ASSESSING THE EFFICACY OFTHE UNITED NATIONS LEGAL CONVENTION AGAINST CORRUPTION: ASSETS RECOVERY IN PERSPECTIVE

By

Abraham Paul*

Abstract

Out of the $4 trillion spent on governmentprocurement annually across the globe, approximately $400 billion is siphoned off usually in the formof bribe. Some of these illegal gainsor assets are oftenlaundered thus making their recovery a herculean task. The objective of this papertherefore is to assess the efficacy of United Nations Convention Against Corruption (UNCAC) in combating corruption through the recovery of such assets with a view to making recommendation to enhance assets recovery efforts across the globe. Doctrinal method is adopted for this research.Accordingly, material from primary sources such asthe relevant provision of UNCAC and judicialdecisions on assets recovery were analyzed. Secondary sources such as books and journal were also analyzed. It was found that a major challenge to effective recovery of assets through UNCAC is the differences inlegalsystems. For instance, a civil law country that seeks to recover assets from common law jurisdictionsoften face obstacles due to high evidentiary requirements. Secondly,the conditions for tracing assets differ. In some jurisdictions, the plaintiff must show a "clear link" between his assets and the one in the hands of the wrongdoer, while in other jurisdictions, the requirement of "clear link" is not always followed.Article 46 of UNCAC has added to the problem byallowing States to decline request in absence of reciprocity and dual criminality.What constitute crime differs from country to country, so there is always the tendency that a request may be declined on this basis. Thirdly, Mutual Legal Assistance (MLA) through Non-Conviction Based (NCB)proceeding can only be responded to by States that have NCB legislation. Finally, even where the above hurdles have been crossed, return of assets to their owners often takes a long time. In view of this therefore, it has become imperative to harmonize or provide uniform standards that would be applicable to all the signatories to the Convention. Harmonization of the substantive and procedural aspects of assets recovery would make it easier for authorities in common law jurisdiction to trace, freeze and confiscate assets in civil law countries and vice versa. It would also ease the requirement of dual criminality, the principle of reciprocity and "clear link" which have made indirect and direct recovery very difficult.

1.1 Introduction

Corruption remains a global issue as criminals continue to move monies through financial systems with ease and to acquire legitimate assets across the world.[1] The International Monetary Fund (IMF) and WorldBank announced that,out of the $4 trillion spent on governmentprocurement annually, approximately $400 billion is siphoned in the

*Department of Accounting, Nuhu Bamalli Polytechnic, Zaria, Kaduna State, Nigeria. *Email Address of correspondence Author: bukab4lyf@gmail.com

[1]Jean-Pierre B., Larissa G. Clive S. and Kevin M. S. (2014) *Asset Recovery Handbook: A Guide for Practitioners*, available @*www.worldbank.org*, accessed on 24th May, 2015. 2: 26. P.M.

formof bribes.[2]In Nigeria, studies put country's corruption and theft of public assets at about $420 billion from 1960 to 2015.[3] This is monies lost to public projects such as roads, building of schools and the construction of hospitals.[4] Efforts by the international community to combat corruption[5] have led to the enactment of the United Nations Convention Against Corruption (UNCAC). [6] Today, UNCAC stands as the most comprehensive and globally accepted international regime for the fight against corruption through assets recovery. [7] However, in spite of the successes recorded through the implementation of the relevant provisions of this Convention, there are still assets in possession of the looterssafely stored in world's financial centres, and their recovery appears to be a herculean task.[8]The paper, therefore, seeks to analyzethe efficacy of UNACAandto identify lacunahindering the effective implementation of the Convention with the view to making recommendation to enhanceassetsrecovery agenda across the globe.

1.2 AnOverview of the International Conventions against Corruption

The relevant provisions for combating corruption through assets as contained under UNCAC seeks to expand the traditional method of punishment to "confiscation" which aims at taking away the proceeds of corruption from the looters. [9] The philosophical basis for combating corruption through assets recovery is based on the realization that, confiscation and return of proceeds of corruption may benefit the victims who are usually the poor.[10] Furthermore, it is also believed that, sentencing without confiscating the proceeds of corruption allows the criminals, their associate or relative to enjoy ill-gotten wealth.[11]To this end, UNACAhas adopted a holistic approach to deprived looters of their illegal gains through a coordinated processstarting withtracing, freezing, confiscation or forfeiture, and repatriation of the assets. Though, assets could be recovered at any stage of these processes. It is not necessary that the processes must be

[2] Mattew, H., (2017), *IMF urges tougher fight against Corruption*, available@ www.cfo.com/global *business/2016/06/imf-urges-tougher-fight-against-corruption/*, accessed on 4th May, 2016, 4:24 PM. and also World Bank, Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan Washington, DC, (2007), p.9.

[3]Wale, O., (2016), *Presidency explains Challenge in Recovering Loot, Begs UK group for Money*, available @ *www.dailypost.ng/2016/02/21/*, accessed on 24th August, 2016. 4:12. P.M.

[4]Enwerenmadu, D.U., (2013), *Nigeria's Quest to Recover Looted Assets: The Abachas Affairs*, African Spectrum, 48, 2, p.56.

[5]André, S. R. (2015), Transnational Organized Crime and the Palermo Convention: A Reality Check, New York: International Peace Institute, p.28.

[6]Signed on 9th December, 2003 and ratified on 24th October 2004.

[7]*Ivory, R. (2014) Corruption, Asset Recovery, and the Human Right to Property in Public International Law*, Baseler, p.147.

[8]Olajide, M.L. (2016), *The Plunderers and Challenges of Socio-Economic Development in Nigeria*, Public Policy and Administration Research, Vol.6, No.1, p.11.

[9]Ibrahim, A. A., (2013), "An Appraisal of Legal and Administrative Framework for Combating Terrorist Financing and Money Laundering in Nigeria" *Journal of Law, Policy and Globalization*, Vol.19, p.29.

[10]Kodjo, A. (2011), *The Recovery of Stolen Assets: Seeking to balance fundamental human rights at stake*, International Centre for Asset Recovery, Basel, p.23.

[11]*Murphy vs. GM* (2001) 4 IR 113 at 136

followed chronologically; it all depends on the circumstances of each.[12] This paper wouldtherefore examine only the relevant provisions of UNCAC relating to the above phases of assets recovery.

1.2.1 Tracingof Assets

Article 31 (3) of the UNCAC[13]in a mandatory term, requires States parties to adopt measuresto facilitate the tracing assets.By implication, this willextend to tracking down the offenders to ensure that they do not benefit from the crime destroying evidence linking them to the assets or dissipate it to frustrate confiscation. [14] Effective implementation of these Articles woulddepend on the existence of a number of measures such asindependent anti-corruption agency as well astraining and capacity building for the anti-corruption agencies.[15]To this end,Articles 6 and 37 of the UNCAC[16] oblige State Parties to establishindependent agenciesand confer them with powers to trace assets for eventual confiscation.Of course, without independence in terms of appointment, security of tenure and funding,anti-corruption agency staff may hardly proceed against corruptly acquired assets of politicianswho appointed them for fear of being removed from office.[17] To enhance the capacity of these agencies,Article 50 (1) of the UNCAC[18]requires States Parties to providethem with special investigative techniques and gargets for undercover operations.

