

ABUAD Law Journal (ALJ)

Vol. 10, No. 1, 2022, Pages 59-79 <https://doi.org/10.53982/alj.2022.1001.04-j>

Published by College of Law, Afe Babalola University Law Journal,
College of Law, Afe Babalola University, Km 8.5, Afe Babalola Way,
P.M.B. 5454, Ado Ekiti, Ekiti State, Nigeria ISSN: 2971-7027
www.abuad.edu.ng, abuadlawjournal@abuad.edu.ng

Reappraising Effective Regulation in Preventing Human Organs Trafficking in Africa: Kenya and Nigeria in Perspective

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Abstract

Over the years, the issue of illegal human organ harvesting and trafficking has been an international concern. There have been so many stories of victims being promised better opportunities overseas but ended up being untraceable all over the world. The news that most of these people seeking greener pastures abroad must have fallen victim to the illegal international human harvesting and trafficking syndicates is quite alarming. The government of the countries, especially African countries are helpless in the wake of these happenings, they could only advise their citizens to be wary of the “too sweet to be true” job opportunities abroad and a better life abroad. United Nations' concern on this issue brought about the resolution adopted by the General Assembly at its 73rd session held on 17 December 2018 on strengthening and promoting effective measures and international cooperation on organ donation and transplantation to prevent and combat trafficking in persons for organ removal and trafficking in human organs. This article examines the law relating to organ harvesting and trafficking in Nigeria and Kenya putting into consideration the United Nations resolution. The article observes that Nigeria with its Trafficking in Person (Prohibition) Law Enforcement and Administration Act 2015 and Kenya with the Counter-Trafficking In Persons Act No. 8 of 2010 are yet to adopt the United Nations General Assembly resolution on strengthening and promoting effective measures and international cooperation on organ donation and transplantation to prevent and combat trafficking in persons for organ removal and trafficking in human organs. The article recommends total conformity with the UN resolution.

Keywords: Effective Regulation – Human Trafficking – Human Organ – Trafficking

1. Introduction

Human Trafficking is a predominant occurrence that affects the health, social, and psychology of victims while the economic effect it has on a country or state cannot be underestimated. Human organ trafficking, harvesting, and transplantation is a global phenomenon that is reoccurring in the international domain most especially in Africa.¹ The reason for this is not far-fetched from the increasing poverty and economic regression of these African countries thereby making victims of human organ trafficking and harvesting embrace the offer to travel abroad with all-expense paid and a better life. Other reasons for increasing organ trafficking, harvesting, and transplantation are the lack of legislation, enforcement of medical ethics, and exploitation of the desperate need of the patient and prospective donor/victim.² In some countries of the world, there are legislations on the recognition of organ donation as a gift either by a deceased or living individual with specific restrictions and prohibitions against unlawful organ harvesting for commercial purposes.³ In 2010, the World Health Organisation advised member states to take appropriate measures in protecting vulnerable individuals or groups from organ and transplant

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¹United Nations Office on Drug and Crime, 'An Introduction to Human Trafficking: Vulnerability, Impact and Action' https://www.unodc.org/documents/human-trafficking/An_Introduction_to_Human_Trafficking_-_Background_Paper.pdf accessed 5 June 2023.

²C Muanya, 'Why Illegal Harvesting of Organs Thrives in Nigeria, The Guardian 2010' <<http://www.guardian.ng/news/why-illegal-harvesting-of-organ-thrives-in-nigeria>> accessed 05 August 2022

³AAdair and S J Wigmore, 'Paid Organ Donation: The Case Against' (2011) *Annals Royal College of Surgeon*, 188-192 at 188.

tourism; a resolution was thereafter made on human organ and tissue transplantation as a form of human trafficking.⁴

The issue of human trafficking⁵ became a public phenomenon due to the wide publicity by the media on the increasing rate of deportation and appeals by victims to their home country (Nigeria) to be rescued from traffickers.⁶ Human trafficking is a common phenomenon in Nigeria; victims of human trafficking are being trafficked from Nigeria to other countries for greener pastures and better life. The prevalence of human trafficking in Nigeria led to the enactment of the Trafficking in Person (Prohibition) Law Enforcement and Administration Act 2015 to curb human trafficking in Nigeria.⁷ The continuous incidence of human trafficking in Nigeria led to the modalities put in place at the airport and across the border to ensure human trafficking is brought to the barest minimum.⁸ Nigeria is one of the transit and destination countries in West Africa for Human Trafficking.⁹ The US Department of State trafficking in

⁴World Health Assembly, 'Sixty-third World Health Assembly Closes after Passing Multiple Resolutions' <<https://www.who.int/news/item/11-12-2010-sixty-third-world-health-assembly-closes-after-passing-multiple-resolutions>> accessed 05 August 2022.

⁵In one of the preambles of the United Nations Resolution, it recognises that, although differences exist between the crimes of trafficking in human organs and trafficking in persons for organ removal, both crimes are related to the shortage of human organs available for transplantation and to social and economic difficulties that make people vulnerable, and that prevention of and response to both crimes must be undertaken in an effective and coordinated manner.

⁶FAttoh, 'Trafficking in Women in Nigeria: Poverty of Value or Inequality' (2009)19(3) *J Soc. Sci.* 167-171.

⁷The law in section 82 describes "trafficking or traffic in persons" to mean the recruitment, transportation, transfer, harbouring, or receiving of persons employing threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person or debt bondage to place or hold the person whether for or not in involuntary servitude (domestic, sexual reproductive) in forced or bonded labour, or in slavery-like conditions, the removal of organs generally for exploitative purposes.

⁸I Okeke-Korieocha, and O Ologunabge, Explainer: 'How to Identify a Human trafficker' <https://businessday.ng/news/article/explainer-how-to-identify-a-human-trafficker/?gclid=EAIaIQobChMIqvimgbGA-gIVhfuyCh0i0AWpEAMYAyAAEgIEofD_BwE> accessed 09 September 2022.

