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VICTIMS OR COMPLICIT TRAFFICKERS? EXAMINING THE STATUS OF VICTIMS OF ORGAN TRAFFICKING IN NIGERIA

Deborah Damilola Adeyemo*

Abstract

Organ trafficking is one of the fast-booming offences with transnational dimensions. Often, organ trafficking is linked with human trafficking and punished along the same lines as the crime of trafficking in persons for the purpose of organ removal. Traffickers are often punished as the offenders while subjects of the harvested and trafficked organs are regarded as victims who are protected by the law rather than punished. However, with regard to the crime of organ trafficking, it is difficult to conceive some so-called victims of organ trafficking as victims without the tainted lens of complicity in the offence. With respect to victims, organ trafficking is largely touted as an offence driven by poverty and economic difficulty as against greed and sheer criminal tendencies. International legal provisions on organ trafficking do not exactly conceptualise a victim in the context of plain organ trafficking, state parties may exercise their discretion within their domestic legal context. This paper examines the subject of victims and the offence of organ trafficking in Nigeria. This paper adopts a purely doctrinal approach in examining the status of victims in organ trafficking. It makes use of data from primary sources from both domestic and international laws and secondary sources of data on organ trafficking in assessing the status of victims of organ trafficking. The paper argues that the recent cases of organ trafficking reveal that many victims are consenting perpetrators and drivers of organ trafficking rather than being innocent, vulnerable and exploited victims. The law ought not to shield those against whom it must wield its sword of correction and punishment. Hence, the status of victims in cases of organ trafficking should be reviewed differently from victims of trafficking in persons for the purpose of organ removal.

Keywords: crime, perpetrators, donor, transplant, commercialization

1. INTRODUCTION

The commercialization of human organs is prohibited with criminal and civil liabilities for offenders.¹ Nigeria is reportedly a source and destination country for organ trafficking as much as it is a transit route for

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¹ Besides Iran where there is an official regulation of organ trade, the commercialisation of human organ is prohibited globally. Secs. 48 -54 of the National Health Act 2014. Sec. 65 (3) of the Trafficking in Persons (Prohibition) Enforcement and Administration Act 2015.

the offence of organ trafficking.² Both trafficking in human persons for the purpose of organ removal and organ trafficking are clearly prohibited.³ Although, it is arguable whether the legal provisions are comprehensive enough. Thus, in Nigeria, organ trafficking is an offence punishable as a subset of human trafficking and outside the context of human trafficking. In both forms, the crime of organ trafficking involves a criminal network of traffickers and organ brokers who may range from health-care practitioners to local recruiters or agents who facilitate the recruitment, illegal harvest and commercialisation of human organs, whether locally or internationally.⁴ Under the international legal framework, the legal provisions relating to the criminalisation of organ trafficking, offer absolute protection to victims.⁵ Victims are considered vulnerable and often coerced, cajoled or exploited into the sale of their organ hence, they are protected by the law.⁶ Thus, the conceptualisation of victim of organ trafficking seems to admit persons who consent to have their organ trafficked even without the element of force, threat, deceit etc.⁷

² 'Nigeria source, transit, destination point for sex, human organ trafficking —EU ambassador' 3 April, 2019. Statement credited to the Head, European Union Delegation to Nigeria and ECOWAS, Ambassador Ketil Karlsen. Retrieved 12 October, 2023. Available at: https://www.eeas.europa.eu/node/60598_en.

³ Section 20 (1) of the Trafficking in Persons (Prohibition) Enforcement and Administration Act, 2015 punishes trafficking in persons for the purpose of Organ removal. However, Secs. 48 -54 of the National Health Act 2014 punish all forms of organ trade or commercialisation.

⁴ Directorate-General for External Policies- Policy Department. Trafficking in Human Organs. 2015. European Union Parliament. EP/EXPO/B/DROI/FWC/2013-08/Lot8/03 EN July 2015 -PE 549.055. 20-23. Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU\(2015\)_549055_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/549055/EXPO_STU(2015)_549055_EN.pdf). OSCE, Trafficking in Human Beings for the Purpose of Organ Removal in the OSCE Region. 2013. Occasional Paper Series No. 6. 6. Available at: <https://www.osce.org/files/f/documents/e/b/103393.pdf>.

⁵ Article 18 and 19 of the Council of Europe Convention against Trafficking in Human Organs 2015. Council of Europe Treaty Series No. 216. Available at: <https://rm.coe.int/16806dca3a#:~:text=In%20order%20to%20ensure%20effective,a%20specific%20follow%20Dup%20mechanism.&text=This%20Convention%20applies%20to%20the,removal%20and%20of%20illicit%20implantation>.

⁶ UNODC. 2015. Assessment Toolkit: Trafficking in Persons for the Purpose of Organ Removal. 41 Retrieved 12 August 2023. Available at https://www.unodc.org/documents/human-trafficking/2015/UNODC_Assessment_Toolkit_TIP_for_the_Purpose_of_Organ_Removal.pdf.

⁷ International legal provisions identify victims of trafficking in persons for the purpose of organ removal irrespective of the circumstances of the crime but the concept of a victim may not necessarily be clear from the existing legal provisions on organ

Although, the law offers protection to the victim and rightfully so, there is no specific definition of a victim in the context of organ trafficking. However, the emerging dimension of the crime of organ trafficking in some cases and contexts shows that victims are not as vulnerable or subjected to exploitation as the law presumes. While consent is irrelevant in human trafficking cases generally, within the context of organ donation and transplant, the basis for legal organ donation and transplant is the informed consent of the donor and this is one of the underlying principles which make up the element of the crime of organ trafficking.⁸ It is difficult to consider consenting donor victims within the context of the crime of organ trafficking as a party to be protected by the law. In the case of organ trafficking, consent should be relevant in determining the concept of a victim.