In addition, anti-corruption agencies need information from individuals (whistle blower) and corporate entities to effectively trace assets.[19]Accordingly, Articles 32 and 33 of the UNCAC[20] obligate Parties to empower their Courts to order production of bank records to facilitate tracing of assets.Article 37 of the Convention,[21]also requires that persons who supply any information as well as their relatives should be protected or even relocatedwithout disclosing their location. Though, this measure is optional. This provision is important because such persons are often under threat due to the information they possess.[22]Theprovision would further, encourage other persons to come with any relevant information at their disposal. In the same vein, with the provision against bank secrecy, an agency can applyfor ex parte order to compel banks to provide information

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[12]Barbara, V., and Todor, K.., (2014), *Disposal of Confiscated Assets in the EU Member States Laws and Practices*. Center for the Study of Democracy. University of Palermo, p.4.
[13]UNCAC, op.cit.
[14]Pedro, G. P., (2016), *Analytical Study on Mechanisms for Asset Recovery and Confiscation in Moldova*, International Center for Assets Recovery, Basel Institute on Governance, p.23.
[15]Ibid., p.24.
[16]UNCAC, op.cit.
[17] Melvin D. A and Julius A. (2014) *Illicit Financial Flows and Stolen Assets Value Recovery*, University of Massachusetts Amherst, p.1
[18]UNCAC, op.cit.
[19]Ukase, P., and Audu, B., (2015), *The Role of Civil Society in the Fight against Corruption in Nigeria's Fourth Republic: Problems, Prospects and the Way forward*, European Scientific Journal, vol.11, No.2, p.2.
[20] Ibid.
[21]UNCAC, op.cit.
[22]Ukase, P., and Audu, B., (2015), *The Role of Civil Society in the Fight against Corruption in Nigeria's Fourth Republic: Problems, Prospects and the Way forward*, European Scientific Journal, vol.11, No.2, p.2.

without stating that it would be used for tracing assets hidden by looter.[23]For assets in foreign country, tracing dependslargelyon international cooperation.[24]Thus, Article 55 (2) of UNCAC[25]thereforeobliges State Parties following a request by another State Party having jurisdiction over an offence, to take measures to trace the assets for the purpose of confiscation.

In tracing assets whether in country of origin or at the international level, identifying the relevant details about the assets and the target are vital.[26] Such details may include: name and known aliases; date and place of birth, with copy of any birth certificate, passport and identity card; names and dates of birth of spouse(s), including ex-spouses, children, parents (including those of a spouse or ex-spouse), and those of other members of the extended family; telephone numbers, e-mail and Facebook or similar group connections.[27] This approach for instance, was used in UK to traced and recovered £16m from two persons in 2011. The defendants defrauded UK government of the sum and channelled it through discretionary trusts. In order to access the money and still keep their distance from the administration of the trusts, the defendants access the funds by writing to the trustees requesting for funds to be granted in the form of loans to them or their family members. There was no evidence of the trustees not complying with the request, and there was also no record that the "loans" collected was repaid. Properties actually bought by the defendants were bought in the names of the trusts, concealing the defendants' interest in the properties.[28]Similarly, in Dariye's case, the law enforcement officers in the UK became aware of allegations of misappropriation of assets by Joshua Dariye. They were able to trace and link the assets to the offence. First, the investigators conducted searches for information on Dariye in the UKthrough property, vehicle and corporate registries, but no link to Dariye was found. Thereafter, the investigators identified Dariye's family and associates in the UK, and they discovered that Dariye's children were attending a private school in the UK. The investigators made inquiries to the relevant bank, and found that Dariye operated a Barclaycard Account which was being paid each month through the bank account of Joyce Oyebanjo, Dariye's banker in the UK who was also paying bills on behalf of Dariye, including the fees for his two children.[29]

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[23] Richard, A. O., and Eme, O. I., (2015), *Analyses of Legal Frameworks for Fighting Corruption in Nigeria: Problems and Challenges*, Kuwait Chapter of Arabian Journal of Business and Management Review, Vol. 5, No.3, p.2

[24]Vlasic M & Noell N (2014) "Fighting Impunity: Recent International Asset Recovery Efforts to Combat Corruption" Cayman Financial Review, available at www.compasscayman.com, accessed on 26th August, 2016. 2:11 A.M, ART. 46, UNCAC, op.cit.

[25]UNCAC, op.cit.

[26]Ladan, M. T., (2016), *Money Laundering, Terrorism, Corruption, Human Trafficking in Nigeria*, LAP LAMBERT, Academic Publishing, p.60.

[27]Ibid.

[28]Emile, V., et' al (2013), *Using Civil Remedies in Corruption and Asset Recovery Cases*, Western Reserve Journal of International Law, Vol. 15, Issue 3.

[29]Ladan, M.T., op.cit.p.62.

The challenge however is, the requirement for tracing assets through international cooperation varies depending on the jurisdiction. In some jurisdictions, the plaintiff must show a "clear link" between his property and the assets in the hands of the wrongdoer.In*Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*[30], the court was of the view that, when tracing assets, the plaintiff must adduce evidence to show "clear link" between his property and the assets in the hands of the wrongdoer as well as to identify the assets as it passes between persons who have handled it prior to arriving in the hands of the wrongdoer. In another English case of *Borden UK Ltd v Scottish Timber Products Ltd*[31] the court held that, in the absence of establishing a clear link movement of funds, the tracing would fail. However, in *Federal Republic of Brazil and Anor v Durant International Corporation and Anor*,[32]the Jersey Royal Court held that, while the "clear link" principle remains good law, assets tracing should not fail simply because the wrongdoer has acted cunningly by creating and transferring the assets into a pool of funds thereby making it difficult to establish a "clear link". The Jersey Royal Court thus maintained that, once a plaintiff can prove that his assets have moved into such pool of funds, the burden of proof will shift to the defendant to show what part of the mixed fund is in fact his. In practice, to require the plaintiff to provide a clear link between his property and the assets in the hands of the wrongdoer at every stage of the assets movement would not be easy in all circumstances. Thus, it would be counterproductive to always insist on establishing clear link.

1.2.2 Freezing or Seizure of Assets

Article 31 (2)of the UNCAC,[33]obligesState Partiesto set up measures for freezing assets which are proceeds of crime for the purpose of confiscation.This would also includefreezingassetswhich have been transformed into other property. The same applies to assetswhich have been intermingled with those acquired from legitimate sources, with theexception that, only the assessedvalue of the intermingled assets shall be frozen.[34]Just as tracing, State Parties are required to facilitate freezing of assets through setting aside the defense of bank secrecy and encouraging international coöperation.[35]Thus, in a proceeding for freezing in response to foreign requests, the requested State should not only permit obtaining foreign evidence to support freezing of assets, but it would also have to maintain confidentiality of the application so as to prevent the property from being dissipated.[36]In practice, freezing order is made ex parte as putting the defendant on

[30](2011) EWCA Civ 347.
[31](1981) Ch. 25.
[32](2010), JLR, 421.
[33]UNCAC, op.cit.
[34]Art. 31(2), UNCAC, op.cit, Art. 12 (3,4 and5), UNTOC, op.cit., Brun, L. *et'al*, (2011), *Asset Recovery Handbook: A Guide for Practitioners*, Star Initiative, World Bank, p.5.
[35]Abiodun, O.(2014) *Assets Repatriation and Global Best Practices: Lessons for Nigeria*, AUDA, vol. 6, no. 1.,p.23.
[36]Louis, de Koker, (2013), "The 2012 Revised FATF Recommendations: Assessing and Mitigating Mobile Money Integrity Risks within the New Standards Framework", Washington Journal of Law, Technology & Arts Vol. 8, Issue 3,p.14.

notice may give him the opportunity to dissipate the assets.[37]Once the order is made, the offender or third parties, such as banks are prevented from dealing in the assets up to the maximum value of the claim.[38] In *Federal Republic of Nigeria and 2 Ors v Atlantic Energy Drilling Concept Nig. Ltd and 3 Ors*[39], the court has granted an order permitting Nigeria Government to freeze assets belonging to Kola Aluko and JideOmokore worldwide and their company Atlantic Energy Concept Nig. Ltd. The implication of this decision is that, the Order prohibits any person by whom the property is held within or outside the country, from dealing with the property. Though, the enforcement of this Order abroad will only be possible if Nigeria has Mutual Assistance Treaty with the foreign states where the assets are located.[40]

A major economic implication of freezing or restraint order is that it can affect the defendant or third party due to the legal restriction disallowing the putting of the assets into any economic use.[41] Article 31 (9) of the UNCAC[42]therefore requires Parties to provide measures that would ensure that the rights of bona fide third parties are not be prejudice during freezing.In addition, Article 31 (3) of UNCAC[43] obliges State Party to adopt measures to regulate the administration by the competent authorities of assets frozen or seized.These measures are necessary because, assets secured through freezing, can either be forfeited or returned to the suspect. Where it is returned, the asset is expected to be in a good condition as to be of value to the beneficiary of the judgment.[44] However, these provisions are not couchedin a way that can effectively provideadequate compensation to the defendants for economic loss suffered during freezing of assets.

