RECOVERY OF PROCEEDS OF CORRUPTION UNDER INTERNATIONAL LAW: AN ASSESSMENT OF THE MEASURES FOR DOMESTIC IMPLEMENTATION OF ANTI-CORRUPTION CONVENTIONS IN NIGERIA

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BEING A THESIS SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES, AHMADU BELLO UNIVERSITY, IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF DEGREE OF DOCTOR OF PHILOSOPHY IN LAW-PhD

June, 2018

DECLARATION

I declare that this Thesis entitled RECOVERY OF PROCEEDS OF CORRUPTION UNDER INTERNATIONAL LAW: AN ASSESSMENT OF THE MEASURES FOR DOMESTIC IMPLEMENTATION OF ANTI-CORRUPTION IN NIGERIA, has been written by me in the Department of Public Law, Ahmadu Bello University, Zaria. The information derived from the literature has been dully acknowledged in the text and a list of reference provided. No part of this thesis was previously presented for another degree or diploma at this or any other institution.

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CERTIFICATION

This Thesis entitled RECOVERY OF PROCEEDS OF CORRUPTION UNDER INTERNATIONAL LAW: AN ASSESSMENT OF THE MEASURES FOR DOMESTIC IMPLEMENTATION OF ANTI-CORRUPTION IN NIGERIA, meets the regulations governing the award of the degree of Doctor of Philosophy in Law-PhD, of Ahmadu Bello University, Zaria, and it is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This work is dedicated to my wife Joy Abraham and to our children Maxwell and Raymond for their support and patience.

ACKNOWLEDGEMENTS

Many efforts combined to make this work a reality. My sincere appreciation goes to God Almighty for given me the strength, sound health and resources to undertake a research work of this magnitude. I am deeply indebted to my supervisors, Professor M.T. Ladan, Dr. I.F. Akande and Prof. B. Babaji, for their guidance, informative comments and suggestions. I benefited immensely from your meticulous attention to details. Whenever other commitment posed a great challenge to this study, you ensured that the study was not abandoned. I cannot thank you enough. I also want to appreciate Dr. A.M. Madaki, the Dean, Faculty of Law, Prof. D.C. John, Prof. Sani Idris, as well as Prof. A.A. Agom and Prof. Mamman Lawal, the Dean Bayero University Kano, for chairing my 1st, 2nd, and final Seminars as well as my external examination respectively. Your observations and comments have really added substance to this thesis. My profound gratitude also goes to Dr. S.A. Apeniga, the Post Graduate Coordinator, Faculty of Law, for his assistance and guidance.

I humbly remember the deep support of my wife Joy. I place on record, my gratitude and sense of appreciation to you. Whenever the work took greater part of my time, she made sure that my obligations to our children were discharged. I am also sincerely grateful to my children Maxwell and Raymond for their patience and understanding that whenever I was in my study, I should be left alone. I would like to express my profound gratitude also to my family members, Dr. Emmanuel Ndor, Pastor Andrew Paul and Mrs. Philomena Ayuba and their respective families, for their support and encouragement. I would also like to acknowledge my Pastor Apostle Dr. S.B. Chechet, and Mummy Barr. F.A. Kera, Engr. Victor Tawani, Pastor Solomon A. Musa, Dr. Musa Bala, and Iliya Yakubu for your prayers, support and encouragement. I remain grateful to you all.

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LIST OF ABBREVIATIONS

UNCAC:	United Nations Convention Against Corruption
UNTOC:	United Nations Convention Against Transnational Organised Crime
AU:	African Union
ECOWAS:	Economic Community of West African States
EFCC:	Economic and Financial Crimes Commission
GDP	Gross Domestic Product
ICPC:	Independent Corrupt Practices Commission
IMF	International Monetary Fund
MLA:	Mutual Legal Assistance
PEPs	Politically Exposed Persons
FATF:	Financial Action Task Force
POCA:	Proceeds of Crime Act
ARA:	Asset Recovery Agency
POCB	Proceeds of Crime Bill
NCB	Non Conviction Based
StAR	Stolen Assets Recovery Initiative
FIU	Financial Intelligent Unit
ECHR	European Convention of Human Right

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Abstract

This thesis examined Recovery of Proceeds of Corruption under International Law with the view to determining whether there are adequate and effective measures for implementation Anti-Corruption Convention in Nigeria. The thesis adopts a doctrinal method, and accordingly analysed materials from primary and secondary sources which include legal instruments, books, journals, articles, newspapers and internet materials on assets recovery. It is found that Nigeria has made provision for Criminal Forfeiture Regime pursuant to Article 31 of the United Nations Convention Against Corruption (UNCAC), Article 12 of the United Nations Convention Against Transnational Organised Crime, and Article 16 of the African Union Convention on Preventing and Combating Corruption. However, the problem is this measure does not apply where the defendant is death or he is conferred with immunity against prosecution. The measure is also too slow due to high standard of prove required to secure criminal conviction. Thus, sometimes corruption cases remained in court for years. Section 396 of the Administration of Criminal Justice Act (ACJA) provides for day to day trial as a measure to enhance speedy dispensation of cases. However, this has not helped much particularly in high profile corruption cases. It is also found that Nigeria has no measure for Non-Conviction Based Forfeiture or Civil Forfeiture in *persomam* pursuant to Article 54 (1) (c) and 53 of the UNCAC. This would have enables civil action to be brought against assets or the defendant if criminal forfeiture proves difficult. The thesis therefore recommends among others that ACJA needs to be amended to provide time limits for completion of corruption cases and appeals. There is also the need to pass the Proceeds of Crime Bill into law. This would complement the existing criminal forfeiture regime. In addition, the Constitution should be amended to include a clause giving automatic force of law to any Bill for

the provision of measure for the implementation of these Conventions, if not passed into law within a particular period of time, say one year. This will resolve the problem of lack of political will which has over the years, frustrated effort at establishing comprehensive measures for implementation of the Conventions in Nigeria.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the study

Corruption remains the greatest obstacle to development.[1] International Monetary Fund (IMF) estimates that, the money laundered each year sums up to 3-5% of worldwide Gross Domestic Product (GDP), fluctuating between US $600 billion and US $2 trillion with a considerable part originating from corrupt offences.[2] Moreover, between US $20 billion and US $40 billion are lost in developing countries each year through bribery, misappropriation of funds and other corrupt practices.[3] In Nigeria, study reveals that from 2005 to 2015 over $150billion has been siphoned from the country through official corruption.[4] What is however disturbing is, the societal costs of corruption far exceed the value of assets stolen by corrupt leaders and other Politically Exposed Persons (PEPs)[5].

Domestic adverse effects of corruption could always be easily named. For instance, at the international level, it erodes confidence in the financial credibility and stability of the nation, thus weakening its global competitiveness and further, becoming unattractive to investments from within as well as outside.[6] Domestically, corruption prevents national income to be properly invested in public services as education, health and infrastructure.[7] Consequently, this undermines growth, erodes trust in governments, fuels support for extremism and hinders the

[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.
[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.
[3]Carey, L.B. (2014), "Record Illicit Money Lost by Developing Countries Triples in a Decade", available @ *www.cbiron@ips.org,* accessed on 4th May, 2016, 4:11 PM.
[4]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.
[5]Report of the Basel Committee on Banking Supervision, 2001 defines PEPs as individuals who are or have been entrusted with prominent public functions, including heads of state or of government, senior politicians, senior government, judicial or military officials etc.
[6]Enwerenmadu, D.U., (2013), "Nigeria's Quest to Recover Looted Assets: The Abacha's Affairs", *African Spectrum,* 48, 2, p.56.
[7]Abioye, O. (2014) "Nigeria Lost US$155 billion to Money Laundering and Fraud", available @ *www.punchng.com,* accessed on 24th May, 2015. 6:33 PM.

fight against poverty.[8] From the figures shown above, it is understandably why corruption must not pay in Nigeria, but must be fought and reduced to the barest minimum because, as observed by His Excellency, President Muhammadu Buhari: "If we do not fight corruption, corruption will kill Nigeria".[9] This of course, will call for broader strategy to tackle corruption differently from the way it has been done in the past in order to achieve expected results.

However, corruption being a global issue also means that it cannot be effectively dealt with using purely domestic legal framework considering such that legal order is developed as self-centered systems structured to deal principally with domestic issues.[10] Instead, it will require a coordinated action by the international community through regulation and control leading to an adjustment of national and international legal orders with the view to making it feasible to investigate, prosecute and recover corruptly acquired assets that are hidden within the country or in different jurisdictions.[11]

The first steps by the international community toward combating corruption was taken in 2000 with the first declarations in favour of international cooperation for the identification, tracking and recovery of "laundered" funds adopted in the UN General Assembly and later on during the G7 meeting at Okinawa.[12] A substantial progress was achieved with the adoption of the United Nations Convention against Transnational Organized Crime (UNTOC) in late 2000, which entered into force on 29 September 2003. Particularly important is its Article 12, 13 and

[8]Richard, A. O. (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.11., Olutoyin, B.I., (2014), "Stamping Corruption out of Our System: The Impact of National and International Legislations on Corruption Control in Nigeria", *Journal of Law, Policy and Globalization*, Vol.23, p.102..

[9] Richard, A. O., op.cit.p.2.

[10]Melvin D. A. and Julius A., (2014), "Illicit Financial Flows and Stolen Assets Value Recovery", *University of Massachusetts Amherst*, p.1.

[11]Chijioke, E. E., (2015), "Probing the Probity of Economic and Financial Crimes Commission (EFCC) Towards Economic Development of Nigeria", *Journal of Poverty, Investment and Development*, Vol.17, p.2.

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

14, regulating confiscation and disposal of proceeds of crime.[13] The ultimate goal of adoption of a comprehensive global anti-corruption convention was achieved soon afterwards. This started with the Ad Hoc Committee for the Negotiation of the United Nations Convention Against Corruption (UNCAC) holding seven sessions between 21 January 2002 and 1 October 2003 and negotiated text was adopted by the General Assembly in the Resolution 58/4 of 31 October 2003, with UNCAC finally entering into force on 14 December 2005.[14] Article 51 of Chapter V stipulates that parties to the Convention shall afford one another the widest measure of cooperation and assistance.

In African, the need to fight corruption in its entire ramification among Member States led to adoption of African Union Convention on Preventing and Combating Corruption (AU Convention) in Maputo, Mozambique, on 11th July 2003. It came into force on 5 August 2006, [15] while the Economic Community of West African States Protocol on the Fight Against Corruption (ECOWAS Protocol) was signed on 21 December 2001. Though, it is not yet ratified by the required number of states for its entry into force.[16] With the enactment of these instruments, the international community has demonstrated its commitment to confront the global challenge of corruption with a global response. Most importantly, it also meant that, if a country's legal framework for combating corruption particularly through assets recovery is weak, then resort can be had to the above international instruments rather than relying purely on national means.[17]

[13]United Nations Convention against Transnational Organized Crime, the Convention entered into force on 29th September, 2003. Nigeria signed 13 December 2000, ratified it 28 June 2001.
[14]Signed on 9th December, 2003 and ratified it on 24th October 2004.
[15]Nigeria ratified the AU Corruption Convention on 26th September, 2006.
[16]available@*http://www.transparency.org/global_priorities/international_conventions/conventions_instruments/ecowas_protoc*, accessed on 11th October, 2016. 3:31. P.M.
[17]André, S. R. (2015), "Transnational Organized Crime and the Palermo Convention: A Reality Check", *New York: International Peace Institute*, p.21.

1.2 Statement of the Problem

The Federal Government on 29th May, 2015 declare that, one of its agenda is to trace, recover and repatriate looted assets stashed in domestic and foreign banks by corrupt Nigerians. This assertion is encouraging considering that the resources which could have been used in development are being pocketed by some cliques who are hell-bent to making life miserable for the teeming masses of Nigeria while they continue to live in affluence.[18] What is however doubtful is, whether Government can effectively recover proceeds of corruption in Nigeria in line with this noble objective taking into consideration the following challenges:

1. Lack of comprehensive Legislative Measures for Assets Recovery

In Nigeria, the law on assets recovery lack critical component in line with the country's Anti-Corruption Treaties obligations.[19] First, the criminal forfeiture regime in Nigeria provided pursuant to Article 31 of the UNCAC[20], Article 12 of the UNTOC[21] and Article 16 of the AU Anti-Corruption Convention[22] and Article 13 of ECOWAS Protocol[23] is too slow. Section 396 (3) of the Administration of Criminal Justice Act (ACJA)[24] in order to facilitate speedy conclusion of cases and to discourage frivolous adjournments, provides for day to day trial and require any adjournments in excess of five to attract reasonable costs. Unfortunately however, this section has failed to realize its objective of speedy trial particularly in high profile corruption cases commenced under the Act. Many corruption cases have been in court beyond the six months.[25] This is partly because day to day trial is virtually impossible as the capacity of High

[18]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.
[19]Shehu, A.Y., (2014), "Key Legal Issues and Challenges in the Recovery of the Proceeds of Crime: Lessons from Nigeria", *International Law Research*, Vol. 3, No. 1, p.194.
[20]UNCAC, op.cit.
[21]UNTOC, Op.cit
[22]AU Anti-Corruption Convention, op.cit.
[23]ECOWAS Protocol, op.cit.
[24]ACJA, No.1, 2015.
[25]Azu, J.C., (2017), "How Anti-Corruption is Strangling Anti-graft war", *Daily Trust, Sunday*, June 10, 2017, p.14.

Courts (particularly those situated in major cities such as Kano, Abuja, Lagos, Port Harcourt and Kaduna) is overstretched by overwhelming corrupt cases before these courts.[26] In addition, awarding cost has not really helped much in discourage frivolous adjournments particularly in high profile corruption cases. The reason being that PEPs who defendants in most of these cases have enormous financial resources, thus, payment of any cost to obtain adjournment with a view to frustrating the trial is not a problem for them.

Furthermore, in corrupt offences such unjust enrichment, the knowledge of the crime mostly resides in the accused, thus making it difficult for the prosecution to prove the case beyond reasonable as required by Section 38 and 39 (1) of the Evidence Act [27]. In such situation, Article 12 (7) of the UNTOC[28] and Article 31 (8) of the UNCAC recommend that States Parties may consider reversing the burden of proof to the accused by requiring him to explain the lawful origin of the assets. However, in Nigeria, there is no such measure. Section 36 (11) of the Constitution[29] has placed a constitutional constraint on such shifting of the burden of proof as the section indeed recognizes that the defendant has the right to be presumed innocent until proven guilty. And Section 131 and 135 (2) of the Evidence Act clearly establish that the burden of proving any allegation lies on the person who asserts it. These provisions often leave the prosecution struggling to prove financial crimes which ordinarily are only within the knowledge of the accused. Article 54 (1) (c) of the UNCAC also encourages State Parties to establish measure for Non-Conviction Based (NCB) that would allow action to be brought against the asset in cases where the evidence is not enough satisfy a criminal standard of proof or the

[26] Ibid.
[27] As required by Section 38 and 39 (1) of the Evidence Act, No.1, 2011, and also Abdullahi Y. S., op.cit. p.197.
[28] UNTOC, op.cit.
[29] Constitution of the Federal Republic of Nigeria, Cap C23 LFN, 2004 (as Amended).

defendant enjoys immunity against prosecution or where he is not within the jurisdiction. However, in Nigeria, this measure is not readily available.[30]

In Nigeria, due to the difficulties associated with assets recovery through conviction based forfeiture, plea bargaining has been adopted as one of the major tools in the recovery of proceeds of corruption.[31] However, the framework of plea bargaining as assets recovery mechanism in the country is weak. For instance, there is no adequate provision to guide the parties in determining the amount to be recovered in a plea bargaining process. Section 14 (2) of EFCC Act[32] for instance, only requires EFCC to compound any offence punishable under the Act by accepting sum of money exceeding the maximum fine. The problem however is, due to lack of precise yardstick for determining the amount to be paid in a plea bargaining process has resulted in the recovery of only a paltry sum far less than what has been embezzled or stolen by corrupt politicians. In addition, Section 270 (17) of the Administration of Criminal Justice Act (ACJA)[33] empowers the prosecution to accept or give plea bargaining subject to the condition among others that, the evidence of the prosecution must be insufficient to prove the offence charged beyond reasonable doubt. Though, this section has not yet been tested in court, but a major problem likely to affect the implementation of this section is, if plea bargaining is to be recommended only when the evidence of the prosecution is insufficient to prove the offence charged beyond reasonable doubt, the defendant may as well insist that he does not want plea bargaining because from the legal point of view, the case would to be determined in his favour since the prosecution's evidence is insufficient to prove the case beyond reasonable doubt.

[30]Country Statement from Nigeria, London Anti-Corruption Summit, 12th May, 2016, p.4, 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, and Adekunle, A., (2011), *Proceeds of Crime in Nigeria: Getting our Act Together*, Nigerian Institute of Advanced Legal Studies Press, Lagos, Nigeria, p.15.
[31]Ted. C. E., and Eze A. G., (2015), "A Critical Appraisal of the Concept of Plea Bargaining in Criminal Justice Delivery in Nigeria", *Global Journal of Politics and Law Research*, Vol.3, No.4, p.33.
[32] Cap.E1, LFN, 2004.
[33]ACJA, op.cit.

2. Lack of capacity for Assets Recovery

Asset recovery is very complex process as expert, corporate vehicles, as well as computers are often used to disguise the illicit nature of financial crimes.[34] Thus, Article 50 and 60 of the UNCAC[35] requires each State to develop specific training programmes to build the capacity of its personnel in the area of intelligent gathering and prosecution of corrupt offences. In Nigeria, Section 11 of the EFCC Act[36] has made this provision measure. However, despites this provision, there is still problem of institutional weakness. This is significantly impacting on the assets recovery efforts in the country. EFCC and ICPC seem to lack the capacity for effective investigation and tracing of assets as well as prosecutions of offenders. In some cases, the agencies would arrest an individual and detain him before conducting investigation into the alleged crime[37] or charge him to court without thorough and proper investigation. It is when the trial is going on that they would go about investigating the case they are already trying in court. Consequently, cases are sometimes closed due to insufficient evidence to support prosecutions.[38] For instance, in 2017, EFCC lost four high profile corruption cases in 96 hour.[39] The problem seems to be that conferring both investigative and prosecutorial functions on the ICPC and EFCC is seems to be too much for the agencies to effectively discharge.

