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## ORGAN TRAFFICKING: AN EMERGING DIMENSION OF ILLEGAL TRAFFICKING IN NIGERIA AND SUB-SAHARAN AFRICA

By

*Deborah D. Adeyemo\**

### **Abstract**

*In the last decade, organ trafficking has become one of the 'booming' illegal businesses in Nigeria. An array of transnational syndicate is reportedly, responsible for the traffic of illegally harvested human organ across sub-Saharan Africa to the coast of Asia, with India and China identified as top destinations. In 2020, there were reports on popular markets for clandestine sale of human organs in cosmopolitan cities such as Lagos, in Nigeria where, human organs are sold for sums ranging between \$ 2,000 US Dollars to \$ 3000 US Dollars. There are alleged reports of organ harvesting and export via human trafficking. With increasing reports on the spate of banditry, kidnappings, general insecurity and missing persons in Nigeria, it is imperative to examine this dimension of criminality and the possible legal solutions.*

*While Nigeria has legislation against human trafficking such as the Trafficking in Persons Law Enforcement and Administration Act 2015 and a specialised agency for human trafficking National Agency for the Prohibition of Trafficking in Persons (NAPTIP), Nigeria is only waking up to the sad reality of this dimension of illegal trafficking and has no specific legislation in place to tackle it. This paper examines the legal framework on human trafficking in Nigeria against this backdrop. It adopts a doctrinal and desktop legal research approach in analysing the existing laws on human trafficking and the emerging dimensions of organ trafficking. It considers Nigeria's legal obligations against the emerging dimensions of illicit organ trade. It proposes a more proactive*

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*approach to the subject of organ trafficking in addressing organ trafficking in Nigeria.*

Keywords: human trafficking, transplant, donation, red markets

## 1.0 INTRODUCTION

Human organ donation and transplantation is legally recognized in medical practice across the world. Human organs for transplant are obtainable either from live or deceased donors and associated with high risks, thus they are guided by the highest ethical and professional standards in the medical field.<sup>1</sup> There are international guidelines and principles which expressly encourage prohibition of commercialisation and brokerage in the procurement of human organs. However, in spite of the guidelines and principles, there are increasing reports on commercialisation and illegal trafficking of human organ.<sup>2</sup> The increasing need for organ transplant as a viable solution to some terminal diseases and the consequent shortage of legally available human organ globally may have driven the increase in organ trafficking. This is without prejudice to other drivers of organ trafficking which are totally illegal. Organ trafficking may be a subset of human trafficking in some cases, as the rationale behind some dimensions of organ trafficking are offshoots of human trafficking. However, organ trafficking is different from human trafficking for the purpose of organ removal although, trafficking in persons for the purpose of organ removal may involve organ trafficking. Organ trafficking may occur without necessarily engaging in human trafficking. Organ trafficking and human

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<sup>1</sup> The World Health Organisation (WHO) issued Guiding Principles On Human Cell, Tissue and Organ Transplantation in 2010. In addition, the World Medical Association, and the European Convention on Human Rights and Biomedicine have released guidelines and principals for the ethics of obtaining organs from consenting living and deceased donors, and ethical boundaries for medical professionals performing organ transplants.

<sup>2</sup> 'New Dimension to Human Trafficking' ThisDay 8 September , 2021 Available at <https://www.thisdaylive.com/index.php/2021/09/08/new-dimension-to-human-trafficking/>.

trafficking for the purpose of organ removal involve different dynamics and are two different crimes.<sup>3</sup>

This paper focuses largely on organ trafficking while making references to trafficking in persons for the purpose of organ removal. Organ trafficking has both domestic and cross border contexts. Initially, organ trafficking statistics only revealed Asia and North-Africa as hot spots destinations, with China popularly labelled as a top world destination for organ transplant tourism from different parts of the world, especially sub-Saharan Africa. This is apart from other top destinations for illegal procurement of human organs in Europe, Asia and the Middle East.<sup>4</sup>

In the last two decades, countries in sub-Saharan Africa have become massive organ suppliers of organ albeit, illegally. Nigeria, especially, has become one of the hubs of 'red markets' for organ trafficking across the continent. Malaysia and India were top destinations for sale of kidneys by young Nigerian organ tourists, between 2010-2015.<sup>5</sup> In 2017, there were media reports of horrifying stories of organ harvesting markets in Libya.<sup>6</sup> Subsequent media reports in 2019 show that Nigerian victims seeking greener pastures are deceived into illegal migration. Victims may end up

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<sup>3</sup> In organ trafficking, the object of the crime is organ the as a product for the illegal trade while, in trafficking persons for the purpose of organ removal, the criminality involves trafficking in person as the object of the crime and the illegal purpose behind the traffic, which is organ removal as an element of the crime.

<sup>4</sup> European Union, 2015. Shimazono identified countries like the United States, Canada, Australia, Japan, Israel, Oman, Saudi Arabia as some of the top destinations for organ trafficking. Shimazono, Yosuke. 'The state of the international organ trade: a provisional picture based on integration of available information.' (2007) 85 *Bulletin of the World Health Organization*: 955.

<sup>5</sup> 'How Nigerians sell Own Kidneys Abroad' Daily Trust 17 September, 2011. Available at <https://dailytrust.com/how-nigerians-sell-own-kidneys-abroad>.

