

AN APPRAISAL OF THE EFFICACY OF THE LEGAL FRAMEWORKS IN REPATRIATION OF LOOTED FUND IN NIGERIA

By

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Abstract

Corrupt politicians, as well as political office holders in Nigeria, go to great extents to conceal their ill-gotten assets by using different proxies, murky jurisdictions and murky Business structures. The process of tracing the whereabouts of these illicit or stolen assets is herculean. It is important to acquire a good understanding of the means used to conceal the assets and the jurisdictions where they might be hidden. The immensity of the Diplomacy involved has crippled the efforts of the Government to repatriate its looted funds; seeking the cooperation of the suspects involved to assist in giving vital information is such a big obstacle that has accounted for why billions of state assets, which have been frozen by the foreign authorities, are yet to be repatriated back to Nigeria. Repatriating stolen assets are costly, time-consuming and tedious. It entails more than just signing bilateral agreements. It involves chiseled Legal frameworks; projected towards securing the looted funds. What are the Legal frameworks required in repatriation of looted fund to Nigeria? To what extent has the legal frameworks been effective in repatriation of looted fund in Nigeria. The paper recommends that for an effective repatriation of looted fund, government must among others, adopt well-defined legal framework that should be applied in repatriation proceedings rather than the traditional criminal justice system. The article proposes some strategies for repatriation of looted funds with a caution that government must have a strong political will and sustainable efforts to tackle the menace and engage requested States.

Keywords: Repatriation, Diplomacy, Public fund, Ill-gotten assets, Public office holder

1.0 Introduction

Repatriation of looted fund is a term used to describe efforts by governments to recover the proceeds of corruption traced to corrupt politicians, public officers, political appointees as well as civil servants. These are state resources illicitly converted and most often transferred to other countries. The sums involved can be quite staggering. According to the Declaration of Nyanga on the Recovery and Repatriation of Africa's Wealth.¹

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An estimated US\$ 20-40 billion has over the decades been illegally and corruptly appropriated from some of the world's poorest countries, most of them in Africa, by politicians, soldiers, businesspersons and other leaders, and kept abroad in the form of cash, stocks and bonds, real estate and other assets.

The proceeds of corruption are often taken out of Nigeria and this has severe consequences for the country. It undermines socio-economic development, reduce foreign reserve, induces chronic poverty and increase armed conflict and internal strife. The harm caused by corruption is terrible and devastating. Recovery the proceeds of corruption stored in foreign jurisdiction always involves complex legal and technical efforts. Major challenges in asset tracking, recovery and repatriation of illicit and stolen wealth includes: immunity of government officials from criminal prosecution² which can preclude effective prosecution and pursuit of illicit assets in corruption cases, few-corruption institutions, high costs in coordinating investigations, lack of political will, inadequate funding, insufficient information and limited state capacity. The most crippling obstacle is the fact that the corrupt elites are always still powerful enough to stall investigations, influence judicial proceedings and theater the lives of anti- Corruption agencies' officials. In addition to problems highlighted above, often differences exist in the legal systems of the receiving state and the requesting state. Also, jurisdictions where stolen assets are hidden may not be responsive to requests for legal assistance or may impose very onerous conditions before the ill-gotten assets could be repatriated.

Looting in public sector is a global problem and one of the world's most disgraceful crimes, affecting the lives of millions of people around the world and robbing them of their economic right. In Nigeria, looting of Public fund by public office holders, political associates, appointees and partners had become apparent since 1950's when the panel of inquiry was set up to look into African Continental Bank and Nnamdi Azikiwe Affairs. The allegation proved to be a big scandal, a tour de force that led to the institution of Strafford Forster – Sutton Commission of enquiry on July 24, 1956 to investigate the allegation. The subsequent indictment of Nnamdi Azikiwe in the commission's report led him to transfer all his rights and interest in the bank to the Eastern Nigeria Government.³ In 1962 Chief Obafemi Awolowo was dragged to the court of accountability. This led to a call or an investigation of the relationship between the erstwhile Awolowo government and the National investment and property Company, a private enterprise said to be indebted to the

¹ The Nyanga Declaration, 2001 at; www.transparency.org Accessed 10th June, 2022

² Constitution of FRN, 1999. S 308.

³ R. L. Sklar (Report of the Foster-Sutton Tribunal of Inquiry) *Nigerian Political Parties: Power in an Emergent African Nation* 1st ed. Trenton, New Jersey: African World Press Inc. 2004.

western regional government to the tune of £7,200.00. On June 20 1962, the Federal government appointed a commission headed by Justice G.B Coker to investigate the allegations and later the commission indicted Awolowo in its report, as a result, the western regional government acquired all the property owned by the National Investment and property company.⁴

With the advent of democratic rule in 1999, the Government launched a high-profile campaign aimed at securing the repatriation of looted public funds being held in foreign banks. This campaign was championed by the then President Olusegun Obasanjo, throughout his eight-year tenure. By the time Obasanjo left office in May 2007, he had secured the recovery of approximately 2 billion USD⁵ in assets and triggered some vital international initiatives against money laundering. However, his efforts were hampered by a combination of local and external challenges. Externally, the campaign was marked by the absence of sufficient international political will. While at the domestic level, it was undermined by insufficient Diplomatic frameworks, lack of transparency, inadequate accounting skills, the uncooperative attitude of accused persons and limited domestic political will. The Yar Adua/Jonathan regime that took over after Obasanjo was short and little or no effort were made to repatriate the looted fund. With the death of Yar Adua as a president, the then vice president, Goodluck Jonathan, took over the affair of the Government and after the tenure of Yar Adua elapsed, Jonathan was re-elected and served for another 4 years.