3. Lack of political will

Section 4 (1) of the Constitution[40] has vested in the National Assembly the power to make laws for the peace, order and good government of the Federation or any part thereof. The challenge

[34]Ladan, M. T., (2016), *Money Laundering, Terrorism, Corruption, Human Trafficking in Nigeria*, LAP LAMBERT, Academic Publishing, p.58.
[35]UNCAC, op.cit.
[36]Cap.E1, LFN, op.cit.
[37]Lawrence, E.O., (2016), "Economic and Financial Crimes Commission (EFCC) and the Challenges of Managing Corruption in Nigeria: A Critical Analysis", *International Journal of Scientific and Research Publications*, Vol. 6, Issue 4, p.346.
[38]EFCC Not Equipped To Recover Criminal Proceeds, available@ *https://www.naij.com/51454.html*, accessed on 24th August, 2016. 4:56. P.M.
[39]Available @ *https://leadership.ng/columns/581294/flashpoint-2*, accessed on 13th April, 2017. 7:12. P.M.
[40]Federal Republic of Nigeria, Cap.C23, op.cit

however is, exercising this power by the National Assembly depends entirely on whether they have the political will to do so. Meaning that, the Legislature cannot be compelled for instance, to pass into law the Proceeds of Crime Bill (POCB)[41] pending before it. This may even be frustrated by corrupt serving Senators and Former Governors[42] who are still facing corruption charges in courts.[43] Unfortunately, the National Anti-Corruption Strategy 2017-2020 clearly states that, the success of the Strategy depends on the passage of POCB into law. For project such as assets recovery, untimely provision of the necessary legislative measures in this regard would only give room for dissipation of the assets thereby frustrating eventual confiscation. It is in view of the foregoing therefore that, the following questions become imperative:

1. What are the relevant provisions of the international and regional legal framework of Assets Recovery?
2. Are there loopholes or challenges in these international and regional legal instruments that are capable of frustrating successful Assets Recovery efforts across the globe?
3. What are the processes and forms of Assets Recovery developed pursuant to the relevant provisions of the international and regional Anti-Corruption Conventions?
4. Are there comprehensive measures in Nigeria for the implementation of the Assets Recovery provisions of the International and Regional Anti-Corruption Conventions?
5. What are challenges inhibiting successful domestic implementation of Anti-Corruption Conventions in Nigeria?

[41] POCB, 2017.

[42] Folashade B. O., (2012), "Corruption as Impediment to Implementation of Anti -Money Laundering Standards in Nigeria", *American International Journal of Contemporary Research*, Vol. 2 No., p.186.

[43] This include, the Senate President, Senator Bukola Saraki (false declaration of assets), Senator Ahmed Sani Yarima (N1billion), Danjuma Goje (N25billion), Abdullahi Adamu (N15billion), Joshua Chibi Dariye (N1.2billion), Godswill Obot Akpabio (N108billion), Sam Egwu (N80billion), Theodore Orji (47billion) and Adamu Aleiro (N10.2billion).

1.3 Aim and Objectives of the Research

The aim of this thesis is to examine the international regime for the recovery of proceeds of corruption and to assess the comprehensiveness and effectiveness of the measures for the implementation of Nigeria's obligations under the international regime, with the view to making recommendation to enhance effective recovery of proceeds of corruption in Nigeria. The thesis seeks to achieve this through the following specific objectives:

1. To analyze the relevant Assets Recovery provisions of the International and Regional Anti-Corruption Conventions.
2. To critically examine and identify the gabs in the International and Regional Anti-Corruption Treaties that can impede successful fight against corruption through Assets Recovery.
3. To appraise the forms and processes of recovery of proceeds of corruption and to identify operational challenges inhibiting its effectiveness.
4. To examine the legislative and non-legislative measures for domestic implementation of Anti-Corruption Conventions in Nigeria.
5. To identify the challenges frustrating effective domestic implementation of Anti-Corruption Conventions in Nigeria.

1.4 Scope of the research.

This research is restricted to the Examination of Assets Recovery in Financial Crimes under International Law: Case Study of Domestic Implementation in Nigeria. Financial crime is a very wide area[44]so also is the term "assets". Thus, in the context of this thesis, financial crime is

[44]Section 46 of the Economic and Financial Crime Commission Act, Cap. E1, op.cit., defines economic and financial crime in broad terms to mean any non-violent criminal and illicit activity committed with the objectives of earning wealth illegally either individually or in a group or organized manner thereby violating existing legislation governing the economic activities of government and its administration and includes any form of fraud, narcotic drug trafficking, money laundering, embezzlement, bribery, looting and any form of corrupt malpractices, illegal arms deal, smuggling, human trafficking and child labour, illegal oil

restricted to corrupt offences as provided under the Organization of Economic Cooperation and Development (OECD) Toolkits. This includes: embezzlement, misappropriation, diversions of public funds, bribery, inflation of contracts and over-invoicing for public works and procurement, abuse/misuse of office for personal gains, trading in influence and money laundering.[45] The term "assets" in this thesis would be restricted to proceeds of the above offences. Furthermore, the thesis would only examine the relevant International, Regional and Nigerian legislations as well as judicial authorities on assets recovery. At the International and Regional levels, the thesis would be limited to the examination of United Nations Convention Against Transnational Organized Crime (UNTOC),[46] United Nations Convention Against Corruption (UNCAC)[47], African Union Convention on Preventing and Combating Corruption and Related Offences (AU Corruption Convention)[48] and Economic Community of West African States Protocol on the Fight Against Corruption (ECOWAS Protocol).[49]

At the National level, emphasis will be placed on the relevant provisions of Corrupt Practices and Other Related Offences Act[50], Economic and Financial Crimes Commission Act[51], Constitution of Federal Republic Nigeria[52], Money Laundering (Prohibition) Act[53], Advance Fee Fraud and other Related Offences Act[54] and the provisions of any relevant Bill that may be proposed by the National Assembly during the course of this work. Territorially, the thesis is

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bunkering and illegal mining, tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes and prohibited goods, etc.

[45]OECD Toolkit, Asset recovery, www.oecd.org/cleangovbiz/toolkit/assetsrecovery.html, accessed on 17th March, 2016. 8:56 P.M.

[46]UNTOC, op.cit.

[47]UNCAC, op.cit.

[48]AU Anti-Corruption, op.cit..

[49]ECOWAS Protocol, op.cit.

[50]Cap. C31, LFN, op.cit.

[51]Cap. E1, LFN, op.cit.

[52]Constitution of the Federal Republic of Nigeria, Cap. C23, LFN, 2004 (as Amended).

[53]Money Laundering (Prohibition) Act, 2012.

[54]Fraud and other Related Offences Act, 2007.

limited to Nigeria. Though, corruption being a transnational crime, reference would also be made to other jurisdictions for guidance where necessary.

1.5 Methodology.

Doctrinal method is adopted for this thesis. Being a library oriented method of research, the thesis will analyze material derived from both primary and secondary sources. The primary sources include information from national and international legal instruments on recovery of assets as well as both local and foreign judicial decisions. While the secondary sources include books, journals, articles, newspapers and internet materials. The analysis of these materials will provide the basis for achieving the aim and objectives of this thesis.

1.6 Justification of the study

Nigeria has responded to the fight against corruption by ratifying a number of international treaties. Some anti-corruption laws have been enacted in the country in compliance to the relevant provisions of these international treaties. However, despite this legal framework, fight against corruption through assets recovery has not recorded a resounding success as considerable amount of loots is still in the possession of the looters. This research is therefore justified on the ground that recommendations would be made with a view to enhancing the country's legal framework for assets recovery. An improved regime of assets recovery legal would play two important roles. In the first, it would block the loopholes often exploited by looter to siphon public assets into private pocket. Secondly, it would facilitate effective recovery of the assets already looted. This in turn, would serve another two important functions. First, it would make resources available that help in the economic growth and development of the country; secondly, it would ensure that crime does not pay.

Furthermore, the research is justified on the basis that comprehensive implementation of the relevant provisions of international legal instrument on asset recovery in Nigeria and success recorded would serve as a precedent for other jurisdictions contemplating the amendment of their laws or introducing non-legislative measures for assets recovery in line with the international best practices. Finally, the research would provide additional material in the subject matter under consideration that would be beneficial for students, lawyers and the interested public.

1.7 Literature Review

There are publications which deal with recovering corruptly-acquired assets. While some of these publications are interested in the effects of corruption and money laundering, others are simply concerned with the processes as well as the effectiveness of the legal and institutional framework for combating corruption and money laundering through assets recovery. For instance, Adekoya,[55] explores the structuring of money laundering control as a mechanism for effective control of the corruption pandemic in Nigeria and other developing countries of the world. The author argued that corruption, like money laundering, is a plague threatening development and enthronement of good governance in most developing countries, including Nigeria. He concludes that in order to effectively fight corruption and money laundering there is need for enhanced international cooperation and the enthronement of good governance. One important contribution of this work is in its realization that corruption and money laundering have become a transnational crimes hence the need for international cooperation in confronting them. However, the learned author limited his work to issues reviewed above. Thus, the work did not cover how an enhanced international cooperation in the fight against corruption and money laundering can be achieved in the face of challenges such as lack of political will on the part of

[55]Adekoya, C. A. (2011), "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, p.272.

the government. Sometimes government, who are often the beneficiaries of such corrupt practices, are in most cases reluctant in seeking international cooperation to confront crimes involving assets hidden across borders. While countries that are the recipients of such stolen funds are sometimes also reluctant to move against powerful interest groups such as banks.

Nnado and Ugwu[56] identify strategies and measures that will strengthen the effectiveness of the commission in their fight against corruption in the Nigerian public sector to ensure accountability and transparency. The authors revealed that lack of societal cooperation, poor staff training, pre-bargaining and systemic disorder affect the effectiveness of the Economic and Financial Crimes Commission (EFCC) in their fight against corruption in the Nigerian public sector. The learned authors contended that it will be difficult for the government to succeed in the fight against corruption in Nigeria if the identified problems are not addressed. They concluded that to effectively fight corruption, enlightened individuals should collaborate with the EFCC to get rid of corruption in Nigeria, and that there is the need to reform and strengthen all the laws that were used to establish the EFCC and other anti-corruption agencies so that they are not weakened by the court. This literature has indeed provided vital information that can help in the fight against corruption and money laundry in Nigeria. However, most part of the conclusion of this work is not clearly defined. For instance, the work requires all enlightened individuals to collaborate with the EFCC to get rid of corruption in Nigeria, but did not explain how or in what regard. Furthermore, the authors suggested the reform of all the laws establishing the EFCC and other anti-corruption agencies, but they did not actually specify which aspect of the laws needs to be reformed. The fight against corruption and money can hardly be effective by simply making sweeping statement about the problems on ground. There is need for clear cut recommendations

[56]Nnado I. C., and Ugwu, C. C. (2015), "Effectiveness of the Economic and Financial Crimes Commission (EFCC) in Enhancing Accountability in the Nigerian Public Sector", *Developing Country Studies*, Vol.5, No.8.

that are implementable. This research would supply that missing link by ensuring that all suggested measures for fighting corruption and money laundry are well defined and implementable.

Adekunle[57] examined the basis and forms of forfeiture; the legal framework for forfeiture in Nigeria with particular emphasis on tracing and investigation of Assets, restraint/seizure proceedings and the final order of forfeiture. The author concluded by proposing the expansion of the EFCC's collection of criminological works with particular reference to profiling and forensics skills in organized crime. However, this work which the author acknowledged himself is the work is too restrictive. The learned author simply limited his expositions to assets forfeiture regime in Nigeria. The field of recovery of assets in both local and international law is very vast comprising of complex issues of human right, plea bargaining and MLA among others which the book did not pay attention to. This research would cover these areas.

Stolpe[58] discussed the key component of assets recovery such as tracing, freezing and returning proceeds of corruption under Chapter V of the UNCAC. He examines direct recovery of assets under Article 53 of the UNCAC as well as recovery through international cooperation under Article 54 and 55 of the Convention. The work also discusses the history, theory and practice of developments to deal with money laundering and the proceeds of crime. The writer argued that it has marked another step in the move towards greater concentration both on the financial aspects of crime and on the internationalization of criminal law. He explains that, Assets Recovery is central to the strategy of targeting criminal monies. The author acknowledged that Nigeria has enacted a number of legislations to facilitate recovery of assets. These according

[57]Adekunle, A., (2011), *Proceeds of Crime in Nigeria: Getting our Act together*, Nigerian Institute of Advanced Legal Studies Press, Abuja.
[58]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.

to him include the EFCC Act, ICPC Act, Penal Code, Criminal Code, and Code of Conduct Tribunal Act. He however, lamented that despite these laws, recovery of proceeds of corruption in Nigeria still remains a serious challenge. The author concluded by suggesting a range of measures for State Parties to take particularly within Nigerian context to create legal, institutional and operational capacities and pre-conditions necessary to bringing into effect the provisions of the UNCAC. Some of these measures according to the author include NCB forfeiture, i.e., the power to bring forfeiture proceedings without a prior criminal conviction. He argued that with this measure, it would be easier for the Government to recover proceeds of corruption from looters who enjoy immunity against prosecution, or flee the country, or where the evidence cannot support criminal standard of prove. The observations of the author are quite in line with the current reality of assets recovery in Nigeria. However, the author only acknowledged that the relevant laws in Nigeria have failed to guarantee effective assets recovery in the country but he did not specifically states the provisions of these laws that need to be amended for better result. Enactment of NCB in Nigeria is good, but it can only play a complementary role to criminal forfeiture regime. It is therefore important to provide a holistic and workable recommendation on how the relevant provisions of these laws can be enhanced for effective assess recovery. This research will attempt that.

Babatunde[59] also examined the types of Forfeiture in Criminal Trials in Nigeria, Non Conviction Based Forfeiture, as well as Criminal Forfeiture Vis a Vis Right to Property. He also explained the various types of forfeiture in criminal trials in Nigeria and the constitutional rights to acquire property only within the provision of the law. He argued that the right to acquire and own movable and immovable properties must be legitimately done within the confines of law.

[59]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.

The writer concluded that Government must however be careful to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasion of individual rights. The writer has no doubt devoted his attention on a very problematic area in recovery of assets. Human rights concerns present a serious challenge to implementation of Assets Recovery legislation in Nigeria. Thus, it is important that the writer attempted to reconcile these concerns by arguing that Government must be careful to ensure that the alarming level of crime is not used to justify violation of individual rights. However, apart from the fact that the writer's recommendation is too vague, one area that needs to be considered is the fact that most issues of human right violations in the process of assets recovery arise as result of the implementation of provisions of assets recovery legislations in Nigeria. Hence, it is imperative that effort is made to provide recommendations that would reconciled any conflict between individual rights and the provisions of the assets recovery law in Nigeria.

Melvin and Julius[60] appraised value recovery as a specific type of criminal forfeiture. They explained that, this form of criminal forfeiture is only applicable where the assets has been sold or used. In such situation, this mechanism allows for the recovery of the value of such assets. The authors argued that, this is an important tool in the enforcement of anti-money laundering laws and also serve as a potent weapon against corruption. They explore international experiences on the implementation of value recovery as well as the institutions for value recovery of stolen assets. The authors explained that when stolen assets are recovered, it represents society's credible commitment to ensure that crimes do not pay. They also argued that mutual cooperation and financial transparency are canonical features of a successful value recovery landscape. They concluded that the sources of international cooperation lie in domestic

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

politics and are shaped by the structure of political institutions and the preferences of the political elites. The authors have no doubt given a general overview of the nature, importance as well as legal and political constraints to effective value recovery. This research will rely on this background, to specifically localize the issues raised to Nigerian context. In particular, to examine how international cooperation has help in value recovery of assets in Nigeria, and legal and political constraints impacting on the process.

Olaleye[61] discussed the general challenges associated with criminal forfeiture in Nigeria. The author explained that criminal forfeiture is based on conviction after trials. Thus, this form of forfeiture is difficult where the defendant died, enjoyed immunity against prosecution, fled the jurisdiction of the court or the evidence cannot sustain conviction. The author concluded by recommending the adoption of a civil asset forfeiture mechanism. This, the he argued that, it will enable confiscation of proceeds of corruption where any of the above constraint makes criminal confiscation difficult. However, this article is limited in scope as it does not address the legal issues associated with the adoption of such mechanism. There remain areas of controversy in the field of civil asset recovery which touch on serious legal issues, such as the right against self-incrimination in a criminal case, retrospective application of civil recovery laws, interference with property rights and violation of the presumption of innocence.

Pedro[62] examined mechanism for civil forfeiture and why proceedings in rem are an essential tool for recovering the proceeds of crime. The author innumerate the importance of civil forfeiture to include allowing action to be brought the assets the defendant is dead, enjoys immunity against prosecution, evidence cannot satisfy criminal prosecution or the defendant is outside the jurisdiction. The he argued that, it is for these reasons that Government enacts

[61]Olaleye, O. (2000), *Confiscation of the Proceeds of Corruption*, Journal of Financial Crime.
[62]Pedro, G. P., (2016), "Analytical Study on Mechanisms for Asset Recovery and Confiscation in Moldova", *Basel Institute on Governance, International Centre for Asset Recovery*, Basel, Switzerland.

legislation or contemplate the enactment of a set of comprehensive asset forfeiture statutes to enhance the State's ability to recover the proceeds of crime. The writer reviews the law enforcement situations in which civil forfeiture statutes are essential to the State's ability to recover the proceeds of crime. The article concludes that in personam criminal forfeiture statutes, which authorize a court to impose forfeiture as an element of the defendant's sentence in a criminal case, are inadequate, by themselves, to allow the State to recover criminal proceeds, and that in rem civil forfeiture provisions must be included in a legislative scheme for it to be fully effective. The author has no doubt made a good case for NCB forfeiture in line with Article 54 of the UNCAC. However, just like Olaleye, the author has limited his work. Hence, some contentious human right issues which could arise from the application of the NCB forfeiture are left out. For instance, the work did not determine whether NCB confiscation regime violates the right to acquisition of assets. Others include whether civil forfeiture process should run concurrently with criminal forfeiture as well as the advantages and the disadvantages of adopting this approach. This research would attempt to examine these issues.