⁹G A. Oladele, 'A Critique of the trafficking in Persons (Prohibition) Enforcement and Administration Act (Amendment) Bill 2018 of Nigeria' (2020) *BIU Law Journal* 154-170 at 156.

person report stated that Nigeria was number 32 out of about 167 trafficking countries and a tier 2 trafficking country in 2022.¹⁰ Also, the National Agency for the Prohibition of Trafficking In Persons(NAPTIP)'s statistical report from 2019-2022 stated that apart from drug trafficking and economic fraud, human trafficking is a crime that is rampant in Nigeria.¹¹

Human Organ harvesting and trafficking is a form of human trafficking otherwise known as organ trafficking. As part of the prohibition against trafficking, it is a crime that is prohibited by international law and international communities.¹²A lot of people (including Nigerians) travel abroad for organ transplantation while information about donors is not revealed. There is no crime against organ donation and transplantation in most countries but it becomes a crime when organs are donated and transplanted unethically and without transparency.¹³This study considers human trafficking, organ trafficking, and harvesting. The first section of this article is the introduction, the second section discusses human trafficking, the third section discusses human organ trafficking and harvesting, the fourth section discusses United Nations resolution, the fifth section discusses the current legal and regulatory framework in Nigeria, the sixth section discusses the current legal and regulatory framework in Kenya ad seventh section is the conclusion and recommendation.

2. Human trafficking

¹⁰U.S Department of State, '2022 Trafficking in Persons Report'.<<https://www.state.gov/reports/2022-trafficking-in-persons-report/>> accessed 09 September 2022.

¹¹NAPTIP, 'Development Partners and Stakeholders Re-Strategize to Tackle Human Trafficking as Boot Camp for Members of State Task Forces Kick off in Abuja' (2022) <<https://naptip.gov.ng/>> accessed 09 September 2022.

¹² D Jean-Philippe, B. Hermon and A. Smith., *Trafficking in Human Organs: An Overview* (Library of Parliament, Ottawa, Canada, 2021)1-17 at 1.

¹³Stop Forced Organ Harvesting <<https://www.freedomunited.org/advocate/forced-organ-harvesting/>> accessed 17 September 2022.

Human trafficking involved trafficking human beings. United Nations defines human trafficking as the recruitment, threat or coercion, fraud, or giving or receiving of payments or benefits to obtain the consent of the person exercising control over the victim.¹⁴ Human trafficking may be internal (within the country) and external (cross border).¹⁵ It is regarded as a modern slave trade that threatens the security, growth, and development of any nation.¹⁶ It is a crime that is not open to law enforcement agencies but only became noticeable recently due to its incessant rate.¹⁷ It is an international organised crime that involves fake promises, manipulation, and the use of force to obtain something from the victims and it is a crime against individuals.¹⁸ It violates the fundamental rights of victims and denies victims their right to freedom of movement.¹⁹ It is a complex phenomenon and a crime against humanity.²⁰ Human trafficking is an avenue for people to be transported to places where they are being exploited for forced labour, prostitution, domestic servitude, and other forms of exploitation (such as organ transplantation).²¹ It is a complicated phenomenon that is often influenced by economic, social, and cultural factors whose

¹⁴ Human Rights Commission, What is Human Trafficking? <https://www.sf-hrc.org/what-human-trafficking> accessed 05 August 2022.

¹⁵ L Akor, 'Trafficking of Women in Nigeria' (2011) 2 *Corvinus Journal of Sociology and Social Policy*, 89-110 at 94.

¹⁶ National Institute of Justice, 'Overview of Human Trafficking and NIJ's Role' <<https://nij.ojp.gov/topics/articles/overview-human-trafficking-and-nijs-role>> accessed 05 September 2022.

¹⁷ *Ibid*

¹⁸ United Nations Office on Drug and Crime, Human Trafficking: A Crime the Shames us all in Dixon, J., An Introduction to Human Trafficking: Vulnerability, Impact and Action. <https://www.unodc.org/documents/human-trafficking/An_Introduction_to_Human_Trafficking_Bakground_Paper.pdf> accessed 05 August 2022.

¹⁹ Dixon

²⁰ Olubukola, I. A., 'Human Trafficking in Edo State, Nigeria: Experiences of some Young Girls who have Survived Trafficking' (2020) 17(5) *Journal of Contemporary Research*, 204-224 at 205

²¹ M Makisaka., 'Human Trafficking: A Brief Overview (2009) *Social Development Notes*' <<https://openknowledge.worldbank.org/bitstream/handle/10986/11103/546830BRI0SDN01C1/Human/Trafficking.pdf?sequence=1&isAllowed=y>> accessed 05 August 2022

victims are often vulnerable.²² It is a modern-day servitude that involves the trading of people or organs for commercial gain.²³ The categories of people who are most vulnerable to human trafficking are homeless youths, persons relocating, among others.²⁴ Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons gave an elaborate definition of trafficking. It defined trafficking in person as:

the recruitment, transportation, transfer, harbouring, or receipt of persons, employing the threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs.²⁵

Exploitation in human trafficking must not necessarily be sexual in nature, it may be in respect of servitude, forced labour, pick-pocketing, and organ trafficking and harvesting.²⁶ Human trafficking occurs when there is movement or selling of an individual in exchange for money, the victim is kept in the bondage of debt, the victim had no knowledge of the nature of the promised job and when the victim's freedom of movement is restricted.²⁷

²²S Punam and S Sharma., 'Human Trafficking: Causes and Implications' <https://www.researchgate.net/publication/338457522_Human_Trafficking_Causes_and_implications> accessed 05 August 2022.

²³I M.Ibrahim and I Omoregbe, 'Human Trafficking in Nigeria: Causes, Efforts by Nigeria Government and the Way Forward' (2020)1 *Nigerian Journal of Social Studies*. 128-140 at 129.

²⁴What is Human Trafficking? <<https://humantraffickinghotline.org/what-human-trafficking>> accessed 05 September 2022.

²⁵Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and Children, supplementing the United Nations Convention against Transnational Organised Crime (Palermo Protocol) 2000.

²⁶ Ibrahim and Omoregbe (n 23)130.