Though,courts have been playing complementary role in this regard. In *Federal Republic of Nigeria v Malabu Oil and Gas Limited & Ors*,[45]the Court observed that, before freezing order can be granted, certain conditions must be satisfied cumulatively. The first is good arguable case.The prosecution must show that it has a good arguable case. In *Allen v White Eagle Modern Building Solutions Ltd*[46], the court upheld the applicant's application for continuation of the freezing order on the ground that there was good arguable case to warrant the continuation of the freezing order.The court observed that there was evidence that the respondent had, on several occasions, asked the applicant

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[37]Simon. B., (2014), *International Asset Recovery Enforcement Strategies*, Thomson Reuters (Professional), UK Limited, p.16.

[38]*Esai Dangabar v Federal Republic of Nigeria (2012)* Suit No: CA/A/256/2012.

[39] FHC/L/CS/2016

[40]Vlassis, D., *et'al*, (2013) *Chapter V of UNCAC: Five Years on Experience, Obstacles and Reforms on Asset Recovery*, In: Zinkernagel G.F., *et'al*, (2013) *Recovering Stolen Assets: Emerging Trends in Asset Recovery*, Peter Lang International Academic Publishers, p.20.

[41]Kodjo Attisso, The Recovery of Stolen Assets: Seeking to balance fundamental human rights at stake <https://www.baselgovernance.org/sites/collective.localhost/files/publications/08_seeking_to_balance_fundamentalhuman_rights_eng.pdf> accessed on 27th August, 2016. 5:34.P.M.

[42]UNCAC, op.cit.

[43] Ibid.

[44]Nuhu, Ribadu, (2016), *Assets Recovery in Nigeria: Experiences from the Past*, www.nigeriatoday.ng, accessed on 24th August, 2016. 2:28. P.M.

[45]Suit No. HC/ABJ/CR/268/2016.

[46](2015) EWHC 2359 (QB).

to alter the paymentarrangements so as to make some illegal payments to its employees rather than to the respondent's own bank account. In addition, the respondent's bank accounts showed that it had assets within the jurisdiction against which a freezing order would beeffective. Though, what constitute good arguable case may depend on the facts and circumstances of each.However, the applicant must always establish thatthe respondent has assets in the jurisdiction, withoutthis, granting the order would simply amount to exercise in futility.

The second condition is,the prosecution must show that there is real risk that the offender would dissipate the assets if the freezing order is not granted.[47] The court usually considers the effect of the respondent's actions, i.e.,dishonesty in relation to the assets, to determine whether there is risk of dissipation.[48]In *SPL Private Finance (PF1) IC Ltd v Arch Financial Products LLP*[49], the court held thatto determine whether there is evidence of a likelihood of dissipation,afinding of dishonesty was insufficient; there still had to be consideration of whether the dishonesty justifies an inference that there is areal risk of dissipation. In *U&M Mining Zambia v Konkola Copper Mines*[50], the claimant, in order to demonstrate a risk of dissipation of assets it sought to recover, he adduced evidence to show that the defendant's employees were willing to give untrue evidence to cause unnecessary harm to the claimant. The court also found that the defendant had been obstructive of the investigation process. The court held that such an entity might well seek to deal with its assets in a way to make recovery more difficult. However, in*IOT Engineering v Dangote Fertilizer*[51], the claimant had sought to argue that it would be difficult to enforce any award of the undertaking as to damages in its favour in Nigeria because resourced party could delay enforcement for a long period of time through appeals. Rejecting the contention, the English Court of Appeal held that, it is absurd to argue that, any party who contracts with a Nigerian company and may in due course needs to enforce against assets in that jurisdiction can, without more, assert risk of dissipation arising out of delay in enforcement.Furthermore, question could be asked whether establishing good arguable case, can equally raise the presumption of risk of dissipation. In *Dinglis Properties Ltd v Dinglis Management Ltd*[52],the court answered this question in the negative. Insisting that the prosecution had to adduce further evidence to show that there was a real risk of dissipation.

The third requirement is that the plaintiff must make an undertaking as to damages in case the order turns to affect the interest of the defendant. In *Ekanem v Umanah*[53] it was held that,where freezing order is capable of conferring benefit on the plaintiff but, also likely to affect the interests of the defendant, the plaintiff will be required to give an undertaking as to damages in case the order turns to be detrimental to

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[47]Scott, N., *et'al*, (2016) *A Guide to Freezing Injunctions and Related Orders*, Memery Crystal, London, p.4.
[48] Barbara, V., and Todor, K.., (2014), *Disposal of Confiscated Assets in the EU Member States Laws and Practices*, Center for the Study of Democracy, University of Palermo, p.6.
[49](2015) EWHC 1124.
[50]EWHC/Comm/2014/3250.
[51]EWCA/Civ/2014/1348.
[52](2016) EWHC 818.
[53](2006) 11NWLR (PT 992) 510.

the interest of the defendant. In *Energy Venture v Malabu*[54], the claimant obtained a freezing order against the defendant and was required to provide an undertaking to compensate the defendant should it eventually transpire that the freezing order should not have been granted. Furthermore, court may allow a defendant, based on the loss he stands to suffer, to apply for increase in the amount of the undertaking. In *Energy Venture v Malabu*(supra), the Court of Appeal confirmedthe defendant's application for increasein the amount of the undertaking. In approving such, the Court however laid the following conditions: The court must make an estimate of the defendant's likely loss resulting from the freezing order; and the defendant must show a sufficient level of risk of loss to require the increase. Thus, once these conditions are satisfied, the Court can increase the amount of undertaking as to damages if what has been proposed cannot cover the loss he stands to suffer.

Furthermore, a prosecution must disclose all matters relevant to the application, including anything which isdetrimental to its own case. Failure to do so may lead to the discharge of a freezing order andcost sanctions. In *Alliance Bank JSC v BaglanAbdullayevichZhunus*[55], the Court set aside freezing order on the ground that the bank had failed to disclose matters which were relevant not only to the merits but also to facts which affected conclusions regarding limitation under Kazakh law.Thus, it will mean that, if the basis for setting a freezing order is on the ground of inadequate disclosure of material facts, the applicant can simply remedy this by reapplying for the order supported with all the relevant information. This was allowed in the case of *JSC MezhdunarodniyPromyshlenniy Bank v Pugachev*[56], where the court granted the applications for further disclosure and re-wording of the asset disclosure.Once assets are frozen, further disclosure and modification of evidence arising from further investigation, may continue to the confiscation stage. This is often to enable the applicant to discover the extent of a dishonest scheme and to take steps to begin the process of recovering the assets.[57]Finally, for court to grant freezing order, the prosecution must show that it is just and convenient to do so.[58]That is, the Court must be satisfied that the freezing order willpromote the doing of justice overall and not to work unfairly or oppressively.[59]