Emile, et' al[63] appraised civil action based on a criminal case as well as Disgorgement and Compensation for damages. The authors argued that civil law remedies are a credible and effective tool for countries interested in recovering stolen assets both when criminal procedures are unlikely to yield a result or in addition to such measures. The authors further contended that civil remedies do not replace criminal prosecutions and confiscation but they complement them by attacking the economic base of corrupt activities and by focusing on victims' interests. While common law offers a wider array of options to exercise proprietary claims on stolen assets, for personal claims both common and civil law systems offer reasonably similar avenues. They

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

concluded that jurisdictions should consider increasing their use of legislation and legal concepts dealing with civil measures to recover profits obtained and damages suffered as a result of corrupt activities. Thus far, one thing that has been established beyond doubt in assets recovery is the importance of NCB forfeiture. It is also clear that the essence of setting up NCB forfeiture mechanism is to complement the effort of conviction based forfeiture. However, what most literatures just like the one under review has failed to show is whether in playing this complementary role the civil and criminal based forfeiture are to work concurrently or independently. Issues like these needs to be clarify for easy understanding of the effectiveness of each of these methods of forfeiture.

Nwobike[64] wrote on interim restraint or freezing injunctions. He explained that there are different species of injunctions. They generally include perpetual, interim, interlocutory, quia timet, mareva and anton piller injunctions. The author argued that, the principles that guide the courts in the grant of these types of injunctions are substantially similar save that, in the case of freezing and mareva injunction, the applicant is required to make full disclosure of all material facts relevant to the application like the full particulars of the assets within jurisdiction, that the debt is due and owing as well as imminent danger or risk of evacuation of assets from jurisdiction to render judgment nugatory or to frustrate eventual recovery of assets. The court must also be satisfied, from the averments in the dispositions in the affidavit in support of the application, that the applicant is likely to be successful at the end of the case. The author further explained that, all the superior courts of record in Nigeria, created by the Constitution have powers to grant injunctions. Most of the enabling statutes also grant these courts the power to grant injunctions. Apart from these laws, the various rules of practice and procedure applicable

[64]Nwobike, J. (2010), "Securing Assets for Execution: The Utility of the Mareva Option", *the Centre for International Legal Studies*, Austria.

to those courts have invested them with the power to grant injunctions in appropriate cases. The author maintained that, such restrain measure is binding not only on the defendant but also a third party. Thus, a third party such bank that assists the defendant to disobey the order of court would also be liable. The author clearly shows the importance of interim measures in preserving assets for eventual confiscation. However, one important area the work did not touch, which this research will examine is on the protection of the interest of bona fide third parties. This is particularly as it concerns given such parties notice of the order depriving them of their interest in the assets and making provision to compensate them for any financial loss suffered.

Abdullahi[65] analyzed the key legal issues and challenges in the recovery of the proceeds of illicit enrichment. The author discussed some international initiatives such as MLA as well as the legal framework for asset recovery in Nigeria. He further examined the principles of plea bargaining as applicable to recovery of stolen assets. The author concluded that confiscating and recovering the criminal assets and freezing of terrorist assets are indispensable aspects of anti-money laundering and terrorist financing efforts as it would send a signal to potential offenders that if discovered and convicted, they will not only be subjected to immediate custodial sentences of a substantial character, but will also lose tainted property. He added that strengthening prosecutorial and judicial capacity to achieving conviction and record successful asset recovery should constitute an area of priority. The author has indeed provided a good literature on the subject matter of asset recovery. However, two areas need to be improved upon. The first is on the challenges inhibiting successful international cooperation in recovery of assets. For instance, while discussing these challenges, the author only mentioned lack of recognized procedure for the return of confiscated funds to the victimized state, lack of established

[65]Abdullahi Y. S. (2014), "Key Legal Issues and Challenges in the Recovery of the Proceeds of Crime: Lessons from Nigeria", *International Law Research*, Vol. 3, No. 1.

procedure for the use of evidence obtained by the requesting state, as well as difficulties in providing rapid information required for the immediate freezing of suspects' assets, but did not consider the problem of dual criminality. Secondly, the work only examined few international legal frameworks for recovery of stolen assets such as United Nations Convention against the Illicit Traffic of Narcotic Drugs and Psychotropic Substances, the UNCAC, the UNTOC as well as the FATF Recommendations. But it did not pay attention to the African Union Convention on Preventing and Combating Corruption, Corrupt Practices And Other Related Offences Commission Act (CPC Act), Criminal Code Act, Penal code Act and Advance Fee Fraud and other Related Offences Act, among others. Thus, it would be difficult for the author to draw adequate lessons for Nigeria from just examining few legal instruments. This research would extend the examination of these legal instruments beyond the ones considered by the author.

Enweremadu[66] also examined the challenges in Nigeria's quest to recover looted assets. The author highlights asset recovery systems, success stories in asset recovery and technical assistance under UNCAC. The authors notably discuss the 'success stories' of the past (the recovery of the assets of Sani Abacha, Ferdinand Marcos and Vladimiro Montesinos) and the concrete challenges for the future with regard to search, seizure, confiscation and repatriation of stolen assets. The writers argue that without an effective framework to recover assets corruptly acquired by leaders, development efforts will remain impeded. He further contended that development efforts will remain frustrated so long as corrupt leaders continue to steal their countries' wealth and dispose of these ill-gotten gains in foreign jurisdictions. The writer however lamented that to date, experience with asset recovery is limited, and a number of legal and other obstacles continue to impede progress. The author's conclusion shows that the challenges inhibiting successful recovery of stolen assets are far from being over as there are still

[66]Enweremadu, D.U., (2013), "Nigeria's Quest to Recover Looted Assets: The Abacha's Affair", Africa Spectrum.

problems ranging from lack of experience in assets recovery to legal obstacles which invariably, the book has no answers to. This is the reason why research in this area has become imperative.

Abiodun[67] discussed the multi-dimensional challenges involved in tracing, freezing and repatriating looted state assets in foreign jurisdictions. He argued that the forms of proceeding available in Nigeria to recover looted assets are inadequate. The learned author further discussed the successful assets recovery cases involving Nigerian corrupt officials and the ones that are not so successful. He further examines the main challenges to assets recovery through criminal proceedings and also highlights various approaches to assets recovery. He concluded 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 paper warns that the success of assets recovery process is contingent on strong political will on the part of the Nigerian government and its ability to constructively engage the requested state. While the author must be commended for discussing some fundamental issues in assets recovery, one area he did not cover which this research would provide the missing link is, apart from forfeiture/confiscation, there are at least three ways that a government might get its hands on money that is, in some sense, the product of corrupt activity. The first is punitive fines. Fines are penalty imposed by a sovereign in response to an offence against the sovereign interest. The second is compensation. When there is an identifiable victim of an unlawful act, the law may allow the party to seek compensatory damages in civil action[68]. The third one is disgorgement. Disgorgement is the forced giving up of profits obtained by illegal or corrupt means on demand by legal authority.

[67]Abiodun, O. (2014), "Assets Repatriation and Global Best Practices: Lessons for Nigeria", *AUDA*, vol. 6, no. 1.
[68]Article 53 of the UNCAC, op.cit., empowered each state party to set up such measures as may be necessary in accordance with its domestic laws to ensure that entities or persons who have suffered damage as result an act of corruption have the right to initiate legal proceeding against those responsible for that damage in order to obtain compensation.

Daniel & Maton[69] examined the effectiveness of Mutual Legal Assistance (MLA) in criminal matters in recovering dictator's plunder. The work deals with policy obstacles, such as the question of the legitimacy of the new government which has taken power from the deposed dictator, and legal obstacles such as Head of State immunity, and the freezing, confiscation, and repatriation of illicit assets. The author concluded that Swiss system of mutual assistance has been too demanding and too slow in providing effective and efficient tracing and recovery of assets. The author has provided a good literature as far as the obstacles in recovery of assets are concerned particularly relating to question of the legitimacy of the new government and Head of State immunity. However, in recovery of assets hiding in foreign banks, mutual assistance is central. Thus, if the author feels that the Swiss system of mutual assistance is too demanding and slow in providing effective and efficient tracing and recovery of stolen assist, then it is expected that he should provide measures that would ease the process.

Ladan[70] also examined Money Laundering, Terrorism, Corruption and Human Trafficking in Nigeria. Chapter Three of the book specifically discussed tracing, freezing, confiscation, recovery and forfeiture of illegal proceeds of money laundering in Nigeria. The learned author grouped these processes into four basic phases. That is, pre-investigative phase: during which the investigator verifies the source of the information initiating the investigation and determines its authenticity. If there are inconsistencies in the story or incorrect statements and assumptions, then the true facts must be established. Investigative phase: where the proceeds of crime are identified and located (tracing) and evidence in respect of ownership is collated covering several areas of investigative work in the process, for example, Mutual Legal Assistance requests to obtain information relating to offshore bank and other records, and financial investigations to

[69]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.
[70]Ladan, M.T., (2016), *Money Laundering, Terrorism, Corruption, Human Trafficking in Nigeria*, LAP LAMBERT Academic Publishing, Germany.

obtain and analyses bank records. The result of this investigation can be a temporary measure to secure later confiscation ordered by the court. Judicial phase: The freezing and seizure stages fall largely under the auspices of the judicial system. Finally, the seized assets are returned to the requesting country. Where the accused person/defendant is convicted (or acquitted) and the decision on confiscation is final. Disposal phase: where the property is actually confiscated (forfeited) and disposed of by the State in accordance with the law, whilst taking into account international asset sharing. The author further provides the domestic legal basis for each of these phases. He also argued that Forfeiture Regime in Nigeria should include Civil Forfeiture. This, the author argued is necessary, in view of the fact that, there is unnecessary delay in trials, and most PEPs enjoy political immunity and the means to evade or delay trials. This work has no doubt addressed one of the major concerns of this research. It has indeed provided the basis for appreciating the nature and the applicable law regulating the key components of assets recovery in Nigeria. However, this research will go further to examine some international and regional legal framework of assets recovery as well as the necessary domestic measures for the implementation of these instruments in Nigeria.

Richard, and Eme,[71] also examined the problems and challenges in the legal frameworks for fighting corruption in Nigeria. The author argued that repatriation of stolen monies makes available additional resources for development activities. He contended further that the challenge is to ensure efficient, accountable and transparent use of such assets, given states may lack capacity or political will and that corruption may be prevalent at various levels of government. Transparency allows for better utilization of recovered assets, and better targeting of resources into sectors that have potential to benefit the victims of corruption, who happen to be mostly the

[71]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.

poor. Lack of effective follow up mechanisms may lead to the inappropriate allocation of resources into sectors that have little effect on alleviating poverty. The cases under review here offer lessons on how to manage repatriation and utilization of proceeds of asset recovery. Further lessons relate to the participation of third parties and the benefits of making the results of the entire process public. The author has really provided an insight into an important aspect of assets recovery, that is, assets management. Because without prudent management of the assets recovered, the rationale behind confiscation of the assets would be defeated. However, something is missing. The author presented his argument on the assumption that such illegal assets could support national development efforts if they were returned. Unfortunately, this is not always the case. Furthermore, the author suggested that accountability and transparency would allow for better utilization of the recovered assets, but he did not suggest the types of measures that should be put in place to ensure accountability and transparency.

Adekunle[72]carried out an overview of the Administration of Criminal Justice Act 2015. The author stated that, the Act is a deliberate effort to transform the criminal justice system from its present state of retributive justice into a restorative justice system. That it also addresses a wide range of issues that had prior to this time slowed down the criminal justice system which in turn resulted in a poor output in terms of number of dispensed criminal cases by the judiciary and an increased number of awaiting trial inmates. One of these issues according to the author is provided in Section 396 of the Act which eliminates unnecessary delays hitherto experienced during criminal trials by providing for all preliminary objections to be taken along with trials and expressly stating that criminal trials upon arraignment shall proceed from day to day until its conclusion and where this is impracticable, either party to the case shall be entitled to no more

[72]Adekunle, A. (2016), "An overview of the Administration of Criminal Justice Act 2015", A Paper Presented at the 2016 Induction Course for Newly Appointed Judges and Kadis, Organized by the National Judicial Institute 23rd MAY – 3rd June 2016, Abuja.

than five (5) adjournments. The intervals between each adjournment is not to exceed fourteen days and where the trial has not been concluded then the court may award cost on any other frivolous application for adjournment as the case may be. The author maintained that, the reason behind this provision is very obvious as this will lead to both parties to a criminal proceeding executing their duties expeditiously in other to obtain the best favourable results for their clients. The work however, limited itself to overview of the provisions of Act. It did not consider the possible limitation to the success of these provisions such congestion in the court or limited judicial officers to handle the overwhelming number of criminal trials in Nigerian courts. In general, the author excluded from the scope of his work, the need to answer the question: why the delay in the dispensation of criminal justice in Nigeria despites the provisions of this Act. This research will strive to answer this question.

Adeleke[73] examined the incidence and the prosecution of corruption in the Nigerian society with specific emphasis on plea bargaining which has been applied to prosecute some PEPs and other people in the upper echelons of the Nigerian society. He also analysed the origin and merits of plea bargaining and provided a critique of corruption prosecution through plea bargain based on moral and principles. The writer argued that plea bargaining is gradually becoming widespread in criminal prosecution in Nigeria. The study precisely advocated for outright dropping of the plea bargain in corruption prosecution in Nigeria because of its tendency to deepen rather than making mild and abating corruption in Nigeria. He concluded that given the patron-client character of power relation in the Nigerian state, the stipulations of anti-graft laws should be strictly followed in order not to make corruption prosecution constitute another source or facilitator of corruption in Nigeria. It is indeed true that plea bargaining is gradually

[73]Adeleke, G. O. (2012), "Prosecuting Corruption and the Application of Plea Bargaining in Nigeria: A Critique", *International Journal of Advanced Legal Studies and Governance*, Vol. 3 No.1.

becoming the norm in criminal prosecution in Nigeria because apart from the conviction secured through plea bargaining, it is quite difficult to recall a high profile criminal conviction secured after full trial. However, the author ought to have recognized that resort to plea bargaining became an option because of the long time it often takes to secure conviction after full trial at the end of which there may be nothing substantial to recover from the PEP. Thus, before advocating for outright dropping of the plea bargain, it is important that the writer should have first pay attention to measures that would make our anti-graft laws comprehensive enough toward an effective regime of assets recovery in Nigeria. Once this is achieved, the practice and prominence of plea bargaining in assets recovery in Nigeria would diminish naturally.

Ted[74] also appraised the concept of Plea Bargaining in criminal justice delivery in Nigeria. The author examines the origin of the concept, its development across the globe and the issues arising from the emerging practice of plea bargain in Nigeria. He explained that, the concept of "plea bargain" is a new phenomenon in the Nigerian legal system. He however maintained that, the application of plea bargaining has been trailed with a lot of controversy. To him, the Economic and Financial Crimes Commission has recently been applying the concept to release many corrupt public officers who should have been in jail. The idea is that they agree to plead guilty for a lesser charge with minimal punishment in exchange for the return of most of their stolen wealth. The opponents of this practice believe that the end result of the practice would be counterproductive in the fight against corruption as it will encourage other public officers to steal public money. The author concluded by recommending that, there should be federal laws that explicitly provides for the procedure as against the present situation. Any enactment explicitly providing for the adoption of plea bargaining in criminal trials should be restricted to property

[74]Ted. C Eze, (2015), "A Critical Appraisal of the Concept of Plea Bargaining in Criminal Justice Delivery in Nigeria", *Global Journal of Politics and Law Research*, Vol.3, No.4,

related offences and should have as its major aim, the restoration or restitution of the stolen property. Before the procedure is evoked in corruption cases, what was stolen must be conclusively verified. Third, for any defendant to benefit from the procedure, he must be prepared to return all that he stole. This work has indeed captured vividly the problems of plea bargaining in Nigeria. Though, one of the author's recommendations that there should be federal law that explicitly provides for the procedure as against the present situation has already been taken care of. This research therefore is a continuation from where the author's work has stop. It will go further to examine effectiveness of the federal law (Section 270 (1) of the ACJA) provided to enhance plea bargaining in Nigeria.

Ribadu[75] in an article titled: "Assets Recovery in Nigeria: Experiences from the Past", examined Nigeria's effort in the recovery of proceeds of corruption. The author argued that Nigeria is one of the countries in Africa that has record an appreciable success in assets recovery. He however, identified corruption and lack of political will to enact civil forfeiture regime as one of the challenges to achieving a resounding success in assets recovery in Nigeria. The author also measures for management of seized assets. He explained that, assets secured through provisional measures such as freezing, can be decided either ways. The property may be forfeited or returned to the suspect. Where it is returned to the suspect, the asset is expected to be in a good condition as to be of value to the beneficiary of the judgment. He pointed out that, at the moment, such assets are often managed by the agency that seized. The author concluded by recommending that the necessary legislations such as civil forfeiture law and assets management law be enacted to enhance the recovery and interim management of proceeds of corruption seized. In assets recovery, the importance of effective management of the assets seized cannot be overemphasis.

[75]Ribadu, N. (2016), "Assets Recovery in Nigeria: Experiences from the Past", available*@www.nigeriatoday.ng/2016/07/*, accessed on 24th August, 2016. 2:28. P.M.

Thus, as the author rightly pointed out, such assets must be well managed during seizure so that, if it is eventually returned to the owner, he will find them useful. However, the author seems to restrict his work to management of assets during provisional measures such as freezing. This research will go beyond that to examine measures for management of assets forfeited pursuant to final or permanent forfeiture order. Examination of the effectiveness of this measure has become necessary as assets recovery will of no significance if this measure is not effective and in place. This research would seek to produce a work that would attempt to bridge the gaps found in the above literatures reviewed.

1.8 Organizational layout.

This work is made up of six chapters. Chapter one gives a general introduction to the work. It outlines the statements of the problem, the objectives of the research, the scope, as well as the methodology, significance of the study, literature review and organizational layout. Chapter two is titled Definitions of Terms and Theoretical Considerations. The chapter would provide clarification into the meaning corruption, Financial Crime, Assets, Assets Recovery, Politically Exposed Persons (PEPs), Jurisdiction, Plea Bargaining, Victim state, Receiving state, Non-State Actors, and Mutual Legal Assistance (MLA).The chapter would conclude by examining the Theoretical Framework of Recovery.

Chapter Three is titled International and Regional Legal Framework for the Recovery Assets. The chapter analyses the legal framework for asset recovery in the context of the following international conventions and domestic laws: International Instruments such as United Nations Convention Against Corruption (UNCAC); African Union Convention on Preventing and Combating Corruption and Related Offences; Economic Community of West African Protocol on the Fight Against Corruption; and United Nations Convention Against Transnational

Organized Crime. The Chapter concludes by identifying the gaps and challenges in the International and Regional Legal Framework of Assets Recovery.