²⁷'European Asylum Support Office, Nigeria trafficking in Human Being: Country of Origin Information' <https://euaa.europa.eu/sites/default/files/publications/2021_04_EASO_Nigeria_Trafficking_in_Human_Beings.pdf> accessed 08 August 2022.

Ollus asserted that the rising universal economic inequality, poverty, unemployment, and disorderliness of the means of livelihood contribute to human trafficking globally.²⁸ Ollus stated that the purpose of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and Children, supplementing the United Nations Convention against Transnational Organised Crime is to ensure that states criminalise trafficking, and investigate and prosecute traffickers.²⁹ Human trafficking involves the use of tricks, deceitful promises, emotional manipulation, and threats of deportation or arrest among others.³⁰ The major cause of trafficking in Nigeria and most African countries is poverty. The poor economic condition of these countries contributes to the rising rate of human trafficking. Apart from poverty, illiteracy, bad leadership, insurgency, conflict, and corruption are also contributing factors to the rising rate of human trafficking.³¹ Lack of information is one of the major causes of human trafficking because victims are promised job opportunities or skill acquisition with higher wages abroad but are unaware of the predicaments that would befall them after their migration.³²

The individuals who carry out trafficking activities are known as traffickers. They play a major role in trafficking. They are connecting the link between demand and supply of trafficked victims.³³ They desperately look for every slight opportunity to get the victim to the extent of

²⁸Ollus, 'The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children: A Tool for criminal justice Personnel' (Report of 122nd International Training Course, 2004) <https://www.unafei.or.jp/publications/pdf/RS_No62/No62_06VE_Ollus1.pdf> accessed 05 August 2022.

²⁹*ibid.*

³⁰'The National Act Plan to Combat Human Trafficking' (The White House, Washington, 2021. <<https://www.whitehouse.gov/wp-content/uploads/2021/12/National-Action-Plan-to-Combat-Human-Trafficking.pdf>> accessed 05 August 2022.

³¹Ibrahim and Omoregbe (n 23) at 132.

³² UNESCO, 'Human Trafficking in Nigeria: Root Causes and Recommendations' <<https://unesdoc.unesco.org>> 10 August 2022.

³³*ibid*

kidnapping them if need be.³⁴ Traffickers make the victim do things against their will (such as the provision of sexual services or marrying a stranger without their consent or removal of organs in their body for financial gain).³⁵

Connections to human trafficking are sex trafficking and forced labour trafficking; the recently recognised form of human trafficking is human organ harvesting and trafficking. Most of the victims of sex trafficking are women and children who are forced to engage in sexual activities for commercial purposes.³⁶ They are taken to another country on the pretence of being offered job opportunities or better lives but are held captive; their passports seized and forced to engage in sex for commercial purposes.³⁷ Sex trafficking involves the use of force, threat, or deception to mobilise people to perform commercialised sexual activities.³⁸ For forced labour, victims are often male and female who are taken to other countries or states to work and earn money for the perpetrators. It involves the use of coercion or force or fraudulent means to employ a person for labour, slavery, or involuntary servitude.³⁹

The Trafficking in Person (Prohibition) Law Enforcement and Administration Act in Nigeria established the National Agency for the Prohibition of Trafficking in Person (NAPTIP).

³⁴Devatop Centre for Africa Development, Overview of Human Trafficking' <<https://www.devatop.org/overview-of-human-trafficking/>> accessed 05 September 2022.

³⁵Human Trafficking: An Introduction' <<https://owjn.org/human-trafficking-and-the-law/module-1/>> accessed 05 September 2022

³⁶HRC, 'What is Human Trafficking?' <<https://sf-hrc.org/what-human-trafficking>> accessed 05 September 2022.

³⁷*Ibid*

³⁸Overview of Human Trafficking' <<https://law.georgia.gov/key-issues/human-trafficking/overview-human-trafficking>> accessed 06 September 2022.

³⁹*Ibid*.

NAPTIP is responsible for investigating, searching, arresting, detaining, prosecuting, seeking, and receiving information from any person or authority on human trafficking.⁴⁰

3. Human Organ Trafficking and Harvesting

Human organ harvesting and trafficking are combinations of two factors, namely; organ trafficking and harvesting; an act of moving persons from one place to another for the purpose of harvesting their organs for possible transplant. Human organ trafficking and harvesting have recently become prevalent due to the long list of patients or recipients awaiting an organ transplant, the high cost of immunosuppression therapies, and the desperation of their family members. It is a form of trade that is specifically associated with human organs.⁴¹ It involves trafficking donors and removing organs without valid consent or in exchange for financial benefits or removal through some forms of deceit or coercion.⁴² Human organ trafficking and harvesting are also known as organ trafficking. Organ trafficking consists of a wide range of criminal activities relating to human organs.⁴³ It is a crime that is carried out by a third party who recruits, transports, transfers, or receives a person by force, deception, coercion, or fraud to remove the person's organ.⁴⁴ The various organs that are transplanted are the heart, kidney, and bone marrow among others.⁴⁵ This transnational crime otherwise known as organ trafficking is

⁴⁰Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2015, s 6

⁴¹Interpol, Trafficking in Human Being for Organ Removal in North and West Africa (Analytical Report, 2021) 1-38 at 10.

⁴²*Ibid*

⁴³K C O'Regan, 'International Organ Trafficking: In Brief' (Congressional Research Services Report 2021) <<https://www.crsreports.congress.gov>> accessed 14 September 2022.

⁴⁴ HCho, M Zhang and P Tansuhaj., 'An Empirical Study on International Human organ Trafficking: Effect of Globalization' (2009)5(3) *Innovative Marketing* 66-74 at 66.

⁴⁵*Ibid*

aviolation of human rights and a crime against humanity.⁴⁶ The three major elements of organ trafficking are action, means, and goal.⁴⁷ The action is the step to move the victim, the means is the method of trafficking and the goal is the removal of the trafficked victim's organ. It involves the connection between donor, recipient, medical experts, and recruiters.