<sup>6</sup> 'Migrants in Libya Used for Organ Trade Alleges Lawyer' The Migrant project 14 December. 2017. Available at <https://www.themigrantproject.org/migrants-libya-2/>.

having their hearts harvested for ₦250, 000 or trafficked young girls harvest their ovaries and sell for ₦ 140, 000.<sup>7</sup>

In 2020, a booming market for organ sale was discovered in a popular conventional market in Lagos state where traders of legitimate items such as everyday or household items engage in illegal organ trade.<sup>8</sup> An illegally harvested kidney is reportedly sold between ₦750, 000 and ₦1, 000, 000<sup>9</sup> depending on the bargaining power of the donor victim/trader. Although victims claim to be driven by economic hardship aggravated by the Covid-19 outbreak, they were largely unaware or unbothered by the health risks and implication of the illegal trade. Proceeds of the illegal trade are laundered and ploughed into legal businesses of victim traders. The pattern reveals involvement of local diagnostic health facility, network of local and international brokers and organ transplant tourism by the victim donor. Victims admit consent without any form of coercion but also express deep regret in the aftermath of several medical complications post-removal and receipt of payment. Similar pattern of organ trafficking is also reported in Internally Displaced Persons' (IDP) Camps across the country. The reports on organ trafficking identifies similar pattern of organ transplant tourism, domestic and international network of brokers and transplant facilities, deception and fraud by recruiters, underlying problem of poverty or sheer ignorance and severe health complications or sometimes, death of victims, post-organ harvest. Sadly, the country while focusing on human trafficking in all its dimensions, may have overlooked organ trafficking as an internal and cross border menace. This is therefore, the focus of this paper

<sup>7</sup> \$500 and \$280 respectively (US Dollars) at the local exchange rate as at 2021. 'Chilling Human Trafficking Tales: How Organ Hunters Harvest, Sells Heart and Human Eggs' Vanguard Newspaper 16 June, 2019. Available at <https://www.vanguardngr.com/2019/06/chilling-human-trafficking-tales-how-organ-hunters-harvest-sell-hearts-human-eggs/>.

<sup>8</sup> 'Organ Harvesting Booms in Lagos as Probe Deepens, How Kidney Merchants in Lagos Recruited Us' Nigerian Tribune 4 July, 2020. Available at <https://tribuneonlineng.com/organ-harvesting-industry-booms-in-lagos-as-probe-deepens/>.

<sup>9</sup> \$1500 and \$2000 respectively (US Dollars) at the local exchange rate as at 2021

in the light of the emerging trends and international legal obligations flowing therefrom.

This paper is divided into five parts. The first section gives a brief introduction on organ trafficking in Africa, generally and Nigeria, specifically. The second section examines the crime of organ trafficking and other associated terminologies from a legal perspective. The third section looks at the dimensions of organ trafficking as a multiplicity of criminal acts with transnational dimension. The fourth section analyses the international, regional and domestic legislation on organ trafficking against the backdrop of the dimensions of organ trafficking in sub-Saharan Africa. The final section makes useful recommendations in the light of the findings of the paper.

## 2.0 ORGAN TRAFFICKING

Organ trafficking can be simply defined as the practice of using exploitation, coercion, or fraud to steal or illegally purchase or sell organs in red markets.<sup>10</sup> Thus, organ trafficking involves all the activities that are aimed at commercialisation of human organs which may not necessarily be for the purpose of transplantation.<sup>11</sup> This is distinguished from organ transplant tourism which describes the practice of traveling to a foreign country for the purpose of buying, selling, or receiving organ transplant. Although the two are interconnected as organ trafficking may involve organ transplant

<sup>10</sup> The 'red market' alternatively refers to illegal organ trade. Broumand Behrooz and Reza F. Saidi. 'New definition of transplant tourism' (2017) 8 *International Journal of Organ Transplantation Medicine* 49. Shimazono 2007 op. cit. (n. 4); United Nations, 2011; United Nations, 2018. This simplified definition does not cover all the dynamics of organ trafficking. Although, there seems there is no universally accepted definition of organ trafficking yet. The Council of Europe Convention against Trafficking in Human Organs adopted on 9 July, 2014 and came into force in 2015 provides a comprehensive definition.

<sup>11</sup> There are reports that there are certain African traditional practices in which certain body part are used by traditional practitioners to increase fertility, health wealth etc. Scheper-Hughes Nancy *Bodies of Apartheid: The Ethics and Economics of Organ Transplantation in South Africa*, Centre for African Studies, 28 September 1999.



tourism. In fact, it is not unlikely that the increasing demand for organ transplant may have increased the rate of organ transplant tourism and consequently driven the 'red market' for organ trafficking.

The legally available organs for transplant only satisfy about 10% of the global organ transplant need.<sup>12</sup> Hence many medical facilities involved in organ transplant usually have an organ waitlist for prospective patients. Organs as used in this paper is a generic name for human cells, tissues and organs capable of being removed from the human body. This is differentiated from human body parts generally. Trafficked organs range from small human body parts such as fingers, toes, to human organs such as kidneys, liver, heart, lungs, cornea, bone marrow etc. Statistical data on organ trafficking are fluid and may be inaccurate owing to the fact that organ trafficking is largely clandestine, underreported and the blurred lines between legal and illegal organ sale in some circumstances. It has been estimated that the red market accounts for about 10% of the organ sale globally.<sup>13</sup>

### **3.0 DIMENSIONS OF ORGAN TRAFFICKING**

Organ trafficking is an organised crime which has both internal and transnational dimensions. All too often, the dimensions of organ trafficking are contextualised based on the field and the perspective of the discourse. Trafficking of organs has been, largely, reported in the context of organ donation and transplant. There are narratives which discuss organ trafficking in the context of human trafficking and associated with other forms of organised crimes such as money laundering.<sup>14</sup> In the same vein, organ trafficking is also reported in the context of armed conflict and the involvement of armed groups

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<sup>12</sup> Yousaf Farhan Navid and Bandana Purkayastha. 'Social world of organ transplantation, trafficking, and policies.' (2016) 37 *Journal of Public Health Policy* 190. Negri, 2016, United Nations, 2018; Global Financial integrity.