1.2.3 Confiscation or Forfeiture of Assets

Article 31 (1) of the UNCAC[60]obliges States Parties toenable the confiscation of proceeds of crime derived from offences established in Conventions or property the value of which corresponds to that of such proceeds.These Articles cover situations where

[54]EWCA/Civ/2014/1295.
[55](2015) EWHC 714.
[56](2015), EWHC 2623
[57]*BDW Trading Ltd v Fitzpatrick* (2015) EWHC 3490 (Ch)
[58]Ibid.
[59] Measures to Freeze, Confiscate and Recover Proceeds of Corruption, including Prevention of Money-Laundering, Third Regional Seminar on Good Governance for Southeast Asian Countries, Co-hosted by UNAFEI, the Department of Justice of the Republic of the Philippines and the UNODC Regional Centre for East Asia and the Pacific, held at Manila, the Philippines October 2010, Tokyo, Japan, p.8.
[60]UNCAC, op.cit.

assets may not be immediately apparent, because the offenders have made their detection difficult by mingling them with legitimate proceeds or by converting them into different forms. In either case, the Articlesrequire States parties to set up measures that enable the confiscation of property into which such proceeds have been converted, or intermingled up to their assessed value. In fact, Article 31(6) of the UNCAC[61] further obliges Parties to ensure that the measures also allow for the confiscation of income or other benefits derived from property into which such proceeds of crime have been converted orintermingled.Just like investigation and freezing, procedural rule relating bank secrecy, protection of witness (whistle blowers), as well as the protection of third parties under Article 31 (9) of the UNCAC also applies in confiscation proceedings.[62]

The above Article did not expressly state whether civil or criminal proceeding should be adopted in confiscation matters. However, by making provision for both object andvalue-based confiscation implied that. State Partiesare required to establish criminal confiscation regime.[63] Criminal confiscation or forfeiture requires a criminal trial and conviction after proving the defendant's guilt beyond reasonable doubt.[64] The defendant could in addition, be required to pay a financial penalty, compensate the victims of the crime and may be compelled to disgorge the proceeds of the crime.[65] This system operates in Nigeria.[66]Thoughin USA, if the defendant is found guilty, a separate criminal forfeiture proceedings are conducted in court before a judge.[67] The UK also adopts a similar approach though subject to the condition that the defendant must have a criminal lifestyle and he must have profited from their illegal behaviour. A defendant is regarded to have a criminal lifestyle if it is a lifestyle offence;[68] it is part of a course of criminal conduct.and it is an offence committed over a period of at least 6 months.The second condition is satisfied if the defendant has benefited from the conduct.[69]

One advantage ofcriminal forfeiture as shown above is that it can be object-based or value-based.Thus, where the defendant has dissipated the specific assets, the court can

[61] Ibid.
[62] Tim Daniel & James Maton, (2013), *Is the UNCAC an Effective Deterrent to Grand Corruption*? In: Jeremy H. & Peter A., (eds, 2013), *Modern Bribery Law: Comparative Perspectives*, Cambridge University Press, p.35.
[63] This is because as it would be explained later, value recovery is applicable in civil proceedings.
[64] European Commission staff working paper Accompanying document to the Proposal for a Directive of the European Parliament and the Council on the freezing and confiscation of proceeds of crime in the European Union Impact Assessment, European Commission: Brussels, (2012), p. 9.
[65] Economic Commission for Africa, (2012). Mbeki Panel on Illicit Financial Flows Adopts Framework Action Plan for Africa. Thabo Mbeki Foundation Newsletter, Africa Union 10th Anniversary Edition, p.1.
[66] Stolpe, O, (2015), *Assets Recovery-Tracing, Freezing and Returning Proceeds of Corruption*, In: Ayodele, M.A., and Igbenedion, S.A., (ed. 2015), *Legal Perspective to Corruption, Money Laundering and Assets Recovery in Nigeria*, Department of Jurisprudence and International Law, Faculty of Law, University of Lagos State, Nigeria.
[67] *United States v Cherry*, 330 F.3d 658, 670 (4th Cir. 2003)
[68] This includes for example drug trafficking, money laundering, people trafficking, counterfeiting, blackmail and arms trafficking. Alldridge, P. (2011), *The limits of confiscation*, Criminal Law Review, 11, p. 829.
[69] S.75(2)(b), Proceeds of Crime Act 2002.

order the payment of a money judgment or forfeiture of substituteassets.[70]Furthermore, time limits do not exist for filing an indictment following seizure of property.[71] In addition, convicted co-defendants are liable equally for satisfyingany money judgment of forfeiture.[72]This was what happened in the case of James Ibori. Ibori was arrested in Dubai in 2010 on a British warrant and extradited to the UK to face charges of money laundering and conspiracy to defraud the Delta State, the same charges dismissed by Nigeria in 2007. Ibori pleaded guilty in London's Southwark Crown Court. Consequently, the following assets were confiscated: a house in London valued at £2.2 million; another property in the UK valued at £311,000; a £3.2 million mansion in Sandton, South Africa; a fleet of armored Range Rovers valued at £600,000; a £120,000 Bentley Continental GT; a Mercedes-Benz Maybach 62 bought for €407,000 and shipped to his mansion in South Africa.[73] Before then, in June, 2010, juries in the UK convicted Ibori's wife, Theresa Ibori; his sister, Christine Ibori-Ibie; and his associate, UdoamakaOnuigbo. The court issued confiscation orders in the sum of £5.1 million, £829,786.44, and £2.7 million against them respectively. Furthermore, Solicitor BhadreshGohil, Ibori's friend; Daniel Benedict McCann, Ibori's fiduciary agent; and Lambertus De Boer, his corporate financier, were all convicted and jailed for their role in the criminal enterprise.[74]

However, a major disadvantage of criminal forfeiture is that, it is impossible where the defendant is dead, escape the jurisdiction of the court or where, it is difficult to prove the matter beyond reasonable doubt.[75] Also, in developing countries like Nigeria, it is often difficult to obtain domestic convictions and enforceable forfeiture orders because of the bad influence of defendants who may want to challenge the proceedings, even when a defense is obviously unsustainable. This results in adjournments and appeals which unduly lengthen the span of criminal proceedings.[76]Coupled with corruption in the judiciary, in Nigeria this has resulted to the slow pace in the recovery of a

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[70]Davis, E.H. (2011). *Transnational Civil Asset Recovery of the Proceeds of Crime and Corruption: A Practical Approach.* In Thelesklaf, D. and Pereira, P-G. (2011), *Non-State Actors in Asset Recovery*, Berne, Switzerland, Peter Lang, p.67

[71]Ayogu, M.D. (2011), *Non-State Actors and Value Recovery: Ganging up to Create Political Will.* In Thelesklaf, D. and Pereira, P.G., (Eds.2011), *Non-State Actors in Asset Recovery*, Berne, Switzerland, Peter Lang. p.98.

[72]Lowe. H. (2013), *Deferred Prosecution Agreement*, the Caymans Connection, p.21.

[73]Melvin D. Ayogu and Julius Agbor (2014), *Illicit Financial Flows and Stolen Assets Value Recovery*, In: Ajayi, S. I. and L. Ndikumana (Eds.) (2014) *Capital Flight from Africa: Causes, Effects and Policy Issues*, Oxford, Oxford University Press, p.23.

[74]BBC News Africa. (2012). Former Nigeria Governor James Ibori Jailed for 13 Years, BBC News April 17, available@http://www.bbc.co.uk/news/world-africa-17739388, accessed on 24th March, 2017, and also available@http://www.westlondontoday.co.uk/content/nigerian-politician-who-stole-250m-was-ruislip-cashier, accessed on June, 14th 2017. 4:23. P.M.