A lot of the patients die while waiting for organ donation and transplant.⁴⁸ Organ donation and transplant become unlawful acts when donors are deceived, threatened, or enticed to donate their organs. The patients leave their home countries to travel abroad for better medical attention and transplant. One of the countries notable for a successful organ transplants is Egypt.⁴⁹ The growing medical technological advancement in organ transplantation led to the increasing demand for organs and the rising crime of organ trafficking.⁵⁰ Due to the growing need for organs, developed countries around the globe have initiated programmes on the improvement, expansion, and promotion of deceased donation to increase the supply of organs⁵¹ while organ trafficking has become a lucrative business across the globe.⁵² An organ can be harvested from a living or deceased donor, but the shortage of organs from a deceased donor has resulted in the need for recipients of organ donation and their family members to source alternative means by looking for

⁴⁶*Ibid*; C. Iremeka, *Grappling with Emerging Cases of organ Trafficking in Africa* (The Guardian, 07 May 2022) <<https://guardian.ng/saturday-magazine/grappling-with-emerging-cases-of-organs-trafficking-in-africa/>> accessed 14 September 2022.

⁴⁷A A Aronowitz and E Isitman., 'Trafficking of Human beings for Organ Removal: Are (International) Legal Instruments Effective Measures to Eradicate the Practice?' (2013)1(2) *Groningen Journal of International Law* 73-90 at 74.

⁴⁸J C Meshelemiah, C A Jacquelyn and R E Lynch., 'The Cause and Consequences of Human Trafficking: Human Rights Violation' <<https://ohiostate.pressbooks.pub/humantrafficking/chapter/chapter-9-organ-trafficking/>> accessed 14 September 2022

⁴⁹ Interpol (n 41)21

⁵⁰ Jean-Philippe, Hermon, and Smith (n 11)3; the global demand for organs far outweighs the supply in recent times.

⁵¹*Ibid*

⁵²INTERPOL, 'The of Human Trafficking' <<https://www.interpol.int/en/Crimes/Human-trafficking/Types-of-human-trafficking>> accessed 05 September 2022.

a living donor.⁵³ However, the general belief that an organ harvested from a living donor has a very high rate of survival than a deceased donor has contributed to the increasing rate of organ trafficking.⁵⁴ Organs harvested from a deceased donor are preserved with ice and can be moved from one part of the world to another while living donors may have to travel with the recipient for the organ to be harvested and transplanted.⁵⁵

Cases of organ harvesting and trafficking are often not easy to come by because perpetrators often purportedly provide huge financial resources and enticing offers to victims, thereby leaving no form of concern for the victims (who are often poverty-stricken or desperate immigrants). It is a less publicised form of human trafficking that is usually unnoticed and it is a transnational organised crime with a low enforcement rate.⁵⁶ It is a crime that is not easily noticeable and as a result of this, awareness of the crime among legal practitioners and law enforcement agents is very low.⁵⁷ It is part of the activities of traffickers who pretend to be representatives of organ matching organisations to desperate patients.⁵⁸ Organ trafficking is an illegal concept that is often not reported and is commonly associated with health issues and human right violation.⁵⁹ Traffickers of organs are persons who are familiar with victims or persons who live in the same environment with victims; they take advantage of the vulnerability, illiteracy, and

⁵³ Aronwitz and Isitman (n 47)77

⁵⁴ *Ibid*

⁵⁵ *Ibid*; sometimes donors and recipients may live in different countries while the transplant may be carried out in another country different from the countries of the recipient and the donor. This is also known as transplant tourism.

⁵⁶ 'Organ Trafficking: The Unseen form of Human Trafficking' <<https://www.acamstoday.org/organ-trafficking-the-unseen-form-of-human-trafficking/>> accessed 09 September 2022.

⁵⁷ Jean-Philippe, Hermon and Smith (n 11) at 4

⁵⁸ *ibid*

⁵⁹ JGonzalez, I Garijo and A Sanchez., 'Organ Trafficking and Migration: A Bibliometric Analysis of an untold Story' (2020) *International Journal of Environmental Research and Public Health*. 1-11 at 1.

standard of living of these poor victims.⁶⁰The financial gain of traffickers is often their top priority than the medical condition of the recipients and the donors. Efforts have been made both nationally and internationally to curb the menace of organ trafficking across the globe.

4. **The United Nations Resolution**

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, titled '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, titled 'Improving the coordination of efforts against trafficking in persons' and /RES/73/189 of 17 December 2018, titled 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 etc. For the purpose of this section, resolution 75/195 of 2020 will be discussed.

The United Nations General Assembly at its seventy-fifth session held on 16 December 2020 adopted a resolution 75/195 on strengthening and promoting effective measures and international cooperation on organ donation and transplantation to prevent and combat trafficking in persons

⁶⁰Meshelemiah, Jacquelyn and Lynch (n 48).

for organ removal and trafficking in human organs.⁶¹ The resolution has seventeen sections and they are discussed as follows:

The first section of the Resolution urges the Member States to prevent and combat trafficking in persons for organ removal and trafficking in human organs, in accordance with their obligations under international and national law, and to uphold accountability through measures that may include preventing and, in accordance with relevant national legislation, investigating, prosecuting and punishing trafficking in persons for organ removal and trafficking in human organs.

The second section of the Resolution urges member states that are yet to ratify or accede to the United Nations Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime should do so.

The third section of the Resolution urges the Member States to consider adopting the measures below as it relates to organ transplantation following the fundamental principles of their domestic legal systems and national legislation along with the World Health Organization guiding principles on human cell, tissue, and organ transplantation:

- (i) Strengthening legislative frameworks, including by reviewing, developing, or amending them, as appropriate, to prevent and combat trafficking in persons for organ removal and trafficking in human organs, including the criminalisation of these practices and provisions to ensure the accountability of the perpetrators;
- (ii) Adopting appropriate legislative measures necessary to guarantee that the donation of organs is guided by clinical criteria and ethical norms, based on the donors' informed

⁶¹ United Nations Resolution 75/195 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/374/15/PDF/N2037415.pdf?OpenElement>> accessed 27 September 2022.