<sup>13</sup> Negri, 2016 *ibid*; United Nations, 2018.

<sup>14</sup> Case studies outside sub-Saharan Africa like Egypt and Libya show that illegal migrants to Europe resort to trafficking their organs to offset bills for their journey

in illicit organ trading to fund their activities.<sup>15</sup> Given the hidden and stealth nature of the crime of organ trafficking and its stereotypical connection with human trafficking, it is often difficult to fully comprehend its patterns and the *modus operandi* of the various actors involved in the perpetration of the crime. Organ trafficking involves a very complex nature of processes which makes it equally difficult to apprehend its exact nature or dimensions.

Organ trafficking may be consensual or non-consensual. Consensual trafficking may occur via direct exploitation and deceit of living donor victims. Non-consensual could be executed through other crimes such as kidnapping, homicide etc. Non-consensual trafficking may involve cases where victim donors are surreptitiously deceived or coerced into having their organs harvested and trafficked.<sup>16</sup> In this instance, victims of organ trafficking are largely vulnerable, poor and are usually misinformed, coerced or deceived into organ trafficking where their organs are harvested in return for a paltry fee.<sup>17</sup> Typically, there is an organised network of illegal brokers and agents in organ trafficking which tends to 'connect' recipients with 'available supply' from victim donors. Whether internal or transnational, organ trafficking is a highly syndicated crime which involves medical and transplant facilities and professionals such as medical professionals and technicians.<sup>18</sup> Once the organ is removed, the victim donor is, usually offered a price lower than the agreed sum or may not even be paid at all. The brokers, however, sell at a higher price. Illegal trafficking of vital organs averagely attracts a purchase price of about \$ 150, 000 while a sum ranging between \$ 1000 - 5000 is

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<sup>15</sup> WHO reckons that retrieved about 11,000 illegally harvested organs from worn-torn zone.

<sup>16</sup> Non-consensual trafficking may even occur under the pretext or guise of legal medical procedures which are exploited by medical personnel to harvest 'organs' of the victims against their knowledge. *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479.

<sup>17</sup> UN, 2011. It is arguable though, that it is not always the case that are poor and vulnerable. Some victims may be well informed but just driven by sheer greed.

<sup>18</sup> In some cases, government officials are also complicit in organ trafficking.

offered to donors victims.<sup>19</sup> Prices could also vary depending on the type of organ being trafficked and the destination of the recipients or buyer.<sup>20</sup> There are reports that that victims of organ trafficking are usually the youth population within the age range of 18-35.<sup>21</sup> Recipients of trafficked organs within the network are generally wealthy, and intrinsically involved in transplant tourism.<sup>22</sup> In some cases, recipients are presented to be in dire need of organs and unable to wait any longer for a legal donation. In other cases, recipients may be deemed unsuitable for transplant domestically, or may not want to ask relatives for a living donation.<sup>23</sup> On the other hand, some recipients may be unaware of organ trafficking and presume that they are responding to seemingly legitimate offers from overseas hospitals and medical professionals that promise the organ transplant for a flat fee.<sup>24</sup> Organ trafficking is illegal, complex and involve several dimensions of criminality. The dimensions of organ trafficking discussed subsequently

### **3.1 Illegal Organ Harvesting/Removal**

Organ harvesting usually involves collecting/‘stealing’ human organs from unwilling or uninformed donors through exploitation of impoverished, indebted, homeless, uneducated, and refugee people.<sup>25</sup> Organ harvesting may be done on living donor victims or deceased donors i.e. life or from a freshly deceased human. Organ harvesting can be perpetrated with or without valid consent or

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<sup>19</sup> Data retrieved from <https://havocscope.com/black-market-prices/organs-kidneys/>.

<sup>20</sup> There are available reports that in Nigeria the are varied prices of certain human organ destined for middle East country differently from others. retrieved from <https://www.aa.com.tr/en/africa/nigerians-warned-against-organ-traffickers/1445802>.

<sup>21</sup> ‘Chilling Human Trafficking Tales: How organ hunters harvest, sell hearts, human eggs’ Vanguard 16 June, 2019. retrieved from <https://www.vanguardngr.com/2019/06/chilling-human-trafficking-tales-how-organ-hunters-harvest-sell-hearts-human-eggs1/>.

<sup>22</sup> European Union, 2015; United Nations, 2015.

<sup>23</sup> United Nations, 2011; United Nations, 2015.

<sup>24</sup> United Nations, 2015.