This paper interrogates the concept of victimhood in organ trafficking. It examines the two main contexts of organ trafficking and attempts to distinguish victims of trafficking for the purpose of organ removal from those of organ trafficking plainly. It argues that it is conceivable that there are situations where perceived victims of organ trafficking are complicit in organ trafficking as co-perpetrators rather than being vulnerable and exploited. The paper is divided into five parts. The first section provides the background to the paper. The second part examines the crime of organ trafficking by providing a brief historical perspective and distinguishing it from trafficking in persons for the purpose of organ removal. The section concludes with an overview of the legal framework for the crime of organ trafficking at the international and national levels. The third section presents a brief overview of the dimensions of organ trafficking in Nigeria. The fourth section examines the concept of a victim generally and assesses the status of victims of organ trafficking within the context of emerging dimensions of organ trafficking in Nigeria. The fifth and final section presents the concluding remarks of the paper and makes recommendations following the findings of the paper.

2. THE CRIME OF ORGAN TRAFFICKING

Globally, organ trafficking reportedly dates as far back as the 1980s when the first report was made on organ trade in the case of impoverished

trafficking. Victims of organ trafficking are often viewed with the same lenses as those of trafficking in persons for the purpose of organ removal.

⁸ This may have informed the basis for the distinction and specific criminalization of organ trafficking differently from trafficking in persons for the purpose of organ removal.

Indians who sold their kidneys to foreign patients in the Middle East.⁹ Although initially associated with trafficking in persons, organ trafficking is increasingly becoming a phenomenon on its own. However, because of the stealth nature of the crime, it is a far less common phenomenon in comparison to other forms of trafficking crimes.¹⁰ This may be due to the high medical skill involved in perpetrating the crime which may conceal the illegality involved. In effect, the crime is hugely under-reported.¹¹ Trafficking in organs is one of the abuses of transplant process which is driven by the acute shortage resulting from overwhelming demand over supply, globally.¹² However, there are other illegal drivers of organ trafficking which are totally unrelated to the acute shortage in legal supply.¹³ Trafficking in persons for the purpose of organ removal and organ trafficking are two similar but significantly different forms of organised crime. While both involve trafficking and target criminalising illegal organ removal, organ trafficking is a general term used to describe all forms of illegal activities targeted at the commercialisation of human organs, it may or may not involve the trafficking of the victim. In addition, the object of the crime in both cases is different. In the case of human trafficking for the purpose of organ removal, the object of the crime is the victim while the object of the crime in organ trafficking is the organ that is illicitly removed, maybe for transplantation or commercial purpose. Organ trafficking may occur in either local or international dimensions.

(a) The Legal Framework against Organ Trafficking

The Protocol to the United Nations Convention against Transnational Organised Crime¹⁴ criminalised organ trafficking as a subset of human trafficking however, organ trafficking is not always connected with human trafficking. Hence, the emergence of international legal provisions against organ trafficking, plainly. Initially, the legal framework against organ

⁹ Directorate-General for External Policies- Policy Department. Trafficking in Human Organs. 2015. *op. cit.* (n. 4)

¹⁰ Duguay, J., Hermon, B. and Smith, A. 2020. Trafficking in Human Organs: An Overview. Library of Parliament: Canada. 1.

¹¹ Inter-Agency Coordination Group Against Trafficking in Persons (ICAT). 2021. Trafficking in Person for the Purpose of Organ Removal. Issue Brief 11. 1.

¹² Duguay, J., Hermon, B. and Smith, A. 2020. *op. cit.* (n. 10). 4.

¹³ Ritual purposes, and other barbaric activities are some of the drivers of organ trafficking which are unrelated to acute shortage in supply.

¹⁴ United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children Supplementing the United Nations Convention against Organised Crimes (Palermo Protocol) adopted 15 November 2000 by UNGA Resolution 55/25, United Nations, Treaty Series, Vol. 2237, No.39574.

trafficking stemmed from the perspective of the regulatory framework for legal organ donation and transplant. However, a convention against organ trafficking emerged. This section makes specific reference to the legal provisions against organ trafficking without necessarily alluding to the provisions on trafficking in persons for the purpose of organ removal.

(i) *International Legal Instruments*

The World Health Organisation Guiding Principles on Human Cells, Tissue and Organ Transplantation¹⁵ and the Declaration of Istanbul on Organ Trafficking and Transplant Tourism¹⁶ established guidelines on ethical practice on organ transplant, encouraged the prohibition of the commercialisation of human organs and emphasized free donation without monetary value or payment.¹⁷ States have the discretion to determine modalities of prohibition against organ sale and sanctions within their jurisdictions. The Istanbul Declaration distinguished organ trafficking from trafficking in persons,¹⁸ for the purpose of organ removal. In addition, the United Nations General Assembly, at different times, adopted various resolutions on trafficking in persons for the purpose of organ removal and trafficking in human organs encouraging States to make provisions on criminalisation organ trafficking among other things.¹⁹

¹⁵ 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. The World Health Assembly (WHA) resolutions 57/18 on Human Organ and Tissue Transplantation complement the WHO Guiding Principles.

