

Toward Effective Repatriation of Illegally Acquired Assets in Nigeria

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Abstract

This study examines the multi-dimensional challenges involved in tracing, freezing and repatriating looted state assets in foreign jurisdictions. It is the view of this article that the forms of proceeding available in Nigeria to recover looted assets are inadequate. The paper discusses successful assets recovery cases and the not so successful cases involving Nigerian corrupt officials. It also discusses the main challenges to assets recovery through criminal proceedings and highlights various approaches to assets recovery. The paper recommends that for effective assets recovery, Nigeria must, among others, enact forfeiture and confiscation laws that should be applied through the civil process rather than the traditional criminal justice system. The article proposes some strategies for assets repatriation, but with a caveat that the success of these proposals is contingent on strong political will on the part of the Nigerian government and its ability to constructively engage the requested state.

Introduction

The effect of corruption in Africa is pervasive, whereas the recovery of looted assets is grossly below expectation. Corruption, particularly grand corruption,¹ is a catalyst to underdevelopment. According to the UN Committee:

It is widely recognised that corruption is a threat to the stability of societies, the establishment and maintenance of the rule of law and economic and political progress. Any meaningful solution to the

¹ John Conyngham Esq, Global Director of Investigations, Control Risks Group Limited, in his testimony before the Committee on Financial Services Subcommittee on Financial Institutions and Consumer Credit, US House of Representatives 9 May 2002, entitled "Recovering Dictator's Plunder" stated:

"[G]rand corruption typically consists of the payments of large bribes often in millions of dollars to secure commercial contracts or other business advantage. In its most extreme form grand corruption can amount to state capture where corrupt interests control the state itself and manipulate the machinery of government to serve their private interests. Former President Mobutu's kleptocracy in Zaire (his "salary" was reported at one point as equaling 17% of the national budget and his "personal allowance" exceeded the combined expenditure on education, health and social services) and former President Slobodan Milosevic's actions in Serbia are widely perceived to be classic examples of this phenomenon." Available at: http://www.ipocafrika.org/index.php?option=com_content&view=article&id=69&Itemid=68 (Accessed 12 September 2011).

problem must account for the recovery of the assets derived from corruption. The recovery and return of those ill-gotten gains can make a significant difference to countries recovering from corruption and sends the important message that the international community will not tolerate such unlawful conduct.²

Assets repatriation is a term used to describe efforts by governments to repatriate the proceeds of corruption recovered from corrupt officials. These are state resources illicitly converted and most often transferred to other jurisdictions. The sums involved can be quite staggering. According to the Nyanga Declaration on the Recovery and Repatriation of Africa's Wealth:³

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.

It is generally agreed that Nigeria is suffering from the worst form of corruption regime⁴, as corruption is well rooted in Nigeria. She is reputed to be one of the most corrupt and fraudulent countries in the world. The proceeds of corruption are often taken out of Nigeria and this has severe consequences for the country. It undermines socioeconomic development, reduces foreign reserves, induces chronic poverty and increases armed conflicts and internal strife. The harm caused by corruption is terrible and devastating.

Recovery of 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 include: immunity of government officials from criminal prosecution⁵, which can preclude effective prosecution and pursuit of illicit assets in corruption cases, few anti-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 threaten the lives of anti-

² Ad Hoc Committee for the Negotiation of a Convention against Corruption. United Nations, 'Global study on the transfer of funds of illicit origin, especially funds derived from acts of corruption' Doc A/AC.261/12 28 November 2002, para 7.

³ The Nyanga Declaration was signed on 4 March 2001 by representatives of Transparency International in Botswana, Cameroon, Ethiopia, Ghana, Kenya, Malawi, Nigeria, South Africa, Uganda, Zambia and Zimbabwe. Available at: www.transparency.org (Accessed 14 September 2013)

⁴ Transparency International (TI), Corruption Perception Index from 1995 to 2007.

⁵ Section 308 of the 1999 Constitution provides that certain public officers – the President, Vice President, 36 Governors and the Deputy Governors shall not be subject to civil and criminal prosecution during their stay in office.

corruption agencies' officials, while some anti-corruption agencies' officials lose their lives in the process.⁶ According to Ribadu:

When you fight corruption, it fights back. It will likely have greater resources than you, and it is led by those who operate outside the law and view the fight as life and death for their survival.⁷

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.