Chapter four appraises the Forms and Processes of Asset Recovery. The Chapter pays particular attention to the key component of Assets Recovery such as Asset Tracing, Freezing, Forfeiture, and Repatriation. The Chapter further identifies the objectives, advantages and disadvantages of these processes. It concludes by highlighting the challenges of Assets Recovery. Chapter Five which is titled Domestic Implementation of Anti-Corruption Convention in Nigeria: Issues and Challenges, examine the Legislative and Non-Legislative measures for Implementation of International and Regional Anti-Corruption Treaties in Nigeria. The Chapter particularly examines provisions of Nigerian law on the key component of Assets of Recovery. It also examines issues such as Plea Bargaining, and concludes by identifying factors inhibiting effective Implementation of Asset Recovery Law in Nigerian. Chapter Six would summarize the work, highlight some major findings and make recommendations.

CHAPTER TWO
DEFINITION OF TERMS AND THEORETICAL FRAMEWORK

2.1 Introduction

The same words may have different meaning to people, especially if they work in various disciplines. This chapter therefore provides conceptual clarification of terms that are central and are used throughout the study which do not have a common meaning or whose meaning have the possibility of being misunderstood. These terms are operationally defined or explained in the context of this study. Of particular note are the following key terms: Assets, Assets Recovery, Assets Tracing, Assets Freezing, Assets Confiscation, Repatriation of Assets, Plea bargaining, Disgorgement, Financial Crime, Money Laundering, Corruption, International Law, Treaty, Signature of Treaty, Ratification of Treaty, Accession of Treaty**,** Acceptance or Approval of a Treaty, Domestic Implementation of a Treaty, Mutual Legal Assistance (MLA), and Politically Exposed Persons (PEPs).

2.2 Meaning of Assets

Section 25 of the Money Laundering Prohibition (Amendment) Act[1] and Article 2 of the United Nations Convention Against Corruption (UNCAC)[2] use the term property, assets and proceeds of crime interchangeably. They define "Property" to mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets. They further define "Proceeds of crime" to mean any property or gain obtained, directly or indirectly, through the commission of an offence. The term "gain" or "benefits" may include the full value of cash or non-cash received by a defendant (or a third party at the defendant's direction) directly or indirectly as a result of the offence. Some examples include: the value of money or assets actually received as a result of committing an offence (for example, the profit from an initial contract obtained by bribery); the value of assets derived or realized by either the defendant or a third party at the direction of the

[1]Money Laundering Prohibition (Amendment) Act, 2012.
[2]UNCAC, 2003.

defendant directly or indirectly from the offence and the value of benefits, services or advantages accrued to the defendant or a third party at the direction of the defendant directly or indirectly as a result of the offence (for example, the contracts secured based on the experience gained through that initial contract obtained through bribery).[3]

Indirect proceeds may typically include services or advantages derived indirectly from the offence or from the appreciation in the value of the direct proceeds. For example if a company bribes an official to win a contract and the direct proceeds of the contract are N5 million, the indirect proceeds would be N500, 000 if the company invested the money for one year and earned 10 % simple interest. Section 25 of the Money Laundering (Prohibition) (Amendment)[4] extends the meaning of assets to include funds. The section defines funds as assets of every kind whether intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to or interest in such assets, including but not limited to bank credits, travelers cheques, bank cheques, money orders, shares, and securities. Furthermore, the term assets also include "Instrumentalities of crime". This means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences**.** The list of what constitutes "assets" appears to be endless. However, in the context of this study, assets or proceeds of crime mean goods of any kind, tangible or intangible, movable or immovable derived from or obtained, directly or indirectly, through the commission of an offence. It also denote revenue or other gain generated, directly or indirectly, from a criminal offence as well as any property into which it is transformed or which it is mingled with or used for the commission of such crime. However, in the context of this thesis, the term "asset" means proceeds and instrumentality of corruption.

[3]Larissa Gray et al., (2014), "Few and Far: The Hard Facts on Stolen Asset Recovery", Washington, DC: World Bank, p.41.
[4] Money Laundering Prohibition (Amendment) Act, op.cit.

2.3 Meaning of Assets Recovery

Assets recovery is a term used to describe efforts by governments to repatriate the proceeds of corruption recovered from corrupt officials. It is the process of tracing, freezing, confiscating and returning of funds obtained through corrupt activities.[5] Asset recovery has become one of the most innovative tools to combat economic and financial crimes because recovering the proceeds of crime, ultimately takes the profit out of the crime and consequently, deprives perpetrators of their illicit gains.[6] Assets recovery can be either property-based or value-based. The former is based on the recovery of the exact actual assets or instrumentalities linked to the offence while the latter is based on the recovery of the quantified monetary amount of benefits, including profits, services or advantages derived from the crime.[7] It involves calculating the monetary value of the benefits derived from criminal conduct and then imposing a monetary penalty of an equivalent value. Thus, at sentencing, the court will impose liability equal to that benefit on the defendant. This judgment may be enforceable as a judgment debt or fine against any asset of the defendant. Because it is not necessary to link specific assets to the offence, it is often easier to obtain a confiscation judgment in a value-based system as opposed to a property-based system.[8] However, the benefits must be linked to the offences that form the basis of the defendant's conviction.[9] On the whole, value recovery is a broader approach to combating illicit financial flows than the familiar and traditional stolen asset recovery initiative.

2.4 Asset tracing

[5]Nyanga Declaration which 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 @ *www.transparency.org* , Accessed 14th September, 2016. 4:33. P.M.

[6]Abdullahi Y. S. (2014), "Key Legal Issues and Challenges in the Recovery of the Proceeds of Crime: Lessons from Nigeria", *International Law Research*; Vol. 3, No. 1, p.7

[7]Art. 31 (4), (5) and (6), UNCAC, op.cit.

[8]OECD/The World Bank (2012), Identification and Quantification of the Proceeds of Bribery: Revised edition, OECD Publishing, available @ *http://dx.doi.org/10.1787/9789264174801-en*, accessed on 24th May 2016. 8:38 A.M.

[9]Ayogu, M. D., and Agbor, J.,(2014), "Illicit Financial Flows and Stolen Assets Value Recovery", *Political Research Institute, University of Massachusetts*, Amherst,p.2.

Asset tracing involves tracking hidden assets through financial investigation. It is an attempt to identify assets from their criminal origins, through all mutations if any, to the eventual form and state in which they exist at the time they are located.[10] There are two ways by which evidence can be gathered. Firstly, law enforcement officials in the country where the act of corruption took place can open an investigation using all available legal authorities as well as certain special investigative techniques. Some of these techniques may require authorization by a prosecutor or judge (for example, electronic surveillance, search and seizure orders, production orders, or account monitoring orders), but others may not (for example, physical surveillance, information from public sources, and witness interviews). Secondly, a private law firm can be retained to file a suit in the jurisdiction where the assets are found. Private investigators do not have the powers granted to law enforcement however, they will be able to use publicly available sources and apply to the court for some civil orders (such as production orders, on-site review of records, testimony, or expert reports).[11]

In Nigeria, assets tracing is mostly done by law enforcement agencies such Economic and Financial Crime Commission (EFCC) and Independent and Corrupt Practices Commission (ICPC). One commonest example in this regard is when the EFCC in 2015 investigated and traced N15 billion belonging to Taraba State into the accounts of five companies allegedly owned by Abdul-Aziz the son of former Governor of the state Murtala Nyako.[40]

2.5 Assets freezing, seizure or restraint

Freezing is the temporal prohibition of the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an

[10]Ajayi, S. I. and L. Ndikumana (Eds.) (2014), *Capital Flight from Africa: Causes, Effects and Policy Issues*, Oxford, Oxford University Press, p.23

[11]World Bank & United Nations Office on Drugs and Crime, (2011), "Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action", Washington, DC, World Bank, p. 1.

[40]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

order issued by a court or other competent authority.[12] It is a measure taken by a competent judicial authority in the issuing State to prevent the destruction, transformation, moving, transfer or disposal of property that could be subject to confiscation. In both common and civil law jurisdictions, two distinct mechanisms have been developed to control and preserve assets which may be subject to confiscation: seizure and restraint.[13] Seizure involves taking physical possession of the targeted asset. Although generally court orders are required, some jurisdictions grand law enforcement the right to seize assets: for example, bulk cash or other property "reasonably suspected or believed" to be the proceeds or an instrumentality of crime may be seized in exigent circumstances. Such powers, often emanating from customs laws, are particularly useful for seizing suspicious cash that is transported across international boundaries in contravention of cash import or export reporting laws.[13]

Restraint orders are a form of mandatory injunction issued by a judge or a court that restrains any person from dealing with or disposing of the assets named in the order pending the determination of confiscation proceedings. Unlike seizure orders, restraint orders do not result in the physical possession of the asset. Judicial authorization is usually required. However, some jurisdictions permit restraint to be ordered by prosecutors or other authorities.[14] Thus, usually, to prevent dealings in corruptly-acquired assets by dissipation or transfer, provisional measures such as freezing, seizure or restraint order are commonly adopted. The application for a freezing order often is made *ex parte*, that is, without notice to the offender who only receives notification

[12]Melissa van den, B., Monique, H., and Wouter de Zanger, (2010), *Asset Freezing: Smart Sanction or Criminal Charge?* Igitur, Utrecht Publishing & Archiving Services, p.19

[13]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.24.

[13]Ibid.

[14]Melvin, D. A. and Julius, A., (2014), "Illicit Financial Flows and Stolen Assets Value Recovery", In: Ajayi, S. I. and Ndikumana, L. (Eds.) (2014), *Capital Flight from Africa: Causes, Effects and Policy Issues*, Oxford, Oxford University Press, p. 12.

when the order is served on him personally.[15] This is important because putting the offender on notice would give him ample opportunity to dissipate his assets with the aim of frustrating the state's claim. One example of the implementation of this phase of assets recovery is the freezing of the sum of $5m found in the account of the Former Nigerian First Lady, Patience Jonathan on the Order of Federal High Court Lagos State.[76]

2.6 Confiscation of Assets

Confiscation (or forfeiture) is a means of redress for authorities seeking to recover stolen assets. It is an order by which a person is permanently deprived of assets without compensation.[16] There are three basic kinds of confiscation namely; criminal confiscation, non-conviction based confiscation and administrative confiscation. Criminal confiscation requires a criminal conviction by trial or guilty plea establishing guilt "beyond a reasonable doubt" or sufficient to convince the court. Once a defendant is convicted, a final order of confiscation can be entered by the court, often as part of the sentence.[17] Criminal confiscation can be either property-based or value-based. Generally, property-based confiscation is based on the exact actual assets or instrumentalities linked to the offence while value-based confiscation aims to reach a quantified value of benefits derived from the crime. An example of this type of forfeiture took place in the case of *Federal Republic of Nigeria vs. Michael Igbinedion & Ors*,[18] where the accused persons were conviction of money laundering charge amounting to N25 billion. The first accused person was sentenced to two years imprisonment with an option of N3 million fine while the second accused was sentenced to 20 years imprisonment in addition to a fine of N250, 000. The court

[15]Ibid.
[76] Wale, A., (2017), "Obasanjo reveals why EFCC lost 4 cases in 96 hours", *available @ https://www.naij.com/1098525-obasanjo-reveals-why-efcc-lost-4-cases-in-96-hours.html*, accessed on 13th June, 2017. 2: 18. P.M.
[16]Ribadu, N., "Challenges and Opportunities of Asset Recovery in a Developing Economy", In: Pieth M (ed, 2008) *Recovering Stolen Assets*. Bern, Peter Lang AG, p. 34
[17]Jacinta Anyango Oduor et al., (2014), "Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery", StAR/World Bank/UNODC, p. 141.
[18] Unreported Suit No. FHC/11C/2016.

also ordered that the company used for the commission of this crime, be wound up and its assets forfeited to the Federal Government.

Non-conviction-based (NCB) confiscation, sometimes referred to as "*in rem* confiscation," on the other hand, does not require a criminal conviction. NCB confiscation authorizes the confiscation of assets by judicial order without the requirement of a conviction. As it is typically a property-based action against the asset itself, not against the person with possession or ownership, NCB confiscation generally requires proof that the asset is the proceeds, or an instrumentality of crime. This type of forfeiture was adopted in late Abacha's case. The Swiss court used the provisions of Article 58 of Swiss Penal Code for confiscation without a criminal conviction to recover the assets. Administrative confiscation on the other hand, occurs without the need for a judicial determination. In other words, Administrative confiscation order are issued by a government agencies rather than the judiciary and can bypass mutual legal assistance requests from foreign countries in cases of urgency.[19] In Nigeria, through administrative confiscation for instance, EFCC in 2016 has seized over $6.555m and €248, 340 from 55 money laundering suspects at the airports in Lagos, Kano and Abuja.[20]

2.7 Asset Repatriation

This is the last step in the process of asset recovery. It involves returning the assets to the country from which they originated.[20] It is important to note that, there is no one universally acceptable procedure for the return of corruptly-acquired assets. This often depends on the peculiarity of

[19] Larissa Gray et al., op.cit. p.43

[20] Lawrence, O. M.,(2016), "The Plunderers and Challenges of Socio-Economic Development in Nigeria", *Public Policy and Administration Research*, Vol.6, No.1,p.12.

[20]Stolpe, O., "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, p.284.

each situation as well as other considerations as may be viewed by the parties concerned.[21] Sometimes, the recovered assets may be used for the partial settlement of debts at a bilateral or multilateral level. In the alternative, returned assets may be used in development programmes. Through international cooperation EFCC and other transnational bodies were able to recover and return of $242 million to a Brazilian bank, $4 million to a Hong Kong National and $ 500,000 to sundry US citizens. [22]

2.8 Plea Bargaining

The term "plea bargaining," is derived from the words "plea" and "bargain". The word "plea" has been defined to mean "an accused persons formal response of "guilty", "not guilty", or no contest to a criminal charge.[23] The word "bargain" on the other hand literally means that act of negotiating a settlement. It is an agreement of two or more persons to exchange promise or to exchange a promise for a performance.[24] A plea bargain is a sort of a criminal charge. It is simply a process where a criminal defendant and a prosecutor reach a mutually satisfactory disposition of a criminal case subject to the approval of the court.[24] It is a negotiated agreement between a prosecutor and a criminal defendant who pleads guilty to a lesser offence or to one or more multiple charges in exchange for some concession by the prosecutor, usually a more eminent sentence or a dismissal of the other charges.[25] The parties involved in a plea bargain are the prosecutor and the defendant/accused person. The main features noticeable from the foregoing is that plea bargaining is that the process is at the discretion of the prosecutor subject however to the approval of the court where the charges are already before it. Thus, on the basis

[21] Enwerenmadu, D.U., (2013), "Nigeria's Quest to Recover Looted Assets: The Abacha's Affairs", *African Spectrum*, 48, 2, p.57.
[22] Ibid.
[23] Bryan A. Garner (2004), *Black's Law Dictionary,* (8th ed), Minnesota, Thompson Web Publishers, p. 1189.
[24]Onyema, M. E., (2016), "EFCC and Plea Bargain Issue in Nigeria: Matters Arising", available @ *http://nigeriaworld.com/* accessed 11th August, 2016. 5:28. P.M.
[24]Legal Dictionary, available @ *thefreedictionary.com/plea-bargain*, accessed on 3th February, 2016. 10 : 37 A.M
[25] Bryan A. Garner, op.cit. p. 1190.

of a plea bargain, the prosecutor could decide to withhold the more serious charges. The defendant could on the basis of a plea bargain plead guilty to a lesser charge in exchange for the prosecutor's withdrawal of the more serious charges. Finally, where a plea bargain is approved by the court, it can hand down a more lenient sentence in respect of any charge before it.[26]

The use of plea bargaining is often justified on the ground that it accelerate the pace of justice and reduces congestion in the prison.[27] Furthermore, it also reduces the caseloads of prosecutors in order to pave way for effective prosecution of more serious cases. This is apart from the fact that defendants save time and money by not having to defend themselves at trials. It is important to note that the aforementioned primary justifications of plea bargains all provide benefits to the respective players – the court, the prosecutor and the defendant.[28] In Nigeria, plea bargaining has become an established practice in our criminal justice system. The practice is supported by Section 14 (2) of Financial Crimes Commission (Establishment) Act[77] and Section 270 of Administration of Criminal Justice Act.[78] The most recent plea bargaining in Nigeria is that of Mr. John Yakubu[126] who on January 2013, who got a punishment of two years imprisonment or the option of a fine of seven hundred and fifty thousand naira (N750, 000, 00) under a plea bargain agreement with the EFCC after stealing N23 billion from Pension Fund.

2.9 Financial Crime

The term "financial crime" can be defined as any non-violent crime resulting in a financial loss. Section 46 of the Economic and Financial Crime Commission Act[33] defines economic and

[26]Ted. C. E., and Eze, A. G., (2015), "A Critical Appraisal of the Concept of Plea Bargaining in Criminal Justice Delivery in Nigeria", *Global Journal of Politics and Law Research*, Vol.3, No.4, p.33.
[27]Ibid.
[28]Surajudeen, O. M. (2015), "Democracy, plea bargaining and the politics of anti-corruption campaign in Nigeria (1999-2008)", *African Journal of Political Science and International Relations*, Vol. 9, p.335.
[77]Cap. E1, LFN, 2004.
[78] No. 1, 2015.
[126]Ozekhome, M.A., (2012), "Coercion to Compromise, the Imperative to Plea in Plea Bargain in Nigeria, Law and Practice", *Nigerian Institute Advanced Legislative Studies*, Abuja, p. 249.
[33] Economic and Financial Crime Commission Act, Cap E1, LFN, 2004.

financial crime in broad terms to mean any non-violent criminal and illicit activity committed with the objectives of earning wealth illegally either individually or in a group or organized manner thereby violating existing legislation governing the economic activities of government and its administration and includes any form of fraud, narcotic drug trafficking, money laundering, embezzlement, bribery, looting and any form of corrupt malpractices, illegal arms deal, smuggling, human trafficking and child labour, illegal oil bunkering and illegal mining, tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes and prohibited goods, etc.