¹⁶ The Declaration of Istanbul on Organ Trafficking and Transplant Tourism of 2008 and The Declaration of Istanbul on Organ Trafficking and Transplant Tourism of 2018. The Declaration has two versions, the first version was in 2008 and the second version was developed in 2018. Both versions adopted a more comprehensive provision against organ trafficking than the WHO Guiding principles

¹⁷ Guiding Principle 5.

¹⁸ Adopted in 2015. 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&usq=AOvVaw0nMgOqp3xcLIYTJvRZlb43>.

¹⁹ The United Nations General Assembly has a number of resolutions on organ trafficking which encourage member states to criminalise organ trafficking. RES/75/195 of 16 December, 2020, 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/73/189 of 17 December 2018, entitled United Nations Resolution Strengthening and promoting effective measures and international

However, the foregoing legal provisions are largely exhortatory and elicit no binding obligations from state parties. The Council of Europe Convention against Trafficking in Human Organs (CoE Convention on Organ Trafficking) is the first legally binding regional treaty against organ trafficking solely, with an ‘international’ outlook.²⁰ The Convention makes comprehensive provisions against organ trafficking. It provides for the criminalisation of certain activities which amount to organ trafficking as criminal offences, the protection of the rights of victims of the offences created in the Convention and encourages States’ cooperation in combatting organ trafficking.

The Council of Europe Convention Against Trafficking in Human Organs describes organ trafficking more comprehensively as a ‘range of illicit practices associated with the removal of organs from living or deceased donors.’²¹ From the Convention’s definition, the illegal activities could include organ removal or harvesting for financial gain or comparable advantage;²² implantation or any other use of illicitly removed organs;²³ illegal solicitation or recruitment of organ donors or recipients;²⁴ offering or requesting for undue advantages to or by healthcare professionals or officials in order to perform or facilitate illegal organ removal or implantation or for other use²⁵ advertisement or availability of organ for

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’, 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’ and RES/59/156 of 20 December 2004, entitled ‘Preventing, combating and punishing trafficking in human organs’.

²⁰ Earlier treaties such as the Council of Europe Convention on Human Rights and Biomedicine (Oviedo Convention) 1999 and the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin are earlier treaties which make important provisions on organ trafficking within the European continent. Article 21, of the Oviedo Convention prohibits the sale of the human body generally. 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.

²¹ Article 4.

²² Article 4 (1).

²³ Article 5.

²⁴ Article 7 (1).

²⁵ Article 7 (2) and (3).

financial or comparable gain²⁶ and; preparation, preservation, storage, transportation, transfer, receipt, import or export of illicitly removed organ.²⁷ The Convention underscores the element of free, informed and specific consent in the crime of organ trafficking.²⁸ It also recognises the aiding or abetting the commission of the any of the illegal practices as organ trafficking.²⁹

Trafficking in Person for the purpose of organ removal is described as the recruitment, transportation, transfer, harbouring or receipt of persons through threat or use of force or other forms of coercion, or abduction, fraud, deception, or the abuse of power or of a position of vulnerability or of the giving or receiving of payments of benefits to achieve the consent of a person having control over another person for the purpose of exploitation through removal of organs.³⁰

It is clear from the description of both organ trafficking and trafficking for the purpose of organ removal are two distinct though similar terms which are often used interchangeably to imply the same crime. Organ trafficking for the purpose of organ removal is necessarily connected and committed in the context of human trafficking. Organ trafficking need not be committed in the context of human trafficking. The elements and requirements of both crimes are clearly different and evident from the legal provisions which prohibit them.

From the definition of the CoE Convention on Organ Trafficking, the elements of the crime of organ trafficking include:

1. The Act: This refers to any of the illegal activities which constitute organ trafficking such as organ removal, illegal implantation, illegal solicitation/recruitment etc.
2. Lack of free, informed and specific consent of the victim
3. Financial gain or comparable advantage
4. Living or deceased person.

²⁶ Article 21 (3).

²⁷ Article 8.

²⁸ Article 4 (1) (a).

²⁹ Article 9.

³⁰ Article 3 (a) of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children Supplementing the United Nations Convention against Organised Crimes (Palermo Protocol) adopted 15 November 2000 by UNGA Resolution 55/25, United Nations, Treaty Series, Vol. 2237, No.39574.

5. Illegally removed/harvested organ

All the elements must be established concurrently to ground a conviction for the crime of organ trafficking. The perpetrators of organ trafficking could be criminally liable principally or as aiders or abettors.

Conversely, trafficking in persons for the purpose of organ removal has three basic elements namely:

1. The Act: This element describes the physical act that is prohibited. This could include any of the illegal activities that are aimed at trafficking such as recruitment, transportation, transfer etc.
2. The Means: The element defines and underscores the means of attainment of the illegal activities which constitute trafficking. This could involve the use of force, threat, coercion, abduction, fraud etc. to obtain the victim's consent.
3. The Purpose: The element underscores the rationale behind the 'Act' or the aim of the 'Act'. This could include exploitation such as organ removal.
4. A living or deceased person

Hence, in order to establish the crime of trafficking in persons for the purpose of organ removal, the concurrence of the three elements above must be established by the Prosecution. It is not required that the actual organ removal had taken place, it is sufficient where the 'Act' and 'Means' are established in the context of the 'Purpose', i.e., for the purpose of exploiting the victim through organ removal.³¹ In respect of the offence of trafficking in Persons for the purpose of organ removal, where the victim is a minor, it not necessary to establish the 'Means' to ground conviction of the perpetrator. The United Nations Protocol stipulates clearly that the requirement of consent of the victim is irrelevant in establishing the crime of trafficking in persons for the purpose of organ removal.³² Thus, it does not matter where the victim consented to the exploitation by the perpetrator willingly or not, neither can the perpetrator raise the consent of the victim as a defence to criminal liability. It is also irrelevant if the

³¹ United Nations Office on Drugs and Crime. 2022. Toolkit in the Investigation and Prosecution of Trafficking in Persons for the Purpose of Organ Removal. 10. Available at: https://www.unodc.org/res/human-trafficking/glo-act2/tip-for-or-toolkit/Module_1.pdf.