During Jonathan's regime, millions of dollars were said to be looted from the country by the political class and their associates, and up till today, most of the looted funds are yet to be repatriated back to Nigeria. Even though, little efforts were made by Jonathan regime to repatriate the looted fund back to Nigeria, particularly the looted funds traced to Abacha's regime, it is imperative to state that some foreign countries are not willing to repatriate the looted funds to Nigeria because of the believe that the regime was characterized with high level of corruption and mismanagement of State funds. Efforts by Buhari administration to repatriate the looted fund back to Nigeria also yielded some results. Some countries have responded to some of the Government's requests. To this extent, part of the Abacha looted funds was released to the Government, while many are still held back. The lack of effective Diplomatic frameworks is still hampering the efforts to repatriate these looted funds back to the country.

Currently, Nigeria has ineffective Diplomatic framework for repatriation of looted fund, as well as for monitoring, managing and utilizing recovered assets and other proceeds of crime. This has resulted in a lack of coordination amongst the numerous agencies and institutions with the mandate to recover assets. Tied to this in effective diplomatic frameworks is the absence of a central register

⁴ Rina Okonkwo, Corruption in Nigeria: A historical Perspective (1947-2002), available at (<http://africaunchained.blogspot.com.ng/2007/09/corruption-in-nigeria-historical.html>) accessed on April 16th 2022

⁵(*ThisDay*, Lagos, 13 March 2005; *Nigerian Compass*, Lagos, 14 November 2012).

or database for recovered assets. This has made it impossible to ascertain the amounts of recovered assets and proceeds of crime. In Nigeria, further groundwork is needed in order to establish an effective Diplomatic framework strong enough to counter other countries' demands for pre-conditions, and the compromises that go with them in repatriation process.⁶

The process and obstacles encountered in repatriating ill-gotten wealth received not much attention from academic researchers in comparison to other subject. This study thus focuses on diplomatic frameworks needed to trace, identify, confiscate and return stolen assets to Nigeria by law enforcement agencies, and through assistance from other state members. The research inquiries into forms of proceedings that have been adopted to recover ill-gotten assets. Also examined are the evidence-gathering process and methodology. The paper further explores effectiveness of the legal process as a tool underpinning assets tracking and recovery of stolen wealth (particularly in a conviction-based regime as Nigeria) in light of the United Nations Convention against Corruption (UNCAC) 2003⁷ which is the first comprehensive instrument of the UN aimed at combating corruption. This is juxtaposed with the inherent advantages of a non-conviction regime and similar ancillary tools. This study concludes that, for more effective and successful recovery of stolen wealth, Nigeria needs to embrace well-defined Diplomatic frameworks as alternative to combination of conviction and non-conviction regimes.

2.0 Recovery of Proceed of corruption trashed in foreign countries

The United Nations Convention against Corruption (UNCAC) which Nigeria signed in 2003 and ratified in 2004 states that “the return of asset is a fundamental principle of this convention, and the states parties shall afford one another the widest measure of cooperation and assistance in this regard.”

This is an unprecedented provision which gives a state the right to recover its stolen assets. The UNCAC provision provide a legal framework, in both civil and criminal law, for tracing, freezing, forfeiting and returning funds obtained through corrupt activities. The paper is divided into four parts. Part one contains the introduction. Part two explicates the diplomatic process in repatriation of looted fund. Part three discusses the quagmire of the efficacy of the Legal frameworks in repatriation of looted fund in Nigeria. Part four contains the conclusion and recommendations.

3.0 Explicating the Diplomatic Process in Repatriation of Looted Funds

Until recently, the diplomatic frameworks aiming at curbing the illicit transfer of state funds were grossly inadequate; the little that exists tends to focus too narrowly on the bribery of foreign

⁶ Daniel, Tim, Repatriation of Looted Assets: Selected Case Studies and the UN Convention against Corruption, Transparency International (TI), *Global Corruption Report*, Berlin, (2004), 100-107 at <http://www.transparency.org> accessed 12th June, 2022.

⁷ United Nations Convention against Corruption, Articles 51.

officials and the activities of narcotic and terrorist networks. This need for an effective diplomatic frameworks was greatly helped by the September 2001 terrorist attacks on the United States, which constrained the United States and its allies to pressurise other nations to tighten their rules and take radical measures to curb illicit transfer of state funds.

One of the international Diplomatic instruments touching directly on the repatriation of proceeds of ill-gotten wealth is the Convention of the African Union Against Corruption, adopted in July 2003⁸. This convention prohibits the transfer or receipt of the proceeds of corruption and calls for such assets to be frozen and repatriated.⁹ It also calls on the states concerned to cooperate with each other under the framework of Mutual Legal Assistance. The European Union has a similar convention, which was adopted in 2005.¹⁰ At the international level, the United Nations Convention Against Transnational Organized Crime and the United Nations Convention Against Corruption were also adopted. The first instrument came into existence in November 2000, while the second was adopted in December 2003. Both treaties require that member states take necessary measures to regulate their financial systems, prohibit corruption, prevent money laundering, initiate investigations and prosecutions, and offer international legal assistance and cooperation to countries which require them. While there have not been many successful prosecutions on the basis of these international conventions, the conviction of one of Abacha's sons and the business partner by a Swiss court for money laundering and fraud appears to demonstrate the importance of these international Diplomatic frameworks.

