No. 102 of 2008, where the court held that the uncorroborated evidence of a child of tender years was deemed insufficient to sustain a conviction.

⁷⁴ Sections 1 and 104 (3). The public may also be excluded from proceeding before the courts, see Trial on Indictments Act s 137, and with regard to child victims in the jurisdiction of the Magistrates Courts the public and press may be excluded in the interests of the child: Magistrates Court Act s 40 (1a).

the Act, but several initiatives have been implemented such as in camera proceedings, and examination by the judicial officer among others.⁷⁵

At times, the parties (in other words, the state and the accused) may enter into a plea bargain. This is where the accused agrees to plead guilty in exchange for an agreement by the prosecutor to drop one or more charges, reduce a charge to a less serious offence, or recommend a particular sentence subject to approval by court.⁷⁶ This is an initiative of the judiciary aimed at facilitating a reduction in case backlog and the time taken during trial. If the parties agree to a plea bargain, the judicial officer will review the agreement, ensure that the accused person has understood the terms and implications of the agreement,⁷⁷ and if satisfied, endorse the agreement, which gives it an irrevocable and binding effect. It is important to note that entering a plea bargain means that the accused person waives their right to appeal except with respect to the legality or severity of the sentence.⁷⁸ Plea bargaining is an important tool in the criminal justice system, especially with respect to human trafficking cases, as victims are spared the re-traumatisation and uncertainty that is characteristic of the trial process in Uganda.

APPEALS PROCESS

The appeals process is intended to enable the appellate courts to remedy any mistakes of the lower courts to avoid a miscarriage of justice. An accused person convicted of an offence and sentenced to death has an automatic right of appeal,⁷⁹ but may decline to proceed. An accused person has the right to notify the court of their intention to appeal the conviction and the sentence or the sentence only. The DPP may similarly lodge an appeal where the decision of the trial court occasions a miscarriage of justice including appealing a decision which results in the acquittal of an accused person.⁸⁰

EXTRADITION PROVISIONS

Uganda is a common law country with limited legislation on extradition and mutual legal assistance. In recent years, Uganda has experienced a wave of international crime, particularly relating to terrorism, trafficking in persons and war crimes, which has necessitated the need to

⁷⁵ The Ugandan Government with UNICEF developed a child-friendly justice handbook, including provisions relating to evidence of children, statement taking, and working with child victims and witnesses, however there is insufficient information on its implementation and lack of data on practice. UNICEF (2016) *Prosecuting Child Related Cases in Uganda: A Handbook for Uganda Directorate of Public Prosecutions*, <<https://www.unicef.org/uganda/media/1781/file/Prosecuting%20child%20related%20cases%20in%20Uganda.pdf>>.

⁷⁶ Judicature (Plea Bargain) Rules s 4.

⁷⁷ Judicature (Plea Bargain) Rules 2016 s 10.

⁷⁸ Ibid s 12(1)(g).

⁷⁹ Judicature (Court of Appeal) Rules s 59.

urgently develop legislation both national and regional levels. Extraditions are managed under the Extradition Act of 1964. The Act lists a number of offences categorised as ‘extradition crimes’⁸¹ including slave dealings, forgery and similar offences, offences relating to narcotics, kidnapping, child stealing, homicide and similar offences which are all relevant to the trafficking of children through orphanages.

An extradition application is to be submitted to the Attorney-General’s Chambers through diplomatic channels of the respective country. The office of the Attorney-General and the Director of Public Prosecutions then review the application to establish if it has merit. If the application appears to have merit *prima facie*, then it is filed in court for the hearing process to commence. The subject of the application (the fugitive) is given the chance to defend themselves before the court decides on the application.

In East Africa, several requests have been successfully handled through the Police Chiefs Forum, the prosecutors’ association to facilitate investigations and extraditions in a speedy manner.⁸² In recognition of the transnational response needed to counter trafficking of persons, international funding and support is being provided to both Uganda and Kenya to support cooperation on mutual legal assistance and extradition in trafficking in persons.⁸³

Unlike states like Tanzania that have legislation on mutual legal assistance, Uganda still relies on the Commonwealth Mutual Legal Assistance Scheme⁸⁴ to facilitate international cooperation between it and other countries. In the absence of legislation establishing the formal actions regarding criminal matters, the Commonwealth scheme offers non-binding approaches to cooperating with other Commonwealth countries regarding matters such as extradition and requesting assistance. While it is a non-binding agreement, it offers guidance on the scope of assistance in criminal matters. As a result, decisions on mutual assistance are decided on the domestic laws of the country to which a request is being made.

⁸⁰ Ibid s 61.

⁸¹ Extradition Act 1964 s 28.

⁸² See <<https://www.kenyans.co.ke/news/48731-96-ugandan-girls-aged-14-18-intercepted-kenya-enroute-dubai>>.

⁸³ Most recently, a workshop on bilateral judicial cooperation was attended by representatives from the Kenyan and Ugandan Offices of the Attorney General and of the Director of Public Prosecutions, United Nations Office on Drugs and Crime, *Kenya and Uganda work closer to counter organized crime in East Africa* (4 March 2021) <<https://www.unodc.org/unodc/en/human-trafficking/Webstories2021/kenya-and-uganda-work-webstory.html>>.

⁸⁴ Also called the ‘Harare Scheme’.

⁸⁵ See Commonwealth Office of Civil and Criminal Justice Reform, *Commonwealth Schemes for International Cooperation in Criminal Matters*, <https://thecommonwealth.org/sites/default/files/key_reform_pdfs/P15370_13_ROL_Schemes_Int_Cooperation.pdf>.

Section Four: Analysis of Laws and Offences Relevant to Orphanage Trafficking

This section examines the legal framework relating to trafficking in persons generally, and provisions specifically to children, and seeks to identify offences under which charges for orphanage trafficking, or its constituent elements, could be brought against perpetrators.

There are four key laws in Uganda that are relevant to orphanage trafficking. They are the Constitution, the Prevention of Trafficking in Persons Act and Regulation the Children Act (Cap. 59) and as amended in 2016 and the Penal Code Act (Cap. 120), as amended in 2007.

THE CONSTITUTION OF THE REPUBLIC OF UGANDA

The Constitution is the supreme law of the land and all laws flow from and must be consistent with the provisions and the spirit of the Constitution. Whilst the Constitution is silent on the issue of human trafficking, it guarantees the inherent rights and freedoms of all human beings and offers some constitutional protection for the rights of children and parents, including of many of the rights violated by orphanage trafficking.

Article 34 deals specifically with children's rights and includes the following relevant protections:

Constitution Article 34: Rights of children

(1) Subject to laws enacted in their best interests, children shall have the right to know and be cared for by their parents or those entitled by law to bring them up.

4) 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.

(7) The law shall accord special protection to orphans and other vulnerable children.

Article 31 deals specifically with the rights of the family, recognising parents as rights holders and the primary

Constitution Article 34: Rights of children

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4) 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.

(7) The law shall accord special protection to orphans and other vulnerable children.

Constitution Article 31: Rights of the family

(4) It is the right and duty of parents to care for and bring up their children.

(5) Children may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons, except in accordance with the law.

duty bearers for the care of children. Article 3 provides constitutional protection against arbitrary interference in the family and states that children can only be removed in accordance with law. Whilst those laws are not articulated in the Constitution, the legal grounds, powers and procedures for the removal of a child from their family are provided for in the Children Act and will be examined in the subsection below.

Constitution Article 31: Rights of the family

(4) It is the right and duty of parents to care for and bring up their children.

(5) Children may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons, except in accordance with the law.

Article 25 of the Constitution provides for the right to be protected from slavery, servitude and forced labour; however, it does not offer protection against a wider array of forms of exploitation or of trafficking itself.⁸⁶

PREVENTION OF TRAFFICKING IN PERSONS ACT AND REGULATIONS

The Prevention of Trafficking in Persons Act 2009 (PTIP Act) was enacted to adopt elements of the United Nations *Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children* ('Palermo Protocol'). It creates offences, sets out the steps for the prosecution and punishment of offenders, protection of victims of trafficking in persons, and other related matters. The PTIP Act lists over 35 offences including offences of aggravated trafficking in persons, child trafficking, attempt, conspiracy, omissions to act and promoting trafficking in persons, among others.

The Act defines trafficking in persons as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of

⁸⁶ Constitution s 25.

⁸⁷ PTIP Act s 2(r).

force or other forms of coercion, of abduction, 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.⁸⁷

The Act criminalises trafficking in persons and expands the definition of trafficking in persons to include recruiting, hiring, maintaining, confining, transporting, transferring, harbouring or receiving a person or facilitating the aforementioned acts through force or other forms of coercion for the purpose of engaging that person in prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude, death bondage, forced or arranged marriage.⁸⁸

This definition has led to the development of the ‘AMP’ (act + means + purpose) model as a tool for law enforcement and prosecutors to easily identify trafficking in persons (TIP) cases.

The relevant **act** includes the recruitment, transportation, transfer, harbour or receipt of persons. The Act renders consent of the victim of trafficking irrelevant where any of the following **means** is used to procure the consent: threat or use of force; coercion; abduction; fraud; deception; abuse of power or vulnerability; or giving payments or benefits. Where the victim of trafficking is a child, it will be considered trafficking even where these means cannot be ascertained or proved.⁸⁹

In order to constitute human trafficking, a relevant act and means must be accompanied by a **purpose of exploitation**. The definition and characterisation of exploitation in the Act is discussed in the section below.

Child trafficking offences

The primary offences that could be used for the prosecution of child trafficking, and therefore orphanage trafficking, are found in Part II Trafficking in Persons. This includes the offence of aggravated trafficking in section 4, and the offence of trafficking in children as prescribed in section 5.

PTIP Section 4: Aggravated trafficking in persons

A person who unlawfully removes another for the purpose of profit making, sexual aggression, production of pornography, marriage against will of the victim, adoption or any form of exploitation shall be punished with imprisonment for 7 years to 15 years. The offence stipulated in this article shall be punished with imprisonment for 15 to 20 years when:

⁸⁷ PTIP Act s 2(r).

⁸⁸ PTIP Act s 3.

⁸⁹ PTIP Act s 3(3).