From the above definitions, it appears that the list of what constitutes financial crime is endless. However, a major feature of financial crimes as distinguished from other crimes is that they are often motivated by financial gain. Though, robbery, murder and manslaughter may be similarly motivated, they are however excluded from the statutory definition of financial crime on the ground of application of violence in such crimes.[34] Furthermore, flowing from the above definition, it is possible to divide financial crime into three different but related types of conducts. The first categories are activities that dishonestly generate wealth. For instance, fraud, drug trafficking, embezzlement, bribery, illegal arms deal, smuggling, human trafficking illegal oil bunkering and illegal mining, and tax evasion among others. The second conduct involves protecting an illegal benefit that has already been obtained. An example of such conduct is where someone launders proceeds of crime in order to conceal their criminal origin or identity. The third categories of conducts constituting financial crimes do not actually involve doing an activity that confers a noticeable financial gain on the perpetrators. Such conducts for instance include dumping of toxic wastes and prohibited goods. The rationale behind including such acts

[34]Adekunle, A. (2011), *Proceeds of Crime in Nigeria: Getting our Act Together*, Nigerian Institute of Advanced Legal Studies Press, Lagos, Nigeria, p.21

as financial crimes may not be unconnected with the fact that they have the tendency to violate the existing economic activities of government.[35]

In the context of this thesis however, financial crime is narrowed to activities that dishonestly generate wealth. This includes corrupt activities such as fraud, bribery, and illicit enrichment, as well as money laundering. Generally, this category of financial crime may be committed between persons or it may involve a financial institution.[36] Financial institutions can be involved in financial crime in three ways: as victim, as perpetrator, or as an instrumentality. Under the first category, financial institutions can be subject to the different types of fraud including, e.g., misrepresentation of financial information, embezzlement, check and credit card fraud, securities fraud, insurance fraud, and pension fraud. Under the second category, financial institutions can commit different types of fraud on others, including, e.g., the sale of fraudulent financial products and misappropriation of client funds. In the third category are instances where financial institutions are used to keep or transfer funds, either wittingly or unwittingly, that are themselves the profits or proceeds of a crime, regardless of whether the crime is itself financial in nature.[37] One of the most important examples of this third category is money laundering. Financial institutions can be used as an instrumentality to keep or transfer the proceeds of a crime. In addition, whenever a financial institution is an instrumentality of crime, the underlying, or predicate, crime is itself often a financial crime.[38]

2.10 Meaning of Money Laundering

In plain words, money laundering is a process where cash or property that has been obtained or derived from illegal or criminal activities is converted into a seemingly legitimate source. It is a

[35] Ibid.
[36] Melissa van den, B., Monique, H., and Wouter de Zanger, op.cit. p.21.
[37] Ibid.
[38] Egmont Group, (2013), "The Role of Financial Intelligence Units in Fighting Corruption and Recovering Stolen Assets", An Egmont Group White Paper, p.12.

generic name given to the process whereby an appearance of legality is given to profits or money accruing from dubious sources. It is the turning moneys or assets illegally acquired into a legitimate account in order for the said money to wear a semblance of legitimacy.[39] Article 3 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention)[40] defines it as the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offense or offenses or from an act of participation in such an offense or offenses.

From the above definition, it appears that the Vienna Convention limits predicate offenses (the criminal activity whose illicit proceeds are laundered) to drug trafficking offenses. Consequently, crimes not related to drug trafficking, such as tax evasion, fraud, kidnapping and theft do not qualify as money laundering offenses under the Convention. However, this definition has been expanded by the Financial Action Task Force on Money Laundering (FATF),[41] defines the term money laundering as "the processing of criminal proceeds to disguise their illegal origin" in order to "legitimize" the ill-gotten gains of crime. Such proceeds could be from criminal activities, like corruption, drug trafficking, smuggling, fraud, embezzlement, and so on. These proceeds of crime may be channeled through financial institutions, organizations or individuals in a way which is intended to conceal their true origin and ownership with the gainful and commercial intent of legalizing them so that these proceeds can be seen as legitimate.

Usually, when money laundering is carried out successfully, the money or other assets concerned are often reinvested into licit activities. Consequently, such assets eventually lose their criminal identity and appear to be legitimate. Thus, making it difficult for law enforcement

[39] *Kalu vs. FRN* (2014) 1 NWLR (Pt. 1389) Pg. 479 at 535, and Adedeji A, op.cit. p. 14
[40] United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.
[41] Chapter III, of the Financial Action Task Force on Money Laundering (FATF), 2012.

agents to uncover or confiscate such proceeds of crime, or use it as evidence in a criminal prosecution.[42] For instance, upon the receipt of criminal proceeds, criminals may seek to launder them through the financial system. This, in turn, may also require a series of fraudulent activities such as counterfeiting invoices. Thus, allowing criminals to distance or separate the proceeds of the crime from the crime in order to enjoy the benefits of the crime in its clean state.[43]

Money laundering and corruption and theft of public assets share one characteristic of dire consequence. Money laundering empowers corruption and other organized crimes. It is a necessary consequence of almost all profit generating crime. For instance, corrupt leaders used money laundering mechanism to conceal source of their money. Furthermore, organized criminal groups need to be able to launder the proceeds of drug trafficking and commodity smuggling. Terrorist groups also use money laundering channels to get cash to buy arms.[44]

2.11 Meaning of Corruption

The term "Corruption" stems from the Latin word *corruptus*, meaning "to break."[45] Corruption is commonly viewed as the abuse of public power or resources by government officials or employees for personnel gain.[46] Section 2 of the Independent Corrupt Practices Commission (ICPC) Act[47] defines corruption to include bribery, fraud and other related offences. Similarly, Articles 15–22 of UNCAC[48] define corruption to all the following activities: the active and passive bribery of domestic and foreign public officials as well as officials from international organizations; the embezzlement or diversion of public property by an official; trading in

[42]Olalekan, C. O., (2014), "Money Laundering: A Threat to Sustainable Democracy in Nigeria", *Journal of Economics and Sustainable Development*, Vol.5, No.2, p.88.
[43] Ibid.
[44]Gledina, M. (2014), "Laundering of Crime Proceeds in Albania: Effectiveness of Legal Framework Amendments: Theoretical and Practical Analysis", *Academic Journal of Interdisciplinary Studies*, Vol. 3 No 4, p.10.
[45]Ophelie B., (2011), "Assessing the relevancy and efficacy of the United Nations Convention Against Corruption: A Comparative Analysis", *Notre Dame Journal of International & Comparative Law*, Vol.1, p. 101
[46]Onyiloha, C. A. (2014), "Corruption in Nigeria: An Ethical Appraisal", *Nimo: Rex Charles and Patrick Publications*, p.4.
[47]Cap. C31, LFN, op.cit.
[48] UNCAC, op.cit.

influence or illicit enrichment by public officials; and bribery and embezzlement in the private sector. Active bribery refers to the party paying the bribe, while passive bribery is the party receiving the money. It is the offering, giving, receiving, and soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party.[49]

It follows that, corruption is a deviation from social norms, and it serves private and selfish interests for personal aggrandizement or a furtherance of family, clique or tribal sentiments. Corruption is wider than just taking of bribe, it encompasses embezzlement, nepotism, favouritism, settlement, misappropriation, misapplication, gross impropriety, extortion, influence peddling, fraud, plagiarism, examination and even electoral malpractices. It is a diversion of natural course of events, with a view to conferring undue advantage on an individual or a group of individuals. It is an action or inaction which gives advantages or bestows favour on a person that he or she is not legally or morally entitled to. It is an abuse of all offices of trust for private gains, whether in public or private sectors. Public office is abused for private gain when an official accepts, solicits, or extorts a bribe. It is also abused when private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit. Public office can also be abused through patronage and nepotism, the theft of state assets or the diversion of state resources.[50]

2.12 International Law

International law generally is classified into two, i.e., public international law (often called international) and private international law. Private international law regulates relations between private actors usually engaged in cross-border transactions. It sets out procedural rules relevant to the substantive law applicable to the relationship between the parties, the appropriate forum to

[49]Chaikin, D. et'al, (2009), *Corruption and Money Laundering: A Symbiotic Relationship*, Palgrave Macmillan, p. 8.
[50]Raimi, L.1, Suara, I. B. and Fadipe, A.O (2013), "Role of Economic and Financial Crimes Commission and Independent Corrupt Practices & Other Related Offences Commission at Ensuring Accountability and Corporate Governance in Nigeria", *Journal of Business Administration and Education,* Vol. 3, Number 2, p. 105

resolve their disputes, and the effect to be given a foreign judgment. It is grounded largely in national or municipal law.[51] Public International law on the other hand, is a body of rules governing relations between states. It consists of rules and principles of general application dealing with the conduct of states and of international organizations as well as persons whether natural or juridical.[52] It comprises a system of rules and principles that govern the international relations between sovereign states and other institutional subjects of international law such as the United Nations, the Arab League, African Union and European Union among others.[53]

Public International law covers almost every facet of inter-state and international activity. It regulates the use of the sea, outer space, international telecommunications, postal services, carriage of goods and passengers by air and the transfer of money. It is concerned with nationality, extradition, the use of armed force, human rights, protection of the environment, the dignity of the individual and the security of nations.[54] In short, there is very little that is done in the international arena that is not regulated by international law. International law is the vital mechanism without which an interdependent world could not function. In this sense, international law facilitates the functioning of the international community, of which we are all a part and on which we all depend.

The sources of international law are contained in Article 38(1) of the Statute of the International Court of Justice[55] and include treaties; customary law; general principles of law and judicial decisions and the teachings of the most highly qualified publicists of the various nations. Thus, rules of international law can be established by international agreement (treaties),

[51]James, F., et'al, (2008), *Private International Law*, Oxford, Oxford University Press, p.4
[52]Michael, J. G. (2015), "International Law and Agreements: Their Effect upon U.S. Law, Congressional Research Service", available *@www.crs.gov*, accessed on 15th February, 2016. 8:28. P.M.
[53] Ibid.
[54]Alex, M., (2009), *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law*, Cambridge University Press, p.1.
[55]United Nations, Statute of the International Court of Justice, 18 April 1946, available *@http://www.unhcr.org/refworld/docid/3deb4b9c0.html*, accessed on 3th February, 2016. 2: 21. P.M.

international custom, and derivation of principles common to major world legal systems and by national court decisions.[56] National court decisions play a distinctive dual role in the doctrine of sources. First, as evidence of State practice relevant to the interpretation of treaties and the formation of custom, secondly as a subsidiary means of determining the existence and content of international law.[57]

2.13 Meaning of Treaty or Convention

The term "convention" is synonymous with "treaty or charter".[58] Article 2(1) (a) of the Vienna Convention[59] defines a treaty as an international agreement concluded between states in a written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. Similarly, the Black's Law Dictionary[60] defines treaty as a formally signed and ratified agreement between two nations or sovereigns, or an international agreement concluded between two or more states in written form and governed by international law. These definitions are restrictive as they do not take into account treaties entered into between international organizations and states. To this end, a treaty can be defined in a broad sense as a consensual engagement which subjects of international law have undertaken towards one another with the intent to create legal obligations under international law.[61] Thus, treaties are agreements under international law entered into either between states or between states and international organizations.

It is also important to distinguish a treaty and "protocol". Protocol is the term used for an additional legal instrument that complements and add to a treaty. A protocol may be on any topic

[56] Michael, J. G., op.cit.p.3.
[57] Anthea, R., (2012), "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law", *Cambridge Journals*, p.12.
[58] Grenville, J.A.S. (1974), *The Major International Treaties 1914-1973*, Methwen & co. Ltd, London, p.8.
[59] Vienna Convention, 1969.
[60] Bryan A. Garner, op.cit. p.418.
[61] Schwarzenberger, G., (2013), "International Law as Applied by International Courts and Tribunals, In: Hamid, A.G., (2013) Treaty Making Power in Federal States with Special Reference to the Malaysian Position", *Journal of Malaysian and Comparative Law*, Vol.30 , p.65.

relevant to the original treaty and is used to further address something in the original treaty, address a new or emerging concern or add a procedure for the operation and enforcement of the treaty such as adding an individual complaints procedure. A protocol is 'optional' because it is not automatically binding on States that have already ratified the original treaty; States must independently ratify or accede to a protocol.[62] A treaty may be bilateral or multilateral. While bilateral treaties are entered into between two parties only, multi-lateral treaties have three or more parties. A treaty may be viewed as a contract. Hence, they are binding upon the parties to them and must be performed in good faith.[63]

2.14 Signing a treaty

Signing a treaty is an act by which a State provides a preliminary endorsement of the instrument. Signing does not create a binding legal obligation but does demonstrate the State's intent to examine the treaty domestically and consider ratifying it.[64] While signing does not commit a State to ratification, it does oblige the State to refrain from acts that would defeat or undermine the treaty's objective and purpose.[65] Article 12 of the Vietnam Convention[66] allows parties to be bound by a treaty by way of signature. Furthermore, some treaties expressly stipulate that they come into force at the moment of signature and require no ratification. An example is the Anglo-Polish treaty of Alliance.[67] However, where the treaty is made subject to acceptance, approval or ratification, the signature will be a mere formality and 'will mean no more than that state

[62] Ibid.
[63] Ladan, M.T., (2013), "Tracing, Freezing, Confiscation, Recovery and Forfeiture of Illegal Proceeds of Money Laundering in Nigeria", Being a paper presented at: A 3-day Financial Investigative and Prosecutorial Anti-money Laundering Training Workshop Organised by the US Department of State, Bureau of International Narcotics and law Enforcement and the US Department of Justice, Office of Overseas Prosecutorial Development, Assistance and Training, held at EFCC Training Academy, Abuja, Nigeria, on 9-13 December, 2013, p.15.
[64] United Nations Treaty Collection, Treaty Reference Guide, 1999, available @ *http://untreaty.un.org/English/guide.asp*, accessed on 11th March, 2016, 5:11 P.M.
[65] Ibid.
[66] Vienna Convention, op.cit.
[67] of 25 August 1939.

representatives have agreed upon an acceptable text which will be forwarded to their particular governments for the necessary decision as to acceptance or rejection.[68]

2.15 Ratification of treaty

Ratification is an act by which a State signifies an agreement to be legally bound by the terms of a particular treaty.[69] To ratify a treaty, the State first signs it and then fulfills its own national legislative requirements. Once the appropriate national organ of the country (Parliament, Senate, the Crown, Head of State or Government, or a combination of these), follows domestic constitutional procedures and makes a formal decision to be a party to the treaty. The instrument of ratification, a formal sealed letter referring to the decision and signed by the State's responsible authority, is then prepared and deposited with the United Nations Secretary-General in New York.[70] Ratification was originally designed to ensure that the representative of a state did not act *ultra vires* with regard to the making of a treaty.[71] Thus, ratification of a treaty reduces the government's discretionary powers as there is the need to secure the consent of the legislative arm of the government of the country intending to enter into the treaty.[72]

Ratification gives a state additional time to consider the treaty and sample the opinion of its populace concerning the treaty. By providing for ratification the feelings of public opinion have an opportunity to be expressed with the possibility that a strong negative reaction may result in the state deciding not to ratify the treaty under consideration.[73] Once a State has ratified

[68]United Nations Treaty Handbook, (2006), Prepared by the Treaty Section of the Office of Legal Affairs, p.5, available *@<http://untreaty.un.org,* accessed on 22nd March, 2016. 1:03 P.M.
[69]United Nations Treaty Collection, Ibid. p.3.
[70] Ibid.
[71]Okeke, C.N., (2015), "The use of International Law in the Domestic Courts of Ghana and Nigeria", *Arizona Journal of International & Comparative Law,* Vol. 32, No. 2, p.398.
[72]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.11.
[73]David, S. (2011), "Domestic Application of Treaties", available *@ http://digitalcommons.law.scu.edu/facpubs/635,* accessed on 4th February, 2016. 9: 03 A.M.

a treaty at the international level, it must give effect to the treaty domestically. Upon ratification, the State becomes legally bound under the treaty.[74]

2.16 Domestic Implementation of Treaty

Domestic Implementation of treaties relates basically to the enforcement of treaty provisions within a country.[75] It is the fulfillment of the obligations arising from treaties concluded by States.[76] Once a treaty is signed and ratified, in some jurisdiction like Nigeria[79], it must be domesticated before it can be implemented.[78] Domestication connotes the enactment of provisions or contents of international instruments as part of municipal laws either wholly or partly.[79] It is the transformation of treaties into municipal law or the process of giving treaties the force of law within a country.[80]

2.17 Mutual Legal Assistance

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 country.[81] It is the formal mechanism by which countries request and provide assistance in obtaining evidence in one country to assist in criminal investigations or proceedings in another.[82] MLA offers three benefits in an asset recovery

[74]Chukwuemeka .A. O., (2015), "Has the Controversy between the Superiority of International Law and Municipal Law been Resolved in Theory and Practice?" *Journal of Law, Policy and Globalization*, Vol.35, p.2.
[75]Ladan, M.T., (1999), *Introduction to International Human Rights and Humanitarian Laws,* Ahmadu Bello University Press, Zaria, Kaduna, Nigeria, p.396.
[76] Ibid.
[79]In Nigeria, Section 12 (1, 2 and 3), Constitution Federal Republic of Nigeria, Cap C23, LFN, 2004 (as amended), requires a treaty to be domesticated before it can be implemented in the country.
[78]Korenica, F., and Doli, D., (2012), "The Relationship Between International Treaties and Domestic Law: A View from Albanian Constitutional Law and Practice", *Pace International Law Review*, Vol. 24 Issue 1, p.12.
[79]Higgins, R., "Problems and Process: International Law and How We Use It", In: Nwapi, C., (2011), "International Treaties in Nigerian and Canadian Courts", *African Journal of International and Comparative Law*, Vol. 19, No.1, p.44.
[80]Redson, E. (2014), "The Relevance of International Law in Judicial Decision-Making in Malawi", Paper presented at the Judicial Colloquium on the Rights of Vulnerable Groups, held at Sunbird Nkopola Lodge, Mangochi, Malawi, on 6 and 7 March 2014.
[81]Osawanoye, B., "International Perspective of Recovered Assets", 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, p.256.
[82] Ibid.

programme. First, it makes available evidence that can be used in criminal prosecution and applications for confiscation of assets on conviction. Secondly, foreign states can be asked to freeze assets believed to represent the proceeds of crime at the outset of, or during, criminal investigations. Finally, it is often the mechanism through which domestic confiscation or civil forfeiture orders are enforced in a foreign country.[83]

There are two types of MLA 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. For instance, Mutual legal assistance between Commonwealth countries is available on the basis of the *Harare Scheme* without a formal requirement for a bilateral treaty.[84] 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.[85]

2.18 Politically Exposed Person

A politically exposed person (PEP) is defined by Section 25 of the Money Laundering (Prohibition) (Amendment)[86] defines PEPs as involving three categories of persons. First, individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or government, senior politicians; senior government, judicial or military officials; senior executives of State owned corporations and important political party officials. Secondly, individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of government, senior politicians; senior

[83]United Nations Office on Drugs and Crime (UNODC) and the World Bank 'Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan' p. 30.
[84]Zinkernagel, G.F., et'al, (2013), *Recovering Stolen Assets: Emerging Trends in Asset Recovery*, Bern: Peter Lang AG International Academic Publishers, p.59.
[85]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.21.
[86] Money Laundering Prohibition (Amendment), op.cit.

government, judicial or military officials; senior executives of State owned corporations and important political party officials. And finally, persons who are or have been entrusted with a prominent function by an international organization and includes members of senior management such as directors, deputy directors and members of the board or equivalent functions other than middle ranking or more junior individuals.