The process and obstacles encountered in repatriating ill-gotten wealth has received little attention from academic researchers. This study thus focuses on efforts to trace, identify, confiscate and return stolen assets to Nigeria by law enforcement agencies, and through assistance from other state members. The research inquires into forms of proceedings that are available to recover ill-gotten assets. Also examined are the evidence-gathering process and methodology. The article 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) 2003⁸, 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 ill-gotten wealth, Nigeria needs to embrace a combination of conviction and non-conviction regimes.

Assets Recovery

Article 51 of the UNCAC states that:

The return of assets ... is a fundamental principle of this Convention, and 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 provisions provide a framework, in both civil and

⁶ For example, the head of the Forensic Unit of the EFCC, Abdullahi Muazu, was assassinated in Kaduna on 14 September 2010. Details available at: http://234next.com/csp/cms/sites/Next/News/5619080-147/gunmen_kill_efccs_forensic_team_leader.csp (Accessed 9 September 2011).

⁷ N. Ribadu 'Capital Loss and Corruption: The Example of Nigeria' (Testimony before the US House Financial Services Committee on 19 May 2009), available at: http://www.house.gov/apps/list/hearing/financialsvcs_dem/ribadu_testimony.pdf (Accessed 10 September 2011).

⁸ UNCAC: Nigeria signed in 2003 and ratified in 2004

criminal law, for tracing, freezing, forfeiting, and returning funds obtained through corrupt activities. 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.

Nigerian Legal Framework

Under the Nigerian legal framework, which consists of international⁹, regional¹⁰, bilateral¹¹ and local mechanisms¹², there are three different types of confiscation procedures which can be adopted in the recovery of stolen wealth stored in another country: conviction based, non-conviction based and ordinary civil litigation.

Nigeria has several well-drafted legislations enacted to combat various types of corruption. The principal legislations on assets recovery and repatriation in Nigeria are conviction-based including the Corrupt Practices and Other Related

⁹ OECD: Anti-Bribery Convention 1997; The London Scheme for Extradition within the Commonwealth (incorporating the amendments agreed at Kingstown in November 2002); United Nations Convention against Transnational Organised Crime (signed December 2000, ratified June 2001); International Convention for the Suppression of the Financing of Terrorism, 1999; UN Convention for the Suppression of the Financing of Terrorism of 9 December 1999; UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988; United Nations Convention against Transnational Organised Crime (UNTOC), 2000; UN Convention against Transnational Organised Crime (UNTOC), General Assembly resolution 55/25, 15 November 2000. The structure of these citations can consistently be slightly improved upon.

¹⁰ OAU Convention on the Prevention and Combating of Terrorism, 1999; African Union - OAU Convention on the Prevention and Combating of Terrorism, adopted on 14 July 1999 ; African Union Convention on Preventing and Combating Corruption, 2003; Nairobi Declaration on International Obligations and on the Recovery and Repatriation of Africa's Stolen Wealth, 2006; Nairobi Declaration on asset recovery by representatives of Transparency International from 7 African countries, 2006; ECOWAS Treaty on Exchange of Information on Criminal Matters; and African Convention on Prevention and Combating Corruption

¹¹ Law Enforcement Cooperation Agreement with the United States of America, 2001; and Nigeria/South Africa Bilateral Treaty on criminal matters, 2001.

¹² Economic and Financial Crimes Commission Act, 2004 (EFCC Act, 2004); Corrupt Practices and other Related Offences Act, 2000 (ICPC Act, 2000); Code of Conduct Act, 1989; Constitution of the Federal Republic of Nigeria, 1999; Money Laundering (Prohibition) Act, 2004; Advance Fee Fraud and other Fraud Related Offences Act, 2006.

Offences Act 2004 and the Economic and Financial Crimes Commission (EFCC) (Establishment) Act 2004. Presently, Nigeria does not have a non-conviction based assets forfeiture regime¹³.

The Court and Assets Repatriation Proceedings

Criminal Action

Assets repatriation proceedings can take many forms: (a) the enforcement authorities might institute criminal actions 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; (b) where it is permissible within the legal framework, the state where the monies are hidden may commence proceedings against the suspect leading to forfeiture of the monies to **either** state; (c) 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 observed:

Criminal mechanisms to recover the corruptly acquired assets of a public official depend first on criminal conviction of the wrongdoer, either in his or her domestic courts or in the courts of the jurisdiction where his or her illicit assets are located, and secondly on an enforceable and final confiscation order against his assets¹⁴

According to Daniel and Maton, this method faces many challenges. Some of these challenges are highlighted below.