Other international bodies like the group of Eight, (G8),¹¹ the Organization for economic cooperation and development members countries (OECD), The Commonwealth, and the Financial action task force members state (FATF) have all committed to intensifying support for the adoption and implementation of an effective Diplomatic frameworks to curb looting of state funds by intensifying international cooperation to recover illicitly acquired financial assets and assisting African countries in their efforts to combat money laundering. The FATF, which consist some of the most influential members of the other international organizations, has now emerged as the primary driving force of the global drive to control money laundering. Its annual list of non-cooperative countries and territories is now a major reference point for assessing progress in individual countries. Countries that find themselves on the list are usually subjected to international ridicule and even sanctions. Nigeria itself escaped such sanction in 2002¹², by

⁸ Convention of the African Union Against Corruption, 2003, Article 6.

⁹ Ibid Article 16.

¹⁰ European Union: Convention on the fight against corruption involving officials of member states of the European Union, 2005.

¹¹ Group of 8 countries industrialized nations.

¹² Anti-money Laundering Act 2022.

hurriedly passed anti-money-laundering legislation which was amended in 2011¹³ and 2022¹⁴. But how exactly did these international regulations impact on Nigeria's attempts to recover its looted assets? International Diplomatic frameworks, such as conventions and treaties seeking to prevent the transfer of illicit wealth abroad, are effective only to the extent that member states are willing to enforce them within their territories.

For decades, international diplomatic isolation and a culture of bank secrecy made Switzerland and other countries like Britain and U.S a preferred destination for stolen funds. Abacha, for instance, held accounts in at least 19 Swiss banks. However, since the beginning of the 1990s, when a series of lawsuits brought by families of the victims of the Jewish Holocaust began to take its toll on its reputation, Switzerland and other countries have been forced to alter their Diplomatic frameworks and policies related to banking. The impact of the lawsuits was made worse by pressure from some foreign governments, notably the US, following the September 2001 terrorist attacks, and Nigeria, desperate to recover billions of dollars stolen by its former dictator, Sani Abacha. For these reasons among others, Switzerland, Britain, U.S and some other countries went further than any of the other fiscal paradises, in the reform of Diplomatic Frameworks and laws, which are now among the toughest and provides among other that their financial institutions should be attentive to suspicious financial transactions.

The diplomatic frameworks put in place for repatriation of looted fund in Nigeria are insufficient. In one hand, this is due to, lack of the strong political will on the part of the government and on the other hand, most of these country(ies) where these funds were illegally kept, usually stipulates conditions for the release of the money, which in most cases usually make the applicability of the little existing diplomatic approach or frameworks practically difficult if not impossible. Some of these conditions includes but not limited to; the requesting government to first begins prosecution of the accused persons at home; confirm the criminal origin of the funds concerned, and sign an undertaking guaranteeing the transparent use of any funds repatriated, the latter condition usually being supervise by the country given the conditions or a chosen international body or agency, like World Bank.

However, this notwithstanding, it can be argued that the first and most important diplomatic approach or steps for repatriation of looted fund is the expression of strong political will of the intending Government. A discriminatory, bias or a weak political will of a government will, however, hinder the process of repatriation no matter how well it started. Examples of this can be found in the process initiated by or during Buhari regime after he took over from Shagari regime.

¹³ Money Laundering (Prohibition) Act 2011 (As amended).

¹⁴ Money Laundering (Prevention and Prohibition) Act 2022.

In 1984, a move by the Buhari military regime, requesting the aid of the British government in recovering funds embezzled and stashed in British banks by the political-tycoon class of the Second Republic (1979-83), the very first of its kind, was quietly abandoned once the British Prime Minister, Margaret Thatcher, announced her intention to publish a list of Nigerians owning bank accounts in Britain¹⁵ During Abubakar Abdulsalam regime as well, despite the fact that most of the looted funds were kept overseas, the Abubakar administration's Political will only place more emphasis on the recovery of what was held within Nigeria. The reason for this less political will to recover the money trashed in foreign bank by Abubakar regime may be attributed to the desire of the regime (above other things) to resolve the political crisis provoked by the annulment of the 1993 presidential elections; restoration of national unity sapped by the five years of tyranny under Abacha; successful and speedy completion of a democratic transition programme and rehabilitation of Nigeria into the international community after years of international isolation among others. By the time he left office in May 1999, despite this lack of political will, Abubakar recovered \$825 million from the Abacha family, leaving a total of \$1.3 billion frozen in several banks in Switzerland, Luxemburg, and Liechtenstein¹⁶ According to the military government, most of the money recovered came from assets (buildings, lands, stocks and shares, vehicles, companies, etc.) and bank accounts of the late dictator and a few collaborators, which were held within Nigeria and had been returned voluntarily by the family of the late Abacha and their close allies. Most of these funds were withdrawn directly from the vaults of the Central Bank of Nigeria (CBN) between 1994 and 1997.¹⁷

The political will inherent in the administration of Obasanjo Government brought a dramatic change in the campaign to recover Nigeria's stolen assets, from a more local-based initiative to the international, with Western governments and other financial centres where stolen funds were believed to be held coming under increasing pressure. As soon as he assumed office, President Obasanjo wrote to all heads of states and governments concerned, including the leaders of the G8, requesting their support in the recovery of Nigerian assets stashed abroad in general, and in their countries in particular. According to Nigerian officials, this request received favourable responses. The Nigerian government's claim that the responses of these leaders were positive. Similarly, according to figures published by the Ministry of Finance, out of a total of \$6 billion allegedly stolen by Abacha, \$3 billion had been identified and almost \$2 billion already repatriated to the country by May 2005.¹⁸

¹⁵ Williams Graf, *The Nigerian State: Economy, State, Class, and Political system in the Post-Colonial Era* (London, James Curry, 1988) 177.