³² Article 3 of the United Nations Protocol.

victim had received some sort of payment or financial gain/ advantage to facilitate the exploitation.³³

(ii) *Domestic Legislation against Organ Trafficking*

As a State party to the Palermo Protocol, Nigeria has domestic legislation against human trafficking, generally. The Trafficking in Persons (Prohibition) Enforcement and Administration Act, 2015 (Human Trafficking Act) criminalised human trafficking for the purpose of organ harvesting, without more.³⁴ The Act provides that

any person who through force, deception, threat, debt bondage, or any form of coercion abuses a position of power or situation of dominance or authority arising from a given circumstance; or abuses a vulnerable situation; or through the giving or receiving of payments or benefits to induce or obtain the consent of a person directly or through another person who has control over him; enlists, transports, delivers, accommodates, or takes in another person for removing the person's organs, commits an offence and is liable on conviction to imprisonment for a term of not less than 7 years and a fine of not less than N5, 000,000.00.³⁵

The Act punishes anyone who assists another in the removal of human organs or in buying and selling of human organs.³⁶ Also, a person who enlists, transports, delivers, accommodates, or takes in another person under the age of 18 years to remove the person's organs, 'commits an offence and is liable on conviction to imprisonment for a term of not less than 7 years and a fine of not less than five million naira (N5,000,000.00).³⁷ The Act established the National Agency for the Prohibition of Trafficking in Persons (NAPTIP).³⁸ The agency is responsible for coordinating and enforcing all preventive, regulatory and investigatory measures against human trafficking and related offences

³³ Article 3 (b) of the UN Protocol.

³⁴ Secs. 20 of the Human Trafficking Act.

³⁵ Sec. 20 (1) of the Human Trafficking Act.

³⁶ Sec. 20 (2).

³⁷ Sec. 20 (3).

³⁸ Sec. 2. NAPTIP was originally established by the National Agency for the Prohibition of Trafficking in Persons Act, 2003, NAPTIP Act.

which includes the offence of trafficking in persons for the purpose of removing their organs.³⁹

The National Health Act 2014 (NHA) is a federal legislation which governs organ donation and transplant in Nigeria. The Act provides a regulatory framework for the donation and transplantation of human organs.⁴⁰ The National Health Act prohibits rendering 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.⁴¹ By the provisions of the Act, only duly qualified and registered medical practitioners are authorized to render transplantation services.⁴² The provisions of the Act covers both living and deceased donors.⁴³ The Act criminalizes organ removal,⁴⁴ and punishes any form of commercialization of human organs.⁴⁵ The Act also punishes the donation of organs for financial reward, except for reimbursement for reasonable cost incurred by the donor in connection with the organ donation.⁴⁶ The Act punishes the removal of human organs for other purposes besides transplantation.⁴⁷ The offences relating to organ trafficking in the Act are punishable with fine or imprisonment or both. Although it expressly mentions tissue, however, the interpretation section expressly states that the expression includes human organs. The Act extends its provisions to cover human tissues and cells and not just organs.⁴⁸ Notwithstanding the absence of the term ‘organ trafficking’ or its definition in the National Health Act 2014, the combined provisions of Sections 48 and 51 of the National Health Act 2014 criminalise organ trafficking by prohibiting removal without informed consent of the person.

The Human Trafficking Act and the National Health Act are the principal legislation against organ trafficking in Nigeria. Clearly, though, Nigeria may make references to other criminal legislation in combating organ

³⁹ Sec. 5 *ibid.* Sec. 6 of the Act empowers the NAPTIP with investigative and prosecuting powers necessary to discharge its functions effectively.

⁴⁰ Secs. 47-57 *ibid.*

⁴¹ Sec. 51 of the National Health Act.

⁴² Sec. 52, *ibid.*

⁴³ Secs. 48, 49, 51 and 55 of the National Health Act.

⁴⁴ Sec. 48 (2) and (3) and 51 *ibid.*

⁴⁵ Sec. 53, *ibid.*

⁴⁶ Sec. 48 (3) and 53 of the National Health Act.

⁴⁷ Sec. 49, *ibid.*

⁴⁸ Sec. 64.

trafficking.⁴⁹ It is however arguable whether the laws provide a comprehensive legal framework against organ trafficking in Nigeria in the light of the scope and emerging dimensions of organ trafficking.

3. EMERGING DIMENSIONS OF ORGAN TRAFFICKING IN NIGERIA

Organ trafficking has both international and domestic dimensions. Both dimensions involve a network of criminals which may include both natural and corporate persons.⁵⁰ Organ trafficking may be 'consensual' or non-consensual.⁵¹ It is consensual when both parties fully consented to the illegal organ removal and receipt of financial or comparable advantage in return. This is regardless of how the consent was obtained from the victim donor. In the other instance of non-consensual organ trafficking, this could involve illegal harvesting of the organ of another forcefully which may involve the use of violence. In Nigeria, organ trafficking operates within and outside the context of organ donation and transplant. The internal dimension of organ trafficking reveals that there is a booming market for illegal organ trade in Nigeria.⁵² Reports are rife on kidnapping and abduction of people whose organ were harvested and sometimes killed in the process.⁵³ Ritual killing is also one of the ways organs are illegally

⁴⁹ The provisions of Sec. 329 of the Criminal Code for instance, simply criminalise 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.