<sup>25</sup> United Nations, 2018.

authorisation. With medical procedures such as organ transplantation or donation, the concept of informed consent is germane.<sup>26</sup> Conversely, where organ trafficking is connected with human trafficking as in the case of trafficking in persons for the purpose of organ removal, the requirement of consent on the part of the victim is irrelevant for the purpose.<sup>27</sup> The commonest means of harvesting organ for trafficking is through recruitment. Recruiters take on various nomenclatures such as brokers, organizers, connectors, coordinators, middlemen, kidney hunters etc. Victims are recognised as donors, organ suppliers, sometimes sellers from whom organs may be harvested directly or through third parties. They are not to be considered actors within the trafficking schemes, however, they may take on active roles, e.g. by approaching brokers, offering their kidney for sale. In many instances, organ harvesting may be perpetuated without the consent of the victims. Some reports show that some victims are put under anaesthesia or drugged and wake thereafter to find one of their organs missing.

### 3.2 Recruitment of Victim donor/Recipient

Victims of organ trafficking may be recruited through brokers/agents, who are individuals or syndicate of individuals who recruit organ suppliers and connect them with organ recipients/international buyers directly or indirectly. Often, these recruiters also serve as agents for the buyers as, they may be connected with prospective buyers or recipients.<sup>28</sup> Recruitment and eventual trafficking in human organ involve a chain of participants from 'organ hunters' to professionals from the medical field such as

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<sup>26</sup> The concept of informed consent seats at the root of professional relationship between patients and medical professionals. It is an ethical and legal doctrine that requires medical professionals to obtain the consent of their patients before treatment is administered or surgery is performed. The principle of patient autonomy is foundational to the doctrine of informed consent: patient autonomy recognizes the right of every patient to bodily integrity and the right to decide what is to be done with his or her body.

<sup>27</sup> Article of the 3 (b) and (c) Palermo Protocol.

<sup>28</sup> Kelly Emily 'International organ trafficking crisis: Solutions addressing the heart of the matter.' [2013] 54 *BCL Rev.* 1317. United Nations, 2011; United Nations, 2015.

doctors, nurses, anaesthetists, ambulance staff, medical scientist from diagnostic centres and entire hospitals/transplant facilities who participate in illegal organ harvesting and transplanting.<sup>29</sup> Professional from other fields such as travel agents, insurance agents, and even faith-based organizations also act as major player in maintaining the illegal buying and selling of harvested organs.<sup>30</sup> While there may be a direct chain of recruiters and victim donor, there may also be a long chain of agents who serve as middlemen between the victims and actual recruiters.

Recruiters/brokers are usually people who may be from the same communities, ethnicity or nationality of a vulnerable population so as to make it easier to build trust relationships with the victims. The recruiters make promises to the organ suppliers like large sums of money or release from debt, and convince them that the organ is not needed and get them to concede to organ donation. The consent of victims may be obtained fraudulently through misinformation, deceit or manipulations. Specifically, in the case of kidneys, the most commonly harvested organ from living donors, recruiters will tell victims that the kidney will grow back, having two kidneys is unnatural, or that they have a large and a small kidney and removal of the small kidney is harmless.<sup>31</sup>

### **3.3 Illegal Transplant/ Use of Organ**

Recruiters often work with other agents within their network to either commercialise or use the organ illegally. Illegally harvested organ may be preserved, stored, transported (import or export) and transplanted. Asides transplant, illegally harvested organs may be used for preparation of medicinal products, ritual purposes etc.

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<sup>29</sup> United Nations, 2011; United Nations, 2015; European Union, 2015.

<sup>30</sup> United Nations 2011.

<sup>31</sup> United Nations, 2011; United Nations, 2015. It is estimated that approximately 7000 kidneys are illegal harvested and trafficked annually across the globe. This statistic may not in fact represent the true picture of the actual trafficking rate.

### 3.4 Commercialisation of Organ

Commercialisation of organ is the cynosure of organ trafficking. It involves commodifying harvested organs through buying and selling. A growing dimension of organ trafficking in Nigeria shows that conventional traders in legal businesses are touted as organ vendors who, engage in illicit trade in human organs especially, kidneys. The syndicate of organ vendors involve health diagnostic clinics, travel agents and other legal businesses. A 'broker'/organ vendor who is connected to a recipient may approach a recruiter and 'demand' for available organ. The recruiter then solicits for organs from donor victims which are sourced through agents/recruiters working with the him or a within a network of agents directly connected to the victims. In this case the recruiter becomes a 'secondary' vendor.

### 3.5 Financial Gain or Comparable Advantage

Harvesting of organs, recruitment and commercialisation involve financial consideration. Financial gain or allied advantage underlie all the dimensions of organ trafficking discussed above. Recruiters and agents are driven by the financial gains that they might get through recruitment or commercialisation. Healthcare professional, public official, or employee of a private sector entity may offer or request undue advantage in order to facilitate or perform organ removal, transplant or use. Victim donors are also often persuaded by the monetary offer made by recruiters in return for their organs especially, in context unconnected with human trafficking. Although, the payments may be laced with deception and fraud by recruiters who fail on their offers outright or deliver lower than the amount offered. In the context of human trafficking for the purpose of organ removal, victims rarely receive the full amount of money promised, if they receive any compensation at all.<sup>32</sup> In some cases, the post-removal healthcare costs for a living organ trafficking victim add to their previous debt and worsen their financial situation.<sup>33</sup> Asides being an organised crime with transnational

<sup>32</sup> United Nations, 2011; United Nations, 2015.