¹⁶ Note 5, 102.

¹⁷ D. Ugolor, the leaders' anti-corruption manifesto at <http://anticorruption-manifesto.org> accessed on the 16th June, 2022.

¹⁸ International campaign for the recovery of looted fund, *ThisDay* newspaper, 13 May 2005.

Between 2003 and 2005, a total of \$750 million frozen in approximately 42 bank accounts was said to have been repatriated from Switzerland in different batches¹⁹ It was after the protracted diplomatic exchanges and bargaining between both governments that the funds were released²⁰ Aside the political will is the intense investigation which will entails the discovery of the origin where the money came from, who was involved, including the array of proxies used, the amount, the illicit methods adopted to getting these funds out of the soil of Nigeria and where the funds was eventually transferred or deposited (the destination country and the financial institution). The whole essence of investigation is to enable the government, “Trace, Confiscate and Return” the stolen funds. It is after the investigation that the repatriation proceedings will then commence.

The process of tracing, confiscating and repatriating stolen wealth is complicated. The first step is the tracing of stolen wealth by the anti-corruption agencies. The second stage is to request that authorities of the country where the assets are domiciled to confiscate the stolen wealth. This may be achieved through the procedure stipulated in the UNCAC or through a Mutual Legal Assistance or other treaties between the two states. Then the assets may be repatriated to their country of origin.

3.1 Legal Frameworks for Repatriation of Looted Fund

Under the Nigeria legal frameworks, which consists of international regional and National legal frameworks, there are three different types of procedures which being adopted in the recovery of stolen wealth stored in another country; these are conviction based, non-conviction based and ordinary civil litigation. Nigeria has several well-drafted legislations enacted to combat various types of corruption, though in some occasion enforcement id the problem. The principal legislations on assets recovery and repatriation in Nigeria are conviction-based including the Corrupt Practices and Other Related.

4.1 The Court and Assets Repatriation Proceedings

a. Criminal Action

Assets repatriation proceeding can take many forms:

- (i) The enforcement authorities might institute criminal action in Nigeria against the suspect. On conviction, judgment will then be enforced in the receiving state, that is the state where the monies are hidden;

¹⁹ Daniel, Soni and Clifford Ndujihe, Abacha Loot: Switzerland has Return \$700m to Nigeria-Swiss Envoy, Vanguard (Lagos), 5th December 2012) at <http://www.vanguardngr.com> accessed 20th June, 2022.

²⁰ Ibid.

- (ii) where it is permissible within the legal framework, the state where the monies are hidden may commence criminal proceedings against the suspect leading to forfeiture of the monies to either state;
- (iii) Proceedings may also be initiated by the state of origin, in the state where the monies are hidden; or a combination of these steps. As rightly observed²¹:

Criminal mechanisms to recover the corruptly acquired of a public official depend first on criminal conviction of the wrongdoer, either in his or her domestic courts or in the court of the jurisdiction where his or her illicit assets are located, and secondly on an enforceable and final confiscation order against his assets

According to Daniel and Matron, this method faces many challenges. Some of these challenges are; generally, in criminal proceeding it is mandatory that the accused is present before the court to stand trial. In some assets recovery cases however, the suspect may be dead like in the Abacha case, or may have fled the country either to avoid arrest or prosecution (as in Diepreye Alamyeseigha of Bayelsa State and Joshua Dariye of Plateau State cases; both jumped bail and fled back to Nigeria from England where they were facing criminal charges relating to corruption and money laundering) it is also difficult to obtain criminal conviction because this class of suspects can afford to hire the best lawyers available in the country, intimidation and harassment of witnesses are also likely to impede trials. Not forgetting the standard of proof required in a criminal case is 'proof beyond reasonable doubt'²²

In addition, where conviction is secured, executing such judgment in a foreign jurisdiction can be very challenging. First, there must be an arrangement in place between the two concerned countries. Second, the trials must have met public policy requirements of the requested state's legal framework. For example, European judges must be satisfied that proceedings conducted abroad meet the justice requirement of the European Convention on Human Rights. It is indeed, Nigeria judgments meet such requirements. Furthermore, the stolen funds are sometimes held in the name of friends, associates and proxies that frequently file all sorts of application to challenge the enforcement of the confiscation order. It is also a requirement that a country seeking foreign enforcement should give the parties involved the opportunity to appeal the judgment, and explore

²¹ Daniel and Matron 'Civil Proceeding to Recover Corruptly Acquired Assets of Public Officials' (Mark Pieth ed) *Recovering Stolen Assets* (New York: Peter Lang, 1998) pp 245-268.

²² *Woolmington v DPP* (1935) AC 462.

all available remedies in the process. This procedure usually takes several years considering the procedural system in Nigeria

b. Civil proceedings

The principle of civil proceedings is recognized by UNCAC 2003, which requires that: Each State Party shall in accordance with its domestic law²³:

- (a) Take such measures as may be necessary to permit another State party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this convention;
- (b) Take such measure as may be necessary to permit its courts to order those who have committed offences established in accordance with this convention to pay compensation or damages to another State Party that has been harmed by such offences.

A requisite for this type of action is that the defendant has a connection with the jurisdiction²⁴. The foreign court is seized of jurisdiction when the stolen property is within its jurisdiction or the defendant lives within jurisdiction. Any act of connection between the defendant, the items and the receiving country is Sufficient to confer jurisdiction on the foreign country. The family member's relatives and business associates may also be joined as defendants.