[75]Abubakar, A. I., (2014), *Domestic Implementation of International Instruments for Combating Terrorist Financing and Money Laundering in Nigeria*, International Journal of Business & Law Research, 2(3), p.13

[76]Richard. A. O., and Eme, O. I., (2015), *Analyses of Legal Frameworks for Fighting Corruption in Nigeria: Problems and Challenges*, Kuwait Chapter of Arabian Journal of Business and Management Review, Vol. 5, No.3, p.4.

considerablenumber of illicit assets acquired by past Governors whose cases are in court for close to eight years after leaving office.[77]

1.2.4 Direct Recovery of Assets or Civil Proceeding In Personam

Article 53 of the UNCAC[78] obliges State Parties to establish three measures for direct recovery of assets. First, measures to permit another State Party to initiate civil action in their courts to establish ownership of property acquired through the commission of an offence established in the Convention. Secondly, measures to permit their courts to order those who have committed offences established in the Convention to pay compensation or damages to another State Party that has been harmed by such offences.This provision does not specify whether criminal or civil procedures are to be followed. Thus, it is up to the parties to agree on which standard applies.Thirdly, measures to permit their courts, when having to decide on confiscation, to recognize another state party's claim as a legitimate owner of property acquired through the commission of an offence established in the Convention. Under the first option, the state would be a plaintiff in a civil proceeding.Itis thus a direct recovery.[79] The victimized state is a party in a civil action it initiates, while under the second requirement, there is an independent proceeding at the end of which the victim state must be allowed to receive compensation for damages.[80]

Direct recovery through these measures(being civil proceeding in personam) is usually more efficient than criminal proceedings because of lower burden of proof (balance of probabilities).[81]In UK, the Court can proceed even in the absence of a defendant so long as the defendant has been served notice in person or through his lawyer.[82]Nigeria has adopted this procedure in the UK to recover assets in Dariye's case.[83] A requisite for this type of action is that the defendant has a connection with the jurisdiction. The foreign court only exercises jurisdiction when the assets is within its

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[77]Such as Orji UzoKalu (Abia State) N5 billion; Lucky Igbinedion (Edo State) N4.3 billion; jolly Nyame (Taraba State) N180million, Chimaroke Nnamani (Enugu State) N5.3 billion, Joshua Dariye (Plateau State) N700million; Michael Botmang (Plateau State) N1.5 billion; and SaminuTuraki (Jigawa State) N36 billion, Action-Aid Nigeria. (2015). Corruption and Poverty in Nigeria: A · Report. Available @ *http://www.actionaid.org/sites/files/actionaid/pc_report_content.pdf.*Accessed on 14th August, 2016. 5:11. P.M.

[78]UNCAC, op.cit.

[79]Babatunde O., (2013) *Non Conviction Based Criminal Forfeiture and Right to Own Property in Nigeria: Enhancing the Benefit and Engaging the Problems*, Journal of Mathematics Vol. 9, Issue 3, p. 25, Edward, W., (2012), Briefing Note: Recovering Assets Secreted Abroad, Washington DC, p.7., and also Article 53 of UNCAC, op cit.

[80]Brunelle-Quraishi, O., (2011), "Assessing the Relevancy and Efficacy of the United Nations Convention Against Corruption: A Comparative Analysis", *Notre Dame Journal of International & Comparative Law*, 39 INT'L L., p.125.

[81]Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis," 16 Tex. J. on Civil Liberties & Civil Rights op.cit., p. 12.

[82]Larissa Gray et al., (2014) *Few and Far: The Hard Facts on Stolen Asset Recovery*, Washington, DC: World Bank, p.41.

[83]*The Federal Republic of NigeriavJoshua Chibi Dariye and another* (2007) EWHC 708 (Ch).

jurisdiction or the defendant lives within jurisdiction.[84] In *Islamic Republic of Pakistan v Asif Ali Zardari and Ors*[85], the English Court therefore rejected to determine claims by the Governments of Pakistan and Zambia to assets held in the UK and believed to have derived from domestic corruption on the ground that the Court has no jurisdiction to determine acorruption case with complete foreign elements.

Furthermore, through civil proceeding in personam, claimants can use constructive trusts to recover assets acquired through breach of trust.[86]This measure was used for example, when SaadiQadafi used funds belonging to the State of Libya to purchase a $10 million house in London. Ownership of the house was easily traceable to Qadafi. The court found that Qadafi held beneficial ownership of the house in constructive trust for Libya.[87]The same logic can beused to allow a stateto claim a proprietary interest in a bribe accepted by an agent. In*KartikaRatnaThahir v Pertamina*,[88]Pertamina, a state oil and gas company found that one of its executives had accepted bribes from contractors seeking preferential treatment. The court ruled that the Executive breached his fiduciary duty and therefore the bribe was held in trust forPertamina. The House of Lords further heldin *the Attorney General for Hong Kong v Charles Warwick Reid and Judith Margaret Reid and Marc Molloy*[89]that, when a bribe is accepted by an agent in breach of his duty, then he holds that bribe in trust for the person to whom the duty was owed. If the property representing the bribe decreases in value, the agent must pay the difference because he should not have accepted the bribe. If the property increases in value, the agent is not entitled to excess because he is not allowed to make a profit out of a breach of duty. Though, the disadvantages of this mechanism include high cost of private litigation.[90]

1.2.5 Indirect Recovery or Recovery Through International Cooperation

The recovery of assets hidden beyond domestic borders often requires cooperation with foreign jurisdictions.[91]Articles 54 (1) (a) of the UNCAC[92]suggests that such assets could be recovered throughinternational cooperation either by submitting

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[84]Jean-Pierre B., Larissa G. Clive S. and Kevin M. S. (2014) *Asset Recovery Handbook: A Guide for Practitioners*, available @www.worldbank.org, accessed on 24th May, 2015. 2: 26.

[85] (2006) EWCA, and *the Federal Republic of Nigeria vsJoshua Chibi Dariye and another* (2007) S.R. (D), 179.

[86]Emile van der Does de Willebois& Jean-Pierre Brun, (2013), *Using Civil Remedies in Corruption and Asset Recovery Cases*, 45:3 Case W Res J Intl L 615, p. 620.

[87]Jean-Pierre Brun *et al*, (2015), *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets*, the World Bank. p.50.

[88]*Kartika Ratna Thahir vs. PT Pertambangan Minyakdan Gas Bumi Negara (Pertamina)*, (1994) 3 SGCA 105 (Singapore).

[89](1994) 1 All ER 1.

[90]For instance, the British solicitors handling Dariye's case submitted a bill of 647,000 pounds as legal fees to the Federal Ministry of Justice for the 1.7 million pounds recovered. Basel Institute on Governance Asset Recovery Knowledge Centre, Dariye Loot: Plateau demands 1.17 m from AGF, available @ Punch newspaper, 7 February 2009. Britain Returns Additional Dariye Loot,*www.Financialnigeria.com/NEWS/newsitem-detail-archives.aspx?item*, accessed on 25th April, 2016. 2:14. P.M.

[91]Abdullahi Y. S., op.cit. p.197.