- and voluntary consent, as an altruistic act, performed without any monetary payment or other rewards of monetary value, for the living donor or the family of the deceased donor, or any other person or entity, which does not preclude reimbursing reasonable and verifiable expenses incurred by donors;
- (iii) Ensuring equitable access to human organ transplantation, based on non-discrimination, and increasing public awareness and understanding of the benefits resulting from the voluntary non-remunerated provision of organs from deceased and living donors, and of the physical, psychological and social risks to individuals and communities caused by trafficking in human organs and trafficking in persons for the removal of organs, as well as transplant tourism;
 - (iv) Ensuring that the removal of human organs from both deceased and living persons, as well as the transplantation of human organs, exclusively take place in centres specifically authorized for such activities by the relevant national health authorities and are not performed outside the framework of domestic transplantation systems or in situations where the transplantation is performed in breach of the guiding principles or national transplantation laws or rules;
 - (v) Developing and strengthening regulatory oversight of the medical facilities and medical professionals involved in the recovery and transplantation of human organs, including through control measures, such as periodic audits;
 - (vi) Setting specific processes and criteria for the authorization of every organ removal and transplantation procedure;
 - (vii) Establishing and developing registries that include information regarding each organ recovery and transplantation procedure and outcomes for living donors and recipients of organs, as well as identification systems that facilitate tracing each organ from donor to recipient and vice versa, to ensure the transparency of practices and the quality and safety of human organs, with due regard to professional confidentiality and personal data protection;
 - (viii) Promoting the voluntary contribution of periodic information to international registers for organ donation and transplantation activity, such as the Global Observatory on Donation and Transplantation developed in collaboration with the World Health Organization;
 - (ix) Providing long-term medical and psychosocial care for both living donors and recipients;

The fourth section encourages the Member States, international organisations, and civil society to make efforts in creating awareness through information on to encourage positive attitude from

the society regarding donation, this includes posthumous donation, as a gesture of altruism, solidarity, and community participation and to also warn of the risks of organ removal when performed in the context of trafficking, especially among people in vulnerable situations who are at risk of becoming victims of this crime.

The fifth section encourages the Member States to exchange experience and information on preventing, prosecuting, and punishing trafficking in human organs and trafficking in persons for organ removal.

To combat the illicit financial flows resulting from such trafficking, as well as on the protection of victims, as appropriate, and to strengthen international cooperation between all relevant actors. The sixth section encourages Member States to develop a strategy for preventing organ diseases and concentrate more on dead donors.

The seventh section encourages member states to develop effective and properly resourced organ donation and transplantation systems and provide technical assistance for their implementation in requesting countries. The eighth section encourages the member states to train law enforcement agents, border control officials, and healthcare professionals to identify cases of trafficking. The ninth section encourages international cooperation among member states.

The tenth section urges member states to develop their domestic legislation on ways of protecting victims of trafficking in persons for organ removal and, as appropriate, ways of addressing the vulnerability of those individuals who sell their organs, including by considering the following measures:

- (i) Adopting all necessary measures, including legal measures, to protect the rights and interests of victims in the course of all phases of criminal prosecution and judicial proceedings and to ensure accountability.
- (ii) Facilitating the access of victims of trafficking in persons for organ removal and, as allowed by domestic law, of those individuals who sell their organs to appropriate relevant information related to their case, while respecting their anonymity, as well as to the necessary protection of their health and other rights that are at stake.
- (iii) Providing medical and psychosocial care to victims of trafficking in persons for organ removal and individuals who sell their organs in the short, medium, and long term.
- (iv) Ensuring that domestic legal systems contain measures that offer victims of trafficking in persons for organ removal and individuals who sell their organs the possibility of obtaining effective compensation for the damage suffered.
- (v) Promoting the creation of governmental mechanisms and providing support to specialised non-governmental organisations, as appropriate, to address the needs of groups at risk of trafficking in human organs and trafficking in persons for organ removal to facilitate the provision of holistic and early care to potential or actual victims of those crimes, and ensuring that all support measures are non-discriminatory as to gender, age and culturally sensitive and comply with their international human rights obligations and national legislation.

The eleventh section welcomes the establishment of the World Health Organization Task Force on Donation and Transplantation of Human Organs and Tissues to render advice and support to the World Health Organisation at all levels. The twelfth section requests the World Health Organisation, the United Nations Office on Drugs and Crime, and the Office of the United Nations High Commissioner for Human Rights to provide guidelines on issues of human organ

transplantation.⁶² The thirteenth section requests inter-agency coordination to improve data collection.⁶³

The fourteenth section requests the United Nations Office on Drugs and Crime, in collaboration with other entities of the United Nations system including the World Health Organisation, to continue providing capacity-building and technical assistance to States, upon request, to assist them in strengthening national capacities to effectively prevent and combat trafficking in persons for organ removal and trafficking in human organs. The fifteenth section invites member states and other donors to make available extra-budgetary resources to the UN office on drugs and crime for implementing the resolution and to the World Health organisation to implement its principles. The sixteenth section of the resolution requests the Secretary-General to submit a report on the implementation of the present resolution to the General Assembly at its seventy-seventh session, all costs associated with it to be covered by extra-budgetary resources.

⁶²The twelfth section requests:

the World Health Organization, the United Nations Office on Drugs and Crime, and the Office of the United Nations High Commissioner for Human Rights continue to provide guidelines to the Member States for developing orderly, ethical, and acceptable programmes for the acquisition and transplantation of human organs for therapeutic purposes, and to intensify the coordination of efforts in combating organ trafficking and trafficking in persons for organ removal, including the development of additional transplantation registries.