In civil law jurisdictions, the requesting state is allowed to join in criminal proceedings as an interested party. Proceedings may be commenced by an investigating magistrate through a request for Mutual Legal Assistance. The requesting state will be allowed to participate in the trial.

This method is though considered the most efficient mechanism of asset repatriation, however, the recourse to diplomatic frameworks can be faster, less costly, effective and less cumbersome as compare to conventional court proceedings in Nigeria. The standard of proof is based on a balanced of probabilities, which is lower than the standard of proof beyond reasonable doubt burden in criminal cases. It is sufficient to prove that the defendant cannot justify the source of his wealth, or that his tax returns do not correlate with his wealth; absence of the defendant does not preclude trials. It is far simple to pursue recovery of assets in foreign jurisdictions than in local courts.

²³ UNCAC 2003, Article 53

²⁴ *The Federal Republic of Nigeria v Joshua Chibi Dariye and another* (2007) EWHC 708 (Ch) and Attorney-General for and on behalf of the Republic of Zambia and Meer Care & Desai (a firm) & Ors (2005) EWHC 2102.

The disadvantages of this mechanism include; high cost of private litigation, though this is usually a fraction of what is recoverable, and compatibility of evidence between the requesting legal regime and the requested legal regime. It is also difficult for the requesting state to secure injunctions to freeze assets in the requested state²⁵

Civil proceedings were adopted in Dariye's case and also in Pakistan²⁶ Joshua Dariye was the Governor of Plateau State, Nigeria. Dariye's administration misappropriated more than USD 11.9 million. Huge amounts were siphoned to accounts in the United Kingdom. The accounts were held by his proxies and under his pseudonym "Joseph Dagwa." Dariye also purchase properties in the UK under the fictitious name. Joshua Dariye's ill-gotten wealth in the United Kingdom was confiscated through two civil actions against him by the Federal Government of Nigeria, Properties worth GBP 395, 000 and assets worth. US \$5.7 million were respectively recovered in the two cases.

c. Unjust Enrichment

This is a common law and equitable remedy in Nigeria. It is a potentially effective tool that is undervalued and underutilized in the assets recovery efforts. Examples of the application of this principle bound in the German, Civil Code; Swiss Civil Code and the French Civil Code The application of the principle of unjust enrichment in assets repatriation requires restitution of ill-gotten wealth obtained from wrongful acts. All the applicant has to prove is that the wrongdoer is in possession of ill-gotten wealth at the expense of the state, consequent of which the state has been deprived, and it would be inequitable or unconscionable for the wrongdoer to enjoy the benefit of the unjust enrichment without restitution. In appropriate circumstances, where the legitimate earnings of the wrongdoer are not commensurate with his ill-gotten wealth, particularly in corruption cases, the application of the principle of unjust enrichment has the potential of shifting the burden of proving that there is no ill-gotten wealth to the wrongdoer²⁷. Enrichment mean anything of value whether moveable or immoveable, money or services²⁸ The categories of wrongs under this head include: proceeds of failed contracts; proceeds of inflated contract, against from contract splitting payments made by mistake proceeds of white elephant project gains appropriation of government funds etc. Lord Mansfield describes unjust factors at common law to include mistake payments made pursuant to failure of consideration, cases of duress, exploitation

²⁵ Willie H, navigating between Mutual Legal Assistance and Confiscation Systems, (Mark Pieth ed) Recovering Stolen Assets (Peter Lang: 1998) p. 147

²⁶ *Republic of Pakistan v Asif Ali Zardari and others* (2006) EWHC 2411 (Comm)

²⁷ Dickson, "Unjustified Enrichment Claims: A comparative overview," (1995) (54) *Modern law Review*, 99

²⁸ Beatson, *The Use and Abuse of Unjust Enrichment* (Oxford: Clarendon Press, 1990), 29

etc²⁹. The use of an offence of unjust enrichment, where the onus shifts to the individual to show that the assets were acquired through legitimate means, can be an extremely effective tool to combat corruption³⁰. The wrongdoer has to justify his assets exceeding known sources of income. This will justify inference of corruption. Any assets in excess of his known income should be forfeited to the state as income derived from unjust enrichment. This principle is available in both the civil and common law jurisdictions.

4.2 Action against the Property of the accused

These are civil procedure against property (in rem).³¹ This procedure is available where the accused is dead, has absconded or is absent. It is a non-conviction method³² of confiscating proceeds of crime in the absence of a criminal conviction. In this regard, an enforcement agency like the EFCC is given the power to proceed, with good reasons, and seize assets derived from corruption. There is no requirement for either a civil or criminal conviction in order to confiscate such assets³³. The action is directed against the property and not the person. The enforcement agencies only need to prove that the assets are derived from corrupt related activities. It is difficult if not impossible to find appropriate local laws that accommodate this procedure prior to year 2004 as rightly said by Odusote Abiodun³⁴ this opinion is right subject to the existing law as at that time which provides that an accused is presumed innocent until he/she is proved guilty of the alleged crime³⁵. However, with the amendment of EFCC Act in the 2004, the EFCC is now empowered by law to seize the property of a convict suspected to be a product of illicit wealth³⁶

Article 54 (1) of United Nation Convention against Corruption recognizes actions in rem it provides:

1. Each State Party, in order to provide mutual legal assistance pursuant to Article 55 of this Convention with respect to Property acquired through or involved in the commission of an offence established in accordance with this convention, shall, in accordance

²⁹ *Moses v Macfarlane* (1760)2 Burr 1005, 97 ER 676.

³⁰ Report of the Commonwealth working Group on Asset Repatriation (Commonwealth) Secretariat: London 2005) Para 17.