Generally, in criminal proceedings, 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,¹⁵ or may have fled the country either to avoid arrest or prosecution.¹⁶ 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'.¹⁷

¹³ Seizure and forfeiture of cash and assets is either through plea bargain or through a court order. No rules have been made by the Attorney-General under section 31 (4) and 43 of the EFCC Act 2004.

¹⁴ Daniel and Maton 'Civil Proceedings to Recover Corruptly Acquired Assets of Public Officials' in Mark Pieth (ed.) *Recovering Stolen Assets* (New York: Peter Lang, 1998) pp 245-268

¹⁵ Sanni Abacha

¹⁶ Diepreye Alamyeseigha of Bayelsa State and Joshua Dariye of Plateau State both jumped bail and fled back to Nigeria from England where they were facing criminal charges relating to corruption and money laundering.

¹⁷ *Woolmington v DPP* [1935] AC 462

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 (ECHR)¹⁸. It is arguable that Nigerian judgments meet such requirements. The stolen funds are sometimes held in the names 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 all available remedies in the process. This will take several years in Nigeria.

Action against Property

Article 54(1) (c) of United Nations Convention against Corruption recognises actions *in rem*:

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 with its domestic law:

(c) Consider taking such measures as may 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.

These are civil procedures against property (*in rem*)¹⁹. This procedure is available where the accused is dead, has absconded or is absent. It is a non-conviction method²⁰ 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 assets²¹. The action is directed against the property and not the person. The enforcement agencies only need to prove that the assets are

¹⁸ Supra note 13

¹⁹ Casella, Stefan. "The Case for Civil Forfeiture: Why in rem Proceedings are an Essential Tool for Recovering the Proceeds of Crime." *Journal of Money Laundering Control* 11 (2008): 8-14

²⁰ The Stolen Asset Recovery Initiative -StAR- (World Bank and UNODC) have recently published a Non Conviction Based Guide which provides practical advice to jurisdictions contemplating NCB asset forfeiture legislation in line with Article 54(1)

²¹ Kofele-Kale, Ndiva. "Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes." *International Lawyer* 40 (2006): 909-44

derived from corrupt related activities. It is difficult if not impossible to find appropriate local laws that will accommodate this procedure at present.²²

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 instance²³

In August 2011, the House of Representatives voted against the second reading of the Bill to amend the EFCC Act 2004 that would allow for action against property. The proposed Bill was 'to make provisions for the restraint and civil forfeiture of property derived from unlawful activity and any instrumentalities used or intended to be used in the commission of unlawful activity and to make provision for the investigation of benefit derived from corruption, money laundering and instrumentalities.' The bill was defeated.

Civil Proceedings

The principle of civil proceedings is recognised in Article 53 of UNCAC, which requires that:

Each State Party shall, in accordance with its domestic law:

(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 measures 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 jurisdiction.²⁴ The foreign jurisdiction is seised 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

²² Section 36 (5) of the Constitution of Federal Republic of Nigeria provides that an accused is presumed innocent until he/she is proved guilty of the alleged crime.

²³ 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

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.

sufficient to confer jurisdiction on the foreign country. The family members, 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.²⁵

This method is the most efficient mechanism of asset repatriation. The standard of proof is based on a balance 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 simpler to pursue recovery of assets in foreign jurisdictions than in local courts.

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 state.²⁶

Civil proceedings were adopted in Dariye's case²⁷. 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 Dagwan". Dariye also purchased 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.

*Unjust Enrichment*²⁸

This is a common law and equitable remedy in Nigeria. It is a potentially effective tool that is undervalued and underutilised in the assets recovery efforts. The application of the principle of unjust enrichment in assets repatriation requires restitution of ill-gotten wealth obtained from wrongful acts. In other words, entitlement generated by unjustified enrichment and at the expense of the

²⁵ Supra note 13.