[92]UNCAC, op.cit.

request to the authorities in requested state requiring them to confiscateand return the assets; or by requesting the authorities in the requested state to enforce a confiscation order issuedby the requesting state.The advantage of the second option is, the authorities in requested state where the assets are hidden may be in a better position to investigate and establish the extent of the assets than the authorities in the requesting state.[93] In the first option however, since it is necessary first to obtain a binding domestic order, if the order is based on civil forfeiture process, its implementation would beimpossible for countries that do not have civil forfeiture regime.[94]

An additional measure is commended under Article 54 (1) (b)here; States are requiredto establish measures that permit their authorities to adjudicate in foreign state, offence of money laundering or other corrupt offence. The advantage is that, the defendant's immunity against prosecutionmay not affect the proceeding. The challenge however is, the particular financial crime in question must be an offence in both countries. Furthermore, even if this is established, the authorities in the requesting state may not be conversant with the technicalities of the law in the requested state. In addition, the requesting state not may be in a position to gather the relevant evidence required to establish the extent of the funds transferred.[95] Perhaps this explained the reason Nigeria had to engage private legal practitioners in the UK to prosecute the money laundering charges it instituted against Joshua ChibiDariyein which it recovered£395,000m and assets worth $5.7m.[96]

1.2.6 Non-Conviction Based Forfeiture

Article 54 (1) (c) of the UNCAC[97] in a non-mandatory term require State Parties to establish measures to allow forNon Conviction Based Forfeiture (NCB) in cases where the offender cannot be prosecuted by reason of death, flight or absence. With this measure, UNCAC has demonstrated its commitment at ensuring thatcriminals or their surviving relatives or associates do not enjoy assets acquired through corruption.[98]NCB proceedingis an action against the asset itself (for example, *Federal Republic of Nigeria v N10, 000*).[99]It is an action *in rem*.The Supreme Court in *United States v Various Items of Personal Property*[100] stated that, in rem, is the property which is proceeded against, held

[93]Edward, W., (2012) "Briefing Note: Recovering Assets Secreted Abroad", Dashwood, United Kingdom, p.14.
[94]Marco, A. and Leonardo S. Borlini, (2014), *Corruption: Economic Analysis and International Law*, Edward Elgar Publishing Limited, p.481.
[95]Kodjo A., (2010), The Recovery of Stolen Assets: Seeking to balance fundamental human rights at stake, International Centre for Asset Recovery (ICAR), Basel Institute on Governance, www.baselgovernance.org, p.11. 12th July, 2016. 5:16. P.M.
[96]*The Federal Republic of Nigeria v Joshua Chibi Dariye and another* (2007) EWHC 708 (Ch).
[97]UNCAC, op.cit.
[98]Civil Asset Forfeiture Reform in Texas, Texas Public Policy Foundation, Center for Effective Justice (2014), p. 10.
[99]Campbell, L., (2014), *The Recovery of Criminal Assets in New Zealand, Ireland and England: Fighting Organised and Serious Crime in the Civil Realm*, 41 Victoria University Wellington Law Review (VUWLR), p.24.
[100]82 US 577, 581.

guilty and condemned.In the US, for example, the Department of Justice (DOJ) has developed the Kleptocracy Asset Recovery Initiative aimed at securing forfeiture of the proceeds of foreign official corruption.[101] The first complaint filed under the initiative ledto the forfeiture of over $1.6m in assets owned by Diepreye Solomon Peter Alamieyeseigha.[102]This was followed by forfeiture of assets worth $1.8 million belonging toTeodoroNguemaObiangMangue, the son of the president of Equatorial Guinea.[103]

Advantages of NCB are many. First, since the action is against property, forfeiture actioncan continue regardless of flight, immunity against prosecution or death of the owner of the assets.[104] In Abacha's case for instance, the Swiss Court used the provisions of Article 58 of Swiss Penal Code for confiscation without acriminal conviction and the reversal of the burden of proof under Article 59of the same to secure a conviction.[105]Furthermore, NCB requires lower standard of proof. It only requires prove on a balance probability that the asset is proceed of crime.[106]Thus, forfeiture under NCB is possibleeven if there is insufficient evidence to support a criminal conviction.[107] In 2004, Hertfordshire police found traces of proceeds of crime, but there was insufficient evidence to secure a conviction. The case was referred to the British Assets Recovery Agency (ARA), which successfully obtained a freezing order on assets worth £1.5 million by merely proving on balance of probability that the assets were proceeds of crime.[108]

Furthermore, criminal prosecution does not constitute a bar to civil forfeiture actions. In *AyodeleOlusegunOlupitan&Anor v Director of the Assets Recovery Agency*[109], the Court considered an appeal against a civil forfeiture order in relation to two properties acquired as a result of mortgage fraud. The appeal was dismissed on the basis that a property acquired as a result of mortgage fraud was recoverable and the proceedings were not the same as a criminal prosecution and so the Director of the ARA was not bound by any concession in the criminal trial. In addition,both NCB and criminal forfeiture could run simultaneously. In Thailand for instance, Section 58 of the Anti-Money Laundering

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[101]Lisanawati, G., (2015), *Best Principles for Criminal Assets Management: Conceptual Framework*, 1 IPBJ, Vol. 7 (1), p.8.

[102]Jonathan, T. *et'al*, (2017), *Getting the Deal through Assets Recovery*, Law Business Research Ltd 87 Lancaster Road London, W11 1QQ, UK, p.5

[103]available@*http://www.docstoc.com/docs/102371036/Obiang-CA-Forfeiture-Complaint for the October 13, 2011 filing*, accessed on 27th June, 2017. 3:21. P.M.

[104]Stefan D. Cassella, (2013), *Civil Asset Recovery: The American Experience*, Oxford University Press, p.30.

[105]Jefferson Holcomb et al., (2014), *Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States*, 39 J. CRIM. JUST. 273, 274.

[106]Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis, 16 Tex. J. on Civil Liberties & Civil Rights (2010), p. 7.

[107] Richard, M. Thompson, (2015), *Asset Forfeiture: Selected Legal Issues and Reforms Legislative Attorney*, Congressional Research Service, p.2.

[108]International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation available @http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf accessed on 28th August, 2016. 3:19. P.M.

[109](2008) EWCA Civ. 104.

Act[110]allows it. In the USA however, a stay of proceedings in the NCB action may besought until conclusion of the criminal case, if the NCB action will prejudice the of conduct criminal investigation.[111]One example where both proceedings were instituted simultaneously is the case of Diepreye Peter Solomon Alaieyeseigha former Governor Bayelsa State. AfterAlamieyeseigha impeachment, he was charged with forty counts of money laundering and corruption. The Federal Government further instituted civil forfeiture proceedings in the UK against him, while simultaneously pursing its criminal proceedings in Nigeria. As these proceeding were going on, the South African Asset Forfeiture Unit initiated NCB proceedings against Alamieyeseigha's assets in the country. The funds were confiscated and returned to Nigeria in January 2007.[112]

However, despite the possibility of instituting criminal and NCB action simultaneously, the court does not allow it if it would affects the defendant's right against self-incrimination.[113] In *Payton v R*,[114] the defendant was charged with a criminal offence. Concurrently, civil proceedings were instituted in the Magistrates' Court in respect of the sum of £7800 alleged to be the proceeds of the offence. In his appeal, the defendant was caught between giving evidence on oath in the civil proceedings about matters which could affect his criminal trial before the trial took place, and refusing to give evidence which might result in forfeiture of the cash seized before the conclusion of the criminal trial. The Court held that a defendant's right to a fair trial should not be prejudiced by anything arising in civil proceedings in the Magistrates' Court and steps to prevent such abuse should be taken by law enforcement authorities.