The Financial Action Task Force (FATF)[87] in Recommendation 12 has expanded the definition of PEPs in line with Article 52 of the United Nations Convention against Corruption (UNCAC)[89] to include foreign PEPs, domestic PEPs, their family members and associates. Article 52 of the UNCAC defines PEPs as "individuals who are, or have been, entrusted with prominent public functions and their family members and close associates", and includes both domestic and foreign PEPs. Foreign PEPs are individuals who have been entrusted with public functions by a foreign country, for example Heads of State or of government. While domestic PEPs are individuals who have been entrusted domestic public functions, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. The last categories of PEPs are the International organization PEPs. These categories of PEPs are senior management or individuals who have been entrusted with a prominent function by an international organization. Such persons include directors, deputy directors and members of the board or equivalent functions.[90] Family members are individuals who are related to a PEP either directly (consanguinity) or through marriage or similar (civil) forms of partnership, while Close associates are individuals who are closely connected to a PEP, either socially or professionally.[91]

[87] FATF Recommendation 12, op.cit.
[89] UNCAC, op.cit.
[90] Ibid.
[91] FATF Recommendation 12, op.cit.

2.19 Theoretical Framework of Assets Recovery

A theory is a supposition or system of ideas intended to explain something especially one based on a peculiar principles.[92] From this definition, one can safely say that a theory is a kind of simplifying device that allows you to decide which facts matter and which do not. This research therefore would be based on a number of theories. This is intended to act as a lens through which to view, appreciate, and differentiate assets recovery from other preventive and criminalization mechanism for combating corruption in Nigeria.

One of the theories that provide the legal and philosophical underpinning for this research is the Proceeds of Crime theory. Douglas Leff[93] opined that according this theory, a property is subject to forfeiture if it is (1) contraband; (2) the proceeds of criminal activity; (3) used to facilitate criminal activity; and (4) connected to a criminal enterprise. By this theory, any money or property traceable to the underlying crime is subject to forfeiture. Thus, if the funds earned while committing a predicate crime were used to buy a home or car, that property would then be subject to forfeiture. This theory contends further that assets or property used in the commission or furtherance of crime can be forfeited regardless of whether the property was purchased with criminal proceeds. An example of facilitating property would be a vehicle used to transport cocaine or clean money in a bank account used to conceal criminal proceeds that were laundered into the account.

Another theory relevant to this thesis is the Utilitarian Theory. The effort to recover proceeds of corruption is in line with utilitarianism as postulated by Michael Levi.[94] This theory opined that the aim of Law is to provide the assurance of the happiness for individuals. Levi

[92] Baylis, J., Smith, S., & Owens, P. (2014). *The Globalization of World Politics* (6 ed.). Oxford, UK: Oxford University Press, p.23.
[93]Douglas A. Leff (2013), "Money Laundering and Asset Forfeiture: Taking the Profit out of Crime", *United States Attorneys' Bulletin*, p.9.
[94]Michael Levi, (2004), *Tracing and Recovering the Proceeds of Crime*, Cardiff University, Wales, W.K. Tolisi, p.21.

based this theory on a number of considerations. The first is the Prophylactic Consideration, meaning that it is necessary to prevent corrupt persons from gaining control over illicitly acquired asset so as not to use it and carry out another crime. This consideration reflects the preventive theory of punishment. This is because assets recovery promotes the aims of punishment by targeting a range of property that is linked with the criminal activity.

This again calls to mind the theoretical postulation of retributive theory of punishment. Retributive theory as propounded by Jeremy Bentham[95] contends that the guilty deserve to be punished. Similarly, Murphy[96] writing on retributive theory of crime contended that guilt is a sufficient condition for justifying punishment. For him, even if a civil society were to dissolve itself agreement of all its members, the last murder remaining in the prison must be executed so that everyone will duly receive what his actions are worth. In line with this theory, Hans Nelen[97] and Matthew Flemin[98] stated that as a form of retribution, confiscation of proceeds of corruption really hurt looters when such illegal gain is taken away. In line with this theory therefore, when a person loot assets belonging to the state, corporate or individual, he must be made to forfeit it to its own rightful owners. Such person owes debt to the victims in the form of return of the stolen assets in addition to any punishment which is condition for his acceptance into the society.

In addition, this theory fulfils punishment's aims of incapacitation of the looters.[99] Although it does not incapacitate offenders in the sense of imprisonment by removing individuals from society, it does seek to incapacitate criminal organizations and "reduce their power and influence" by "divesting major criminals of their ill gotten gains. In line with the first

[95]Jeremy Bentham, (1995) *The Theory of Legislation*, Bombay: N.M. Tripathi Private Ltd., p.167.
[96] Murphy, J.G. (1979) *Retribution, Justice and Therapy; Essays in Philosophy of Law*, Holland: D Reidel Pub, Co.,p.82.

[97]Hans, N., (2004) "Hit them where it hurts most? The proceeds-of-crime approach in the Netherlands", *Crime Law and Social Change, Maastricht University*, p.5.
[98]Matthew M. Fleming, (2005), *Asset Recovery and Its Impact on Criminal Behaviour, An Economic Taxonomy: Draft for Comments, version Date*, University College, London. p.126.
[99]Fried, D.J. (1988), "Rationalizing criminal forfeiture", *The journal of criminal law and criminology*, vol. 79, nr. 2, 1988, p.328.

consideration above, asset recovery also reflects deterrent theory of punishment. According to Sumaryono,[100] this theory aims at showing the futility of crime and thereby teaches a lesson to others. The object of punishment according to this theory is to show that the crime is never profitable to the offender. Thus, by confiscating illegal gains of the defendant, the world at large would learn that crime is a costly way of achieving an end. In other words, recovery of proceeds of corruption when successful represents society's commitment to ensuring that crimes do not pay.[101] Though it could be argued that assets recovery does not serve as a general deterrent because it merely recoups what was not legitimately owned and therefore does not render the individual any worse off than before the criminal conduct. On critical look however, it could still serve as a general deterrent as it removes one of the major incentives to commit unlawful behaviour.

The second is the Propriety Consideration. This means that those corruptors have no valid rights of those illicitly gained assets. Hence, such assets must be confiscated returned to the rightful owners. In line with this consideration, Kodjo opined that confiscation and return of proceeds of corruption may benefit the victims who are usually the poor.[102] Thus, assets recovery is also based on compensation theory of punishment. According to this theory, the object of punishment must not be merely to prevent further crimes, but also to compensate the victim of the crime. The third is Priority consideration which suggests that the state possessed the priority right to claim those assets illicitly gained by those corruptors.

[100]Sumaryono, E., (2000), *Legal Ethics (The Relevance of Natural Legal Theory of Thomas Aquinas)*, Kanisius, Yogyakarta, p.13.
[101]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.
[102]Kodjo, A. (2011), "The Recovery of Stolen Assets: Seeking to balance fundamental human rights at stake", *International Centre for Asset Recovery, Basel*, p.23.

The recovery of proceeds of corruption is also based the theory of social justice. Purwaning[103] opined that this theory is in line with what Thomas Aquinas regarded as general justice or *justitia generalis*. That is, justice pursuant the will of the Law which is formulated based on the public interest. Thus, based on this idea of justice, it is just for the state to recover proceeds of corruption. In effect, this theory tries to explain the necessity of assets recovery based on the principle of social justice which set forth the competency, duty and responsibility to the state and her legal institutions to render protection and chance for the individuals of society to strive for their prosperity. But of course, within such sphere of state rights there were the state obligations which constitute the individual rights of society members, so that there is an equal principles, give the people what is their due.

Thus, the theoretical foundation of the thesis would be found in the combination of proceeds, utility, retributive, deterrence, and compensation theory of punishment. The Thesis contends that effective recovery of proceeds of corruption would, as the name implies, take away the illegal gains from the looters which is the major motivating factor. Taking away the proceeds of corruption from the criminals would hit them where it hurt the most which is the illicit gains. This would prevent the use of such gains to further finance other criminal activities. It would also deter the looter or any member of society from committing such crime as doing so does not pay. Most importantly, the proceeds recovered could be used to compensate the victims (who are usually the masses) by executing projects that would enhance their well being.

In conclusion, this chapter has attempted to provide some definitions of terms, as proffer by different scholars and authors. The terms defined, are restricted those that are central to this research. The chapter tried as much as possible to provide a general definition of these

[103]Purwaning M. Yanuar, (2007), *Corruption Coined Assets Recovery pursuant to UNCAC 2003 in Indonesian Legal System*, Alumni, Bandung, p.7.

terms, as well as providing salient distinguishing features between them and other similar terms where necessary. In addition, terms that are wider in scope such as assets and financial crimes, are restricted and defined within the context of research. The chapter concludes by highlighting the theoretical framework which provides the philosophical and legal foundation for recovery of proceeds corruption. This will help us to understand the basis, necessity and importance of assets recovery as a tool for combating corruption.

CHAPTER THREE
ANALYSIS OF INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK OF ASSETS RECOVERY

3.1 Introduction

Efforts have been made by the international community and governments of individual states to combat corruption and reduce its adverse effects through the recovery of corruptly-acquired assets. These efforts have led to the provision of a broad array of International and Regional Treaties obliging developed and developing countries alike to combat corruption through assets recovery.[1] In effect, this legal framework seeks to expand the criminological approach of dealing with financial crimes beyond the traditional method of punishment to "confiscation" which aims at taking away the proceeds of corruption from the looters.[2] These Treaty commitments are given effect primarily through national laws, implemented by national courts and national enforcement organizations, thus placing great reliance upon the integrity and competence of those institutions.[3] This chapter therefore seeks to analyze the International and Regional Legal Framework of Assets Recovery with a view to determining the effectiveness of this Regime and to identifying lacuna that could inhibit meaningful assets recovery efforts at national and international levels.

3.2 Analysis of International and Regional Legal Framework of Assets Recovery

The major international and regional legal instruments which are germane to this discourse are: United Nations Convention Against Transnational Organized Crime (UNTOC),[4] the United Nations Convention Against Corruption (UNCAC)[5], African Union Convention on Preventing

[1]André, S. R. (2015), "Transnational Organized Crime and the Palermo Convention: A Reality Check", New York: International Peace Institute, p.30.
[2] Abdullahi Y. S., (2014), "Key Legal Issues and Challenges in the Recovery of the Proceeds of Crime: Lessons from Nigeria", *International Law Research*; Vol. 3, No. 1, p.188.
[3]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.20.
[4]2000. Nigeria Signed the Convention on13th December 2000 and ratified it 28 June 2001.
[5]2003. Nigeria Signed the Convention on 9th December, 2003 and ratified it on 24th October 2004.

and Combating Corruption and Related Offences (AU Corruption Convention)[6] and Economic Community of West African States Protocol on the Fight Against Corruption (ECOWAS Protocol).[7] It is important to note however that, most of these instruments made similar provisions with respect to the key components of assets recovery such as tracing, freezing, confiscation or forfeiture, repatriation and disposal of assets. Hence, to avoid repetition, the instruments would not be analyzed one by one or according to the numerical order of the legal provisions. Instead, only the relevant provisions relating to the above components of assets recovery will be analyzed.

3.2.1 Tracing and Identification of Assets

Article 31 (3) of the UNCAC,[8] Article 12 (2) of the UNTOC,[9] Article 16 (1) (a) of the AU Convention,[10] Article 13 of the ECOWAS Protocol[11] oblige States parties to adopt appropriate measures to facilitate tracing and identification of any proceed of crime or funds used or allocated for the purpose of committing any offence set out in these Conventions in order to permit their confiscation where appropriate. The key objective of punishing corruption-related offences is to deprive the criminals of the illegal gains. These may be of monetary nature or other properties such as houses, private jets, etc. arising from the corruption. Thus, by implication, this measure will also extend to tracking down the offenders to ensure that they are not able to benefit from the crime committed. This is necessary because, without making effort to also track

[6] 2003. Nigeria ratified the AU Corruption Convention on 26th September, 2006.
[7] ECOWAS Protocol, 2001.
[8] UNCAC, op.cit.
[9] UNTOC, op.cit.
[10] AU Anti-Corruption Convention, op.cit.
[11] ECOWAS Protocol, op.cit.

down the corrupt persons or their accomplice, they may frustrate tracing or investigation by destroying evidence linking them to the assets or dissipate it to frustrate eventual confiscation.[12]

A careful examination of the above provisions would reveal that, effective implementation of these Articles depend on a number of factors. First, the Articles require establishment of appropriate measures that would facilitate investigation and tracing of assets. Though, while Article 31 of the UNCAC, Article of the 12 (2) of the UNTOC, and Article 13 of the ECOWAS Protocol did not give a hint as to what measures may be considered appropriate in the circumstance, Article 16 (1) (a) of the AU Convention, makes it clear that, legislative measures will be necessary to ensure that adequate powers exist to support the tracing and the investigative measures needed to locate and identify assets and link them to relevant crimes. Secondly, the investigative capability needed to implement the above Articles fully will depend to a large degree on non-legislative measures, such as ensuring that law enforcement agencies and prosecutors are properly trained and provided with adequate resources and independence.[13] To this end, Article 6 and 37 of the UNCAC[14] and Article 9 (2) of the UNTOC[15] oblige Member to ensure the existence of independent anti-corruption bodies capable of implementing, coordinating, and overseeing anti-corruption policies that promote proper management of public property, integrity, transparency and accountability. Given that anti-corruption agencies are saddled with the responsibility of tracing proceeds of corruption, thus, if they are neither transparent nor held accountable to the public, their impact becomes trivial.[16] In addition, it is necessary for the agencies to enjoy independence in terms of appointment, security of tenure and

[12]Stolpe, O., "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, p.338.
[13]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.25.
[14]UNCAC, op.cit.
[15]UNTOC, op.cit.
[16]Jean-Pierre B., Larissa G. Clive S. and Kevin M. S. (2011) *Asset Recovery Handbook: A Guide for Practitioners*, available *@www.worldbank.org*, accessed on 24th May, 2015. 2:26. P.M.

funding. Of course, this is necessary because without it, anti-corruption agency's employees may dare not proceeds against corruptly acquired assets of some key public office holders for fear of being removed, victimized.[17]

Furthermore, to enhance effective investigation, Article 50 (1) of the UNCAC[18] requires States parties to take measures to allow for the appropriate use of special investigative techniques for the investigation of corruption. The Article advocates the use of controlled delivery and, where appropriate, electronic or other forms of surveillance and undercover operations on the understanding that such techniques may be an effective weapon in hands of law enforcement authorities to combat sophisticated criminal activities related to corruption. However, the deployment of such techniques must always be done to the extent permitted or in accordance with the conditions prescribed by domestic laws and within a country's means. In addition, successful tracing of assets also depends on information provided by informants (sometimes referred to as whistleblowers). These persons sometimes because of the sensitive nature of the information they possess or provide, they are often threatened and intimidated.[19] Thus, in order to protect them so as to encourage them to provide relevant information to law enforcement agencies, Article 32, 33 and 37 of the UNCAC,[20] Article 5 (5) of the AU Convention[21] and Article 24 of the UNTOC[22] require States to establish measures in corruption cases, to protect witnesses, experts, victims, and reporting individuals as well as their relatives and other persons close to them, including protection of their identities. These measures include providing effective witness protection from potential retaliation or intimidation, safeguarding persons reporting

[17]Melvin D. A and Julius A. (2014), *Illicit Financial Flows and Stolen Assets Value Recovery*, University of Massachusetts Amherst, p.7.
[18]UNCAC, op.cit.
[19]Pedro, G. P., op.cit., p.26.
[20]UNCAC, op.cit.
[21]AU Anti-Corruption Convention, op.cit.
[22]UNTOC, op.cit.

corruption in good faith and on reasonable grounds from any unjustified treatment, and encouraging cooperating offenders to supply useful information to investigatory authorities to recover proceeds of crime in exchange for potential mitigation of punishment. In fact, such measures include where necessary, relocating the reporting persons or their family members without disclosing their whereabouts or limiting such disclosure. Though, under UNCAC, this measure is optional. In other words, it is at the discretion of the parties whether or not to implement it.

Lack of transparency of corporate vehicles can also impede effective investigation and locating of assets. This is especially where it involves funds in a bank account. Thus, Article 12 (6) of the UNTOC[23], Article 17 of the AU Convention[24], Article 13 of the ECOWAS Protocol[25], therefore obligate State Parties to empower courts or other competent authorities to order production of bank records and other evidence for purposes of facilitating such identification and tracking of assets. Thus, States are expected where they have not already done so, to review their relevant legislation in order, inter alia, to provide an effective basis for asset tracing. Furthermore, proceeds of corruption are seldom found in only one jurisdiction as offenders often disperse such proceeds in different jurisdictions in order to hide their true origin, nature and ownership. Thus, effective tracing of such assets depends on tools for international cooperation and MLA.[26] Article 55 (2) of UNCAC[27], Article 18 and 19 (3) of AU Convention,[28] and Article

[23] Ibid.
[24] AU Anti-Corruption Convention, op.cit.
[25]ECOWAS Protocol, op.cit. FATF Recommendation 37, 2012 also recommends provision of similar measure. It provides that, Countries not to refuse to execute a request for MLA to freeze or seize and confiscate proceeds of crime under Recommendation 4, on the grounds that laws require financial institutions to maintain secrecy (except where the relevant information that is sought is held in circumstances where legal professional privilege or legal professional secrecy applies).
[26]Vlasic M and Noell N (2014), "Fighting Impunity: Recent International Asset Recovery Efforts to Combat Corruption", Cayman Financial Review, available @ *www.compasscayman.com*, accessed on 26th August, 2016. 2:11 A.M,
[27]UNCAC, op.cit.
[28]AU Anti-Corruption Convention, op.cit.