²⁶ Willie H, 'Navigating between Mutual Legal Assistance and Confiscation Systems' in Mark Pieth (ed.) *Recovering Stolen Assets* (Peter Lang: 1998) p.147

²⁷ See also *Islamic Republic of Pakistan v Asif Ali, Zardari and others* [2006] EWHC 2411 (Comm)

²⁸ Examples of the application of this principle bound in the German Civil Code; Swiss Civil Code and the French Civil Code.

state²⁹ must be restituted by the wrongdoer. Enrichment means anything of value whether moveable or immoveable, money or services.³⁰ The categories of wrongs under this head include: proceeds of failed contracts; proceeds of inflated contract, gains from contract splitting; payments made by mistake; proceeds of white elephant projects; gains appropriation of government funds, etc. Lord Mansfield describes unjust factors at common law to include mistakes, payments made pursuant to failure of consideration, cases of duress, exploitation, etc.³¹

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 wrongdoer:

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 corruption³²

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 enrichment³³.

International Diplomacy and Assets Recovery

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 country³⁴. For example, MLA may include the tracing, identification, and seizure of looted assets domiciled in the requested state. This may also extend to

²⁹ Dickson, "Unjustified Enrichment Claims: A Comparative Overview," (1995) 54 *Modern Law Review*, 99.

³⁰ Beatson, *The Use and Abuse of Unjust Enrichment* (Oxford: Clarendon Press, 1990), 29.

³¹ *Moses v Macferlan* (1760) 2 Burr 1005, 97 ER 676

³² Report of the Commonwealth Working Group on Asset Repatriation (Commonwealth Secretariat: London 2005) Para 17

³³ This principle is available in both the civil and common law jurisdictions

³⁴ Chaiken, David. "The Impact of Swiss Principles of Mutual Assistance on Financial and Fiscal Crimes." *Revenue Law Journal* 16 (2006): 192- 214

technical assistance and provision of aid. MLA is very vital in the assets recovery process.

There are two types of MLA³⁵ 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 exchange of intelligence. There is also formal assistance requiring the use of coercive powers by the requested state - for example, searches, arrests, and confiscation may require a formal MLA. Mutual legal assistance between Commonwealth countries is available on the basis of the *Harare Scheme* without a formal requirement for a bilateral treaty.

In the case of Abacha, Nigeria sought the assistance of Swiss authorities through MLA. 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 realise approximately USD 1.3 billion. The situation is well illustrated in the quotation below:

The importance of international cooperation becomes evident when contrasting the eighteen year Philippine saga in recovering Marcos's 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 freeing order against Abacha with only a limited amount of initial evidence, and their decision to investigate Montesinos and freeze \$48 million on November 3, 2000, even before Peru formally requested it, illustrates a positive shift in the attitude toward international cooperation in stolen asset restitution.³⁶

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.

The Nigerian Judiciary and Assets Recovery

The Economic and Financial Crimes Commission (EFCC) has continued relentlessly in its effort to curb corruption, by arresting highly placed suspects

³⁵ Ibid

³⁶ 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 02 Jan 2014)

and prosecuting several high-profile cases. Unfortunately, conviction has been minimal and corruption has continued at an alarming scale. The seeming incapacity of both the enforcement agencies and the courts to convict corrupt officials is very glaring. In a conviction-based regime, without first securing conviction, it is quite difficult to recover ill-gotten wealth. The Nigerian judiciary has not been able to deal effectively with the menace of corruption and the list of moribund and stalled trial is endless.³⁷ 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 picture³⁸. 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.³⁹ 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 matters⁴⁰. According to a former Head of the EFCC, Mrs Farida Waziri:

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 capitalised 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

³⁷ Ayo Fayose (Governor of Ekiti State), Orji Uzo Kalu (former Governor of Abia State), Saminu Turaki (former Governor of Jigawa State), Joshua Dariye (former Governor of Plateau State), Chimaroke Nnamani (former Governor of Enugu State) (and Fani Kayode (former Minister of Aviation)

³⁸ See note 7 above

³⁹ Ibru, Igbiniedion

⁴⁰ *The Nigerian Punch Newspaper*, 'Akanbi, NBA back special courts,' Available at: http://www.punchng.com/index.php?option=com_k2&view=item&id=3350:akanbi-nba-back-special-courts&Itemid=542 Accessed on 03 November, 2011 Retired Justice Mustapha Akanbi was the former Chairman of the Independent Corrupt Practices and other related Offences Commission; *The Nigerian Tribune* 'CORRUPTION: Edwin Clark calls for state of emergency • Advocates special courts to review files of ex-govs, others' Available at: <http://www.tribune.com.ng/index.php/news/30669-corruption-edwin-clark-calls-for-state-of-emergency-advocates-special-courts-to-review-files-of-ex-govs-others> (Accessed 03 November 2011)

corruption use the rule of law to frustrate attempts at bringing them to justice, then the state must device other appropriate methods⁴¹

Chief Uchechukwu Uche also observed:

We need special courts that can try corruption cases speedily. For such courts, there should be deadlines or time frames within which cases should be dispensed with. This is critical because if people corruptly enrich themselves and know that they can exploit the judicial processes then they could go to any length to perpetuate frauds in spite of the preaching by government.