Another advantage of NCB regime is that it can be applied retrospectively.In *DassaFoundation v Liechtenstein*,[115] the European Court of Human Rights (ECtHR) held that NCB law could be applied retroactively to forfeit assets without offending Section 61 of the Liechtenstein Criminal Code and Article 7 of the European Convention on Human Rights which provide for the right to property. The Court held further that, NCB law is akin to civil restitution of unjust enrichment and its retroactive application would not constitute a penalty. Without this, a loophole could be created that may allow defendants to profit from acts that were illegal at the time they were committed. Furthermore, application of NCB regime does not violate the right to be presumption of innocence and the right to property.[116]*In Butler v UK*,[117]theECtHR held that, the forfeiture action was

[110]S.58 of the Anti-Money Laundering Act, 1999, provides that where the asset involved in the commission of an offense is subject to another legal process which has not yet commenced or is pending or if it would be more effective to proceed under this Act, then the Government shall proceed as provided in this Act.
[111]Ajayi, S. I. and L. Ndikumana (Eds.) (2014), *Capital Flight from Africa: Causes, Effects and Policy Issues*, Oxford: Oxford University Press, p.23
[112]Edward, A.P., *et'al*, (2008), *Recovering Stolen Assets: A case Study*, IBA Conference Paris, 24th-25th, April, 2008, p.10.
[113]This right as provided under Section 36(11) of the Constitution of the Federal Republic of Nigeria, Cap. C23, op.cit, confers immunity in criminal proceedings from an obligation to provide information tending to prove one's guilt.
[114](2006) EWCA Crim. 1226.
[115]ECHR Application number 696/05 (10 July 2007)
[116]Simser J (2014) *Asset Recovery and Kleptocracy*, 17 (3), Journal of Financial Crime, p.332.
[117]41661/98, 27th June 2002.

instituted against the property not the defendant, so there is no basis for raising the issue of presumption of innocence contained in Article 6 of the European Convention on Human Rights. On property rights, the court maintained that, since NCB actions are in rem, the property is the defendant and the property in itself has no constitutional rights. The UK Supreme Court in confirmed this position of law in *Gale v SOCA.*[118]

Though, a major drawback of NCB is that it is restrictive when compared to criminalforfeiture. The confiscation is limited to the assets linked directly to the offence.[101] Thus, the court cannot order the confiscation of other property or money as a replacement for a lost asset. This basically means that, civil forfeiture is onlyuseful if the alleged offender actually owns assets that can be located and are worth forfeiting. Ifthe prosecution suspects based on the offender's previous involvement in illicitactivities that, he should own a certain amount of funds that cannot be located, then criminal forfeiture would appropriate in this circumstance.[102]

1.2.4 Return of Assets

This is the last step in asset recovery. It involves returning the assets to the owner. Provisions for this are found in Article 57 (2) of UNCAC.[119]ThisArticlerequires that in the case of embezzlement of public funds or laundering of embezzled public funds,confiscated assetsareto be returned to the requesting State. In the case of any other offences such as fraud, Article 57 (3) (b) of the Convention provides two alternative additional conditions for the return of assets, i.e. that the requesting State reasonably establishes its prior ownership of such confiscated property or that the requested State recognizes damage to the requesting State as a basis for returning the confiscated property. In doing so,. the State Party must takecognizance of the rights of *bonafide*third parties.[120] However, in all the above cases, Article 57 (3) (b) of the Convention requires an amount to be deducted from the assets for settlement of expenses incurred in investigations or judicial proceedings leading to the confiscation of the assets in the requested country, provided that, the confiscation was executed through MLA on the basisof a final judgment in the Requesting State.[121]

Assets may also be returned directly to victims, including a foreign jurisdiction in case of direct recovery.[122]These Articles have been implemented in a number of cases. For instance, when Mabey& Johnson admitted to the United Kingdom Serious Fraud Office that it had paid bribes in several jurisdictions, it was ordered to make reparations

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[118]UKSC 2010/190.

[101]Tim Daniel & James Maton, (2013), *Is the UNCAC an Effective Deterrent to Grand Corruption*? In: Jeremy H. & Peter A., (eds, 2013). *Modern Bribery Law: Comparative Perspectives*, Cambridge University Press, p. 293.

[102] Ibid.

[119]UNACA, op.cit.

[120]Art. 57(3) (b), Ibid .

[121]Art. 57 (4),Ibid. A similar provision is made under Article 14 (3) of UNTOC, op.cit.

[122] Art.53, Ibid..

of about £658,000 to Ghana, £618,000 to Iraq and £139,000 to Jamaica.[123] Similarly, three co-defendants of Steve Ferguson, head of the National Gas Company of Trinidad and Tobago, were ordered by a United States court to make restitution to the government of Trinidad and Tobago in the amounts of $4 million, $2 million and $100,000 respectively.[124]

1.3 Gapsin the International Legal Framework of Assets Recovery

Under Article 46 (4) of UNCAC,transmission of information about ongoing investigations to foreign authorities is optional.[125] Provisions like this could affect the effectiveness of international cooperation, because without a legally binding obligation, it is doubtful that jurisdictions whose legal orders do not permit such sharing without a formal MLA request will be encouraged to promote legal reforms in this sense. Furthermore, NCB which is the subject of Article 54(1) (c) of UNCAC[126] is not mandatory for Parties. This is perhaps one of the most significant shortcomings of the Convention. It possibly could impede the effective recovery of stolen assets of some political office holders as it fails to take into account the fact that in many jurisdictions, such office holders are in control of state organs and prosecution against them by virtue of their immunity is usually not possible until they leave office or flee. Furthermore, leaving NCB to the discretion of states parties limits the effectiveness of efforts to recover assets, in that mutual legal assistance requests in this regard can only be responded by States Parties who have enacted the relevant provisions.In effect, making some obligations optional could reduce the seriousness with which the states would have provided measures for implementation of the Conventions as well as its uniform application by member states.

Furthermore, Articles 46(3)(j), (k) and 55(3) of the UNCAC[127]have left MLA for the purpose of assets recovery at the discretion of State Parties to postpone or reject it completely on the bases of some international conditions. For instance,Article 46 (9) of UNCAC[128] allows States Parties to decline to render a requestin absence of dual criminality, i.e., where the requested jurisdiction does not criminalize the conduct that the requesting jurisdiction is investigating or prosecuting.Secondly, MLA may be refused if it is likely to prejudice a party's "essential interests".[129] However, the meaning of the terms "essential interests" is not precise and defined in the instrument. The implication of thisis, parties are left to determine what constitute their "essential interest", and in

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[123]United Nations Office on Drugs and Crime, "Digest of Asset Recovery Cases" (New York: United Nations, 2015), p. 65, available@https://www.unodc.org/documents/corruption/Publications/2015/15-05350_Ebook.pdf, accessed on 24th June, 2017. 7:21. P.M.
[124]Elena, H., &Selvan, L., (2015), *Using the Anti-Money Laundering Framework in Asset Tracing in Tracing Illegal Assets: A Practitioner's Guide*, Basel: Basel Institute on Governance, International Centre for Asset Recovery, p.73.
[125]Article 46(4), Ibid.
[126]UNACA, op.cit.
[127]Ibid.
[128]Ibid.
[129] Art. 46 (21) (b) UNCAC, op.cit.,

protection of which they may not respond to a request for MLA.However, notwithstanding the rights of parties in this regard, without making a provision to guide the parties, it may give room for states to unnecessarily reject MLA request on the basis of exercising the right to protect their "essential interests". For instance, France refused to help Nigeria because the request was in English language.[130]Furthermore, Article 55 (7) of UNCAC[131] allows jurisdictions to refuse to assist where the assets involved are *de minimis* and no provision is made regarding what should happen to such assets where the request for MLA is refused.