⁵⁰ The criminal network involves organ traffickers and brokers, Transplant facilities, medical professionals etc.

⁵¹ Adeyemo, D. D. 'Organ Trafficking: An Emerging Dimension of illegal Trafficking in Nigeria and across Sub-Saharan Africa' (2022) 7 *University of Port Harcourt Journal of Private Law* 206 at 212.

⁵² Akin Irede, 'Parts for Sale Nigeria: Kidneys sell for \$10,000 as organ trafficking booms' *The Africa Report*, July 2022. Available at: <https://www.theafricareport.com/220690/nigeria-kidneys-sell-for-10000-as-organ-trafficking-booms/>.

⁵³ Dennis Naku. Three nabbed in alleged murder, organ harvesting in Rivers. *Punch*, 18 September, 2023. Available at: https://punchng.com/three-nabbed-for-alleged-murder-organ-harvesting-in-rivers/?utm_source=auto-read-also&utm_medium=web.

harvested in Nigeria.⁵⁴ However, a fast-emerging dimension is illegal organ trade in seemingly unsuspecting ways.⁵⁵

A report revealed that in 2020, a popular conventional market in Lagos State where traders deal in legitimate items also held illegal organ trade.⁵⁶ An illegally harvested kidney is reportedly sold between ₦750, 000 and ₦1, 000, 000 depending on the bargaining power of the donor victim/trader. While 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 implications of the illegal trade. Victims of the illegal procedure then launder proceeds of the illegal trade and plough them into their legitimate businesses. Reports also show that some women, especially university undergraduates, also engage in the sale of their eggs. The women are administered drugs which hyper-stimulate their ovaries and they have their eggs extracted for sale.⁵⁷ The dimension of organ trade involves local diagnostic health facilities, a network of local and international brokers and organ transplant tourism by the victim donor. Victims in these cases 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. It was also reported that criminal networks of young men formerly involved in fraud and cybercrimes are beginning to branch into organ trade because they assume it is more rewarding to trade their organs in return for foreign currency such as the US dollars. They find it a safer means of making money compared to

⁵⁴ Percy Onyejekwe, 'Organ Harvesting: Six Arrested in Anambra State' Independent, 16 February, 2023. Available at: <https://independent.ng/organ-harvesting-six-arrested-in-anambra/>; and Temi Iwalaiye 'The Booming Business of Organ Harvesting, Trafficking in Nigeria' Business Insider Africa., 13 August 2023. Available at: <https://africa.businessinsider.com/local/markets/the-booming-business-of-organ-harvesting-trafficking-in-nigeria/gnp23g1>.

⁵⁵ Lara Adejoro, 'Illegal Organ Harvesting. Thriving Business in Nigeria' Punch. 29 March 2023. Available at: <https://punchng.com/illegal-organ-harvesting-thriving-business-in-nigeria-nephrologist/>.

⁵⁶ Unini Chioma. Organ Harvesting Industry Booms in Lagos as Probe Deepens. 26 June, 2022. The Nigerian Lawyer. Retrieved 20 August, 2023 from <https://thenigeria.com/organ-harvesting-industry-booms-in-lagos-as-probe-deepens/>.

⁵⁷ Editorial. Trafficking in Human Organs. 27 September, 2023. ThisDay Newspaper. Retrieved 30 September, 2023 from <https://www.thisdaylive.com/index.php/2023/09/27/trafficking-in-human-organs>. Chilling Human Trafficking Tales: How Organ Hunters Harvest, Sells Heart and Human Eggs' Vanguard Newspaper 16 June, 2019. Retrieved 30 September, 2023 from <https://www.vanguardngr.com/2019/06/chilling-human-trafficking-tales-how-organ-hunters-harvest-sell-hearts-human-eggs1/>.

cybercrime or financial crimes which could earn them jail terms. Similar pattern of organ trafficking is also reported in Internally Displaced Persons (IDP) Camps across the country.⁵⁸ It is also reported that people often walk into health care facilities to indicate their willingness to donate an organ, e.g., a kidney for a fee.⁵⁹ Although, such persons are discouraged by the health professionals in the facility, it is not improbable that such persons may eventually venture into illegal organ trade despite the dissuasion.

The dimensions of organ trafficking reveal that there are unfortunate victims whose organs are illegally harvested, some without their knowledge and under the guise of a legitimate medical procedure.⁶⁰ On the other hand, reports also show persons who willingly offer to trade their organs in return for financial gain. Poverty, economic pressures and the demands of survival are often identified as the rationale behind the choice to venture into organ trafficking on the part of the 'victim/donor'. The emerging cases have however shown that this may not always be the case. Victims could be driven by sheer greed or extreme frustration. In the face of the likely consequences such as medical complications and eventual death, protecting such categories of 'donors' as victims appears contrary to the aim to combat organ trafficking. While there are clear-cut cases of victims whose organs are illegally harvested, there are others whose decision to have their organs harvested was well-informed and driven by nothing but greed. There should be a clear distinction between these two categories in the conceptualisation of victims of organ trafficking. The clear distinction between organ trafficking and trafficking in persons for the purpose of organ removal may create the need to revisit the conceptualisation of victimhood under the two forms of criminality. Trafficking in persons for the purpose of organ removal and organ trafficking are often confused in public debate and are frequently used interchangeably by the media and within the medical community. These, however, are two distinct crimes, which are governed by separate but complementary legal frameworks.