Yes, government has been saying that it is fighting corruption but I must say that the government is beginning to sound like a broken record. All we hear is talk, talk, talk about people being charged, there was corruption here, it was uncovered there, billions here, millions there. But we never hear a lot about convictions. If government is to make people know that something is truly happening in the fight against corruption, we need to see convictions⁴².

Waziri's frustration with the Nigerian judicial system underscores the use of plea bargaining as a tool of the EFCC in securing criminal convictions. This paper will now proceed to examine some of the criminal convictions that have been secured through plea bargaining.

Plea Bargaining and Assets Recovery

Plea bargaining is defined in *Black's Law Dictionary* as:

a negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offence 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 charges⁴³

Plea bargaining found its way into the Nigerian 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.

⁴¹ Farida 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.

⁴² Chief Uchechukwu Uche was the President of the Institute of Chartered Accountants of Nigeria (ICAN) see the interview granted to *Thisday newspaper* of 15 Jun 2009.

⁴³ Garner, BA (ed), *Black's Law Dictionary* (Thomas West: 2004)

Some of the high-profile criminal convictions secured through plea bargaining are discussed and set out below:

*Diepreye Alamieyeseigha's Case*⁴⁴

Diepreye Alamieyeseigha was elected Governor of Bayelsa State in May 1999. In September 2005, he was arrested by the Proceeds of Corruption Unit of the London Metropolitan Police and was charged with money laundering offences. He was released but later jumped bail. He was later impeached by the Bayelsa State House of Assembly. Thereafter, he was arrested by the EFCC and charged on money laundering and corruption offences. He pleaded guilty in July 2007, and was sentenced to two years in prison with effect from the day of his arrest. He was consequently released a few hours after his sentence. A total sum of 17.7 million naira was recovered from him through plea bargaining in Nigeria and non-conviction civil suit in London.

*Tafa Balogun's Case*⁴⁵

Tafa Balogun was a former Inspector-General of the Nigerian Police Force. He was charged, tried, convicted and sentenced for corruption and money laundry related charges. His assets worth over N17 billion were confiscated and returned to the Federal Government of Nigeria.

*Chief Lucky Nosakhare Igbinedion's Case*⁴⁶

Igbinedion, a former Governor of Edo State in the South-South part of Nigeria, was arraigned on charges of corruption, money laundering and embezzlement of N2.9 billion naira. He entered into plea bargaining and a 191-count was reduced to a mere one-count charge:

That you, Lucky Igbinedion (former Governor of Edo State) on or about January 21, 2008 within the Jurisdiction of this honourable court neglected to make a declaration of your interest in account No. 41240113983110 with GTB in the declaration of assets form of the EFCC and you thereby committed an offence punishable under section 27 (3) of the EFCC Act 2004.

Lucky Igbinedion was convicted on this one charge and the EFFCC was able to recover N500m, a few properties. He was sentenced to either six months' imprisonment or payment of N3.6 million as option of fine.

⁴⁴ Available at <https://star.worldbank.org/corruption-cases/node/18620> (Last accessed on 14/02/2014); see also FGN V Alamieyeseigha Suit No. FHC/L/329C/05)

⁴⁵ Available at www.transparencynigeria.com, "Inspector-General Tafa Balogun Convicted: Jailed for Six Months" Law, Crime & Judiciary (Last accessed on 14/02/2014)

⁴⁶ *Chief Lucky Nosakhare Igbinedion v FGN* No FHC/EN/6C/2008

This was undoubtedly a slap on the wrist. The EFCC pretended not to be satisfied with the judgment and appealed the option of fine. Later, the EFCC filed a fresh count of corruption⁴⁷ against Igbinedion who promptly raised the defence of double jeopardy and the case was struck out.