Article 55 (3) (6) of the UNCAC[132]provides that if a state party elects to make the granting of MLArequest conditional on the existence of a relevant treaty, that State Party shall consider this Convention as sufficient treaty basis. Unfortunately, in practice some countries still stick to having a MLA treaty as a requirement for engaging in international co-operation. For instance, in efforts to recover over $200 million alleged to have been stolen and placed into overseas jurisdictions by the former Premier Khaleda Zia's son, Arafat Rahman Koko, the Bangladeshi authorities are said to have cited successfully the provisions of UNCAC as the legal basis for the exchange of critically important information and evidence in relation to this ongoing investigation in the absence of any formal bilateral treaty with Singapore. [133] Furthermore, in the case of the Former Governor of Delta State, James Ibori, who was arrested in Dubai by the London Metropolitan Police on charges of money laundering, the United Kingdom has requested his extradition because it has an extradition treaty with the United Arab Emirates. Though, charges of corruption and money laundering are also pending against him in Nigeria. However, an extradition request could not be made because Nigeria has no extradition treaty with the United Arab Emirates.[134]

Even where above legal hurdles have been crossed successfully, the processing of requests for mutual legal assistance often takes a long time. In the case of Ferdinand Marcos, it took the Swiss Government almost five years to act on a request to transmit bank documents to the government of Philippines.Inthe Abacha case, it took nearly four years before bank documents required for evidentiary purposes were transmitted to the Nigerian government.[135] Though, Nigeria has so far succeeded in recovering about $723 million. [136] However, this was after protracted diplomatic exchanges between both governments (spanning about five years) that the sum of $722 million was released 2005 even though more funds are said to be held up in Switzerland. Frustrated by Switzerland's stance, Nigeria decided to sign a Memorandum of Understanding (MoU)

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[130]Marie, C. (2008), *Mutual Legal Assistance and Money Laundering*, U4 Helpdesk, Transparency International, p.2.

[131] Ibid.

[132] Ibid.

[133]http://www.thedailystar.net/newDesign/news-details.php?nid=71090, accessed on 26th May, 2017. 3:11. P.M.

[134]Vlassis D, et'al, op.cit. p.14.

[135]Stephenson, Kevin M., et al. op.cit., p.17.

[136]www.vanguardngr.com/2016/03/abacha-loot-switzerland-returns-732m-to-nigeria-in-10-years/ 14th August, 2016. 11:28.A.M.

with Switzerland in 2010. In return, Switzerland pledged to ensure that its financial centres will no longer be used as safe havens by corrupt Nigerians.[137]In 2016 the parties signed another MoU that would allow for return of $321 million from the Abacha's loot.[138] Yet, nothing has been returned.

1.4 Conflict and Choice of Law Situation in Assets Recovery

Generally speaking, there are instances where asset recovery actions will include international elements, i.e., involving people of different nationalities. Such circumstances will inevitably raise the question of choice of law. To put more properly, which law will be more appropriate to address the situation? In *Federal Republic of Brazil and Anor v Durant International Corporation and Anor*[139] the Jersey Royal Court held that the test to be applied is the one set out by Lord Goff in *Spiliada Maritime Corp v CansulexLimited.*[140] By this test, the Court will consider in which forum the case may be tried most suitably in the interests of all parties and the ends of justice. However, in applying this test, the Court must be guided by taking into consideration the following connecting factors: Matters concerning convenience or expense (e.g., location of witnesses and documents relative to the proposed forum); the governing law of the transaction; and the jurisdictions where the respective parties reside and carry on their business.

Though, the court did not state whether or not these factors must be present at the same time before a court can be conferred with the jurisdiction to entertain assets recovery matter involving foreign elements. But from the above case, it seems the court is more interested in adopting a test that will protect the interests of all parties and the ends of justice. If this interpretation is correct, then it does not matter whether all or only one of the factors is present, once it will achieve the end of justice, the court will rely on it. This also reflects the position of in the UK. As shown above, for English courts to entertain assets recovery matter in involving foreign element, the defendant must have a connection with the jurisdiction. By this principle it means, foreign court only exercises jurisdiction when the assets is within its jurisdiction or the defendant lives within jurisdiction. However, English Court may also refuse to entertain an assets recovery matter if it has reason to believe that that the claim would be better determined in the courts of the state that has suffered the corruption. For instance, in Islamic Republic of *Pakistan v Asif Ali Zardari and Ors* (supra), the English Court declined to determine claims by the Pakistani and Zambian Government to assets held in the UK which was believed to have been derived from domestic corruption on the basis that the Court has no jurisdiction to entertain a corruption case with complete foreign elements.

Going by the above decision, one will think that, the choice of applicable law in asset recovery matter involving foreign elements would not be a problem once the

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[137]Pedro, G. P., op.cit. p.19.
[138]Abacha Loot: Switzerland return $723 to Nigeria in 10 Years, www.vanguardngr.com/2016/03/ abacha-loot-switzerland-returns-$723-to-nigeria-in-10-years/ 30th August, 2016. 6:28. P.M.
[139](2010) JLR, 421.
[140](1987) AC 460.

conflict with respect to the proper forum is resolved. However, in practice, it may not necessarily be so. This is particularly the case if we take into consideration jurisdictional differences such as whether both parties are from civil or common law jurisdiction. This will go a long way to determine whether parties in the first place, will agree on the standard of prove to be adopted in the matter.[141] Furthermore, if the law of the jurisdiction in which the alleged corrupt offence occurred is considered to be the applicable law, such a choice would not be in the interest of justice at least on the part of the party in whose jurisdiction the act in question does not constitute a crime. Of course, this concern should not come as a surprise because, what constitute corruption and its manifestation differs from country to country. Thus, as far as assets recovery involving foreign element is concern, problems such as the above will continue unless, perhaps some of unification is achieved in that regard.

1.5 Conclusion

The enactment of UNCAC is a clear sign that the international community recognizes the importance of fighting corruption.Throughthe implementationof this instrument.an appreciable success has been recorded in the recovery of assets by law enforcement agencies. Though, there are still challenges. Effective enforcement of UNCACin certain instances has been difficult due to differences in legal system. Differences between approaches taken in civil and common law systems, especially concerning confiscation proceedings and admission of evidence pose challenges. Requesting states parties that seek to recover assets often face obstacles in developed countries due to high evidentiary requirements. Similarly tracing assets through international cooperation varies depending on the jurisdiction. For instance, in while some jurisdictions assets tracing has failed because the plaintiff could not show a "clear link" between his property and the assets in the hands of the wrongdoer, in others, this requirement is not always followed. In fact,Article 46 (9) of UNCAC also added to this problem by allowing States to decline a request in absence of reciprocity, and dual criminality, i.e., where the act is not a crime in the requested jurisdiction. Unfortunately, the definition of crime differs from country to country, so there is always the tendency that a request may be declined on basis of dual criminality. In fact, France refused to help Nigeria simply because the request was written in English language.

Additionally, MLA in confiscation through NCB is only responded by states parties who have enacted NCB legislation. Furthermore, the language of this Conventionhas not really helped in its enforceability. The Convention requires measures for implementation to be established by the signatories. However, some of these requirements are mostly phrased using discretionary terms. A typical example is the provision on NCB. This outcome has partly renders the Conventions "toothless". This could reduce the seriousness with which States would have provided measures for implementation of the Conventions as well as its uniform application by Member States.

[141] Kevin M Stephenson et al, (2011), *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action*" StAR/The World Bank, p. 179.

If not properly construed, the clauses could defeat, frustrate, or annul the assets recovery objective of the Convention. Finally, even where above hurdles have been crossed successfully, the processing of requests for return of assets often takes a long time.

In view of these challenges, it has become highly necessary to re-negotiate and re-draft the assets recovery provisionsof this Convention with the view to harmonizing or providing uniform standards that would be applicable to all the signatories to the Convention. The signatories must also be required to show evidence of provision of the necessary legislative and non-legislative measures for given effect to their obligations under the Convention. In the new draft, mandatory language should be used to instigate State compliance. Harmonization of the substantive and procedural processes of assets recovery wouldmake it easier for law enforcement agencies in common law jurisdiction totrace, freeze and confiscateassets proceeds in civil law countries and vice versa. It would also ease the various international legal conditions such as dual criminality, the principle of reciprocity and "clear link" which have made recovery of assets through direct and indirect approaches very difficult. It is also recommended that, a timeframe should be provided within which recovered assets recovered should be returned to their rightful owners. Where this is not practical, in case of money, it should be placed in an interest bearing for the benefits of the owners.