³¹ Casella, Stefan. "The Case for Civil Forfeiture. Why in rem proceeding are an Essential Tool for Recovering the proceeds of Crime." *Journal of Money Laundering Control* 11 (2008): 8-14.

³² The Stolen Assets Recovery Initiative – STAR- (World Bank and UNODC) a Non Conviction Based Guide.

³³ Kofele-Kale, Ndiva. "Presumed Guilty: Balancing Competing Rights and Interest in Combating Economic Crimes"(2006)(40) *International Lawyer*. 909-44.

³⁴ Odusote Abiodun, 'Towards effective repatriation of illegally acquired assets in Nigeria' *unilag journal of humanity*, at <http://ir.unilag.edu.ng> accessed on 21st June, 2022.

³⁵ The Constitution of Federal Republic of Nigeria 1999 (As amended) S. 36 (5).

³⁶ EFCC Act 2004 (As amended), ss 22 and 23.

with its domestic law.

- (c) Consider taking such measures as many be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

In support of this procedure a former chairman of the EFCC emphatically stated:

If culprits cannot be tried and convicted, they can at least have their assets confiscated without the necessity of a trial, conviction and sentence. It is a democratic law that seeks to take back assets illicitly acquired and deny the corrupt the enjoyment of loot they are not entitled to in the first instance.³⁷

4.3 International Assets Recovery Process

i. Mutual Legal Assistance (MLA)

Mutual Legal Assistance (MLA) is an agreement between states that makes state request and provide assistance in obtaining information or evidence located in one country to assist in judicial investigations or proceedings in another country³⁸, for example, MLA may include the tracing, identification, and seizure of looted assets domiciled in the requested state. This may also extend to Technical assistance and provision of aid. MLA is very vital in the assets recovery process. There are two types of MLA³⁹ that may be required at different stages of judicial proceedings. There is informal assistance that may not require coercive powers by the enforcement agencies which may be given without a treaty, for example, day-to-day exchanges of intelligence. There is also formal assistance requiring the use of coercive power by the request state – for example, searches, arrests, and confiscation may require a formal MLA. Mutual legal assistance between common wealth countries is available on the basis of the Harare Scheme without a formal requirement for a bilateral treaty.

³⁷ Fairda Waziri, 'How Corruption Undermines Democracy; a lecture delivered at Open House Forum held at the Compass Media Village, Isheri, Ogun State on 26 May, 2009

³⁸ Chaiken, David. "The Impact of Swiss Principles of Mutual Assistance on Financial and Fiscal Crimes." (2006)(16) *Revenue Law Journal* 192-214

³⁹ *ibid*

Using the MLA, Nigeria sought the assistance of Swiss authorities through MLA in the case of Abacha. General Sani Abacha was the military head of state of Nigeria from 17 November 1993 to 8 June 1998. General Abdulsalami Abubakar and Olusegun Obasanjo respectively succeeded Abacha. They investigated the massive looting that occurred during Abacha's regime. Abacha was estimated to have looted about USD 4 billion. Through mutual legal assistance submitted to Liechtenstein, Luxembourg, Switzerland, the UK, and the US, Nigeria was able to realize approximately USD 1.3 billion. The situation is well illustrated below:

The importance of international cooperation becomes evident when contrasting the eighteen-year Philippine saga in recovering Marcos' loot with the three to five years it took Peru and Nigeria to recover assets stolen by Montesinos and Abacha, respectively. The fact that Swiss authorities issued a general freezing order against Abacha with only a limited amount of initial evidence, and their decision to instigate Montesinos and freeze \$48 million on November 3, 2000, even before Peru formally requested it, illustrated a positive shift in the attitude toward international cooperation, in stolen asset restitution.⁴⁰

Under MLA, the requested state may offer diverse help ranging from assistance in securing evidence that may be used in securing conviction, obtaining confiscation order against the wrongdoer, recognition of confiscation order from the requesting state, assisting in implementing enforcement orders, etc. Levels of available assistance are dependent on the terms of the MLA.

ii. The Quagmire of the Efficacy of the Diplomatic Frameworks in Repatriation of Looted Fund in Nigeria

In Nigeria, corruption is nourished by weak and ineffective legal system. Corruption that is, flourished in an environment where the judiciary is subservient to the executive: where there is no regard for rule of law; where there is no proper accountability; where there is tolerance for the culture of corruption. The procedure for assets recovery in Nigeria is at the moment conviction based, though under the Nigerian legislative framework assets of the wrongdoer may be restrained by an order *ex parte* once criminal investigation begins. This is fraught with lots of difficulties as the prosecutor will have to prove that the assets are indeed proceeds of corruption. Nigeria needs to learn from past local and international experiences in order to have a successful assets recovery regime. From the foregoing analysis, it is important for the government to remain focused at all

⁴⁰ United Nations Office on Drugs and Crime (UNODC) and the World Bank Stolen Asset Recovery (STAR) Initiative: Challenges, Opportunities, and Action Plan P.30 Available at: www.unodc.org/documents/corruption/StAR-sept07-full.pdf accessed 22nd June, 2022.

times. Assets recovery is a very technical, tedious and lengthy expedition. Following the successes recorded in the repatriation of Abacha, Dariye, Odili, Alamieyeseigha and Deziani's loot, Nigeria has been widely recognized by scholars as a touch-bearer in assets repatriation⁴¹. "Nigeria is a prime example of what can happen when leaders say enough is enough to rampant corruption."⁴² Major obstacles to recovery often comes from within, in terms of state incapacity, lack of political will, lack of trained personnel and the general atmosphere of insecurity. Drawing from experiences highlighted above, this study suggests that for effective assets recovery priority should be given to the Diplomatic frameworks set out below.