⁵⁸ Akin Irede, Parts for Sale Nigeria: Kidneys sell for \$10,000 as organ trafficking booms. *op. cit.* (n. 52).

⁵⁹ Lara Adejoro, Illegal Organ Harvesting. *Ibid* (n. 55).

⁶⁰ Two more doctors nabbed in Plateau over organ harvesting. 20 September, 2023. Punch Newspaper Retrieved 30 September, 2023 from https://punchng.com/two-more-doctors-nabbed-in-plateau-over-organ-harvesting/?utm_source=auto-read-also&utm_medium=web.

4. RE-ASSESSING THE STATUS OF THE VICTIM IN ORGAN TRAFFICKING

(a) The Concept of a Victim in Criminal Law

Generally, a victim of crime is defined as an individual or group of persons who have suffered some form of harm occasioned by the violation of criminal laws.⁶¹ Such harm could be physical, emotional, mental, economic or could constitute an impairment of their fundamental human rights. Victims could be direct in the case of the actual recipient of the harm or indirect in the case of the dependent or immediate family member of the direct victim.⁶² However, there may be a fundamental flaw with the conceptualisation of victims of crime in the context of harm only. There are crimes which are regarded as ‘obviously harmless’ to no specific person in particular or inflict no harm on any recipient directly. For instance, in the case of ‘moral crimes’ such as possession of narcotic drugs and harmful substances or prostitution etc., where no specific harm can have been identified, it may be difficult to conceptualise who a victim is. Additionally, such crimes are regarded as ‘victimless’ because they do not necessarily harm anyone directly. Thus, a more concrete definition of a victim of crime could include cases where harm is not suffered by the recipient whether directly or indirectly. In the Nigerian Criminal Law, there is no general definition of a victim of crime. Victims of crime are defined by the context of the legal provisions regarding specific crimes.⁶³

(b) Victims of organ trafficking

The principal legislation on organ trafficking do not define who a victim is with respect to organ trafficking neither does the CoE Convention against Organ Trafficking offer any definition of a victim.⁶⁴ Impliedly however, victims of organ trafficking are persons who have been made

⁶¹ Paragraph 8 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by United Nations General Assembly resolution 40/34 of 29 November 1985. Subsequently referred to as the Declaration in this paper.

⁶² The Declaration recognises persons who suffered harm in the process of intervening to assist a victim or prevent further violation to a direct victim as an indirect victim. Paragraphs 1 and 2 of the Declaration.

⁶³ Adeyemo, D. D. 2021. Recognising Victims’ Rights in Nigeria and the Nigerian Criminal Justice System. *International Journal of Comparative Law and Legal Philosophy* Vol. 3 No. 3: 64 -72, 66.

⁶⁴ There is no mention of the term victim in the National Health Act however, there are references to the word victim in the Human Trafficking Act. The Human Trafficking Act identifies a victim as a ‘trafficked person’ in section 82 without more.

subject of organ removal or any of the illegal activities regarded as organ trafficking. It is impracticable to extend the meaning of victims in the context of organ trafficking to include indirect victims. Victims in this context would include both living and deceased persons whose organs have been illegally removed.

(c) **Categories of Victims**

(i) *Living Persons*

These are reportedly mostly males in their youth or middle age. Victims are often recruited through the exploitation of their vulnerability in terms of financial incapability or ignorance.⁶⁵ Generally, victims of organ trafficking are reportedly between the ages of 20-40 years.⁶⁶ There are reported cases where male spouses obliged their female spouses to have their organs harvested on the contention that they are 'breadwinners'.⁶⁷ Living victims also include vulnerable groups such as IDPs, Albinos, persons who lack the capacity to give informed consent such as mentally unstable persons, minors etc. Generally, organ removal from minors is prohibited.⁶⁸ Undocumented migrants, refugees, detainees and/or people living in hardship or extreme poverty are often target victims of organ trafficking.⁶⁹ For instance, it has been reported that illegal migrants from Sub-Saharan countries like Egypt and Libya to Europe resort to trafficking their organs to offset bills for their journey.⁷⁰ Also, armed conflicts zones and areas riddled by extreme poverty are top spots for recruiters/ agents of organ trafficking hence, victims are protected by law.⁷¹ Minors do not have the legal capacity to provide the requisite consent for organ donation, hence any form of organ removal or harvesting from minors is clearly illegal irrespective of the context of the consent.⁷² In the Nigerian context

⁶⁵ UNODC. 2015. Assessment Toolkit: Trafficking in Persons for the Purpose of Organ Removal. 43 *op. cit.* (n. 6).

⁶⁶ UNODC. 2015. Assessment Toolkit: Trafficking in Persons for the Purpose of Organ Removal. *ibid.* 41.

⁶⁷ Inter-Agency Coordination Group Against Trafficking in Persons (ICAT). 2021. *op. cit.* (n. 11).

⁶⁸ Some domestic legislation recognise cases of exception where it is in the best interest of the minor such as medical or therapeutic reasons. However, within the context of organ donation, such exceptions do not hold.

⁶⁹ UNODC. 2015. Assessment Toolkit *op. cit.* (n. 6) 41.