⁶³The thirteenth section requests:

the United Nations Office on Drugs and Crime to engage in a dialogue with members of the Inter-Agency Coordination Group against Trafficking in Persons and other relevant intergovernmental international organizations, in particular the World Health Organization, in close consultation with the Member States, to enable the Office to improve data collection and analysis on instances of trafficking in persons for organ removal and relevant prosecutions, and to promote research among diverse fields, such as the medical and health management fields, as well as on the part of the anti-trafficking community, while bearing in mind that data on trafficking in persons for organ removal are being gathered for the Global Report on Trafficking in Persons, in accordance with the provisions set out in General Assembly resolution 70/179 of 17 December 2015;

Lastly, the seventeenth section of the resolution provides for the decision of the UN General Assembly to continue its consideration of the question at its seventy-seventh session under the item entitled “Crime prevention and criminal justice”.

5. The Current Legal and Regulatory Framework in Nigeria

Before 2003, there was no law on the prohibition of trafficking in persons in Nigeria. The then-wife of the Nigerian Vice President, Mrs. Titi Abubakar setup a committee to draft an anti-trafficking bill. The then Nigerian President, Chief Olusegun Obasanjo gave his assent to the bill on 14 July 2003 which brought to life the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003. Section 1 (1) of the Act established a multi-dimensional crime-fighting Agency known as the National Agency for Prohibition of Traffic in Persons and Other Related Matters (NAPTIP).⁶⁴The law was subsequently amended by the Trafficking in Persons (Prohibition) Law Enforcement and Administration (Amendment) Act, 2005 to give a practical translation to some of the enforcement powers of the Agency.⁶⁵

The current legal and regulatory framework prohibiting trafficking in persons (Trafficking in Persons (Prohibition) Enforcement and Administration Act, 2015) repealed the 2003 and 2005 laws. The objectives of the Act are to (a) provide an effective and comprehensive legal and institutional framework for the prohibition, prevention, detection, prosecution, and punishment of human trafficking and related offences in Nigeria; (b) to protect victims of Human Trafficking; and (c) promote and facilitate National and International cooperation to meet the

⁶⁴National Agency for the Prohibition of Trafficking in Persons (NAPTIP) <https://naptip.gov.ng/legal-and-prosecution-department/> accessed 19 September 2022.

⁶⁵*ibid.*

Objectives set out in paragraphs (a) and (b).⁶⁶ The law is administered by an Agency known as the National Agency for the Prohibition Establishment of Trafficking in Persons.⁶⁷

Section 20(1) of the Trafficking in Persons (Prohibition) Enforcement and Administration Act, 2015 provides that:

- (1) Any person who: (a) through force, deception, threat, debt bondage, or any form of coercion
 - (i) abuses a position of power or situation of dominance or authority arising from a given circumstance; or
 - (ii) abuses a vulnerable situation; or
- (b) 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.

Section 20(2) further provides punishment for anyone who assists anyone in the removal of human organs or buying and selling of human organs.⁶⁸ Also, any 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).⁶⁹

⁶⁶Trafficking in Persons (Prohibition) Enforcement and Administration (NAPTIP) Act, 2015, s 1

⁶⁷*ibid* s 2

⁶⁸ Section 20(2) of the Trafficking in Persons (Prohibition) Enforcement and Administration Act, 2015 provides:
Without prejudice to the provisions of subsection (1) of this section, a person who procures or offers a person, assists or is involved in any way (a) in the removal of human organs; or (b) buying and selling of human organs, commits an offence and is liable on conviction imprisonment for a term of not less than 7 years and to a fine of not less than N 5,000,000

⁶⁹NAPTIP Act s 20(3)

The law prohibits the selling of human beings and specifies punishment for such offences to be five years imprisonment with two million naira fine.⁷⁰ It also prohibits modern-day slavery specifying imprisonment for a term of not less than seven years and a fine of not less than two million naira (N2,000,000.00).⁷¹ Section 25 prohibits slave dealing and prescribes its punishment to be imprisonment for a term of not less than seven years with a fine of not less than two million naira (N2,000,000.00).⁷² On the jurisdiction to try the offence under this law, the law gave the High Court⁷³ the power to try the offences under the Act⁷⁴

The Court also has the power to adopt measures to avoid delay in dealing with such matters.⁷⁵ Apart from the prohibition and punishment of the offenders, the victim of trafficking is entitled to certain rights and treatments under the law. This is provided for under section 61 of the Trafficking in Persons (Prohibition) Enforcement and Administration Act, 2015 where the Agency⁷⁶ is given the power to protect the trafficked person from discrimination, ensure his or her access to adequate health, ensure access to his or her country's embassy or consulate, and

⁷⁰ Section 21 provides that:

Any person who buys, sells, hires, lets, or otherwise obtains the possession or disposal of any person with intent, knowing it to be likely or having reasons to know that such a person will be subjected to exploitation, commits an offence and is liable on conviction to imprisonment for a term of not less than 5 years and a fine of not less than N2,000,000.00.

⁷¹ NAPTIP Acts 24.

⁷² "slave" as provided for under section 82 means a person who is held in bondage whose life, liberty, freedom, and property are under the absolute control of someone.

⁷³ Section 82 provides that "High Court" means Federal High Court, the High Court of a State, or the High Court of the Federal Capital Territory.

⁷⁴ NAPTIPs 36

⁷⁵ This is provided for under NAPTIP Acts 24 as follows:

(1) In any trial for an offence under this Act, the Court shall have power, notwithstanding anything the contrary in any other enactment, to adopt all legitimate measures that it may deem necessary to avoid unnecessary delays and abuse in the conduct of proceedings.

(2) Subject to the provisions of the Constitution of the Federal Republic of Nigeria, an application for stay proceedings in respect of any criminal matter brought under this Act shall not be entertained.

⁷⁶ The Agency as provided for under section 82 of the law means the NAPTIP established under NAPTIP Acts 2.

where there is none, have access to a diplomatic representative of his or her country, ensure his or her safe return home, provides temporary residence visa during the pendency of the trafficking case, respecting the trafficked person's right to privacy during an investigation on the trafficking case, ensure that the identity of a person trafficked is protected, prevent the use of any person's history of being trafficked to discriminate or cause harm to such person, family or friends, ensure it takes steps to maintain and rehabilitate facilities provided for trafficked persons, and to ensure that a trafficked person and his family are protected from intimidation, threats, and reprisals from traffickers and their associates including reprisals from persons in a position of authority.