<sup>33</sup> Kelly, *op. cit.* (n. 28) 2013.

dimensions, organ trafficking is reportedly connected with other forms of organised crimes such as money laundering. Organ trafficking is reported to have an estimated flow of \$1 billion annually. Owing to the nature of the crime, it is often difficult to detect the actual financial activity related to the crime. Some of the brokers and agents involved in organ trafficking operate through shell companies and are highly involved in laundering funds accruing from their nefarious activities.

#### **4.0 THE LEGAL FRAMEWORK AGAINST ORGAN TRAFFICKING AND CRIMINALISATION**

There is an established international legal framework against trafficking in persons for the purpose of organ removal. The international regulations in this respect, are wide and indicate well formulated elements of the offence. In the same vein, the commercialisation of human organs is globally prohibited with the exception of Iran which, legally recognises sale of organ with some forms of regulations.<sup>34</sup> The prohibition of organ commercialisation is often linked with laws governing donation and transplant. A few States have express provisions on the prohibition of organ sale/commercialisation while other States have them simply subsumed under domestic regulations on donation and transplant.<sup>35</sup> However, there is no established international legal instrument against organ trafficking which elicit binding obligations from States. The available legal framework on all forms of prohibitions related to organ trafficking are subsequently examined.

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<sup>34</sup> In Iran the sale of kidneys is organised and managed by non-governmental organisations endorsed by government. For instance, the Charity Association for the Support of Kidney Patients connects potential recipients with donors and the Charity Foundation for Special Diseases.

<sup>35</sup> The United States' National Organ Transplantation Act prohibits sale of organ for the purpose of transplant. Britain's Human Organ Transplants Act 1989 prohibits the sale of human organs. Egypt's Transplantation of Organs and Tissues Act, 2010 criminalises commercialisation of human organs in Egypt. South Africa's Human Tissue Act of 1983 also prohibits organ sale.

## 4.1 International Legal Provisions

International legal prohibitions of organ trafficking can be broadly categorised into binding and non-binding legal instruments.

### 4.1.1 *Non-Binding Legal Instruments*

The WHO Guiding Principles on Human Cells, Tissue and Organ Transplantation<sup>36</sup> embody the guidelines on ethical practice on human organ and tissue transplant and expressly prohibits the commercialisation of organs for transplantation and emphasizes free donation without monetary value or payment<sup>37</sup> The guidelines ban the purchase or sale of organ with exception in certain circumstances. First, it permits compensation for medical expenses and lost earnings on the part of the donor. This presupposes that donors of organs may be reimbursed for reasonable and verifiable expenses they might incur. Such expenses could be the costs of recovering, processing, preserving and supplying human organs for transplantation or even loss of income. Second, it permits payment for legitimate cost of procurement without financial gain. Such legitimate cost includes the cost of ensuring the safety, quality and efficacy of human cell and tissue products and organs for transplantation. Thus, by the provisions of the Guidelines, the prohibition of organ trafficking is against the background of organ transplant. However, States have the discretion to determine modalities of prohibition and sanctions within their jurisdictions.

The Declaration of Istanbul on Organ Trafficking and Transplant Tourism of 2008 (and 2018 revision) provides a more comprehensive regulation on organ trafficking. Although the 2008 Declaration defined organ trafficking in the narrower sense of connecting it with human trafficking, the revised Declaration of 2018 corrects the earlier position. The 2018 Istanbul Declaration

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<sup>36</sup> WHO Guiding Principles On Human Cell, Tissue and Organ Transplantation adopted in 2010. Available at [https://www.who.int/transplantation/Guiding\\_PrinciplesTransplantation\\_WHA63.22en.pdf](https://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf). The World Health Assembly (WHA) resolutions 57/18 on Human Organ and Tissue Transplantation complement the WHO Guiding Principles.

<sup>37</sup> Guiding Principle 5.



further defines organ trafficking and clearly delineates it from trafficking in persons for the purpose of organ removal. It encourages criminalisation of both forms of trafficking and identifies associated issues such as transplant commercialism, and transplant tourism.<sup>38</sup>

From the definition of organ trafficking by Declaration, the element of consent appears to be a requirement amongst other elements of the crime. The Declaration makes specific provisions on the guidelines for care, reimbursement, and recruitment of living donors.<sup>39</sup> The Declaration addresses self-sufficiency in organ donation and financial aspects of organ donation. Although the Declaration is merely exhortatory, it encourages criminalisation of organ trafficking and recommends that all countries develop a legal and professional framework to govern organ donation and transplantation. The Declaration further recommends a transparent regulatory oversight system that ensures the safety of donor and recipient safety and the enforcement of standards and prohibitions on unethical practices.

The WHO Guiding Principles, the Declaration of Istanbul and various resolutions of United Nations on trafficking in persons for the purpose of organ removal and trafficking in human organs<sup>40</sup> urge

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<sup>38</sup> The Declaration simply adopted the definition offered by the Council of Europe Convention Against Trafficking in Human Organs.

<sup>39</sup> In 2018, the Declaration was revised to address emerging issues in organ trafficking.