- a. *the victim is a child*
- b. *adoption, guardianship, fostering and other orders in relation to children is undertaken for the purpose of exploitation*
- c. *the offence is committed by a syndicate, or on large scale*
- d. *the offender is an organization engaged in the activities of organizing, directing or protecting the vulnerable persons in society*
- e. *the offender is engaged in organizing or directing another person or persons to commit the offence*
- f. *the offence is committed by a close relative or a person having the parental care, authority or control over the victim or any other person*
- g. *the offence is committed by a public officer*
- h. *the offence is committed by military personnel or law enforcement officer*
- i. *the person organizes, facilitates or makes preparations for the kidnapping, abduction, buying, selling, vending, bringing from or sending to, receiving, detaining or confining of a person for purposes of harmful rituals or practices, human sacrifice, removal of any body part or organ, or any other act related to witchcraft, and*
- j. *the victim dies, becomes a person of unsound mind, suffers mutilation, gets infected with HIV/ AIDS or any other life-threatening illness.*

PTIP Section 5: Trafficking in children

A person who—

- (a) does any act referred to under Section 3 in relation to a child;*
- (b) uses a child in any armed conflict;*
- (c) removes any part, organ or tissue from the body of a child for purposes of human sacrifice;*
- (d) uses a child in the commission of a crime;*
- (e) abandons a child outside the country;*
- (f) uses a child or any body part of a child in witchcraft, rituals and related practices; commits an offence of aggravated trafficking in children and may be liable to suffer death.*

These offences rely on the definition of trafficking, and other terms, as prescribed in the general trafficking in persons offence in section 3.

PTIP Section 3: Offence of trafficking in persons

(1) A person who—

- (a) 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 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;
(b) recruits, hires, maintains, confines, transports, transfers, harbours or receives a person or facilitates the aforementioned acts through force or other forms of coercion for the purpose of engaging that person in prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude, death bondage, forced or arranged marriage;
commits an offence and is liable to imprisonment for fifteen years

Section 3(3) clarifies that, consistent with the Palermo Protocol, the requirement for means to be proved is removed in cases of child trafficking. This provision equally applies to the offences of aggravated trafficking and child trafficking in sections 4 and 5.

Section 3(4) deems consent given for the exploitation, by the victim or in the case of a child, the parent or guardian, as irrelevant.⁹⁰ Therefore, with respect to orphanage trafficking, the parents or guardian's consent to, or involvement in, the transfer of the child to an orphanage or institution, does not preclude the act constituting an element of orphanage trafficking.

Although similar to the aggravated trafficking offence in section 4, in as much as it is applicable to child victims, the section 5 offence is specific to child trafficking, and includes additional circumstances that amount to aggravated child trafficking, and creates more severe penalties by providing for capital punishment. This allows charging officers (prosecutors and police) some discretion in selecting which section to charge a perpetrator under.

Characterisation of exploitation

Consistent with international norms, the PTIP Act does not conclusively define what exploitation is but rather provides a set of circumstances in section 2(d) that amount to exploitation:

PTIP Section 2 (d): Interpretation of exploitation

Exploitation includes 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.

⁹⁰ PTIP Act s 3.

a set of circumstances in section 2(d) that amount to exploitation:

*“Exploitation” includes 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.*⁹¹

The use of the phrase ‘includes at a minimum’ means that the provisions of section 2(d) are not exhaustive. There are several forms of exploitation not explicitly referenced that have been accepted as meeting the definition of exploitation, including forced surrogacy which has emerged as new trafficking trend.

Prosecuting orphanage trafficking under the PTIP offences

Section 4 of the PTIP sets out the conditions under which an act of trafficking is considered an aggravated offence:

4. Aggravated trafficking in persons.

A person commits the offence of aggravated trafficking where—

(a) the victim of trafficking is a child;

(b) adoption, guardianship, fostering and other orders in relation to children is undertaken for the purpose of exploitation;

Section 4(b) specifically includes the use of child care orders, including but not limited to for adoption, guardianship and fostering, to facilitate exploitation.⁹² In doing so, the Act recognises situations where care orders are misappropriated to facilitate the transfer of a child, under the guise of ‘legality’ into an alternative care setting for the purpose of exploitation as a form of aggravated trafficking. This removes the requirement for the removal of a child from parental responsibility to be unlawful in all instances, for trafficking to be evidenced. Instead, the emphasis is placed on the element of purpose of exploitation. This potentially recognises that children who legitimately require care and protection can also be trafficked through the alternative care system for the purpose of exploitation.

Whilst section 4(b) can only capture orphanage trafficking acts perpetrated in conjunction with approved homes (as care orders cannot be issued to unapproved homes), the further inclusion of section 4(d) may enable aggravated trafficking charges to be brought against other organisations that, under the guise of charity, are involved in unlawfully recruiting/transferring/receiving children into unapproved children’s homes, for the purpose of exploitation. It states that: ‘the offender is an organisation engaged in the activities of organising, directing or protecting the vulnerable persons in society’.

⁹¹ Ibid s 2(d).

⁹² PTIP Act s 4.

This could potentially include the conduct of the many unregistered orphanages purporting to be charitable organisations that are, in fact, recruiting children into their residence with a primary purpose of profit. Section 4(d) of the Act specifically provides for a scenario in which operators of orphanages or other institutional care facilities, whether approved or unapproved, involved in recruiting, transferring or receiving children, with or without care orders, could be held accountable for the trafficking and exploitation of children in their care. Similarly, perpetrators who are brokers of orphanage trafficking, involved in one of its constituent elements, could be charged under this section for recruiting, harbouring and transferring to a third-party orphanage, for the purpose of exploitation.

As the PTIP Act would categorise these activities as aggravated trafficking in persons, it could attract a penalty of up to life imprisonment. Where the perpetrator of the offence is a legal entity or a body corporate, the penalty would be a fine of one thousand currency points. Other remedial action can be taken against legal entities charged with trafficking offences, including suspension of registration, deregistration, closure and/or disqualification from practice.⁹³

There are two other offences relevant to orphanage trafficking, found in sections 7 and 8 of the Act. The relevant sections are set out below:

PTIP Section 7: Promoting trafficking in persons

- (e) gives or facilitates the giving of false information to any authority for the purpose of enabling the entry, stay in Uganda, or exit from the country of any person;*
- (g) in any way engages in the selling or buying of persons;*
- (h) recruits, transports, transfers, harbours or receives a child for any purpose without authority of the parent or guardian of such a child; except that this provision shall not apply where the recruitment,*

PTIP Section 7: Promoting trafficking in persons

- (e) gives or facilitates the giving of false information to any authority for the purpose of enabling the entry, stay in Uganda, or exit from the country of any person;*
- (g) in any way engages in the selling or buying of persons;*
- (h) recruits, transports, transfers, harbours or receives a child for any purpose without authority of the parent or guardian of such a child; except that this provision shall not apply where the recruitment, transportation, transfer, harbouring or receipt is done lawfully, in good faith and in the best interests of the child;*
- (i) abandons a child in circumstances likely to cause fear, isolation, injury, pain or other harm; or to facilitate the trafficking of that child;*

⁹³ This translates to approximately US \$5,500, PTIP s 3.

PTIP Section 8: Offences related to trafficking in persons

(a) attempts to traffic in persons;

(b) conspires with another person to do an act of trafficking in persons;

(g) adopts or facilitates the adoption of a person for illicit purposes;

transportation, transfer, harbouring or receipt is done lawfully, in good faith and in the best interests of the child;

(i) abandons a child in circumstances likely to cause fear, isolation, injury, pain or other harm; or to facilitate the trafficking of that child;

Section 7(h) importantly criminalises the removal, transfer, receipt or harbouring of a child, where it occurs without the parent/s or legal guardian's permission and is done unlawfully and not in the best interests of the child. This could be relevant to prosecuting elements of orphanage trafficking, and/or unlawful use of institutional care, that when normalised (regularly occurring with impunity), creates an enabling environment for orphanage trafficking.

Specifically, this offence could potentially be brought against operators of unapproved residential care facilities who receive children without care orders (thus removing the defence of 'lawful receipt'), and who refuse to return children to their parents or guardians, despite requests to do so; or harbour children on the basis of forcing parents to sign or verbally agree to contracts stipulating penalties for attempting to remove their children from institutions, despite intact parental responsibility/guardianship (thus meeting the criteria for 'without permission'). It could also be charged in instances where children are moved from one unregistered institution, where the child was admitted or transferred with

Unlike the offences in sections 4 and 5, the offence of Promoting Trafficking in Persons in section 7(h) does not require the presence of, or proof of exploitation. Rather it is predicated on the lack of parental/guardian authority for the act or transferring/receiving/harbouring the child. Therefore, it could be used to bring charges in instances where the burden of evidence for exploitation cannot be adequately met.

The offence of Promoting Trafficking in Persons 7(i) could potentially be used to prosecute perpetrators in instances where a child is transferred to an orphanage for the purpose or intention of using the orphanage as an interim or transit site for onward trafficking, including into profit-motivated

intercountry adoption. This offence does not require that the trafficking has already been attempted or taken place, only that it was the purpose.

Interestingly, the offence prescribed in 7(i) also allows for prosecution of the act of abandonment of a child; however, the offence is not predicated on the act of abandonment per se, rather the circumstances of abandonment and likely impact of the circumstances on the child (fear, isolation, injury, pain or other harm). Whilst it is unlikely this offence would be brought against parents or guardians who abandon a child in an orphanage for purposes other than trafficking, there is ample evidence to prove that residential care facilities, particularly those that are unregistered and therefore unaccountable to national standards and authorities, are unsafe environments associated with developmental, emotional and psychological harm. It is therefore possible that it could be used to prosecute perpetrators who knowingly abandon a child to an orphanage that is unregistered and of gravely subpar standards. In such circumstances, it may be possible to meet the burden of evidence for the criteria of 'likely to cause harm'.

PTIP Section 8: Offences related to trafficking in persons

- (a) attempts to traffic in persons;*
- (b) conspires with another person to do an act of trafficking in persons;*
- (g) adopts or facilitates the adoption of a person for illicit purposes;*

Section 8 Offences Related to Trafficking in Persons, provides an offence in 8(a) for attempts to traffic in persons⁹⁴ and an offence in 8(b) conspiring to do an act of trafficking.⁹⁵ This offence could potentially be used to prosecute the conduct of perpetrators involved in aspects of arranging or facilitating orphanage trafficking, where it occurs without direct involvement in the elements of recruitment, transportation, transfer, harbouring or receipt or a trafficked child. This could be an important measure to enable the prosecution of offenders who commission orphanage trafficking, including leaders of trafficking rings that may involve multiple orphanages and networks of brokers.