The Act provides that a victim of the trafficking in person shall not be detained or prosecuted for an offence relating to being a victim of trafficking, including non possession of valid travel documents, use of false travel, or other documents.⁷⁷ The other rights of the victim include the right to information,⁷⁸ establishment of the transit shelter⁷⁹ and right to compensation or restitution.⁸⁰

In addition to the above, the Act provides for mutual legal assistance with respect to requests from the Foreign States, requests to the Foreign States, evidence according to a request, form of requests, extradition, and exchange of information relating to human trafficking.⁸¹ From the above, the law only deals with anti-trafficking in person for organ harvesting and not regulations for human organ donation, harvesting, and transplantation.

⁷⁷NAPTIP Act s62.

⁷⁸*Ibids*63

⁷⁹*Ibid* s 64

⁸⁰*Ibid* s 65

⁸¹*Ibids* 69-74

Nigeria's National Health Act 2014,⁸² signed into law by then President Goodluck Jonathan which ought to regulate human organ donation, harvesting, and transplantation was drafted in a way that makes the law open to ridicule. Specifically, Section 48(1) of the National Health Act 2014 provides that

Subject to the provision of section 53, a person shall not remove tissue, blood, or blood product from the body of another living person for any purpose except:⁸³

- (a) with the informed consent of the person from whom the tissue, blood, or blood product is removed granted in the prescribed manner,
- (b) that the consent clause may be waived for medical investigations and treatment in emergency cases, and
- (c) under prescribed protocols by the appropriate authority.

Section 48(1)b specifically mentioned that the consent clause may be waived “for medical investigations” and “treatment in emergency cases”. Ironically, section 64, which is the interpretation section of the Act, did not provide for the definition of the phrases “medical investigations” and “treatment in emergency cases.” The implication of this error is that anybody under the pretext of carrying out “medical investigations” or “treatment in emergency cases” could accost any non-consenting living person and forcefully remove his or her tissue or blood or blood product.

⁸²Act No. 8 2014.

⁸³Health Act No. 8 2014 s 53 provides that:

- (1) It is an offence for a person:
 - (a) who has donated tissue, blood, or a blood product to receive any form of financial or other rewards for such donation, except for the reimbursement of reasonable costs incurred by him or her to provide a such donation,
 - (b) to sell or trade in tissue, blood, or blood products except for reasonable payments made in an appropriate health establishment for the procurement of tissues, blood, or blood products.
- (2) A person who contravenes under subsection (1) of this section commits an offence and is liable on conviction to a fine of 100,000.00 or imprisonment for a period not exceeding one year or to both.

Also, section 48 (2)(a) of the Act states that "a person shall not remove "tissue" which is not replaceable by natural processes from a person younger than 18 years." Does it mean that a person can remove tissue replaceable by natural processes from persons who are 18 years and above? Also, section 49 states that a person shall use "tissue" removed or blood or a blood product withdrawn from a living person only for such medical or dental purposes as may be prescribed. Again the definitions of the phrase "medical or dental purposes" are not provided in the interpretation section of the Act.

Though there are punishments specified under these provisions, it is doubtful if an offender could be convicted under the provisions considering how they were drafted.

The Act provides that human organs obtained from deceased persons for transplantation or treatment, or medical or dental training or research shall only be used in the prescribed manner. The section provided further that human organs so obtained shall be allocated as prescribed. The National Tertiary Health Institutions Standards Committee is empowered to determine (a) criteria for the approval of organ transplant facilities and (b) procedural measures to be applied for such approval. Contravening this section, the law prescribes five years imprisonment without the option of a fine.⁸⁴

A person is allowed under the Act to make a Will donating his or her body after his or her death and may nominate an institution or a person as Donee.⁸⁵ The donation of the body may be made for training of students in health sciences, health research, advancement of health sciences, therapy, including the use of tissue in any living person, or production of a therapeutic,

⁸⁴Health Act s54

⁸⁵*Ibid* s55

diagnostic, or prophylactic substance.⁸⁶ The Donor may also revoke the donation of his or her body the same way the donation was done.⁸⁷

It is however important to note that the second National Tertiary Health Institutions Standards Committee was inaugurated in September 2021 after the enactment of the law in 2014.⁸⁸ This means that the Act has not been properly implemented since its enactment.

6. The Current Legal and Regulatory Framework in Kenya

On 23 September 2022, Kenya rescued her citizens from suspected organ traffickers. Kenya's Foreign Ministry said it rescued 24 trafficked Africans, mostly Kenyans, in cooperation with authorities in Laos and the International Organization for Migration (IOM).⁸⁹ The Foreign Ministry in Kenya said that there was a disturbing intelligence report on organ harvesting of workers in this case. The 24 people (22 Kenyans, a Ugandan, and a Burundian) had contacted authorities back home raising the distress calls that saved them after being deceived about employment opportunities in the Asian country.⁹⁰

The new breeds of victims are young, tech-savvy individuals, and multilingual youth. The government of Kenya has warned its people to stop applying for online jobs that are advertised in

⁸⁶*Ibids*56

⁸⁷*Ibids*57

⁸⁸Kazeem Biriowo, 'FG Inaugurates Second NTHIS Committee Since NHA Was Signed Into Law' (2021) <<https://tribuneonline.ng.com/fg-inaugurates-second-nthis-committee-since-nha-was-signed-into-law/>> accessed 27 September 2022.

⁸⁹ Andrew Wasike, 'Kenya rescues her citizens from suspected organ traffickers' <<https://www.aa.com.tr/en/africa/kenya-rescues-citizens-from-suspected-organ-traffickers-/2693337>> accessed on 25 September 2022.