<sup>40</sup> The United Nations General Assembly has a number of resolutions on organ trafficking which encourage member states to criminalise organ trafficking. RES/59/156 of 20 December 2004, entitled 'Preventing, combating and punishing trafficking in human organs', RES/71/322 of 8 September 2017, entitled 'Strengthening and promoting effective measures and international cooperation on organ donation and transplantation to prevent and combat trafficking in persons for the purpose of organ removal and trafficking in human organs', RES/72/195 of 19 December 2017, entitled 'Improving the coordination of efforts against trafficking in persons' and /RES/73/189 of 17 December 2018, entitled United Nations Resolution Strengthening and promoting effective measures and international cooperation on organ donation and transplantation to prevent and combat trafficking in persons for the purpose of organ removal and trafficking in human organs.

States to make provisions for the availability and safety of organ and tissue donations and transplantations and criminalise organ trafficking. These regulations are soft law, exhortatory in nature and do not elicit any binding obligation from any State.

#### 4.1.2 *Binding Legal Instruments*

The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol) is the first binding international legal document which recognised trafficking in persons for the purpose of organ removal<sup>41</sup> and urges State parties to criminalise trafficking in persons for the purpose of organ removal.<sup>42</sup> The Palermo Protocol only makes provisions for Trafficking in persons for the purpose of removal of organs and seems to subsume organ trafficking in its definition of human trafficking<sup>43</sup> The elements of the crimes of trafficking in persons for the purpose of organ removal follow the same pattern as those of human trafficking. There are three basic elements of action, means and purpose which must concur in every given instance to establish the crime of human trafficking. The element of action may be in form of recruitment, transportation, transfer, harbouring or reception of persons. The element of means emphasises the mode of perpetrating the element of action. Such means could include threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim. The element of ‘purpose’ relates to the aim of the offender’s action which is generally, exploitation. Such exploitation may be forced labour, slavery, sexual exploitation, removal of organs etc.

#### **Regional Legal Provisions**

The European continent has the foremost regional provisions against organ trafficking. Perhaps, this might be attributable to the fact that it is labelled as one of the top destination continents for organ

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<sup>41</sup> Article 3.

<sup>42</sup> Article 5.

<sup>43</sup> Article 3 (a). The Protocol actually supplements the UN Convention against Transnational Organized Crime which criminalises human trafficking.

trafficking. The Council of Europe Convention Against Trafficking in Human Organs (the CoE Organ Trafficking Convention)<sup>44</sup> makes laudable provisions against organ trafficking in Europe. The Convention criminalises organ trafficking *simpliciter* without any necessarily connecting it to human trafficking or contextualising it with organ transplantation purposes. Thus, the Convention recognises that organ trafficking may be aimed at other purposes outside transplantation and does not have to be linked with human trafficking purposes.<sup>45</sup> It prohibits the organ harvesting and sale.<sup>46</sup> The convention criminalises all the dimensions of organ trafficking earlier discussed. It encourages State parties to criminalise illicit removal organs from living or deceased donors,<sup>47</sup> transportation, storage and preservation of harvested organs for transplantation or other use of such organs<sup>48</sup> and soliciting or recruitment donors as organ trafficking offences.

The requirement of financial gain or 'comparable advantage' is emphasized by the Convention as a form of organ trafficking offence which State parties should criminalise. The Convention recognises attempt and various forms of criminal liability such as aiding and abetting the commission of any of the prohibited acts.<sup>49</sup> The provision of the CoE Organ Trafficking Convention is complemented by earlier treaties such as the Council of Europe Convention on Human Rights and Biomedicine (Oviedo Convention 1999)<sup>50</sup> and the Additional Protocol to the Convention

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<sup>44</sup> 2014. Council of Europe Treaty Series No.216 The convention came into effect in 2018. It is the first international instrument with a more universally agreed upon definition of organ trafficking. Available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiJuJWS68X1AhUB8xQKHazADiAQFnoECCAQAQ&url=https%3A%2F%2Frm.coe.int%2F16806dca3a&usg=AOvVaw0nMgOqp3xcLIYTJvRZlb43>.

<sup>45</sup> Article 5 *ibid*.

<sup>46</sup> Articles 4 and 7 *ibid*.

<sup>47</sup> Article 4 *ibid*.

<sup>48</sup> Article 8 *ibid*.

<sup>49</sup> Article 9 *ibid*.

<sup>50</sup> entered into force in December 1999, is not only open for signature by the member States of the Council of Europe, but also the non-member States

on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin. The conventions are also important legal instruments on organ trafficking within the European continent.<sup>51</sup>

At the African regional level, there are no express legal provision on prohibition of organ trafficking as it obtains in the Council of Europe Convention. There are no express provisions on state co-operation in combating transnational dimension of organ trafficking.<sup>52</sup> This, in turn, affects data and information gathering on the actual dimensions of organ trafficking in the region. Sadly, Africa remains a lucrative red market with the States of the Sub-Saharan accounting for top source and transit countries for trafficked organs and northern States such as Egypt and Libya, notorious for organ trafficking. It would seem that legal prohibition on organ trafficking is left within the realm of international and domestic regulations on organ donation and transplantation of respective States. The main international regulations prohibit commodification of organs, provide ethical and legal principles on organ donation and transplant but they do not elicit binding legal obligations from States neither do they cater for the transnational dimensions of organ trafficking. Transnational organ trafficking is rife and keeps thriving due to weak laws and enforcement, poor or inexistent co-operation among states, porous borders and poverty.

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which have participated in its elaboration and by the European Community. Article 21, of the Oviedo Convention prohibits sale of human body.