In addition, section 8(g) also includes an offence for adoption for illicit purposes,⁹⁶ which in respect of orphanage trafficking, could capture instances where adoption out of institutions is facilitated for profit motives, rather than the best interests of the child. In these instances, orphanage operators and brokers often misrepresent the child's placement in the institution and/or the terms of adoption in order to solicit parental consent. This practice has been widely evidenced in Uganda, and the offence therefore provides an important safeguard. However, as noted by the Ugandan Human Rights Commission, it falls short of criminalising inducing consent for adoption, and therefore does not bring Ugandan law into full conformity with

⁹⁴ PTIP s 8.

⁹⁵ Ibid. s 8.

⁹⁶ PTIP s 8.

CAP 59 Section 1: Interpretation

Child trafficking means recruitment, transportation, transfer, harbouring or receipt of a child by means of threat or use of force or other forms of coercion, abduction or fraud, deception, 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;

Article 3(1)(a)(ii) of the *Optional Protocol to the CRC on Sale of Children, Child Prostitution and Child Pornography*.⁹⁷

Whilst the analysis of PTIP Act offences in this paper has focused on establishing the grounds for prosecuting orphanage trafficking where the form of exploitation is profit related, offences prescribed in the Act are equally sufficient to prosecute orphanage trafficking involving other forms of exploitation commonly occurring in orphanages, including sexual exploitation and labour exploitation.

THE CHILDREN ACT AND CHILDREN AMENDMENT ACT

The Children Act (Cap 59) was brought into force in 2010, however was significantly modified via the Children (Amended) Act in 2016. The Act offers guiding principles for determining matters relating to children and child rights and gives effect to the ratification of the Convention on the Rights of the Child. The 2016 Amendment strengthened the legal basis for children's rights in general, and significantly improved protections regarding guardianship, including closing the loophole by which guardianship was being used to fast-track intercountry adoption. Despite these improvements, some critical gaps remain,⁹⁸ including gaps that are relevant to the issue of curtailing orphanage trafficking.

One of the most notable of these gaps is the lack of prioritisation of family-based care over residential care for children requiring alternative care.⁹⁹ The Children Act sets forth a guiding principle requiring a child's best interests to be of paramount consideration in all decisions and questions pertaining to children's care and upbringing.¹⁰⁰ However, the Act does not expressly stipulate that residential care should be used as measure of last resort. Rather, section 4(2) states that 'the best substitute care available shall be provided'¹⁰¹ in instances where separation of children from their parents is

⁹⁷ UHRC *Assessment of Compatibility of the Ugandan Legislation with the CRC* 2017 p. xii.

⁹⁸ Ibid.

⁹⁹ UHCR (n 101) pp. x-xi.

¹⁰⁰ Children Act 2016 s 3.

¹⁰¹ Ibid s 4.

deemed necessary. Restricting and regulating the exceptional use of residential care in legislation is a key component of addressing the pull factors for child institutionalisation and decreasing the possibility of orphanage trafficking. Further amendments to the Children Act should be considered to address these gaps and bring the Act into full conformity with the prioritisation of family care and principle of last resort articulated in Article 20 of the CRC.¹⁰²

Relevance of the Children Act to the prosecution of orphanage trafficking

The Children Act does not explicitly criminalise child trafficking; however, it does provide both a definition for child trafficking and a right for children to be protected from it. The definition of child trafficking found in the Children Act was added in the 2016 amendment and reads:

CAP 59 Section 1: Interpretation

‘Child trafficking’ means recruitment, transportation, transfer, harbouring or receipt of a child by means of threat or use of force or other forms of coercion, abduction or fraud, deception, 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;

Section 42A of the Children Act establishes the right for children to be protected from child trafficking as one form of violence:

CAP 59 Section 42A: Protection of children from all forms of violence

Every child has a right to be protected against all forms of violence including sexual abuse and exploitation, child sacrifice, child labour, child marriage, child trafficking, institutional abuse, female genital mutilation, and any other form of physical or emotional abuse.

CAP 59 Section 42A: Protection of children from all forms of violence

Every child has a right to be protected against all forms of violence including sexual abuse and exploitation, child sacrifice, child labour, child marriage, child trafficking, institutional abuse, female genital mutilation, and any other form of physical or emotional abuse.

¹⁰² CRC art 20; UHCR (n 101).

CAP 59 Section 4: Rights of the child

(2) Subject to subsection 1(a), where a competent authority determines, in accordance with the laws and procedures applicable that it is in the best interests of the child to separate the child from his or her parent, the best substitute care available shall be provided for the child.

Despite not directly criminalising child trafficking, the Children Act is an important piece of legislation with respect to a prosecutorial strategy for orphanage trafficking for a number of reasons. Firstly, the Children Act sets out the legal grounds, powers and procedures for the removal a child from parental responsibility or guardianship, child protection interventions –including the issuing of alternative care, guardianship and adoption orders – and powers and responsibilities of organisations providing residential care for children. For an act to be classified as orphanage trafficking and meet the criteria for prosecution under various PTIP offences, at least some aspects must typically occur in violation of child protection laws and regulations and/or be fraudulent or constitute a misuse of child protection mechanisms. As such, an examination of the Children Act is necessary to distinguish between lawful child protection interventions and violations that constitute unlawful and criminal conduct, including orphanage trafficking.

Secondly, the Children Act also prescribes a range of offences that could be used to prosecute elements of orphanage trafficking or unlawful acts that may not meet the threshold for orphanage trafficking, yet when left unaddressed, create an enabling environment for orphanage trafficking to occur.

Both the legal powers and justification for pertinent child protection interventions, and the rights and offences in the Act relevant to orphanage trafficking will be examined below.

Legal powers and justification for removal of children and admission into residential care

To begin with, the Act establishes every child's right to live with his or parents or guardian.¹⁰³ It does, however, recognise that there are circumstances in which it is in the best interests of a child to be separated from their parents. This is articulated in section 4(2) which states that:

Subject to subsection 1(a), where a competent authority determines, in accordance with the laws and procedures applicable that it is in the best interests of

¹⁰³ Ibid s 4(1)(a).

*the child to separate the child from his or her parent, the best substitute care available shall be provided for the child.*¹⁰⁴

This section of the Act sets forth the foundation of a legal criteria for removal, establishing that removals must be in accordance with legal powers, grounds and procedures. Subsection 3 states that any person who contravenes subsection 1, which includes the child's right to live with their family, commits an offence. As such, the act of violating a child's right to live with their family, including through unlawful removal and irregular admission into residential care, is considered an offence under the Act and one that carries a penalty of a fine and/or imprisonment.

Part V of the Act adds greater specificity to subsection 4(2) and elucidates the full scope of powers, grounds and procedures for removal of a child from a parent/guardian, divestment of parental responsibility and recourse to residential care. For the purpose of this Act, 'parental responsibility' is defined in section 1(o) as: 'all rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child'.¹⁰⁵

Powers to remove a child from parental responsibility

In all situations, the powers to remove a child from parental responsibility rests with the mandated authorities, which include Probation and Social Welfare Officers, police, and the Secretary of Children's Affairs within the Local Council and the Family and Children Court. This is outlined in Parts 3, 4 and 5 of the Act.¹⁰⁶ There are no situations provided for in the Act where directors or staff of residential care facilities, or other alternative care or social welfare service providers, or members of the public, are authorised to make decisions regarding the necessity of removal or physically remove a child from parental responsibility. The powers of wardens of approved homes are limited to assuming parental responsibility for a child once a referral is made by the authorities, or under a court-issued care order. As such, the Act provides for a clear separation between gatekeeping functions and powers and the roles and powers of alternative care service providers.

Grounds for removal

The grounds for removal of a child from parental responsibility are articulated in the Act including:

- section 17: Care or supervision order to be of benefit to child
- section 21: Grounds for making a supervision or care order, and
- section 37(1): Removal of a child under emergency protection.

¹⁰⁴ Children Act s 4.

¹⁰⁵ Ibid s 1.

¹⁰⁶ Ibid s 1.

CAP 59 Section 17: Care or supervision order to be of benefit to child

A family and children court shall not make a supervision order or a care order unless it considers that doing so would be beneficial to the child

CAP 59 Section 21: Grounds for making a supervision or care order

A family and children court may only make an order under this Part, if it is satisfied that

(a) the child concerned is suffering or is likely to suffer significant harm; and

(b) that the harm, or probability of harm, is attributable to

(i) the care given to the child, or likely to be given to the child if the order were not made, not being what it would be reasonable to expect a parent to give to a child; or

(ii) the child's being beyond parental control.

CAP 59 Section 17: Care or supervision order to be of benefit to child

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CAP 59 Section 21: Grounds for making a supervision or care order

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(b) that the harm, or probability of harm, is attributable to—

(i) the care given to the child, or likely to be given to the child if the order were not made, not being what it would be reasonable to expect a parent to give to a child; or

(ii) the child's being beyond parental control.

CAP 59 Section 37: Removal of a child under emergency protection

(1) A probation and social welfare officer, any member of the police force or an authorised person who has reasonable grounds for believing that a child in his or her area is suffering or is likely to suffer significant harm, after notifying the secretary for children's affairs of the local government council in writing, may take the child and place him or her under emergency protection in a place of safety for a maximum period of forty-eight hours.

The Act stipulates that the threshold for removal is significant harm or risk thereof, however the burden of evidence differs depending on the nature of the intervention. For a care order (interim or full), sufficient evidence of the harm or risk must be present to the court for an order to be issued. For removal under emergency protection, a much lower bar of reasonable grounds to believe' need only be met and by an authorised person rather than a court. However, for the removal/separation to be sustained beyond the 48-hour period permitted under

emergency protection, a court-issued care order is required and, as such, the burden of evidence plus requirement for other family preservation measures to have been attempted and failed, must be met at that point. In addition, subsection 17 specifies that the care order must be beneficial to the child.¹⁰⁷

The wording of subsection 17 is strengthened by the guiding principle found in subsection 3 that requires for all decisions made by courts pertaining to a child's care to consider the welfare of the child as paramount.¹⁰⁸ This equates to a requirement for a best interest determination to be made in the establishment of sufficient grounds for removal and recourse to alternative care.

Domestic violence is also specified as grounds for removal of a child from parental responsibility in the Domestic Violence Act 2010.¹⁰⁹ Whilst the Act does not consider children victims of domestic violence, local councils are required to ascertain whether children are involved in relationships where domestic violence has been reported or identified, and report to Probation and Social Welfare Officers if there are.¹¹⁰ A protection order issued under the provisions of the Domestic Violence Act can include an order to temporarily award custody of a perpetrator's child to another person or institution, thus suspending the perpetrators parental rights and responsibilities.¹¹¹ Ongoing child protection interventions overseen by Probation and Social Welfare Officers are initiated by the report made by local council and follow the grounds and provisions of the Children Act.