⁹⁰*Ibid.*

South East Asia without authenticating them, as it exposes them to dangers including the possibility of losing body organs.⁹¹

The current legal and regulatory framework against the trafficking of persons in Kenya is the Counter-Trafficking Act 2010.⁹² The Act has six parts with twenty-eight sections. Part I is preliminary, and Part II is on trafficking in persons and related offence covering sections 3 to 10. Part III provides for trial of offenders and remedies for victims of trafficking in persons covering sections 11 to 18. Part IV provides for the establishment of the Counter-Trafficking in Persons Advisory Committee covering sections 19 to 21. Part V provides for the establishment of the National Assistance Trust Fund for Victims of Trafficking in Persons covering sections 22 to 24 and Part VI is the miscellaneous provisions covering sections 25 to 28.

On trafficking in persons, section 3 of the Counter-Trafficking Act 2010 provides that:

(1) A person commits the offence of trafficking in persons when the person recruits, transports, transfers, harbours or receives another person for exploitation by employing (a) threat or use of force or other forms of coercion; (b) abduction; (c) fraud; (d) deception; (e) abuse of power or position of vulnerability; (f) giving payments or benefits to obtain the consent of the victim of trafficking in persons; or (g) giving or receiving payments or benefits to obtain the consent of a person having control over another person. (2) The consent of a victim of trafficking in persons to the intended exploitation shall not be relevant where any of the means set out in subsection (1) have been used. (3) The recruitment, transportation, transfer, harbouring, or receipt of a child for exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set out in subsection (1) of this Act. (4) An act of trafficking in persons may be committed internally within the borders of Kenya or internationally across the borders of Kenya. (5) A person who trafficks another person, for exploitation, commits an

⁹¹*Ibid.*

⁹² Law of Kenya, No. 8 of 2010 which commenced on 1st October 2012.

offence and is liable to imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings or both, and upon subsequent conviction, to imprisonment for life. (6) A person who finances, controls, aids, or abets the commission of an offence under subsection (1) shall be liable to imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings or both and upon subsequent conviction, to imprisonment for life.

There is nowhere in the law where it was specifically provided for trafficking of persons nor trafficking in the human organ. However, sections 80 to 83 of the Health Act 2017⁹³ makes provisions for organ donation, harvesting, and transplantation.

Section 80 provides that:

(1) No person shall remove tissue or gametes from a human being for transplantation in another human being or carry out the transplantation of such tissue or gametes except: (a) in a duly authorized health facility for that purpose; and (b) on the written authority of: (i) the medical practitioner in charge of clinical services in that health facility or any other medical practitioner authorized by him or her; or (ii) in the case where there is no medical practitioner in charge of the clinical services at that health facility, a medical practitioner authorized by the person in charge of the hospital; or (iii) the person from whom the tissue or gametes are removed, in the prescribed manner.

From the above, no tissue or gametes shall be removed from a human being for transplantation without written authorisation, especially from the donor of such tissue or gametes. It is however unclear from the wording of the provision if “or” means the Donor’s written authorization is optional.

⁹³ The Health Act No. 21 of 2017 Laws of Kenya.

It is also provided that the medical practitioner mentioned in subsection (1)(b) shall not be the lead participant in a transplant for which he or she has granted authorisation under that subsection. The intent of this provision may be to avoid malpractice.⁹⁴ Also, there is a regulatory authority to prescribe the criteria for the approval of organ transplant facilities and procedural measures to be applied for such approval.⁹⁵ Contravention of this section attracts on conviction, a fine not exceeding ten million shillings or imprisonment for a period not exceeding ten years or to both a fine and imprisonment.⁹⁶ Anyone who charges a fee for a human organ commits an offence.⁹⁷

A competent person may make a Will to donate his body or any specified tissue after his death. The said donation must be to an institution or a specified person and where there is no donee, the donation is null and void.⁹⁸ A donation under section 82 may only be made for: (a) the purposes of the training of students in health sciences; (b) the purposes of health research; (c) the purposes of the advancement of health sciences; (d) therapeutic purposes, including the use of tissue in any living person; or (e) the production of a therapeutic, diagnostic or prophylactic substance.⁹⁹ A donor is allowed under the law to revoke the donation in the same way it was made.¹⁰⁰

7. Conclusion and Recommendation

⁹⁴Health Act 2017, s80(2)

⁹⁵*Ibid*s80(3)

⁹⁶*Ibid* s80(4)

⁹⁷*Ibid*

⁹⁸*Ibid* s81

⁹⁹*Ibid* s82

¹⁰⁰*Ibid* s83

A comprehensive examination of the laws of the two African countries of Nigeria and Kenya had been carried out. There have been good attempts at addressing the subject matter but there is more to be done under the United Nations resolution on strengthening and promoting effective measures and international cooperation on organ donation and transplantation to prevent and combat trafficking in persons for organ removal and trafficking in human organs. The purpose of making effective legislation as succinctly stated in part of the preambles of the UN resolution isto protect the rights of donors and recipients of organs and that health-care systems should be instrumental in ensuring such conditions,

Considering also that the commercial trade in human organs is prohibited in almost all Member States and that both trafficking in persons for organ removal and trafficking in human organs have a great impact on the health both of those who sell their organs and of victims of trafficking in persons for organ removal, as well as on recipients of organs obtained in such circumstances, and that both crimes might represent a threat to public health and may, in some cases, affect the integrity and the functioning of health-care systems.

The UN Resolutions in themselves are soft laws and are not legally binding on any member states. They are merely exhortatory. Apart from the UN resolutions, there are other soft laws such as: the World Health Organisation (WHO) Guiding Principles On Human Cell, Tissue and Organ Transplantation adopted in 2010, the World Health Assembly (WHA) resolutions 57/18 on Human Organ and Tissue Transplantation which complements the WHO Guiding Principles and the Declaration of Istanbul on Organ Trafficking and Transplant Tourism of 2008 (and 2018 revision).Asides the above, there are regional laws.

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REAPPRAISING EFFECTIVE REGULATION IN PREVENTING HUMAN ORGANS TRAFFICKING IN AFRICA:
KENYA AND NIGERIA IN PERSPECTIVE <https://doi.org/10.53982/alj.2022.1001.04-j>

Thus, perhaps the first point of call is to have a comprehensive and binding international legal instrument on organ trafficking.