15 of the ECOWAS Protocol[29] therefore, oblige State Parties following a request made by another State Party having jurisdiction over an offence established in the Convention, to take measures to identify and trace any proceeds and instrumentality of crime for the purpose of eventual confiscation. In fact, Article 18 and 19 (3) of AU Convention extends the offences for which international cooperation could be sought, beyond the offences provided in the Convention. Thus, by implication, unlike the other treaties, under the AU Anti-Corruption Convention, any proceeds or instrumentality of corruption or related offences that may arise in the future could be traced through international cooperation. Furthermore, Article 20 of the AU Anti-Corruption Convention and Article 13 of the UNCAC, make an important addition by mapping out a strategy for international cooperation. The Articles oblige State Parties to establish an independent national authority which shall be responsible for mutual legal assistance and international cooperation. This is important because such measure will ensure the speedy and proper execution or transmission of the requests received. What is however common to all the Articles is that, while State Parties that have received a request from another State Party for tracing of proceeds of crime situated in its territory, are oblige to submit the request to their competent authorities, the authorities in the requested state have the discretion whether or not to respond to the request if it is inconsistent with its domestic legal system. While provision like this may be based on the need to protect and enhance the principles of state sovereignty[30], it may on other hand, slow down pace of international cooperation in assets tracing.

[29]ECOWAS Protocol, op.cit.
[30]Art.4, UNCAC, op.cit.

3.2.2 Freezing of Assets

Article 31 (2) of the UNCAC,[31] Article 12 (2) of the UNTOC[32], Article 16 (1) (a) of the AU Convention,[33] and Article 13 of the ECOWAS Protocol[34] obliged State Parties in accordance with their domestic laws, to establish measures for freezing assets which are proceeds or instrumentalities of crimes for the purpose of eventual confiscation.[35] This measure is also expected to allow for freezing proceeds of corruption which have been transformed into other property. The same applies to proceeds which have been intermingled with assets acquired from legitimate sources, with the exception that, the intermingled property shall be liable to confiscation only up to the assessed value of the original proceeds.[36] Thus, by these Articles, States are mandated to set up measures to facilitate preservation of the maximum value of proceeds of corruption so as to prevent the defendant from dissipating it with a view to frustrating eventual confiscation. For instance, sequel to such measure, in May 2012, pursuant to a request from the United Kingdom, United States has freeze Ibori's assets in the US. [37]

Just like tracing, Article 31 (7) of the UNCAC[38] Article 19 (3) of the AU Convention[39] sets forth procedural law requirements to facilitate freezing of assets and for international cooperation in this regard (as provided also in Article 55 of the UNCAC). Article 31 (7) of the UNCAC for instance, requires States parties to ensure that bank records, financial records (such as those of other financial services companies) and commercial records (such as of real estate transactions, shipping lines, freight forwarders and insurers) are subject to compulsory

[31]Ibid.
[32]UNTOC, op.cit.
[33]AU Anti-Corruption Convention, op.cit.
[34]ECOWAS Protocol, op.cit. The FATF recommendation 4, op.cit., also recommended the adoption of similar measure.
[35]The FATF recommendation 4, op.cit., also recommended the adoption of similar measure.
[36]Art. 31(2), UNCAC, op.cit, Art. 12 (3,4 and5), UNTOC, op.cit
[37]Wall Street Journal, 24 July 2012, US Restrains $ 3 Million of Nigerian Ibori's Asset, available@ *www.blogs./wsj.com/corruption currents/2012/07/24/us-restrains-3-million-of-nigerian-iborisus- assets/,* accessed on 24th June, 2016. 3:16. P.M.
[38]UNCAC, op.cit.
[39]UNTOC, op.cit.

production, for example through production orders and search and seizure or similar means that ensure their availability to law enforcement officials for purposes of freezing of proceeds or instrumentality of crime. Thus, in an ongoing proceeding considering freezing in response to foreign requests, the requested State's procedure should permit obtaining foreign evidence to support freezing of assets. This also implies that, requested states would have to ensure or maintain confidentiality of the application in response to the foreign request so as to prevent the property in question from being dissipated.[40]

Article 30 (2) of the UNCAC[41] and Article 7 (5) of AU Anti-Corruption Convention[42] address an important aspect of the fight against corruption through freezing and confiscation of proceeds of crime. Article 30 (2) of the UNCAC for instance, oblige States parties to take measures as may be necessary maintain proper balance between the immunities conferred on their public officials and the need to investigate and prosecute them for corrupt offences. Article 7 (5) of AU Anti-Corruption Convention also provides that, State Parties commit themselves subject to the provisions of domestic legislation that, any immunity granted to public officials shall not be an obstacle to the investigation and the prosecution of such officials. These Articles have given states wide discretion to determine the type of legislative measure to establish in the implementation of this obligation provided that, it would allow their public office holders to be investigated and prosecuted for corrupt offences. Though, while Article 7 (5) of AU Anti-Corruption Convention shows that states are committed to providing such measure, it clearly points out however that any measure set up toward the implementation of this obligation, is subject to the provisions of the parties' domestic law. Meaning that, Member States cannot

[40]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.16.
[41]UNCAC, op.cit.
[42]AU Anti-Corruption Convention, op.cit.

provide such measure or where it has been established, they cannot implement it until there is consequential alteration to their existing law to permit the implementation of their obligation under the Article. One advantage in setting up this measure is that, political office holders in control of public resources can be proceeded against or their assets can be frozen irrespective of the immunity enjoy. Considering that in Africa, leaders always want to die in power, thus, without measures to freeze their assets for eventual confiscation or to prosecute them for corruption, they would continue to enjoy such proceeds of corruption. It would be highly damaging to the legitimacy of the overall anticorruption strategy, public perceptions of justice, private business functioning and international cooperation, if corrupt public officials were able to shield themselves from accountability and investigation or prosecution for serious offences.[43] The objective of these Articles is to eliminate or prevent such cases as much as possible.

In addition, Article 31 (3) of UNCAC[44] obliges State Party to adopt measures to regulate the administration by the competent authorities of assets frozen or seized. This is a provision not found in the other Conventions. The provision is necessary because, assets secured through provisional measures such as freezing, can be decided either ways. The property may be forfeited or returned to the suspect. Where it is returned to the suspect, the asset is expected to be in a good condition as to be of value to the beneficiary of the judgment.[45] Thus, once assets have been secured through this measure, it is imperative that the authorities ensure the safety and value of the assets up until the assets are eventually confiscated. However, the challenging aspect is, since freezing of assets remove the assets from the control of the person under investigation sometimes this could raise some human right concerns. For instance, persons affected by a

[43]Legislative Guide to the Implementation of UNCAC, 2006, p.131., and also Jean-Pierre B., Larissa G. Clive S. and Kevin M. S., op.cit. p.7.
[44]UNCAC, op.cit.
[45]Nuhu, Ribadu, (2016), "Assets Recovery in Nigeria: Experiences from the Past", available *@www.nigeriatoday.ng,* accessed on 24th August, 2016. 2:28. P.M.

restraint order may be affected economically due to the legal restriction disallowing the putting of the assets into any economic use. In the same vein, innocent third party who acquired any interest in such asset may also be affected by the order.[46] To this end, Article 31 (9) of the UNCAC[47] provides that the provisions of this article shall not be so construed or interpreted as to prejudice the rights of bona fide third parties during freezing. Going by this Article therefore, necessary safeguard must be put in place to ensure that once assets are frozen, the interest of third parties in such assets are adequately protected. This provision in effect, exclude those with no knowledge of the offence or connection with the offender(s). The Article is understandably silent regarding what interpretation or safeguard may be consider appropriate in the circumstance as this would be decided by the Member States. What is important is however is, the nature of the legislative measures adopted will go a long way in determining whether or not anti-corruption agencies would exercise a subjective discretion during assets freezing.

3.2.3 Confiscation

Mandatory requirements for confiscation of assets are made in Article 31 (1) of the UNCAC[48], Article 16 (1) (b) of the AU Anti-Corruption Convention,[49] Article 12 (1) of the UNTOC[50], and Article 13 of the ECOWAS Protocol.[51] These Articles sets out the primary legislative obligations to create powers that enable confiscation of proceeds of crime. For instance, Article 31 (1) (a-b) of the UNCAC and Article 12 (1) (a-b) of the UNTOC which contain similar provision, require that States parties shall, to the greatest extent possible within their domestic legal systems, enable the confiscation of proceeds of crime derived from offences established in accordance with the

[46]Kodjo A., (2010), "The Recovery of Stolen Assets: Seeking to balance fundamental human rights at stake", available*@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.
[47] UNCAC, op.cit.
[48] Ibid.
[49] AU Anti-Corruption Convention, op.cit.
[50] UNTOC, op.cit.
[51] ECOWAS Protocol, op.cit.

Convention or property the value of which corresponds to that of such proceeds and property, equipment or other instrumentalities used in or destined for use in offences established in accordance with the Convention. Article 16 (1) (b) of the AU Anti-Corruption Convention provides that each State Party shall adopt such legislative measures as may be necessary to enable confiscation of proceeds or property, the value of which corresponds to that of such proceeds, derived, from offences established in accordance with this convention. Article 13 (1) (b) of the ECOWAS Protocol provides that, each State Party shall adopt measures, where necessary, that would permit the forfeiture of proceeds from crimes established in accordance with the provisions of this Protocol.

These provisions cover both assets and value recovery. Thus, where the assets are located and identified, it can be confiscated by virtue of the above Articles. Furthermore, even if the assets may not be immediately apparent, because the offenders have made their detection more difficult by mingling them with legitimate proceeds or by converting them into different forms, the Articles require States parties to set up measures that enable the confiscation of property into which such proceeds have been converted, or the intermingled proceeds of crime up to their assessed value.[52] 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[53] also applies in confiscation proceedings. The system of confiscation intentionally constitutes an interference with the economic interests of individuals. For this reason, the essence of Article 31 (9) of the UNCAC is to ensure that special care is be taken so

[52]Jacinta Anyango Oduor et al., (2014), "Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery", StAR/World Bank/UNODC, p. 141.
[53] UNCAC, op.cit.

that the system developed by States parties protects the rights of bona fide third parties who may have an interest in the property in question.[54]

In addition, Article 12 (7) of the UNTOC[55] and Article 31 (8) of the UNCAC[56] in a non-mandatory term provided two additional requirements. First, the Articles give Parties the option to determine the applicable standard of prove in forfeiture proceedings. Thus, it for the parties to decide whether confiscation would be treated as a civil matter, with the attendant balance of probabilities standard or it would considered a criminal punishment, for which the higher standard of beyond a reasonable doubt should be applied and may in some cases be required. Secondly, they recommend that States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation' to the extent consistent with its domestic law. This Article realizes the difficulties often encountered by the prosecution in proving financial crimes as most times, the knowledge of such crimes reside entirely in the accused person.[57] Hence, it is desirable in such circumstance as the Article suggested, to shift the burden of proof to the accused by requiring him to explain the lawful origin of the assets. However, since States may have constitutional restraint on such shifting of the burden of proof, they are therefore only required to consider implementing this measure if it is consistent with the fundamental principles of their law.

3.2.3.1 Direct recovery of assets.

Article 53 of the UNCAC[58] obliges State Parties in accordance with their domestic law, to establish three specific measures to enhance direct recovery of property. The first is, States parties must take necessary measures to permit another State party to initiate civil action in their

[54] Jacinta Anyango Oduor et al.,op.cit.
[55]UNTOC, op.cit.
[56]UNCAC, op.cit.
[57]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.16.
[58]UNCAC, op.cit.

courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with the Convention. In this instance, the State would be a plaintiff in a civil proceeding; it is thus a direct recovery. Nigeria has adopted this procedure in the UK to recover assets in Dariye's case.[59] Secondly, States parties must take necessary measures to permit their courts to order those who have committed offences established in accordance with the Convention to pay compensation or damages to another State party that has been harmed by such offences. By this provision, it can be argued that, state parties are not only expected to seek the return of stolen assets to their owners or the compensation of the owners for the value of those stolen assets. Rather, they should pursue additional compensation for damages from all parties that contributed materially to the injury. Though, this provision does not specify whether criminal or civil procedures are to be followed. Thus, it is up to the States parties involved to agree on which standard applies.[60] It would be the responsibility of the concerned State to meet the evidentiary standard. But what is certain however is, in order to implement this provision, States parties must allow other State parties to stand before their courts and claim damages; how they meet this obligation is left to the States parties. In essence, under the first option, 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.

In the third requirement, States Parties must take necessary 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 accordance with the Convention. In the implementation of this requirement, States may need to

[59] *Republic of Nigeria vs. Joshua Dariye* (2005), QBD, High Court, London., and also Pedro, G. P., op.cit. p. 24.
[60] André, S. R. op.cit. p.25.

review their domestic laws with respect to assets recovery to see whether it accommodates such a claim by another State. A provision like these, there is no doubt, if effectively implemented, would solve the problem of those jurisdictions that do not permit foreign governments to act as private litigants.[62] Furthermore, will also help to harmonize civil and criminal proceedings, as well as offers plaintiffs an important advantage namely, that of a lower burden of proof (balance of probability as opposed to beyond all reasonable doubt).[63]

3.2.3.2 Indirect recovery or recovery through international cooperation

Article 13 (1) of UNTOC[64] suggests that assets can be recovered through international cooperation through direct submission of the request to competent authorities in the requested state with a view to obtaining a confiscation order and then executing it by the authorities in the requested state. However, it is important to note that although corruption is a sufficient legal basis for Article 13, the criminal act must have been carried out by an 'organized criminal group' within the definition of Article 2 (a) of the Convention.[65] Consequently, Under the UNTOC, a State Party is not obliged to act in response to requests for confiscation where proceed of crime is corruptly acquired by an individual. Though, by virtue of this Article, proceeds of corrupt offence, say theft of public funds, may be confiscated, if such theft is on a grand scale. The problem however is, the Article did not define how to determine whether theft is on a grand scale. It is therefore left for the parties to decide on the criteria to be used for that purpose.

[62]Claman, D., "The promise and limitations of asset recovery under the UNCAC", In: Pieth, M. (ed.2008), *Recovering Stolen Assets*, Peter Lang, International Academic Publishers, p. 343.
[63]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.127.
[64] UNTOC, op.cit.
[65]Olutoyin, B.I., (2014), "Stamping Corruption out of Our System: The Impact of National and International Legislations on Corruption Control in Nigeria", *Journal of Law, Policy and Globalization*, Vol.23, p.112.

Articles 54 (1) of the UNCAC[66] imposes three obligations for indirect recovery. Though, third obligation would be consider separately. The Article obliges states; (a) to take measures necessary to permit its authorities to give effect to a foreign confiscation order; (b) take such measures to permit domestic authorities having jurisdiction, to order confiscation "by adjudication of an offence of money laundering or such other offence" and finally (c) to consider taking measures to permit confiscation of property without a criminal conviction in certain cases. Article 54 (1) (a), which is also reflected in the provisions of UNTOC, may take one of two different forms. The competent authorities of the requested state may either recognize or enforce the foreign confiscation order, per se, or they may institute new proceedings under their own domestic law and enforce the confiscation order through domestic proceedings. The latter procedure was adopted in the case of Diepreye Peter Solomon Alaieyeseigha in the UK. Though he later jumped bail in November 2005 and returned to Nigeria.[67] An obvious advantage of this measure is that, the requested state may be in a better position to conduct investigation and establish the extent of the assets than the authorities in the requesting state. Under Article 54 (1) (b), there is a requirement for adjudication in the requested state for an offence of money laundering although the Article also envisages other offence. The advantage of this measure is that, its implementation may not face any serious legal or political huddles since the authorities of the country where the assets are hidden are not hampered by some of the legal constraints such as immunity against prosecution which may affect the authorities in the requesting state. However, going by the provision of the Article, this procedure can only be possible if the requested has jurisdiction over the offence. Furthermore, another challenge is that, even if both requesting and requested country have jurisdiction over the offence, the law enforcement

[66] UNCAC, op.cit.
[67] Edward, W., (2012) *Briefing Note: Recovering Assets Secreted Abroad*, Dashwood, United Kingdom, p.14.

agencies 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 effectively gather the relevant evidence require to establish the extent of the funds transferred.[68]

Article 16 (2) (3) of the AU Anti-Corruption Convention[69], in making provision for indirect recovery of assets, provide that, the Requested State Party shall, in so far as its law permits and at the request of the Requesting State Party, seize and remit any object which has been acquired as a result of the offence for which extradition is requested. The provisions of this Article does not in clear terms, indicates the specific requirement for implementing this measure. However the phrase "at the request of the Requesting State Party, seize and remit any object", suggests that, the requesting state may decide to initiate a domestic confiscation proceeding, and request for its enforcement in the requested state jurisdiction or it may require the requested state to initiate a proceeding in its own court and confiscate the assets. It is already shown above the advantages and challenges of either of these methods. An important point to note under this Article is the fact that, where such request is made, the object or proceeds of crime in question can be confiscated irrespective of whether extradition is being requested in respect of the crime or the extradition is refused or cannot be carried out due to death, disappearance or escape of the person sought. However, when the said object is liable for seizure or confiscation in the territory of the Requested State Party the latter may, in connection with pending or ongoing criminal proceedings, temporarily retain it or hand it over to the Requesting State Party, on condition that it is returned to the Requested State Party.[70]

[68]Kodjo A., op.cit. p.14.
[69]AU Anti-Corruption Convention, op.cit.
[70]Art. 16 (4), Ibid.

3.2.3.3 Non-Conviction Based Forfeiture

Article 54 (1) (c) of the UNCAC[71] in a non-mandatory term require State Parties to, "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". Using the phrase "other procedures authorized under its domestic law", gives an impression that there may be circumstances in which the States Parties may wish to use other non-traditional means to secure a successful return of stolen assets even in circumstances where there is no criminal conviction of the suspect.[72] UNCAC recommends applying this type of confiscation to situations in which the offender cannot be prosecuted by reasons of death, absence of flight or "in other appropriate cases.[73] By doing so, UNCAC highlights the importance of civil forfeiture in ensuring that, criminals or their relatives or associates do not enjoy proceeds acquired through corruption and in complementing existing systems in criminal forfeiture.