Procedures

The procedures for removal are also detailed in Part V of the Act. All cases, with the exception of removal under emergency protection, require a court order to be issued by the Family and Children Court upon application made by a Probation and Social Welfare Officer or other authorised person. In conjunction with the issuance of a care order, the court may issue a search and production order, which authorises the probation and social welfare officer, with or without police, to enter a premise to remove a child. In emergency removals, subsection 37 allows for Probation and Social Welfare Officers, members of the police or other authorised persons to remove a child without a care order, however only after notifying the representative for children's affairs at the local council level.¹¹² In addition, removal and placement in any form of alternative care without court order under this provision, is, as previously noted, for a maximum of 48 hours, during which time a report must be made to the Family and Children Court or Local Council for initiation of investigation. This commences proceeding for investigation, and where protection and alternative care is deemed necessary, the issuance of an appropriate care order for a child's ongoing care.

¹⁰⁷ Ibid s 17.

¹⁰⁸ Ibid s 3.

¹⁰⁹ Domestic Violence Act 2010 s 13.

¹¹⁰ Ibid s 6.

¹¹¹ Ibid s 13.

CAP 59 Section 73: Custody of children

(4) A person who unlawfully removes a child from the lawful custody of another person, institution or organisation commits an offence and shall be dealt with in accordance with this Act.

In addition to stipulating the lawful powers, grounds, and procedures for removal of a child from parental responsibility, subsection 73(4) of the Act makes unlawful removal of a child from lawful custody an offence:

CAP 59 Section 73: Custody of children

(4) A person who unlawfully removes a child from the lawful custody of another person, institution or organisation commits an offence and shall be dealt with in accordance with this Act.

Whilst this section of the Act deals primarily with custody issues in the context of divorce, separation or declarations of parentage, it does not specifically preclude application to other situations, including unlawful removal from the custody of parents for the purpose of irregular admission into residential care. As such it could potentially be relevant to a prosecutorial strategy for orphanage trafficking.

Admission to residential care

An approved residential care facility can only lawfully receive children in two ways:

1. Under an interim or full care order issued by the Family and Children Court, granting temporary parental responsibilities to the warden of the approved home, and
2. In emergency situations, by referral from a police officer, probation and social welfare officer or other authorised person, in accordance with subsection 37 of the Act.¹¹³

The requirement for a care order for admission into residential care is required regardless of whether a child is lawfully removed from parental responsibility, is found abandoned, or is orphaned. The only provision under the Act for the lawful transfer of parental responsibility, without a care order, is for kinship care, where relatives assume the care of a child after both parents are deceased.¹¹⁴

¹¹² Children Act s 37.

¹¹³ Ibid s 57.

¹¹⁴ Ibid.

Therefore, any stakeholder who identifies a child in need of alternative care, found with or without parents, must report this to a law enforcement officer or other local authority for a referral to be made. The Act stipulates that care orders, both full and interim, for alternative care placement can be made to approved homes or an approved foster carer. Referrals under a care order cannot be made to unapproved residential care facilities. The provisions for emergency alternative care under subsection 37 do not stipulate an approved home or approved foster carer, rather allow for a child to be removed to a 'place of safety'. This is defined in subsection 1(q) of the Act as: 'a place where food, protection and accommodation is provided by a fit person to a child to whom section 37 applies'.

Although this widens the scope of emergency alternative care placements, subsection 56(2) of the 2016 amendment to the Act states that:

A person who establishes or runs a home without the approval of the Minister under this section commits an offence and is liable, on conviction, to a fine not exceeding one hundred and twenty currency points or imprisonment not exceeding 5 years or both.¹¹⁵

This serves to clarify that under no circumstances deemed 'lawful' can an unapproved children's home operate and/or receive children. Furthermore, it provides for an offence that can be used to prosecute operators of unapproved residential care facilities.

Guardianship and adoption orders

In addition to orphanage trafficking often involving unlawful removal of a child from their parents and irregular admission of a child into residential care, guardianship and adoption orders may be fraudulently acquired for children residing in institutions and utilised to facilitate exploitation for profit. As such, it is also necessary to examine the legal processes for issuing guardianship and adoption orders to ascertain what constitutes illicit adoption or guardianship, for the purpose of exploitation, and therefore meets the threshold for prosecution of aggravated trafficking under section 4 of the PTIP Act.

The 2016 Amendment to the Children Act introduced a much more rigorous procedural criteria that must be met for a legal guardianship order to be issued. Firstly, the child's situation must meet the following criteria:

- both parents are deceased or cannot be found
- one parent is deceased and the surviving parent is incapacitated
- there are no relatives or next of kin who are known or willing to assume parental responsibility for the child, or
- parents with parental responsibility provide consent.¹¹⁶

¹¹⁵ Ibid s 56.

¹¹⁶ Children Act 2016 s VI A.

Secondly, guardianship must be deemed as being in the best interests of the child, consistent with the 'welfare principle' applicable to all decisions pertaining to a child's upbringing.¹¹⁷ Thirdly, the person applying for legal guardianship of a child must be a Ugandan citizen who has resided in Uganda for a minimum of three consecutive months.¹¹⁸ This provision does not entirely preclude intercountry adoption via guardianship, however does limit it to Ugandan citizens with residency in another country.

This limitation to guardianship applications was introduced via the 2016 amendment to the Act to curtail instances of trafficking or sale of children into intercountry adoption, which was prevalent amongst non-Ugandan citizens securing guardianship to bypass the lengthy foster-to-adopt requirement for intercountry adoption. In addition, the amendment to the Act made it impermissible for a court to issue a guardianship order until it is satisfied that no payments or rewards have been made or received by applicants in conjunction with guardianship applications.¹¹⁹ This places a positive obligation on the courts to vet all applications for guardianship for financial incentives and/or evidence of sale of children or trafficking before an order can be issued. Furthermore, guardianship orders can be revoked where they are later found to have been obtained by fraudulent means or misrepresentation. This is designed to further protect against guardianship being used in situations that constitute trafficking or the sale of a child.

Given the inability of non-Ugandans to adopt via first securing guardianship under the amended Act, it is likely that instances of trafficking children into orphanages for the purpose of profiting from illicit adoption through guardianship has been greatly reduced. However, it may still occur in some instances, and in association with other forms of exploitation, including sexual or labour exploitation.

The law also provides a means for children who are orphaned, abandoned, or legally relinquished to be adopted transnationally. The Amendment to the Children Act softened some of the measures around intercountry adoption and strengthened others. For example, the time prospective adoptive parents are required to foster a child in-country, prior to seeking an adoption order, was reduced from 3 years to 12 months.¹²⁰ The amendment also weakened the safeguards around intercountry adoption by granting courts license to waive any of the requirements for PAPs in section 46(1) in 'exceptional circumstances', without stipulating what situations would meet that threshold. On the flipside, however, it also more clearly relegated intercountry adoption to an option of last resort in the continuum of care, replacing the previously undefined language of 'in exceptional circumstances' with 'last option available... along a continuum of comprehensive child welfare services'.¹²¹

¹¹⁷ Children Act 2016 s 3.

¹¹⁸ Children Act 2016 s 43F.

¹¹⁹ Ibid s 43k.

¹²⁰ Ibid s 46.

¹²¹ Ibid s 46(6) and (7).

The amended Act also clarifies the role of the court in safeguarding children in intercountry adoption applications, stating that the court must first be satisfied that:

- informed consent has been obtained, where consent (from a parent or guardian) is required
- no monetary promises or exchanges have been made to the applicant or by the applicant or their representative to the parent/guardian with respect of the adoption, and
- the order is being made for the welfare of the child.¹²²

The Amendment provides a clause for rescission of an intercountry adoption order, in the event it was obtained through fraud or misrepresentation or is found not to be in the best interests of the child.¹²³

Based on the provisions of the Children Act guardianship or adoption orders obtained by fraud or misrepresentation can be understood to include situations where:

- consent from parents with intact parental responsibility over the child is not obtained or is improperly informed
- consent from parents with intact parental responsibility is induced via payment or promise of payment or another gift
- payment or gifts were otherwise made by or to the applicant in consideration of the adoption
- parental status or whereabouts is misrepresented to evade the requirement for consent to be given. This could include through paper orphaning or falsely claiming abandonment
- options for other forms of alternative care were not explored or exhausted, or
- the eligibility criteria for prospective guardians or adoptive parents was not met.

Where the purpose of adoption or guardianship orders obtained through fraud or misrepresentation, according to the situations listed above, was for the purpose of profit-related exploitation, charges of aggravated trafficking under section 4 of the PTIP could foreseeably be brought against perpetrators.

Whilst there is a general offence found in subsection 109 of the Children Act that can be used to prosecute any contraventions,¹²⁴ including of the adoption/guardianship provisions therewithin, the Act primarily regulates the conduct of mandated authorities and not of PAPs/prospective guardians or their brokers/representatives. As such, this offence is only likely to be relevant to the prosecution of mandated authorities found to be negligent or complicit in illicit adoption or guardianship. This limitation once again points to the lack of criminalisation of the act of inducing consent for adoption or guardianship, which is not covered by either

¹²² Ibid s 48.

¹²³ Ibid s 15.

CAP 59 Section 1: Interpretation

Child exploitation means the employment of a child in activities from which other people derive a benefit, whether financial, sexual or political, and includes activities such as child trafficking, child prostitution, child pornography and involvement of children in armed conflict.

the Children Act nor the PTIP. This is common in cases of orphanage trafficking for the purpose of profit associated with adoption or guardianship and should be addressed as a priority in future amendments to the Act.

Other relevant offences

The Children Act¹²⁵ also provides for a number of offences relevant to some of the forms of exploitation that can occur in conjunction with orphanage trafficking, or in institutional care settings.

The 2016 amendment to the Children Act introduced a new definition for child exploitation, which makes more explicit the inclusion of the commodification of children as a form of exploitation.¹²⁶ Under section 1, child exploitation is defined as:

CAP 59 Section 1: Interpretation

'Child exploitation' means the employment of a child in activities from which other people derive a benefit, whether financial, sexual or political, and includes activities such as child trafficking, child prostitution, child pornography and involvement of children in armed conflict.

Whilst there is no offence attached to child exploitation in the Children Act, the specificity of the definition potentially strengthens the ability to prosecute orphanage trafficking, where it is for the purpose of profit, whether through orphanage tourism, foreign funding or intercountry adoption, and where other more traditionally conceived of forms of exploitation are absent or difficult to prove. As noted above, the main motivation for orphanage trafficking is the highly lucrative nature of orphanage tourism, foreign donation for institutions, and intercountry adoption, which are predicated upon harbouring children in institutions from which point they can be commodified.