*Cecilia Ibru's Case*⁴⁸

Cecilia Ibru was the former Chief Executive Officer of Oceanic Bank. She was charged and convicted of offences related to corruption; authorising loans beyond her credit limit; and rendering false accounts and approving loans without adequate collateral. She entered into a plea bargaining, convicted and sentenced to imprisonment for a term of 6 months and forfeited some of her ill-gotten assets worth N191.4billion to the Assets Management Corporation of Nigeria⁴⁹.

Obviously, these cases do not portray the law enforcement agency as diligent and competent. It is apposite to mention that aside from the convictions secured through plea bargaining it is quite difficult to recall a high-profile criminal conviction secured after full trial.⁵⁰ This is not unconnected with the problems of criminal proceedings already highlighted above. In a conviction-based criminal justice system, as Nigeria, it means assets recovery is limited to the few cases secured through plea bargaining.

However, plea bargaining as presently practised 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 case 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.

Onyema observed that:

It is pertinent to reveal also that the near secret manner with which the plea bargain is negotiated and secured does not help matters. Sadly enough, Nigerians only wake up to hear that the deal has been brokered. As a court process, its negotiation should be openly canvassed in the court. This will enable enlightened and informed Nigerians, perhaps, to make contribution(s) towards frustrating it⁵¹.

⁴⁷ Suit No FHC/B/HC/2011.

⁴⁸ *Federal Republic of Nigeria v Dr (Mrs) Cecilia Ibru* FHC/L/297C/ 2009

⁴⁹ Ibid

⁵⁰ The only case of note is the High Court judgment in *Chief Bode George & Ors v Federal Republic of Nigeria* ID/71C/2008. The case falls outside the scope of this paper as there was no assets recovery involved.

⁵¹ Onyema M E 'EFCC and Plea Bargain Issue in Nigeria: Matters Arising' Available at: <http://nigeriaworld.com/articles/2009/may/241.html> (Accessed 10 September 2011)

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.

Lessons for Nigeria

Corruption is nourished by weak and ineffective legal institutions. Corruption, that is, grand corruption, flourishes 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 times. Assets recovery is a very dangerous, tedious and lengthy expedition.

Following the successes recorded in the repatriation of Abacha, Dariye and Alamieyeseigha's loot, Nigeria has been widely recognised by scholars as a touch-bearer in assets repatriation.⁵² "Nigeria is a prime example of what can happen when leaders say enough is enough to rampant corruption,"⁵³

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 issues set out below:

⁵² Fofack, Hippolte, and Leonce Ndikumana. "Capital Flight Repatriation: Investigation of its Potential Gains for Sub-Saharan African Countries." (Paper presented at the annual international meeting for the African Development Bank, Tunis, Tunisia, November 12-14, 2008.); Daniel and Tim above Supra note 13; Hofmeyr; and Scher, supra note 24

⁵³ Antonio Maria Costa, Executive Director, UNODC at the UN Crime Congress in Bangkok, Thailand, 2005

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 Marcos' loot.⁵⁴

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 article 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 2003.⁵⁵

Removal of Immunities from Prosecution

The Nigerian Constitution provides absolute immunity to certain public officials while in office.⁵⁶ 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 efforts to be successful, public officials should not be immune to prosecution against corrupt related offences⁵⁷. Under international law, head of governments and head of states 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 humanity.⁵⁸ This study advocates that money laundering and corruption should be included under this exception. Compared to torture, and perhaps some war crimes, the effects of corruption are more devastating in

⁵⁴ Chaiken, David. "Tracking the Proceeds of Organised Crime- the Marcos Case." Paper presented at the Conference on Transnational Crime convened by the Australian Institute of Criminology, Canberra, Australia, March 9-10, 2000.

⁵⁵ United Nations Office on Drugs and Crime (UNODC) and the World Bank 'Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan' Available at: www.unodc.org/documents/corruption/StAR-Sept07-full.pdf (Accessed 10 October 2011)

⁵⁶ *IMB v Tinubu* (2001) 8 NWLR (pt. 740) 192 at 708 and 718

⁵⁷ In virtually all the commonwealth countries there is no immunity for public officials

⁵⁸ UN 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, 2005.

developing countries. 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 leave of the Supreme Court to press criminal charges against high-ranking public officials for offences including corruption.

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 asset confiscation. Mutual legal assistance between countries should be available without a requirement for a bilateral treaty.