⁷⁰ Directorate-General for External Policies- Policy Department. Trafficking in Human Organs. 2015. *op. cit.* (n. 4)

⁷¹ *Ibid.*

⁷² Sec. 48 (2) (a) of the National Health Act, 2014.

generally, a minor is a person below the age of eighteen (18) years.⁷³ Although the National Health Act expressly mentions 18 years, the National Health Authority operate with the age of 21 years. Thus, it appears conflicting which of the ages to reckon with.

(ii) *Deceased Persons*

Living persons whose organs are harvested through violence which may lead to their death may be categorised under this heading. Also, since the law recognises deceased organ donors,⁷⁴ such types of donors could also become victims if their organs are illegally removed. A person while alive may express his wish to donate their organs when dead. Alternatively, in the absence of such wish by the deceased, the organs of dead persons may be donated via approval by the deceased's relatives or family. Thus, these kinds of donors could become victims of organ trafficking where ethical considerations are violated.

(d) **Legal Provisions on the Rights of Victims of Organ Trafficking**

Victims of organ trafficking are fully protected by the law and accorded certain rights with respect to their position. It is however questionable whether victims can easily access the rights and enjoy the protection the law affords them in Nigeria. The Human Trafficking Act provides an array of rights for victims of trafficking generally and these rights apply to the victims of organ trafficking since the National Health Act makes no similar provisions.⁷⁵ First, the principle of non-punishment provides that victims should not be subject to arrest, charge, detention, prosecution, or be penalized or otherwise punished for illegal conduct that they committed as a direct consequence of being trafficked. In contrast, they should be protected and given support services.⁷⁶

Victims are protected from discrimination,⁷⁷ provide for their access to adequate health and other social services.⁷⁸ Victims have a right to

⁷³ Sec. 29 (4) of the Constitution of the Federal Republic of Nigeria sets the age of full capacity at eighteen, hence any person below the age of eighteen is considered a minor generally. Further, sec. 277 of the Child's Rights Act 2003 sets the age of a child in the same manner as the Constitution.

⁷⁴ Sec. 55 of the National Health Act, 2014.

⁷⁵ Sec. 61 of the Human Trafficking Act.

⁷⁶ Sec. 51, *ibid.*

⁷⁷ Sec.61 (1) (a).

⁷⁸ Sec.61 (1) (b).

rehabilitation Their identity must be protected, and their personal history of trafficking must not be used to discriminate or cause harm to such them, their family or friends. The protection is extended to the relatives and family members of the victims. The victim and their family must be protected from intimidation, threats, and reprisals from traffickers and their associates including reprisals from persons in a position of authority. Victims also have the right to privacy during the investigation and evidence gathering in the trafficking case. In the process of investigation and evidence gathering, intrusion into the personal history of the victim must be minimised as much as practicable. In the course of legal proceedings in a trafficking case, victims have the right to relevant information on the court proceedings. They also have the right to counselling and information on their rights and legal assistance to enable them to present their views and concerns in court. Victims have the right to compensation and restitution. While the right to compensation may apply to victims of organ trafficking, it is doubtful if the right to restitution applies to them except, they can receive the organ and be restored to status *quo ante*. With respect to victims of trafficking in persons for the purpose of organ removal, they have the right to access the country's embassy or consulate, and where there is none, have access to a diplomatic representative of the country; the right to ensure their safe return home and the right to temporary residence visa during the pendency of the trafficking case.

(e) The Requirement of Consent in Legal Organ Donation and Transplant

The requirement of valid consent in legal organ donation and transplant is fundamental and in fact, the basis of illegal organ removal. While it is irrelevant in prosecuting trafficking in persons for the purpose of organ removal, the case is different for the crime of organ trafficking. The requirement of absence of informed, voluntary, explicit and specific consent is one of the vital elements that must be proven in establishing the crime of organ trafficking. While the requirement operates together with other requirements to ground the offence of organ trafficking, the fact that the 'victim' consented does not negate the crime provided other elements are present. In international legal instruments, the requirement of valid consent is qualified by the expressions; 'informed', 'voluntary', 'explicit' and 'specific'.⁷⁹ These expressions validate consent. However, the

⁷⁹ Principle 3 of the World Health Organisation (WHO) Guiding Principles.

National Health Act only makes use of the term ‘informed consent’.⁸⁰ The other qualifications of consent are presumed into the domestic provision. The National Health Act does not define what informed consent means, however, consent generally refers to the agreement of a legal organ donor to donate their organ to another person. A valid consent must fulfil the criteria of being ‘informed’, ‘voluntary’, ‘explicit’ and ‘specific’.

First, consent must be provided after the donor must have been given adequate and objective information by a healthcare professional on the purpose and nature of the donation. The information must be detailed and relayed in the language that the donor understands. The donor must have been given time to consider and weigh the information given. Second, the donor must give the consent voluntarily free from any form of coercion, or undue influence. Third, the consent must be express, specific and refer to a particular organ. The consent may be given in writing or orally before a recognised authority as prescribed by the law. Hence, the consent of the donor is not in doubt. The process of obtaining informed consent is multi-layered and marked by processes to ensure that the donor has the capacity to understand the procedure.⁸¹ In addition, the donor must be capable of giving consent. Under national law, capacity is measured in terms of the provision on maturity and ability to properly understand and assess the information based on the evaluation by the requisite authority.⁸² In the case of deceased victims, the consent must have been provided before their death or via their family members. However, donations by deceased persons are not as regulated as living donations.