Section 8 of the amended Act provides for an offence for sexual exploitation of children.

¹²⁴ Ibid s 109.

¹²⁵ See s 8A as amended.

¹²⁶ Children Act Amendment 2016 s 1.

CAP 59 Section 8: Prohibition on sexual exploitation

(1) A person shall not engage a child in any work or trade that exposes the child to activities of sexual nature whether paid for or not.

(2) For avoidance of doubt, it shall be unlawful for any person to use-

- a) Inducement or coercion in the encouragement of a child to engage in any sexual activity;*
- b) Children in prostitution or other unlawful sexual practices; and*
- c) Children in pornographic performances or materials.*

This provision significantly waters down the penalty for the offence when compared to the PTIP Act, prescribing only a maximum of 5 years imprisonment or a fine not exceeding 100 currency points – equivalent to approximately US \$550 – compared to penalties of life imprisonment or the death penalty for PTIP offences. In cases where the prosecution cannot prove the ‘trafficking’ element, acts of sexual exploitation that occurs in residential care settings could be covered by this lesser offence. This consideration informs the decision to choose one charge over another. Alternatively, and preferably, both charges could be listed as separate counts.

The Act also criminalises the removal of a child from an approved home¹²⁷ without reasonable cause¹²⁸ and unlawful removal of a child from the lawful custody of another person, institution or organisation.¹²⁹ It prescribes a general penalty for offences under the Act as being a fine not exceeding one hundred thousand shillings (equivalent to approximately US \$27) or to imprisonment for a period not exceeding six months (or both). In practice, these offences can be added to the charge sheet for trafficking in persons/children as additional counts.

CAP 59 Section 8: Prohibition on sexual exploitation

(1) A person shall not engage a child in any work or trade that exposes the child to activities of sexual nature whether paid for or not.

(2) For avoidance of doubt, it shall be unlawful for any person to use-

- a) Inducement or coercion in the encouragement of a child to engage in any sexual activity;
- b) Children in prostitution or other unlawful sexual practices; and
- c) Children in pornographic performances or materials.

¹²⁷ An approved home is defined by s 1(a) of the Children Act as a government or non-governmental home approved to provide substitute family care for a child and includes babies' homes and children's homes. This includes orphanages, children's shelters and other alternative care homes.

¹²⁸ Children Act s 61.

¹²⁹ Ibid s 73.

CAP 120 Section 89: False certificates by public officers

Any person who, being authorised or required by law to give any certificate touching any matter by virtue whereof the rights of any person may be prejudicially affected, gives a certificate which is, to his or her knowledge, false in any material particular commits a misdemeanour.

The amendment to section 56 of the principal Act requires that all residential care facilities, established for the purpose of providing care for children, are approved by the Minister. Section 56(2) prescribes an offence for persons and entities who run residential care facilities without approval. This offence carries a penalty of a fine of 125 currency points and/or a maximum imprisonment of 5 years.¹³⁰ This is an important provision of the Act that allows for the prosecution of perpetrators unlawfully operating orphanages and receiving children in the absence of care orders and due legal process. Better utilisation of this offence could significantly curtail orphanage trafficking, which is likely to be more prevalent in unregistered institutions operating without any oversight or accountability.

PENAL CODE ACT (CAP. 120)

The Penal Code Act contains a range of ancillary offences that may be relevant to the development of a prosecutorial strategy for orphanage trafficking. In particular, the Act contains definitions and a number of offences relevant to the involvement of officials and non-officials in falsifying documentation, which is a common element of paper orphaning. The Penal Code also contains offences that relate to the removal or relinquishment of children from parental responsibility or guardianship. These further elucidate what constitutes unlawful conduct as it pertains to the irregular admission of children into institutional care. In addition, these offences could be used to prosecute and therefore discourage conduct, such as active recruitment or the transfer of children into unlawfully operating institutions, that when normalised, put children at risk of orphanage trafficking.

CHAPTER IX - CORRUPTION AND THE ABUSE OF OFFICE

CAP 120 Section 89: False certificates by public officers

Any person who, being authorised or required by law to give any certificate touching any matter by virtue whereof the rights of any person may be prejudicially affected, gives a certificate which is, to his or her

¹³⁰ Ibid s 56.

affected, gives a certificate which is, to his or her knowledge, false in any material particular commits a misdemeanour.

This offence could be brought against officials who falsify children's birth certificates or parental death certificates in an attempt to fraudulently establish 'orphanhood' for the purpose of admission into residential care and/or eligibility for adoption. This conduct, known as paper orphaning, is a common element of orphanage trafficking.

CHAPTER X - OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE

CAP 120 Section 99: Fabricating evidence

Any person who, with intent to mislead any tribunal in any judicial proceeding—

(a) fabricates evidence by any means other than perjury or subornation of perjury; or

(b) knowingly makes use of such fabricated evidence, commits a misdemeanour and is liable to imprisonment for seven years.

Similar to the above, this offence is relevant to the prosecution of unlawful conduct related to paper orphaning. This particular offence could be used to prosecute officials or non-officials involved in the Family and Children's Court proceedings, who present fabricated evidence in order to secure care orders for admission of children into approved residential care institutions and/or for adoption as a part of orphanage trafficking. Care orders are neither required nor can they be secured for admission of children into unapproved homes.

CHAPTER XXXIII - DEFINITIONS and CHAPTER XXXIV - PUNISHMENT FOR FORGERY

Chapter 33 offers a definition of forgery that is also relevant to prosecuting the involvement of officials and non-officials in elements of orphanage trafficking. Article 342 of Chapter 33, defined forgery as follows: 'Forgery is the making of a false document with intent to defraud or to deceive'.

CAP 120 Section 99: Fabricating evidence

Any person who, with intent to mislead any tribunal in any judicial proceeding

(a) fabricates evidence by any means other than perjury or subornation of perjury; or

(b) knowingly makes use of such fabricated evidence, commits a misdemeanour and is liable to imprisonment for seven years.

CAP 120 Section 346: Intent to defraud

An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person, ascertained or unascertained, capable of being defrauded by it, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact, nor by the fact that he or she had, or thought he or she had, a right to the thing to be obtained by the false

CAP 120 Section 353: Procuring execution of documents by false pretences

Any person who by means of any false and fraudulent representation as to the nature, content or operation of a document, procures another to sign or execute the document commits an offence of the same kind and is liable to the same punishment as if he or she had forged the document.

Following on from this definition, Chapter 34 prescribes a number of relevant offences for forgery.

CAP 120 Section 346: Intent to defraud

An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person, ascertained or unascertained, capable of being defrauded by it, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact, nor by the fact that he or she had, or thought he or she had, a right to the thing to be obtained by the false document

This offence could potentially be brought against officials knowingly involved in paper orphaning, foreseeably in conjunction with the offence of false certificates by public officers, covered by Article 89 and described above.

CAP 120 Section 353: Procuring execution of documents by false pretences

Any person who by means of any false and fraudulent representation as to the nature, content or operation of a document, procures another to sign or execute the document commits an offence of the same kind and is liable to the same punishment as if he or she had forged the document.

CAP 120 Section 361: False statements for registers of births, deaths and marriages

Any person who knowingly and with intent to procure the same to be inserted in a register of births, deaths or marriages makes any false statement touching any matter required by law to be registered in any such register, commits a felony and is liable to imprisonment for three years.

Offences 353 and 361 could potentially be used to prosecute the involvement of orphanage traffickers, including recruiters, brokers and orphanage operators, or any other non-officials, in the issuing of false statements and/or procurement of falsified documents as a component of paper orphaning. This

could include making falsified statements for the purpose of securing fraudulent birth certificates for children and/or death certificates for parents or guardians. These documents maybe be subsequently used to fraudulently secure a care order for the admission of a child into residential care and/or for adoption. As such, this charge could be brought against a perpetrator in conjunction with the offence of fabricating evidence as articulated in Article 99 of the Act.

CHAPTER XV OFFENCES RELATING TO MARRIAGE AND DOMESTIC OBLIGATIONS

CAP 120 Section 159: Child stealing

(1) Any person who, with intent to deprive any parent, guardian or other person who has the lawful care or charge of a child under the age of fourteen years of the possession of such child— forcibly or fraudulently takes or entices away, or detains the child; or receives or harbours the child, knowing it to have been so taken or enticed away or detained, commits a felony and is liable to imprisonment for seven years.

(2) It is a defence to a charge of any of the offences defined in this section to prove that the accused person claimed in good faith a right to the possession of the child, or in the case of an illegitimate child, is its mother or claimed to be its father.

This offence could be used to prosecute the conduct of a range of actors involved in constituent elements of orphanage trafficking including:

- the unlawful recruitment of children from families by orphanage operators or brokers, where recruitment involves deception
- the receipt and transfer of a child to an institution, who has been unlawfully removed from the care of a parent or guardian under deceptive or fraudulent means, by a broker, and
- the receipt and admission of a child into an institution who has been unlawfully removed from their parent or guardian under deceptive or fraudulent means by an orphanage operator.

CAP 120 Section 361: False statements for registers of births, deaths and marriages

Any person who knowingly and with intent to procure the same to be inserted in a register of births, deaths or marriages makes any false statement touching any matter required by law to be registered in any such register, commits a felony and is liable to imprisonment for three years.

CAP 120 Section 159 Child stealing

(1) Any person who, with intent to deprive any parent, guardian or other person who has the lawful care or charge of a child under the age of fourteen years of the possession of such child forcibly or fraudulently takes or entices away, or detains the child; or receives or harbours the child, knowing it to have been so taken or enticed away or detained, commits a felony and is liable to imprisonment for seven years.

(2) It is a defence to a charge of any of the offences defined in this section to prove that the accused person claimed in good faith a right to the possession of the child, or in the case of an illegitimate child, is its mother or claimed to be its father.

The criteria for ‘fraudulently takes or entices away’ is likely to be met in situations where perpetrators have:

- deceived the parents as to the purpose of the child’s admission into institutional care (in other words, claiming that admission is for the purpose of providing the child with better access to services rather than for the purpose of exploitation, including profit)
- deceived the parents or guardians as to the standards of care that will be provided to the child in order to entice relinquishment, or
- removed the child for admission into an unregistered and unapproved residential care institution.

An orphanage operator who receives a child removed forcibly or fraudulently from their parent or guardian is only likely to be able to meet the defence criteria outlined in section 2 of the offence, in the event that:

- (a) the institution is an ‘approved home’, and
- (b) the director/orphanage operator presents the child to the relevant authorities within the stipulated time after receiving the child in accordance with the provisions outlined in the Children Act.