<sup>51</sup> Article 22 of the additional protocol prohibits illicit trafficking in organs of human because such practices exploit vulnerable people and may undermine people's faith in the transplant system. The Charter of Fundamental Rights of the European Union, (2000/C 364/01) protects the dignity and integrity of human persons in Articles 1 and 3 and refers to the prohibition on making the human body and its parts as such a source of financial gain.

<sup>52</sup> Besides the provisions of Article 4 (2) (g) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa from which the prohibition on trafficking may be inferred, there is the African Union Commission Initiative 2010 and the Ouagadougou Action Plan to Combat Trafficking in Human Beings Especially Women and Children 2006, which focus human trafficking without specific reference to organ trafficking.

Africa hosts some of the intense internal armed conflicts around the globe and armed conflicts zones riddled by extreme poverty are top spots for recruiters/ agents of organ trafficking.

Overall, international legislation seems to focus on organ trafficking as a form of human trafficking and restricts its criminalisation in connection with human trafficking. This implies that the essential elements of the offence of trafficking in human persons for the purpose of organ removal will follow the pattern of concurrence of the three basic elements of human trafficking. The three basic elements require that there must be a prohibited act, the means of execution and the purpose of the act in order to ground a human trafficking offence. The absence of any of the three elements identified above would vitiate the existence of a human trafficking offence and might otherwise, constitute an attempt. These elements may, however, not be the same in the case of the crime of organ trafficking, when unconnected with human trafficking. Additionally, the absence of a comprehensive legislation on the emerging dimensions of organ trafficking undermines the efforts aimed at combating organ trafficking. The existing legal framework has not addressed important issues relating to criminal liability of illegal organ recipients, the role of health professionals in organ trafficking, state cooperation on organ trafficking, exchange of information and extradition and organ traceability systems.

#### **4.3 Domestic Legislation**

Nigeria is state party to the Palermo Protocol and has a domestic legislation against human trafficking, generally. The Human Trafficking in Persons Law Enforcement and Administration Act 2015 (Human Trafficking Act) criminalises human trafficking for the purpose of organ harvesting, without more.<sup>53</sup> The National Agency for the Prohibition of Trafficking in Persons (NAPTIP) is responsible for co-ordinating and enforcing all preventive, regulatory and investigatory measures against human trafficking and related offences which includes the offence of trafficking in

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<sup>53</sup> Secs. 20 of the Human Trafficking Act.

persons for the purpose of removing their organs.<sup>54</sup> A few sub-Saharan African countries have domestic legal provisions relating to legal organ donations and transplantation without specific legislation on organ trafficking.<sup>55</sup> Most countries, like Nigeria, do not have existing specific or comprehensive legislation on organ trafficking. While it is not the case that the existence of a legislation will comprehensively combat organ trafficking, suffice to state that, it is the starting point for controlling and preventing the rising cases of illegal trafficking in human organs. Nigeria relies on its Human Trafficking Act, the National Health Act and other criminal legislation in combating organ trafficking.<sup>56</sup> The National Health Act 2014 (NHA) governs organ donation and transplant in Nigeria. The Act provides a regulatory framework for the removal and use of human organs donated for transplantation.<sup>57</sup> The National Health Act prohibits the provision of organ transplant services except in a duly authorized hospital and with the written permission of the medical practitioner in charge of clinical services at that hospital.<sup>58</sup> Thus, only duly qualified and registered medical practitioners are authorized to render transplantation services.<sup>59</sup> The Act prohibits

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<sup>54</sup> Sec. 5 *ibid.* Sec. 6 of the Act empowers the NAPTIP with investigative and prosecuting powers necessary to discharge its functions effectively.

<sup>55</sup> The regulations on organ donation and transplantation range from written consent and ethical committee approval to standardisation of transplant facilities. André Loua et al reports that eleven African countries out of the WHO African region member states have a law prohibiting organ trafficking while nine countries have banned transplant commercialization and three countries forbid organ import and export. André Loua et al 'A review of Policies and Programmes for Human Organ and Tissue Donations and Transplantations, WHO African Region' (2020) 98 *Bull World Health Organ* 420. Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7265924/>,

<sup>56</sup> The provisions of Sec. 329 of the Criminal Code for instance, simply criminalises possession of human parts. Arguably, the provision is largely unrelated to organ trafficking, as the possession of human parts does not necessarily imply trade or illegal dealings and human parts present a wider scope than human organs. However, such criminal provisions may be remotely useful in prosecuting all forms of illegal dealing with the human body.

<sup>57</sup> secs. 47-57 *ibid.*

<sup>58</sup> Sec. 51 of the National Health Act.

<sup>59</sup> Sec. 52 *ibid.*

organ removal<sup>60</sup> and punishes any form of commercialization of human organs and import or export of human organs, thus, it is an offence punishable with fine, or imprisonment or both for a person who has donated a tissue or organ to receive any form of financial reward, except reimbursement for reasonable cost incurred by the donor in connection with the organ donation.<sup>61</sup> The Act punishes removal of human organs for other purposes besides transplantation.<sup>62</sup>

#### **4.3.1 Assessment of Domestic Legislation**

Nigeria has a robust law against human trafficking in compliance with international standards however, it may have underestimated organ trafficking as an emerging menace and organised crime in Nigeria. First, the Trafficking in Persons, Law Enforcement and Administration Act 2015 focuses on trafficking in person to the detriment of organ trafficking and subsumes it as a 'result crime' of human trafficking.<sup>63</sup> Hence, where the crime of organ trafficking is unrelated or unconnected with human trafficking, it may not be punishable under the Act.