It is indisputable that the capacity of a donor to give valid consent may be vitiated by such factors as the level of education and literacy of the victim, socio-economic status, physical or mental disabilities etc. However, in the cases of illegal organ removal, subjects of the illegal procedures may be fully informed but in fact, be the solicitors for organ removal in exchange for financial gain. From the recent dimensions of organ trafficking in Nigeria, it is conceivable that there may be cases where consent is well-informed and the organ is illegally removed for a purpose other than therapeutic purpose or legal organ donation and transplant. In such cases of organ trafficking, it is difficult to consider such fully consenting

⁸⁰ Sec. 48 (1) (a).

⁸¹ United Nations Office on Drugs and Crime, 2022, Toolkit in the Investigation and Prosecution of Trafficking in Persons for the Purpose of Organ Removal. *op. cit.* (n. 31). 6.

⁸² *Ibid.* 7.

subjects of the illegal organ removal as victims. They would rather, appear, as co-perpetrators complicit in the process of illegal organ removal. Additionally, such consenting victims would negate one of the vital elements of the crime of organ trafficking.

The legal principle of *volenti non-fit injuria*⁸³ creates a case of voluntary assumption of risk. Persons who despite of their knowledge of the risk and dangers of illegal organ removal, choose to participate in the process as the subject should not expect to be regarded as victims of a crime, they wilfully and knowingly participated in without force or deception. Otherwise, it would seem that the law is wielded as a two-edged sword with double standards. Clearly, such persons should not be regarded as victims in the first place or accorded any legal protection befitting for victims. Where the law offers protection to subjects of illegal organ removal without regard to their valid consent in the process, it detracts from the deterrence aim of the law. Validly consenting subjects of illegal organ removal should be regarded as co-perpetrators and punished along the same lines as organ traffickers. Such cases should be distinguished from cases of consent obtained via coercion, threat, deception or fraud as such would invalidate the consent. Persons driven by greed, avarice and sheer desire to acquire financial freedom by any means should not be treated as victims or protected where they validly consented to illegal organ trade as subjects. Their level of criminal liability may be lower than the major perpetrators such as the organ brokers and complicit health professionals and facilities usually involved in organ trafficking. Hence the concept of victims of human trafficking for the purpose of organ removal should be significantly different from cases of organ trafficking plainly. In the absence of a clear definition of a victim of organ trafficking by the National Health Act, the definition provided by the Human Trafficking Act should not applied without clear qualification applicable to organ trafficking cases.

Although there is no decided case on organ trafficking in Nigeria yet, the case of *R v. Obinna Obeta, Ike Ekweremadu and Beatrice Ekweremadu*⁸⁴ is instructive on the dimensions of the crime of organ trafficking. The case

⁸³ A Latin expression which roughly translates, 'voluntarily suffered, injury is not fit for action' meaning that a person who willingly consents to the injury cannot recover for any resulting injury.

⁸⁴ (2023). Sentencing Remarks of Mr Justice Johnson Central Criminal Court 5 May, 2023. Retrieved 10 August, 2023 from <https://www.judiciary.uk/wp-content/uploads/2023/05/R-v-Obeta-and-others-sentencing-remarks.pdf>.

is a case of organ transplant tourism and human trafficking for the purpose of organ removal which is clearly different from organ trafficking plainly. The victim was trafficked to London in the United Kingdom for the purpose of the removal of his kidney in return for financial reward and employment offer in the United Kingdom. One of the defendants, Mr Ike Ekweremadu is a high-profile Nigerian politician who conspired together with his wife and the first defendant, Mr Obinna Obeta. The three defendants were convicted and sentenced for conspiracy to commit the offence of human trafficking. While the vulnerable position of the victim in the case was exploited by the defendants, the case could have been a case of negotiations on illegal organ removal and transplant gone wrong. The facts of the case revealed that Mr Obinna had benefitted from an organ transplant via a similar process and was contacted in the case to help broker a 'donor' for the other two defendants' daughter who needed a kidney urgently.

5. CONCLUSION

Victims of organ trafficking are undoubtedly vulnerable and should be protected by the law. However, perpetrators are not and should not be protected by the law under the guise of being victims. The concept of victims of organ trafficking should be clearly defined by law. Emerging dimensions of organ trafficking show the likelihood of persons who are erroneously labelled victims but who themselves, are the solicitors for illegal organ removal in return for financial or similar material benefits. These individuals are young men driven by sheer greed and avarice. While it is true that extremely difficult economic situations in the country might have driven them into such illegal ventures, it is no defence to their culpability for organ trafficking. If they are not liable as co-perpetrators, they could be liable as aiders and abettors but certainly, they should not be regarded as victims deserving of legal protection. Persons who provide fully informed consent to the process of illegal removal of their organs should not be afforded any protection by the law. Otherwise, the criminal justice approach to combatting organ trafficking will keep losing the battle against organ trafficking. Largely, organ trafficking cases may be one of the difficult cases of trafficking to prosecute because of the covert nature of the crime and the involvement of medical health professionals. It would become increasingly difficult to combat organ trafficking via the criminal justice system where perpetrators are shielded as victims. Thus, this study recommends that there should be a comprehensive legal provision in Nigeria which clearly defines a victim in the context of organ trafficking.

While the context of each case would be defined on a case-by-case, basis, it is important that the law is clear on who a victim is. It is not the case that the existence of legislation will comprehensively combat organ trafficking, suffice it to state that, it is the starting point for controlling and preventing the rising cases of illegal organ trafficking.