As only approved homes have the right to receive children and retain them in care for a maximum period of 48 hours without a care order, orphanage operators who receive children in all other circumstances are likely to be implicated under this offence, provided the removal of the child was forcible or fraudulent.

Section Five: Detecting and Reporting Cases of Orphanage Trafficking

INDICATORS OF ORPHANAGE TRAFFICKING

For prosecutions of orphanage trafficking to occur, cases of orphanage trafficking must first be detected and reported to the appropriate authorities for investigation. Orphanage trafficking can be difficult to detect for several reasons. Firstly, it typically occurs under the guise of charity and child protection, which gives the acts occurring in the process of orphanage trafficking a sense of legality and legitimacy. Secondly it occurs in conjunction with institutions, which are by nature closed spaces, making the detection and reporting of trafficking and/or the element of exploitation more challenging. Thirdly, children and parents may not be aware that trafficking has occurred, particularly where they consented to the transfer of the child to the institution, under deceptive circumstances and in association with disadvantage. Lastly, the economic exploitation of children in conjunction with foreign funding, orphanage tourism, volunteering and intercountry adoption is not a well understood form of exploitation, particularly as these practices are all associated with altruism. Awareness amongst both mandated authorities and the public of how these acts could indicate exploitation is consequently typically low, and indicators of orphanage trafficking may be missed, misinterpreted, and go unreported.

Therefore, key to a prosecutorial strategy for orphanage trafficking is the clear articulation of indicators that can be used for the detection of potential cases of orphanage trafficking and trigger reporting and investigation. Indicators may include the:

- operation of an unapproved home (unlawfully operating institution)
- operation of a residential care institution that fails to meet the stipulated national standards
- absence of a valid a care order for a child residing in residential care institutions
- denial of family contact for children residing in residential care facilities (in contravention of articles of the Children Act that require wardens of approved homes to facilitate family contact unless an exclusion order has been issued by the courts)¹³¹
- contracts with parents or guardians attempting to prevent parents from exercising parental powers, and/or containing threats
- facilitation of orphanage tourism and volunteering by operators of residential care facilities

¹³¹ Children Act s 35.

- marketing materials or methods (online or otherwise) that disclose children's identities and other confidential information, such as previous traumas or HIV status, for fundraising purposes
- close connections between a residential care facility and an adoption agency or broker
- lack of appropriate documentation of children, or irregular documentation (including birth certificates, parental death certificates, and incomplete or inaccurate child history forms)
- low numbers of children reintegrating back into family of origin or other family-based care placements
- high numbers of children being referred for adoption and/or guardianship
- suspicion, allegations or indicators of child abuse, severe neglect, violence, or extreme control exerted over the children by wardens of children's homes or staff
- inconsistencies in children's stories, in particular with respect to names, status of their parents (deceased or alive) and circumstances of their removal and reasons for admission (abuse, trafficking, abandonment, orphanhood and so on).
- interference with or significant reluctance of wardens or staff to permit contact between children and authorities/qualified professionals for the purposes of reintegration, counselling, or the provision of other services
- evidence of children providing labour to farms, businesses or domestic service within households associated with the orphanage management or personnel, and
- evidence of children's involvement in unlawful activities such as prostitution.

DETECTION OF ORPHANAGE TRAFFICKING INDICATORS

There are various ways in which indicators of orphanage trafficking may be detected. These include:

1. Reporting and inspection of residential care facilities by mandated authorities

The law requires wardens of the homes to report on a bi-annual basis the status of the home and the children they serve.¹³² This is to ensure that compliance is checked and confirmed periodically. Failure to submit reports in accordance with The Children (Approved Home) Rules, is an offence which carries a penalty of a fine and/or 2-year maximum sentence.¹³³ The law also mandates that probation and social welfare and public health inspectors inspect all approved homes biannually. Inspections are conducted against the minimum standards stipulated in The Children (Approved Home) Rules,¹³⁴ which help to identify when homes are operating to

¹³² Children (Approved Homes) Rules r 13.

¹³³ Ibid s 14.

¹³⁴ Ibid s 15.

subpar standards. They may not, however, detect other important indicators of orphanage trafficking, including orphanage tourism, volunteering and paper orphaning. Regardless, the inspection – by both the Public Health Officer and the Probation and Social Welfare Officers – is the basis upon which a home may be considered for closure or indictment for contravention of legal requirements. It is therefore an important mechanism for detection of indicators of orphanage trafficking, and one that should be targeted for strengthening. Furthermore, Probation and Social Welfare Officers are classified as mandatory reporters and are required to report all reasonable suspicions of violence (which includes trafficking, exploitation, and institutional abuse) or imminent danger of a child to the police for investigation.

Probation and Social Welfare Officers are classified as mandatory reporters and are required to report all reasonable suspicions of violence (which includes trafficking, exploitation, and institutional abuse) or imminent danger of a child to the police for investigation.¹³⁵

Therefore, where indicators of trafficking, exploitation or abuse are detected through routine inspections, it should trigger reporting to police for criminal investigation in addition to redress mechanisms for regulatory violations. To enhance the use of inspections in the detection of orphanage trafficking, more must be done to sensitise Probation and Social Welfare Officers, Public Health Officers, and the office of the Permanent Secretary to the indicators that, individually or in combination, may indicate orphanage trafficking.

Despite the legal requirement for regular inspections, in practice, the inspections may not happen in person or at all on account of the various challenges facing the department, including the lack of funding and personnel to adequately deliver child protection functions reported by some district level governments.¹³⁶ Many districts have only one Probation and Social Welfare Officer and one Public Health Officer, making it logistically challenging to inspect all homes, represent the interests of vulnerable children and perform their functions effectively. In addition, unapproved homes are not routinely inspected or promptly closed upon discovery. This leaves children most at risk of orphanage trafficking in situations devoid of oversight and has allowed perpetrators to operate with relative impunity. Encouragingly, the recent release of draft guidelines for piloting the closure of unapproved homes, includes a directive for Probation and Social Welfare Officers to submit a register of all residential care facilities operating in their jurisdiction, approved and unapproved.¹³⁷ It also requires a minimum standards assessment to be conducted on unapproved homes and stipulates a cut-off score for earmarking facilities for closure.¹³⁸ Section 6.4.6 stipulates the procedures for the investigation and prosecution of those involved in operating residential care facilities unlawfully, and for bringing criminal charges, in the event there is sufficient evidence of abuse

¹³⁵ Children Act s 42A.

¹³⁶ Lira District, *Probation and Social Welfare* <<https://liradistrict.com/probation-and-social-welfare/>>.

¹³⁷ Ministry of Gender, Labour and Social Development (2019) *Guidelines on Closure of Unapproved Children's Homes and Approved Children's Homes That Do Not Comply with the Minimum Quality Standards, Draft for Pilot*.

¹³⁸ *Ibid* s 6.

or other criminal conduct uncovered in the closure process.¹³⁹ If widely implemented, closures enacted under these guidelines could become a critical measure in detecting indicators of orphanage trafficking and of increasing investigation and prosecution. For this to be the case, however, sensitisation of the police force, charged with investigating criminal conduct in residential care institutions and the multi-disciplinary ‘closure teams’ comprised of a range of local authorities and responsible for determining if there is enough evidence to warrant referral to the police for investigation, will be necessary.¹⁴⁰

2. Reintegration and placement of children in alternative care

Probation and Social Welfare Officers, social workers, and/or gatekeeping panels may uncover indicators of orphanage trafficking in the process of implementing case management for the purpose of reintegration or referral to alternative care. Indicators may be more readily detected in cases of children being reintegrated out of unapproved homes or homes undergoing closure due to failure to comply with the Children (Approved Homes) Rules. Probation and Social Welfare Officers, social workers, and members of gatekeeping panels, need to be well sensitised to the indicators of orphanage trafficking, including interference in case management, to aid in early detection and accurate interpretation of indicators, reporting and emergency intervention.

3. Reports made by members of the public or mandatory reporters

Reports, allegations, complaints or suspicions of child abuse, endangerment of a child or any form of violence, including trafficking and exploitation, may be registered with the local authorities, the probation and social welfare office or to the police. The police are responsible for investigating all claims and ascertaining the veracity of what has been reported and act accordingly. Certain persons are classified as mandatory reporters under the Children Act, including medical practitioners, social workers, teachers, and certain local government councillors.¹⁴¹ Sensitising all of these mandatory reporters, who routinely come into contact with children, including children in residential care, could aid in the detection of orphanage trafficking and lead to increasing prosecutions. In particular, reporting of children residing in unapproved homes should be encouraged in recognition of the risks to children of being in facilities operating without oversight. Authorities should be encouraged to more readily take punitive action against operators of unapproved residential care facilities in accordance with offences provided for under the Children Act.

4. Suspicions raised in the course of care, guardianship or adoption order applications

Given the known links between orphanage trafficking and fraud or misrepresentation in care/adoption/guardianship applications, the Family and Children Court has an important role to play in the detection of orphanage trafficking.

¹³⁹ Ibid s 6.4.6.

¹⁴⁰ Ibid s 7.

¹⁴¹ Children Act s 42A.

Cases of orphanage trafficking may be detected due to irregularities in documentation noticed within or across cases that suggest documents are being fraudulently issued/obtained or used to misrepresent the child's eligibility. Due attention should be paid to adoption agencies, brokers and/or orphanages, who regularly offer up children for intercountry adoption under the guise of being orphaned, abandoned or with parental consent. Where the volume of cases suggests that guardianship or intercountry adoption are not being used in accordance with the hierarchy established under law (last resort), greater scrutiny should be applied, as this may suggest profiteering.

5. Public awareness and civil society

Given the proclivity for orphanage trafficking to involve collusion with mandated authorities, the public and civil society, particularly child protection organisations, have a vital role to play in the detection and reporting of indicators of orphanage trafficking. Increased awareness raising amongst the child protection community will likely increase detection and reporting efforts. Similarly, increased awareness raising in 'source communities', including of community leaders, will likely surface cases of active recruiting of children into orphanages that may indicate orphanage trafficking and that would have otherwise gone unreported. Improved awareness of orphanage trafficking and its indicators in at-risk communities will likely enhance both the prevention and prosecution of orphanage trafficking.