5.1 Political Will and Sustained Effort

For appreciable success to be recorded. There is need for political will and sustainable efforts. For instance, the Government of the Philippines sustained an effort over 18 years to recover part of Marco's loot.⁴³ In 1986, the Republic of the Philippines filed a request for mutual assistance with the Swiss authorities in connection with the repatriation of Marcos' deposits in Swiss banks. Twelve years elapsed before these deposits were transferred to escrow accounts in the Philippine National Bank (PNB) and another six years passed before the concerned \$624 million was transferred to the Philippine Treasury. In between, several major legal hurdles had to be crossed including presenting evidence that the monies were the product of embezzlement, diversion of public property, and plundering of the public treasury. Only after the Philippine government won a ruling that the monies could be moved out of Switzerland without a final conviction of Mrs. Marcos under articles 74A of the International Mutual Assistance on Criminal Matters Act (IMAC) was the money moved to the Philippine National Bank in 1998. It was released to the Philippine Treasury in 2004 following a Philippine Supreme Court decision ordering the forfeiture of the Marcos' Swiss Deposits in July 2003.⁴⁴

5.2 Removal of Immunities from prosecution

The Nigerian Constitution provides absolute immunity to certain public officials while in office.⁴⁵ These immunities present a major obstacle to the prosecution of corruption in Nigeria. If the fight against corruption is to be effective and asset recovery effort to be successful, public officials should not be immune to prosecution against corrupt related offences. Under International law,

⁴¹ Fofack, Hippolte, and Leonce Ndikumana. "Capital Flight Repatriation: Investigation to its potential Gains for Sub-Saharan African Countries." (Paper Presented at the annual international meeting for the Africa Development Bank, Tunis, Tunisia, November 12-14, 2008).

⁴² Anthonio Maria Costa, Executive Director, UNODC at the UN Crime congress in Bangkok Thailand, 2005.

⁴³ Chaiken, David. "Tracking the Proceeds of Organized Crime- the Marcos Case" paper presented at the conference on Transnational Crime convened by the Australian Institute of Criminology, Canberra, Australian, March 9-10, 2000. at <http://www.ojp.gov.com> accessed on 22nd June, 2022.

⁴⁴ United Nations Office on Drugs and Crime (UNODC) and the World Bank 'Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan' at www.unodc.org/documents/corruption/StAR-sept07-full.pdf Access on 22nd June, 2022.

⁴⁵ *IMB vTinubu* (2001) 8 NWLR (PT. 740) 192 AT 708.

head of government and head of state generally enjoy immunity from prosecution abroad; however, there is emerging authority that they are no longer entitled to immunity where it involves offences like torture, war crimes, genocide and crimes against humanity⁴⁶. This study advocates that money laundering and corruption should be included under this exception. Compared to torture, and perhaps some war crimes, the effect of corruption is more devastating in Nigeria. Country like Ghana provides a good example of a country that does not provide civil or criminal immunity for public officials in the alternative, Nigeria may adopt the Cyprus model, whereby the prosecutor has to obtain the level of the Supreme Court to press criminal charges against high-ranking public officials for offences including corruption.

5.3 Power to Prosecute Absconding or Dead Accused

Nigeria should enact effective legislation for criminal conviction-based asset confiscation. This should include the power to confiscate in circumstances where the accused has absconded or died. Nigeria should also put in place a procedure for non-conviction based confiscation. Mutual legal assistance between countries should be available without a requirement for a bilateral treaty.

5.4 Establishment of Special Courts

Nigeria must establish a specialist and well respected court to handle corruption cases and assets recovery cases. This will serve several purpose; designated, well trained and dedicated bodes will handle request for assistance; likelihood of speedy trials; specialized knowledge of the area; and capacity-building for specialization of prosecutors and judges.

The Nigeria judiciary has not been able to deal effectively with the menace of corruption and the list of moribund and stalled trial is endless. For example, former Governor Dariye who has been convicted by a UK court had to face money laundering charges in Abuja. A comparison of the number of arrests and arraignments since the inception of the EFCC and the number of convictions recorded paints a gloomy picture. Where the prosecuting agencies have been able to secure trials, the punishment was usually been a slap on the wrist, which is more of an invitation to others to emulate. The judiciary is faced with huge challenges; inadequate funding, inadequate resources; slow judicial process; and corruption. There is now a persistent call for special courts to handle corruption related matters.⁴⁷ According to a former Head of the EFCC, Mrs Farida Waziri;

⁴⁶UN Secretary-General, Preventing and Combating Corrupt Practice and Transfer of Assets of Illicit Origin and Returning such Assets to the countries of origin: Report of the secretary-general. New York: UN General Assembly, 2006; commonwealth working Group on Asset Repatriation. Report. London: The Commonwealth, 2008 at <http://www.digitallibrary.un.org> accessed On 23rd June, 2022.