Establishment of Special Courts

Nigeria must establish a specialist and well respected court to handle corruption cases and assets recovery cases⁵⁹. This will serve several purposes; designated, well trained and dedicated bodies will handle requests for assistance; likelihood of speedy trials; specialised knowledge of the area; and capacity-building for specialisation of prosecutors and judges:

South Africa presents an example of the importance of funding and staffing teams of prosecutors and judges. The country created a special commission to investigate corruption and special tribunals to adjudicate civil matters arising from those investigations.⁶⁰

The Use of Search and Seize Orders

The EFCC and the ICPC should be given the powers to enter, search, and seize documents the wrongdoer might possibly destroy or keep out of investigations. Human rights activists may deem this to be a violation of the wrongdoer's right to privacy. However, this is in consonance with the principle in *Anton Piller KG v Manufacturing Processes*.⁶¹

The Use of Mareva Injunctions

It is important to obtain an order of court retraining 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.

⁵⁹ Ibid

⁶⁰ Selby Baqwa, "Anti-corruption efforts in South Africa", *Journal of Public Inquiry*, vol. 21, Fall/Winter 2001, p. 21; At the material time Selby Baqwa was the Public Protector of South Africa.

⁶¹ [1975] 1 WLR 302, CA

The Application of No-say Orders

Financial institutions and financial advisers ordinarily have a duty to inform their clients of 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 'no say 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:

In the English proceedings brought by the Nigerian Government against the Abacha family, the 'no say' order was in place for six weeks before notice was given to the family. During that time a wealth of information was gathered for disclosure and freeing injunctions in relation to accounts at banks revealed by disclosure from other banks. Almost 20 banks were subject to orders at the end of the process.⁶²

Know Your Customer Test

Article 52 (1) of the Convention provides:

Without prejudice to Article 14 of this Convention, each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer.

Also, Article 65 of the Convention provides enhanced provisions of identification in relation to politically exposed persons and their families and associates:

The whole package of measures in Article 65 addresses many of the core issues associated with abuse of office, lax banking controls and the use of offshore banks. If every country were to pass legislation giving effect to the measures contained in this Article, and ensure proper enforcement, there is no doubt that opportunities for looting to take place would be radically reduced.⁶³

⁶² Daniel and Tim Supra note 13.

⁶³ Freeman K, 'Repatriation of looted state assets: some case studies and the UN Convention against Corruption' Available at: <http://www.ipocafrika.org/index>

At the moment, the *know your customer test* is being enforced within the Nigerian financial industry, but more still has to be done.⁶⁴ Due diligence tests must be performed by the banks to ascertain the identity of their customers with the aim of eliminating identity theft, assets looting, and money laundering⁶⁵. The test must aim to match customer's record, and salary, with deposit and transactions in respect of the account. Disclosure of suspicious money transfer and deposit must be made to appropriate authorities.

Conclusion

This study has shown that efforts to trace, identify, confiscate and return stolen assets 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 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 of this author that the forms of proceeding available in Nigeria to recover looted assets are inadequate. Nigeria needs to consider and implement other forms of proceedings that comply with international standards. For example, the non-conviction model discussed above will eliminate some of the problems associated with the conviction regime. The study has also emphasised the urgent need to create special courts to tackle corruption and to recover looted assets.

In sum, to effectively tackle the menace of corruption and to be able to effectively and successfully recover ill-gotten wealth, Nigeria needs to embrace a combination of conviction and non-conviction regimes with effective international diplomacy. The need to effectively recover looted assets cannot be overemphasised. Recovery of looted assets "would boost domestic saving, which in turn would induce higher investment"⁶⁶. 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."⁶⁷

[.php?option=com_content&view=article&id=69&Itemid=68](#) (Accessed 12 September 2011)

⁶⁴ Opara, Ijeoma. "Nigerian Anti-Corruption Initiatives." *Journal of International Business and Law* 6 (2007): 65-93; Serio, M. "Politically Exposed Persons: AML, Taking the Profit Out of Corruption and Problems for the Banks." *Journal of Money Laundering Control* 11 (2008): 269-72.

⁶⁵ Serio, M. "Politically Exposed Persons: AML, Taking the Profit Out of Corruption and Problems for the Banks." *Journal of Money Laundering Control* 11 (2008): 269-72.

⁶⁶ Adekoya, Charles A. "Structuring Money Laundering Control as a Mechanism for Controlling Corruption in Nigeria: Need for Enhanced International Cooperation." *International Journal of Liability and Scientific Enquiry* 1 (2008): 272-281.

⁶⁷ Hippolyte Fofack et al. *Supra*

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