Section Six: Formal Processes for Trafficking Victim Identification and Rescue

Part 3 of the PTIP Act establishes the legal basis for the protection of victims of human trafficking.¹⁴² This section of the Act was operationalised through the development of the National Referral Guidelines for Management of Victims of Trafficking in Uganda. The guidelines outline detail provisions for formal identification, legal and physical protection, and assistance and reintegration of victims of human trafficking, under a four-phase referral process.¹⁴³

IDENTIFICATION AND REFERRAL

The referral process commences with the formal identification of a person as a victim of human trafficking, at which point physical and legal protection and assistance must be provided.¹⁴⁴ Formal victim identification is comprised of a screening and verification process conducted by first responders. First responders can include:

- community leaders
- local councillors
- police officers
- border officials
- immigration officers
- labour officers
- intelligence agencies
- social welfare officers
- foreign embassy officials, and
- civil society organisations.

To formally register a case of human trafficking and to initiate criminal investigations, the matter must be referred to the police. As such, all non-police first responders, in addition to referring the victim to appropriate support, are required to report the matter to the nearest police station. Police must then open a criminal case which triggers investigation by investigating officers. Investigation also initiates the process for rescue in cases where the victim remains in a situation of exploitation.¹⁴⁵ Reporting to police is also obligatory for

¹⁴² PTIP Pt 3.

¹⁴³ Republic of Uganda (2020) *National Referral Guidelines for Management of Victims of Trafficking in Uganda*.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid p.10.

all persons who have information about or believe a person has or is being traffickers, thus extending the mandatory reporting requirement beyond first responders to all members of the public. Failure to make a report is an offence under the PTIP and carries penalties of fines and possible imprisonment.¹⁴⁶

As can be seen in the following diagram, the guidelines provide a mechanism for cross referral between the criminal justice and victim support systems, with the Coordination Office, situated within the Ministry of Internal Affairs, responsible for ensuring the linkages. This is designed to ensure that regardless of who the first responder is, all victims of human trafficking can access the full scope of their rights as provided for in the PTIP. As this translates into a wide range of entry points into the system, broad awareness-raising of what constitutes orphanage trafficking will be critical to ensuring victims are identified and cases appropriately referred.

13.0 THE REFERRAL SCENARIOS

13.1 General Referral Proces for Victims of Trafficking Identified within Uganda

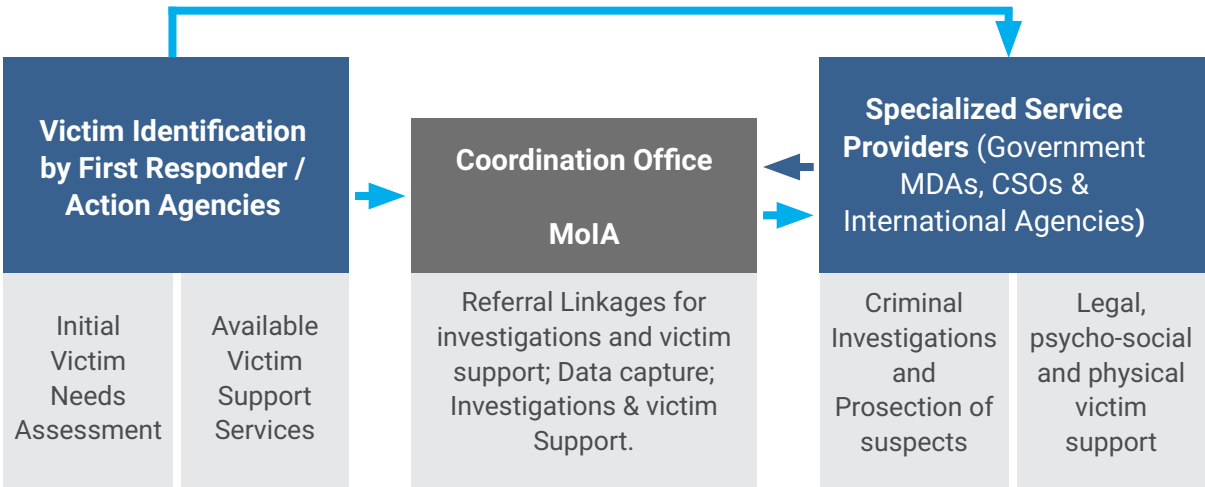


Figure 1: National Referral Guidelines. p.16

'RESCUE'/REMOVAL

First responders can also initiate action to intercept or 'rescue' a victim upon identification provided they immediately report it to the police. For children who are victims of orphanage trafficking and who remain in exploitative institutions, this means any first responder, including Probation and Social Welfare Officers, or civil society organisations, can remove a child identified as a suspected victim of trafficking from an orphanage without police involvement. Suspicion of trafficking would meet the criteria for 'reasonable cause' for removal from an approved home, as required under section 61 of the Children Act to negate removal constituting an offence.¹⁴⁷ This provides an important mechanism for children to be immediately removed

¹⁴⁶ PTIP s 10(2).

¹⁴⁷ Children Act s 61.

from exploitative orphanages, approved or otherwise, particularly when victim identification occurs in the context of minimum standards inspections or the fulfilment of other statutory child protection duties by Probation and Social Work Officers. This once again points to the importance of sensitising Probation and Social Welfare Officers to orphanage trafficking indicators and to ensuring there is adequate human and financial resources for inspectors to occur regularly and to high standards.

Circumstances in which children require removal in conjunction with orphanage trafficking may also extend to situations where the child is in the custody of a PAP, adoptive parent, or guardian, and where the process of securing a care order granting them custody was fraudulent and trafficking is suspected. In these cases, it is more likely for removal to occur via reporting to police (via complaints made to Probation and Social Welfare Officers or courts) rather than via immediate intervention of a first responder. In these cases, it may be necessary for care orders to be revoked or discharged as part of the redress and reintegration process. As with adoption, a provision exists within the Children Act to revoke a legal guardianship order where it was fraudulently obtained.¹⁴⁸ For foster care orders, section 39 of the Children Act provides for a means for courts to discharge the order upon application by a parent, guardian, former caregiver or probation and social welfare officer.¹⁴⁹ This may be a process initiated after a child has been identified as a victim of trafficking, or could be the means by which the authorities become aware that trafficking of a child has indeed occurred.

IDENTIFICATION AND RESCUE IN TRANSNATIONAL CASES

The guidelines outline procedures for identification, rescue and repatriation of a Ugandan victim of human trafficking who has been trafficked transnationally. Suspected cases can be reported to authorities in Uganda or the Ugandan mission in the destination country where the victim is being harboured. This initiates a cross-agency referral process as shown in the diagram below.¹⁵⁰ These procedures may be relevant in cases of orphanage trafficking for the purpose of economic exploitation via intercountry adoption where the child has already been moved to the adoptive parent's country of origin. Section 46A of the Children Act provides a legal basis for rescinding adoptions found to involve fraud or misrepresentation.¹⁵¹ Applications to rescind intercountry adoption can be made by the Minister or any other person 'with justifiable reason'.¹⁵² This could include a parent or relative with claims of child trafficking. Whilst the Children Act provides for measures that can be taken to restore the child to family and/or for alternative care arrangements in all cases involving fraud, should the child be formally identified as a victim of trafficking, the provisions in Part 3 of the PTIP Act, and elucidated in the National

¹⁴⁸ Ibid s 43K.

¹⁴⁹ Ibid s 39.

¹⁵⁰ Republic of Uganda, *National Referral Guidelines*, p. 17.

¹⁵¹ Ibid s 46A.

¹⁵² Ibid s 46A (1).

Referral Guidelines, would also come into effect. This would grant the child the legal right to protection, assistance and support for repatriation and rehabilitation under the trafficking in persons response framework in addition to rights guaranteed in the Children Act.

13.2 General Referral Proces for Incidences Involving Victims in Foreign Countries

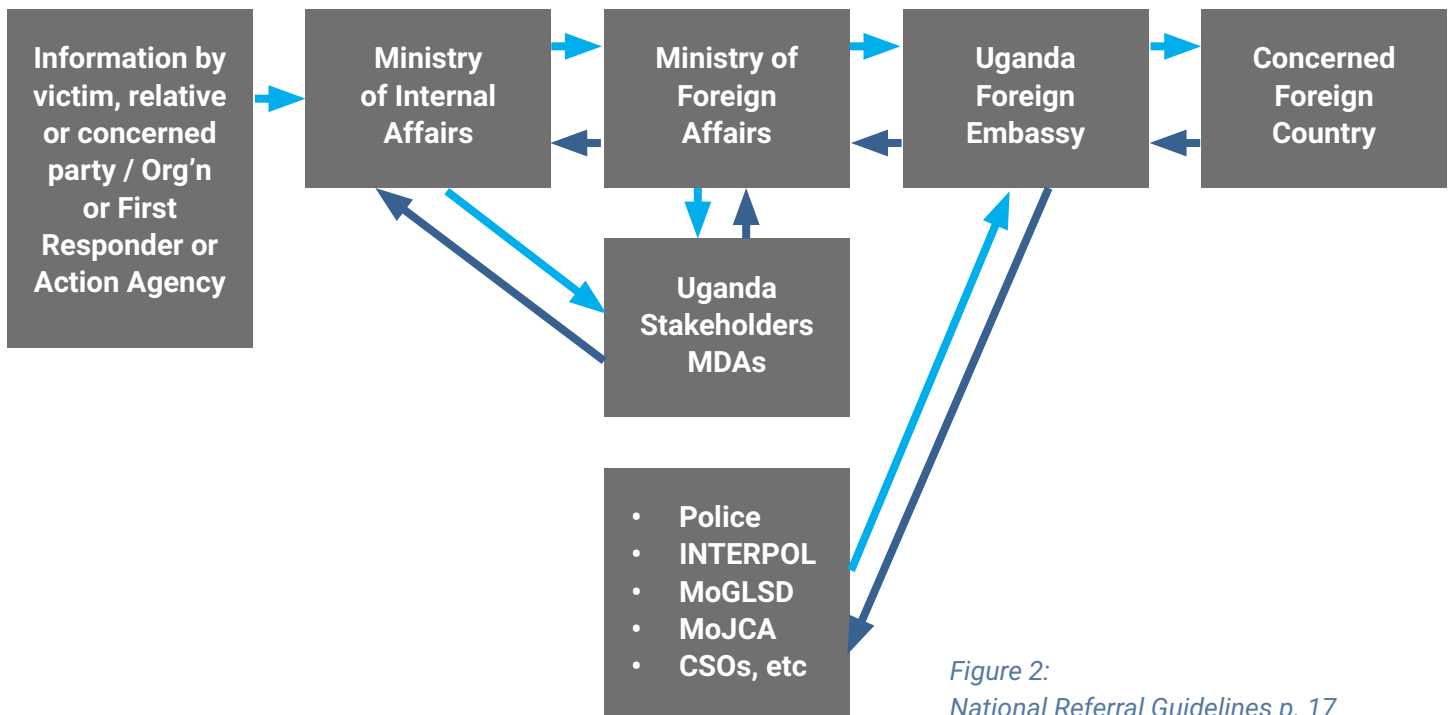


Figure 2:
National Referral Guidelines p. 17

Section Seven: Conclusion

As demonstrated in this report, orphanage trafficking is a complex crime, which involves the misappropriation of child protection mechanisms to facilitate the exploitation of children. In Uganda, orphanage trafficking is most commonly associated with exploitation for profit via intercountry adoption, foreign funding and orphanage tourism; however, it can also involve labour and sexual exploitation of children. Orphanage trafficking is enabled by the underregulated state of the residential care sector in Uganda which, at its peak, saw an estimated 500 institutions operating, most without approval or oversight.¹⁵³ It is further exacerbated by inadequate execution of statutory child protection duties by mandated authorities, including enforcing registration for residential care institutions, inspections of approved facilities and procedures for guardianship and adoption applications. This coupled with the various drivers, including poverty, death of a parent, migration and other factors, leave families vulnerable to traffickers who recruit or facilitate the transfer of children into orphanages under the guise of providing care and opportunity. Instead, children are exploited including for profit, and parents stripped of their parenting rights – often permanently – in conjunction with illicit intercountry adoption.