⁴⁷*The Nigeria Punch Newspaper*, 'Akanbi, NBA' at: http://www.punchng.com/index.php?option=com_k2&viwe=item&3350:akanbi-nba-back-

The slow judicial processes our courts are known for and the bureaucratic and legalistic bottlenecks of the judicial system of this country, do not allow us to achieve our stated goals easily. The legal process takes quite a lot of money, energy, time and deployment of personnel to get a single conviction. ... A special court for EFCC- related offences will take us away from the undue legalities that many brilliant lawyers have capitalized on to twist the hand of the courts and the commission. It is a common practice to define the success of an institution like the EFCC on the number of convictions it had. However, analysts should put into consideration the slow and windy justice system. Under the rule of law as enshrined in the constitution, a person is presumed innocent until found guilty. If the perpetrators of corruption use the rule of law to frustrate attempts at bringing them to justice, then the state must device other appropriate methods

5.5 Plea Bargaining and Assets Recovery

Plea bargaining is defined in Block's law Dictionary as:

A negotiation agreement between a prosecutor and a criminal defendant whereby the defendant plead guilty to a lesser offense or to one of multiple charge in exchange for some concession by the prosecutor, usually a more lenient sentence or a dismissal of the other charges.⁴⁸

Plea bargaining found its way into the Nigeria legal system through the EFCC Act, section 14 (2) of the EFCC (Establishment) Act 2004, which states that:

Subject to the provision of section 174 of the Constitution of the Federal Republic of Nigeria 1999, the Commission may compound any offence punishable under this Act by accepting sums of money as it thinks fit, not exceeding the sum of the maximum fine to which that person would have been liable if he had been convicted of that offence.

special-courts&itemid=542 ; Accessed on 23rd June, 2022; <http://www.tribune.com.ng/index.php/new/30669-corruption-edwin-clark-calls-for-state-of-emergency-advocates-special-courts-to-review-files-of-ex-govs-others> (Accessed 23rd June, 2022).

⁴⁸ Bryan Garner, *Black's law Dictionary* (11th ed Thomas Reuters: 2019).

Some of the high-profile criminal convictions secured through plea bargaining are *Diepreye Alamieyeseigha's Case*⁴⁹ *Tafa Balogun's Case*⁵⁰ *Chief Lucky Nosakhare Igbinedion's Case*⁵¹ and *Cecilia Ibru's Case*⁵². Plea bargaining as presently practiced is besieged with lots of problems. The problems of plea bargaining in relation to criminal proceedings in corruption cases include: lack of an enabling legal framework; recovery of a fraction of the sum involved (the Igbinedion cases is a typical example of gross abuse of the process, in fact a mockery of the system); discriminatory application of plea bargaining; and the secrecy surrounding negotiations. Nevertheless, plea bargaining is an effective tool in assets recovery if well deployed. The case studies on Abacha, Alamieyeseigha and Ibru stress the importance of introducing domestic reforms that can boost domestic asset recovery.

5.6 The Use of Mareva Injunctions

It is important to obtain an order of court restraining the wrongdoer from taking the stolen wealth out of jurisdiction or from dissipating or dealing in it. This is similar to a Mareva injunction. This order is to be served on the third party in possession of the items. For example, a bank may be served a Mareva injunction. This automatically freezes the money and the wrongdoer may only be permitted to withdraw maintenance expenses.

5.7 The Application of Secrecy of Orders

Financial institutions and financial adviser ordinarily have a duty to inform their clients or any order to make a disclosure about their client's account. This may be detrimental to corruption cases. Once, the wrongdoer is aware his account is being investigated; he will, definitely move the money out of the court's jurisdiction. In these circumstances, the court can make a 'an order to keep secret it order'. This will prevent the bank from disclosing any information to the wrongdoer. However, the wrongdoer might be allowed to operate his account in a normal way but large amounts of money may not be withdrawn from the account.

6.0 Conclusion and Recommendations

This study has shown that efforts to trace, identify, confiscate and return stolen asset to Nigeria by law enforcement agencies, and through assistance from other states, have yielded insignificant gains compared to the huge sums of money being siphoned abroad. Although, compared to other

⁴⁹ *FGN V Alamieyeseigha* Suit No. FHC/L/329C/05) at: <https://star.worldbank.org/corruption-cases/node/18620> accessed on 23rd June, 2022.

⁵⁰ *FRN v. Tafa Balogun* "Inspector-General Tafa Balogun Convicted: Jailed for six months" Law, Crime & Judiciary at www.transparencyng.com accessed on 23rd June, 2022.

⁵¹ *Chief Lucky Nosakhare Igbinedion v FGN* No FHC/EN/6C/2008.

⁵² *Federal Republic of Nigeria v Dr (Mrs) Cecilia Ibru* FHC/L/297C/2009.

jurisdictions where corruption is rampant, Nigeria's assets recovery might be considered a modest achievement. This study highlighted forms of proceedings available to recover ill-gotten assets and examined the evidence gathering process and methodology. It is the view that the forms of proceedings available in Nigeria to recover looted assets are inadequate. Nigeria needs to consider and implement other forms of proceedings that comply with international standards which have been analysed in this paper. For example, the non-conviction regime, the study has also emphasized the urgent need to create special courts to tackle the menace and to recover looted assets.

In sum, to effectively tackle the menace and to be able to effectively and successfully recover ill-gotten wealth, Nigeria needs to embrace a combination of conviction and no-conviction regimes with effective international diplomacy. The need to effectively recover looted assets cannot be overemphasized. Recovery of looted assets "would boost domestic saving which in turn would induce higher investment. In addition, repatriated capital flight would increase the taxable base, raising government revenue. This would allow the government to increase public investment. This will ultimately boost capital formation, a key driver of long-term growth. One of the objectives should be to narrow the gap between confiscated assets and actual assets returned to their legitimate owners. There is the need for the international community to demonstrate political will in removing all difficult barriers and obstacles to the full implementation of the provisions of United Nations Convention Against Corruption (UNCAC) particularly Article 51 on Asset Recovery and Return, including cases that make use of settlement or to her non-trial resolutions.