The National Health Act 2014 (NHA) make a fair attempt at capturing a few dimensions of organ trafficking but leaves out a host of salient issues unaddressed. While criminalising some forms of organ trafficking, the NHA situates organ trafficking within the context of donation and transplantation which is not always the case. Trafficking may occur outside the context of organ transplantation, hence, delimiting the scope of criminalisation. The provisions of the NHA localises organ trafficking as a domestic crime and overlooks the transnational dimension of the crime. Organ trafficking seems to be thriving and on the rise with spates of reports flowing from missing organs in retrieved bodies of abducted or kidnapped victims and the precarious situation with the country's security.

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<sup>60</sup> Sec. 48 (2) and (3) *ibid.*

<sup>61</sup> Sec. 48 (3) and 53 of the National Health Act.

<sup>62</sup> Sec. 49 *ibid.*

<sup>63</sup> Result crimes are actions punishable by law as consequences resulting from an action or chains of action. For instance, murder is a result crime which punishes actions/omissions that result in the death of another.

In Nigeria, the law has not actively apprehended the dimensions of organ trafficking so as to harmonise existing provisions and effectively criminalise.<sup>64</sup> For instance, there is no provision for prohibitions on recruitment of victim donors or recipients of harvested organs organ solicitation and soliciting or receiving financial gains. The Act leaves much to be said about the status and identity of victims, the place of consent in the crime of organ trafficking, criminal culpability of recipients of harvested organs and the modes of liability in each case. The law leaves so much to assumption and inference within the existing legal framework on human trafficking. For instance, it will be presumed that NAPTIP takes on both investigative and prosecutorial roles as far as organ trafficking is concerned even though there is no express provision to this effect. There is nothing in the existing legal provisions on the traceability systems of organs to track illegally harvested organs or provisions on tracing and seizure of proceeds of organ trade.

## **5.0 RECOMMENDATIONS AND CONCLUSION**

Organ trafficking requires a holistic approach, combining both legal and social responses. At the regional level, there is need to expressly criminalise organ trafficking in all its dimensions by developing a comprehensive legal instrument that captures the dynamics of organ trafficking in Africa, without necessarily connecting it with human trafficking as a crime. The transnational dimension of organ trafficking requires cooperation and coordination of efforts among States against organ trafficking. Such cooperation must also focus on addressing international supply and demand, increasing awareness and taking measures to address the legally obtained organ shortage. To effectively combat transnational organ trafficking, it is important to boost the regional capacity through state cooperation and intercountry learning, Fostering states co-operation and exchange of information to combat transnational trafficking especially across sub-Saharan Africa

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<sup>64</sup> Although the Nigerian criminal law recognises that neither corpses nor their 'body parts' are capable of being stolen, organs can be harvested from can be done on decedent.



At the domestic level, Nigeria must prioritise public education on organ trafficking especially in red zones identified as hotspot for trafficking activities and network. It is presumed that the targeted population are not just rendered vulnerable because of poverty but also, ignorance may play a huge role in their vulnerability. A social approach which involves public education by creating awareness on the risks, both medical and legal, associated with organ trafficking especially targeting vulnerable populations through print and virtual media. This presents a more proactive stance against organ trafficking.

Also, there is an urgent need to strengthen legal and regulatory frameworks of organ donation and transplantation. The development and implementation of a comprehensive legal frameworks can contribute to mitigate the resort to black market by prospective recipient of human organ. It is arguable that the weak regulatory frameworks on organ donation and transplantation often make it easier for illegal trafficking to thrive. While organ trafficking should not be zoned out to organ donation and transplantation context, it is important to emphasize monitoring and oversight functions and bodies within the regulations of organ transplantation. Health facilities and transplant facilities which by the way are just a few in the country should be properly monitored to promote reportage on suspicious activities. Although, the NHA provides for the National Tertiary Health Institutions Standards Committee on standardisation of transplant facilities, there is nothing in the Act which suggests oversight and monitoring duties of the committee.

The United Nations Global Report on Trafficking in Persons (2018) states that the areas where human trafficking as a whole has decreased are countries that have adopted legislation, detailed action plans, and are dedicated to identifying victims and perpetrators of trafficking. Such legislation must clearly define the scope of organ trafficking and prioritise protection of vulnerable populations and preventing abuses of power. It is not enough to have a comprehensive legal provision, implementation and enforcement of the legal provisions are important to combating organ trafficking.

With the current legal position on criminalisation of organ trafficking, traffickers involved in organ trafficking may go scot-free in the face of inadequate legislation. Hence, it may be more rewarding to have a separate legal provision on organ trafficking to complement the provisions of the NHA or an amendment of the NHA to reflect the dynamics of organ trafficking and its extra-territorial elements. In addition to legislation, it is important to develop a national strategy for combating organ trafficking in the same fashion as human trafficking.

Whistleblowing policy on organ trafficking may provide a veritable means of tracking organ trafficking tides. The clandestine nature of the crime of organ trafficking may require whistleblowing to effectively address the dynamics of the crime. A comprehensive provision for anonymous whistleblowing on organ trafficking with adequate protection for whistleblowers may contribute significantly to exposing organ trafficking attempts and the networks involved in each circumstance. This will cater for the arguments that outright criminalisation may only drive the crime underground.