Uganda's existing criminal law framework contains a number of offences under which charges for orphanage trafficking could be brought against perpetrators. This include the offences of aggravated trafficking and child trafficking, which are found in the PTIP Act and carry maximum sentences of life imprisonment and the death penalty respectively. There are also offences under the Penal Code and Children Act that could be used to prosecute conduct that is unlawful and either a constituent element of orphanage trafficking, or an act that contributes to the enabling environment in which orphanage trafficking occurs. This includes offences for fraud, falsification of documents or evidence, child stealing and contraventions of the Children Act, including operating an unapproved home, unlawfully removing a child from custody and irregular admission of children in institutional care.

Whilst it is promising to note the existence of offences under which orphanage trafficking charges could be brought, in practice the prosecution of orphanage trafficking is equally contingent upon effective detection and victim identification. Without this, cases of orphanage trafficking can be easily missed and go unreported. In other cases, indicators of orphanage trafficking may be interpreted superficially and addressed as regulatory violations rather than offences under criminal law. Therefore, the prosecutorial strategy for orphanage trafficking in Uganda needs to incorporate significant investment into training and awareness raising with relevant authorities, service providers across both child protection and the anti-trafficking

¹⁵³ Riley, 'Baseline Study on Institutional Care in Uganda' (n 1) p.6.

sectors, and the community at large, in order for cases to be detected and referred. This will need to include sensitising first responders, most notably police and those who hold child protection responsibilities, and the courts, to the indicators of orphanage trafficking. These differ significantly from more traditional indicators of trafficking and are often hidden under a cloak of legality and child protection.

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

Section Eight: Annexes

ANNEX ONE: MATRIX OF RATIFICATION AND DOMESTICATION OF INTERNATIONAL TREATIES

INTERNATIONAL TREATIES		
Treaty name	Date of ratification/ accession	Entry into force
United Nations Convention on the Rights of the Child + Amendment	Aug 1990	Aug 1990 Jun 1997
Implementing Legislation:		
1	Children Act as Amended	
CRC Optional Protocol on the sale of children and child prostitution and pornography (CRC-OP-CS)	State Party	Nov 2001
Implementing Legislation:		
1	Children Act as Amended	
CRC Optional Protocol to the Convention on the Right of the Child on Involvement in Armed Conflict	State party	May 2002
Implementing Legislation:		
1	The Prevention of Trafficking in Persons Act	
United Nations Convention Against Transnational Organized Crime	Dec 2000	March 2005
UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children	Dec 2000	Not ratified
Implementing Legislation:		
1.	Prevention of Trafficking in Persons Act 2009	
2.	Prevention of Trafficking in Persons Regulations	

ILO Convention No. 182 concerning the prohibition and immediate action for the elimination of the worst forms of child labour		June 2001
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Implementing Legislation:

- | | |
|----|----------------|
| 1. | Employment Act |
|----|----------------|

Convention Concerning Forced or Compulsory Labour 1932	June 1963	
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Implementing Legislation:

- | | |
|---|------------------|
| 1 | The Constitution |
|---|------------------|

REGIONAL TREATIES

Treaty	Date of ratification/ accession	Entry into force
African Charter on Human and Peoples' Rights (Banjul Charter) 1986	27 March 1986	
African Charter on the Rights and Welfare of the Child 1990	17th August 1994	

ANNEX TWO: MATRIX OF DOMESTIC LAWS RELEVANT TO ORPHANAGE TRAFFICKING

DOMESTIC LEGISLATION

Constitution

Title of legislation	Date entered into force	Abrogated / repealed
The Constitution of the Republic of Uganda	Oct 1995	NA

Relevant Articles:

- | | |
|-----|---|
| 22 | Protection of Right to Life |
| 25 | Protection from Slavery, Servitude and Forced Labour |
| 31 | Rights of the Family |
| 34 | Rights of Children |
| 126 | Exercise of Judicial Power |

Primary Legislation

Title of legislation	Date entered into force	Abrogated / repealed
Prevention of Trafficking in Persons Act	Oct 2009	In force

Relevant Sections:

3	Offence of trafficking in persons
4	Aggravated trafficking in persons
5	Trafficking in children
7	Promoting trafficking in persons
8	Offences related to trafficking in persons
10	Duty to report trafficking in persons
12	Protection, assistance and support for victims of trafficking in persons
13	Confidentiality

The Children Act	Aug 1997 and amended 2016	In force
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Implementing Legislation:

1.	Employment Act
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Convention Concerning Forced or Compulsory Labour 1932	June 1963	
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Relevant Sections:

3	Guiding principles
4	Child's right to stay with parents
5	Duty to maintain a child
6	Parental responsibility
10	Local councils to safeguard children and promote reconciliation between parents and children
21	Grounds for making a supervision or care order
27	Care order
31	Parental responsibility of warden or foster parent
38	Offence to remove a child from a place of safety without authority
43	Conditions for foster care placements

45	Restrictions and conditions
46	Intercountry adoption
58	Purpose of an approved home

The Penal Code Act	June 1950	In force
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Relevant Sections:

249	Kidnapping or abducting child under fourteen years
247	Child's right to stay with parents
156	Desertion of children duty to maintain a child
159	Child stealing

ANNEX THREE: MATRIX OF REGULATIONS RELEVANT TO ORPHANAGE TRAFFICKING

REGULATIONS

Regulations

Title of regulation	Date entered into force	Abrogated / repealed
Prevention of Trafficking in Persons Regulations		
Children's Approved Homes Rules No. 52 of 2013	November 2013	
Relevant Regulations:		
8	Admission of children to an approved home	
Part 3	Management of an approved home	
23	Contact with parents and relatives	
26	Visitation by parents	
29	Removal of a child	
30	Recovery order	

Tier 5: Policies and Procedures

Orphans and Vulnerable Children Statistical Report	2017–2018	
National Child Labour Policy	2006	

National Action Plan for the Prevention of Trafficking in Persons in Uganda	2019	
National Referral Guidelines for the Prevention of Trafficking in Persons in Uganda	2019	

ANNEX FOUR: DUTY BEARERS AND RESPONSIBILITIES

Duty bearer	Ministry/ National Committee	Regulation establishing functions	Functions with respect to trafficking
Uganda Police	Ministry of Internal Affairs	Prevention of Trafficking in Persons Act	<ul style="list-style-type: none"> Promote enforcement of the policies, legislations, regulations, ordinances, by-laws, and guidelines related to prevention of trafficking in persons Investigate reports of trafficking in persons
Coordination Office for the Prevention of Trafficking in Persons	Ministry of Internal Affairs	Prevention of Trafficking in Persons Act	<ul style="list-style-type: none"> Initiate, strengthen, develop and standardise preventive policies and strategies, including ways of Identification of victims of trafficking Fast track the development of evidence-based policies, legislations, regulations, guidelines, ordinances, by-laws and bilateral agreements on issues related to externalisation of labour, child protection, abolition of, archaic traditional practices, amongst others.
Probation and Social Welfare Office	Ministry of Gender Labour and Social Development	<p>The Children Act</p> <p>The Prevention of Trafficking in Persons Act</p>	<ul style="list-style-type: none"> Enhance supervision and monitoring of children's homes, adult's homes and the process of child fostering and adoption Liaise with stakeholders to identify child victims of the various forms of exploitation Provide psychosocial support to some victims of trafficking through the services of Probation and Social Welfare Officers Analyse and make reports to the court in petitions for adoption and legal guardianships
Directorate of Citizenship and Immigration Control	Ministry of Internal Affairs		<ul style="list-style-type: none"> Detection of the crime and identification of victims during the processing of passport applications, registration of citizens by registration and dual citizens, issuance of visas and work permits, and during clearance of travellers through the airport and other gazetted border stations Provision of psychosocial counselling and temporary care for the identified victims while in the jurisdiction of Immigration Officers

Duty bearer	Ministry/ National Committee	Regulation establishing functions	Functions with respect to trafficking
Office of the Director of Public Prosecution	Ministry of Justice and Constitutional Affairs		<ul style="list-style-type: none"> Guides the court on ensuring the psychological and physical protection of victims of trafficking during the prosecution process Guides the police on the required evidence for successful prosecution and possible awards of compensation and restitution to the victim of trafficking Facilitate exchange of criminal information Initiate, strengthen and develop operational guidelines to ensure quality investigations and prosecutions Carry out trainings to develop and strengthen technical skills in investigations and prosecutions of human trafficking cases
Civil society organisations	Ministry of Internal Affairs	Prevention of Trafficking in Persons Act	<ul style="list-style-type: none"> Supplement the available Government systems to identify and rescue victims of trafficking and offer some of them with requisite assistance, and make referrals to other relevant stakeholders for services they cannot offer, including criminal investigations and prosecution, physical security and legal protection
Duty bearer	Line Ministry/ Committee	Regulation establishing functions	Functions with respect to trafficking
District, Town and Local Councils	Ministry of Local Government	Local Government Act	<ul style="list-style-type: none"> Initiate and formulate policy for the district or town Oversee the implementation of the government and the council's policies and monitor and coordinate activities of nongovernmental organisations in a district