3.2.3.4 Guideline for Assets Recovery through International Cooperation.

Article 53 and 54 of the UNCAC[74] and Article 13 (1) of the UNTOC[75], have established the different circumstances assets could be recovered through direct recovery or international cooperation. These Articles are meant to provide mutual legal assistance pursuant to requests by State Parties. They are meant to cover loopholes in mutual legal assistance where previously states could give effect to requests for mutual legal assistance only through executing foreign orders or instituting their own proceedings. This created potential loopholes, where some

[71]UNCAC, op.cit.
[72]Andrew, B., (2014), "The State vs. The Victim: What Happens When Proceeds of Crime Forfeiture Laws Collide with Victims' Rights, the Perspective of the United Kingdom", *Off-Shore Alert, Miami,* p.12.
[73]Vlassis, D., et'al, "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, 14.
[74]UNCAC, op.cit.
[75]UNTOC, op.cit.

requests could not be effected because there was no mechanism to enforce them under the domestic legal framework.[76]

However, to give effect to request for assets recovery either through direct or indirect recovery, Article 55 of the UNCAC[76] and Article 13 (2) of the UNTOC[77] oblige States to establish a regime with specific criteria laid down for the process of engaging the requested state. These Articles seek to place an obligation upon the State Party to create procedures to be used upon receiving a request for recognizing and enforcing foreign confiscation orders and foreign provisional measures. For instance, the Article require that, in the case of a request pertaining to the request for obtaining an order of confiscation in the requested state, the information must contain a description of the property to be confiscated and a statement of the facts relied upon by the requesting State Party to enable the requested State Party to seek the order under its domestic law. In the case of a request relating to permitting domestic authorities to order confiscation by adjudication in the requested state, information to be provided must include a legally admissible copy of an order of confiscation upon which the request is based, issued by the requesting State Party, and a statement of the facts and information as to the extent to which execution of the order is requested. Under the provisions of Article 55 (3) (6) of the UNCAC, if a State Party elects to make the taking of the measures conditional on the existence of a relevant treaty, that State Party shall consider this Convention as the necessary and sufficient treaty basis. This of course is easier said than done in practice as many countries remain wedded to fairly rigorous criteria when it comes to engaging in international co-operation.[78]

[76] Jean-Pierre B., Larissa G. Clive S. and Kevin M. S., op.cit. p.8.
[76]UNCAC, op.cit.
[77]UNTOC, op.cit.
[78]For instance, the Bangladeshi authorities were able to plead the UNCAC provisions as a legal basis for MLA and asset recovery with Singapore, a country with which it has no bilateral MLA relations. In efforts to recover over $200 million alleged to have been stolen and placed into overseas jurisdictions by 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

3.2.4 Return of Assets

Article 57 of UNCAC[80], Article 16 of AU Corruption[81] and Article 14 of UNTOC[82] oblige States Parties to enact laws that would enable the repatriation of the proceeds and instrumentalities of corruption. These Articles particularly harbours a desire that the confiscated assets should be returned to the requesting State so it can be given to their legitimate owners. However, article 14 (3) of the of UNTOC also encourages States Parties to consider concluding an agreement whereby proceeds may be contributed to the United Nations to fund technical assistance activities under UNTOC, or an arrangement to share the proceeds with other States parties that have assisted in their confiscation. Provision like this, is capable of creating practical problem particularly in a federal system like Nigeria where most times, it is the Federal Government that institute action for the recovery of assets looted by a Governor of a state. Thus, if confiscated, such assets remain the property of the State it was looted from and must therefore be returned to that State. However, while the Federal Government can use part of the money recovered to settle the fees of professionals employed and other expenses incurred, it is doubtful if they have right to the recovered funds to the extent of concluding arrangement to contribute to the United Nations to fund technical assistance activities under UNTOC.

The provision of Article 57 of UNCAC[83] seems more detailed. Particularly, Article 57 (2) of the Convention[84] imposes the obligation for States parties to adopt such legislative and other measures that would enable their competent authorities, when acting on a request made by another State party, to return confiscated property, taking into account the rights of bona fide

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information and evidence in relation to this ongoing investigation in the absence of any formal bilateral treaty with Singapore. *http://www.thedailystar.net/newDesign/news-details.php?nid=71090*, accessed on 26th May, 2017. 3:11. P.M.

[80] UNCAC, op.cit.

[81] AU Anti-Corruption Convention, op.cit.

[82] UNTOC, op.cit.

[83] UNCAC, op.cit.

[84] Ibid.

third parties. In particular, the Convention requires States parties that receive a relevant request in the case of embezzlement of public funds or of laundering of embezzled public funds to return the confiscated property to the requesting State. In the case of any other offences covered by the Convention, 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 these cases, the requested State shall give priority to returning confiscated property its prior legitimate owners or compensating the victims.[85] In doing so, the State Party must take cognizance of the rights of *bona fide* third parties.[86] Furthermore, in all these cases, the Convention allows an amount to be deducted from the assets for settlement of reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the confiscation of the assets in the requested country, provided that, the confiscation was executed through MLA on the basis of a final judgment in the requesting State Party, though the Parties may waive this condition.[87]

It follows that, if article 57 of UNCAC[88] is not applicable, the return of the confiscated assets will depend on domestic legislation, MLA treaties, or special agreements (for example, asset sharing agreements). Assets may also be returned directly to victims, including a foreign jurisdiction through the order of a court (this is in case of direct recovery).[89] The AU Convention makes the remedy of "repatriation of proceeds" available with or without extradition, further suggesting that asset recovery in the AU Convention context is not a mere criminal

[85]Art. 57 (3) (c), Ibid.
[86]Art. 57(3) (b), Ibid .
[87]Art. 57 (4),Ibid.
[88] Ibid.
[89] Art.53, Ibid.

punishment.[90] Such provisions are consistent with the AU Corruption Convention's focus on development and good governance.

In regard to the somewhat controversial issue of monitoring returned assets, Article 57(5) of UNCAC[91] stipulates that state parties may "give special consideration to concluding agreements or mutually acceptable arrangements on a case-by-case basis, for the final disposal of confiscated property." This vague provision attempts to ensure that return of property is not unconditional in cases involving fragile, corrupt recipient states. Aside from objections relating to the erosion of the recipient's sovereignty, monitoring may pose its own challenges, such as expense and technical difficulties.[92]

3.3 Lacuna in the International and Regional Legal Framework for Assets Recovery

The enactment of the above international and regional legal instruments is a clear sign that the international community recognizes the importance of fighting corruption through assets recovery. As examined above, this international and regional legislative framework has no doubt made relevant provisions aimed at guaranteeing effective recovery of proceeds of corruption around the globe. Nonetheless, these instruments are not free from some gaps and challenges capable of inhibiting their effectiveness in assets recovery effort by State Parties. Some of these challenges include:

3.3.1 Making some Critical State Parties' obligations optional

The language of these Conventions is important in determining their enforceability. The Conventions require a wide array of measures to facilitate active implementation on the part of many signatories. However, problems may arise in regards to the language used to promote

[90] Art. 16(2)-(3), AU Convention, op.cit.
[91] UNCAC, op.cit.
[92] Gretta F. Z. & Kodjo Attisso, "Past Experience with Agreements for the Disposal of Confiscated Assets", in: Gretta, F. Z., et'al, (2013), *Emerging Trends in Asset Recovery*, Peter Lang AG, International Academic Publishers, p.340.

effective implementation. For instance, Article 7 of the AU Anti-Corruption Convention suffers from excessive use of claw-back clauses which tend to limit or undermine some of its progressive provisions. The Article provides that any immunity granted to public officials shall not be an obstacle in any assets recovery investigation or prosecution of such officials, subject however to the provisions of domestic legislation. Under Article 8, state parties are required to establish under their laws an offence of illicit enrichment subject to the provisions of their domestic laws. Similarly, Article 14 provides for the right to a fair trial (whether during conviction based forfeiture or not) for those suspected to have committed acts of corruption subject to domestic law.

Similarly, Non-Conviction Based forfeiture which is the subject of article 54(1) (c) of UNCAC[93] is optional. 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 civil forfeiture 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 or entered into by states parties which have enacted the relevant provisions. If these obligations are not properly construed, the clauses could defeat, frustrate, or annul the fundamental objectives of the Conventions, which is to eradicate corruption.

These clauses can permit a state, in its almost unbounded discretion, to restrict its treaty obligations to eradicate corruption within its territory. Though, it could be argued that such provisions are necessary to protect states sovereignty. It reality however, by making these

[93]UNCAC, op.cit.

important requirement optional or subject to national laws, the clauses could seriously emasculate the effectiveness of the Conventions as well as their uniform application by member states. Thus, if not properly construed, the clauses could defeat, frustrate, or annul effective assets recovery under the Conventions.

3.3.2 Gaps in the Mutual Legal Assistance framework

The success of identification, tracing, freezing and confiscation of assets in for foreign jurisdiction can only be possible through MLA. However, Articles 46(3) (j), (k) and 55(3) of the UNCAC[94] and Article 18 (20) of UNTOC,[95] has 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[96] provides that a States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. Thus, a request may be refused where the requested jurisdiction does not criminalize the conduct that the requesting jurisdiction is investigating or prosecuting. Hence, there is always a tendency that an MLA request would be inconsistent with fundamental principles of the domestic law of the requested State. Secondly, MLA may be refused if it is likely to prejudice a Party's "essential interests"[97]. However, the meaning of the terms "essential interests" is not precisely defined in the instrument. Furthermore, since MLA is resource intensive, Article 55 (7) of UNCAC 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. Furthermore, another challenge is the inclusion in article 46 (4) of UNCAC a non-mandatory language for transmission of information about ongoing investigations to foreign

[94]Ibid.
[95]UNTOC, op.cit.
[96]UNCAC, op.cit. Similarly, FATF Recommendation 38, 2012, specifically allows States to refuse MLA request where it inconsistent with fundamental principles of their domestic law. This highlights a major challenge with MLA. What constitute corruption and its manifestation differs from country to country.
[97]Art. 46 (21) (b) UNCAC, op.cit.

authorities.[98] Provisions like this could affect the effectiveness of international cooperation treaties, 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.

3.3.3 Failure to provide Remedies for Victims of Corruption

The Convention did not provide effective remedies for victims of corruption. Unlike Article 53 of the UNCAC[58] which requires State Parties to establish measures to permit their courts to order the defendant to pay compensation or damages to another State party that has been harmed by such offences, under AU Anti-Corruption Convention there is no such measure. Thus, Parties under the Convention cannot in addition to assets recovery, pursue additional compensation for damages from all parties that contributed materially to the injury.

3.3.4 No mechanism for holding states accountable for failure to fulfill their obligations

The Conventions lack the mechanism for holding states accountable for refusal to honour their respective treaty obligations. Without a meaningful implementation system for the Conventions, it cannot be assumed that states would take seriously their obligations to end corruption let alone afford legal recourse and compensation to individuals or groups whose human rights are violated as a result of corruption.

In conclusion, this chapter analyzed the international and Regional Legal Framework of Assets Recovery. It addressed a host of provisions and measures contributing to the effective identification, tracing, freezing and confiscation of assets. These measures are recommended to ensure that justice is meted out and offenders are prevented from enjoying the fruits of their misconduct as well as to provision compensation for damages. Instrumental and necessary in this

[98] Article 46(4), Ibid.
[58] UNCAC, op.cit.

respect is also the adequate protection of witnesses, victims and others who collaborate in the investigation or prosecution of offences established in accordance with the Conventions. The chapter has shown that, all of these goals can only be achieved through national and international cooperation not only among relevant public authorities, but also between national authorities and the private sector. However, a number of lacuna where also identified. This includes making NCB optional, as well as making the granting of MLA subject to the discretion of the parties. The next chapter will try to appraise the processes of assets recovery developed pursuant to these provisions and particularly, to examine how the challenges identified here can impact on the processes.

CHAPTER FOUR
APPRAISAL OF THE FORMS AND PROCESSES OF ASSET RECOVERY

4.1 Introduction

There are internationally recognized processes that allow for recovery of assets. These processes enable the relevant authorities to identify, trace, and freeze or seize proceeds, property and instrumentalities of financial crime for the purpose of confiscation.[1] Although each of these steps presents its unique challenges, the steps are however inter-dependent. Thus, the task of putting a

[1]Gretta F. Z.,et'al, (2014), "The role of donors in the recovery of stolen assets", *Anti-corruption Resource Centre*, Chr. Michelsen Institute (CMI), p.14.

successful assets recovery case needs a lot of coordination of these processes. It is also important to note however that, assets could be recovered at any stage of these processes. In other words, assets could be recovered through voluntary surrendered during tracing and investigation or it could be seized at the adjudication stage. Therefore, it is not necessary that these processes must be followed chronologically, it all depend on the circumstances of each. What is however certain is that, these processes have been useful in attacking the benefits derived from corruption and money laundering and they are an endorsement of the notion that attacking the profit motive is essential if the struggle against these crimes is to be effective.[2] However, sometimes question arise as to the effectiveness of the process of assets recovery and most importantly, how a government can be trusted in this process especially where trust between the government and the public has been broken through previous theft or mismanagement of public assets returned. Against this background, this chapter seeks to examine the processes of assets recovery, and in particular, identify the issues and challenges confronting Nigeria's effort in this regard.

4.2 Tracing and Identification of Assets

The first step in assets recovery effort is tracing of stolen wealth by the anti-corruption agencies.[3] The development of assets tracing can be traced to the decision establishing the order in the *Norwich Pharmacal*.[4] In that case, a pharmaceutical firm noticed that its patent rights were being infringed by imported products. It sought information from Her Majesty's Customs and Excise Commissioners about the infringers. The request was administratively denied but granted upon application to the court. The grounds for the judicial decision were that clear damage was resulting

[2]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.
[3]Enwerenmadu, D.U., (2013), "Nigeria's Quest to Recover Looted Assets: The Abacha's Affairs", *African Spectrum*, 48, 2, p.56.
[4]Norwich Pharmacal and others vs. Customs and Excise Commissioners, AC 133 (1974).

from wrongful conduct and that the responsible party could not be identified and sued without the requested information. This decision established the circumstances in which a proceeding could be brought to compel a third party to provide information about a cause of action. The case is significant as establishing case authority for disclosure orders, as useful tool for identification and tracking of proceeds of crime.[5] Consequently, in some common law jurisdictions like Nigeria, a party can require an ex parte discovery order to compel banks or third parties to provide information without disclosing the fact that such information is being sought to the person in respect of whom the information is pertinent. This order allows the authorities to obtain access to information which will enable them to trace assets hidden by suspected criminals.[6]

Unlike murders or other crimes of violence, corruption and money laundering leave no readily visible signs that alert authorities to their occurrence, or the proceeds generated from their occurrence.[7] In fact, a country's borders no longer count in cross-border cash movement, as large sums of money may be transferred electronically at the click of a mouse. The offender, in an attempt to avoid being linked to the corruptly-acquired assets, launders it to disguise their illegal origin.[8] Furthermore, professionals such as accountants, lawyers, or trust and company service providers, provide access to the financial sector and also serve to disguise a corrupt official's involvement in a transaction or ownership of assets. They employ complicated financial schemes, often involving offshore centers, shell companies, and corporate vehicles to launder the proceeds

[5]Stolen Assets Recovery Initiative (StAR) Report on Non-Conviction Based Asset Forfeiture, p.15.
[6]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
[7]Adekunle, A. (2011), *Proceeds of Crime in Nigeria: Getting our Act Together*, Nigerian Institute of Advanced Legal Studies, Lagos, Nigeria, p.21.
[8]Gretta Fenner Zinkernagel & Kodjo Attisso, "Past experience with agreements for the disposal of confiscated assets", In: Gretta Fenner Zinkernagel, et'al, (2013), *Emerging Trends in Asset Recovery*, Bern, Switzerland: Peter Lang AG, International Academic Publishers, p.340

of corruption.[9] Against this backdrop, an investigative process aimed at tracing the assets and collating evidence becomes an essential component in any asset recovery effort.

4.2.1 Tracing and Identification in the Country of Origin

Upon assumption of power, a new government, desirous of recovering funds diverted by corrupt leaders of the predecessor regime, may embark upon an investigation. The law enforcement agency will first gather evidence about where the proceeds of corruption might be located.[10] It may gain access to records of transactions which will disclose the monies that have been diverted or misappropriated and the methods used to achieve the diversion.[11] Such records may include: records of the country's central bank; records of other local banks to which the central bank can gain access; government-awarded contracts in which corruption may have played a role; and evidence from officials lower in the hierarchy who may have assisted the leaders.[12] In addition to gathering publicly available information and intelligence from law enforcement or other government agency databases, law enforcement can employ special investigative techniques. Some techniques may require authorization by a prosecutor or judge (for example, electronic surveillance, search and seizure orders, production orders, or account monitoring orders), but others may not (for example, information from public sources, and witness interviews).[13]

Generally, asset tracing is often intended to achieve certain objectives. Few among these include gathering information that would provide a lead to identify assets for recovery, location of evidence, other criminal actors such as bribe payers, money Launderers, witnesses and

[9]Odusote, A., (2014), "Assets Repatriation and Global Best Practices: Lessons for Nigeria", *AUDA*, vol. 6, no. 1, p. 84.
[10]Stolpe, O., "Assets Recovery-Tracing, Freezing and Returning Proceeds of Corrupion", 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, p.285.
[11]Ibid.
[12]Kodjo, A. (2011), "The Recovery of Stolen Assets: Seeking to balance fundamental human rights at stake", *International Centre for Asset Recovery*, Basel, p.16
[13]Jean-Pierre B., Larissa G. Clive S. and Kevin M. S. (2011), *Asset Recovery Handbook: A Guide for Practitioners*, p.18., available *@www.worldbank.org*, accessed on 24th May, 2015. 2:26. P.M.

persons extorted, and new leads for investigation.[14] The collation and analysis of this information could help the law enforcement agencies to connect the asset to the illegal activity, which is an important requirement needed to prosecute corrupt official for corruption and money laundering[15] or to initiate the process of voluntary return of assets.[16] Establishing that the assets is directly or indirectly from the commission of a crime, is what makes tracing and investigation more difficult because not many criminals admit such a fact, and many take steps to launder their assets in the hope of defeating investigation. Thus, in investigation, identifying the relevant information is essential and this is often achieved by routinely asking the question: Who? What? Why? Where? How? This helps the law enforcement agencies to determine whether they would concentrate on the corrupt person or his associate. Such question further helps them to know their target and the things the target spends his money on or how they laundered the assets. In sum, details about the target are vital in order to trace assets effectively. Such details may include: Name and known aliases; date and place of birth, with copy of any birth certificate, passport and national identity card; names and dates of birth of spouse(s), including ex-spouses, children, parents (including those of a spouse or ex-spouse) if known, and those of other members of the extended family; telephone numbers, e-mail and Facebook or similar group connections; and recent photograph.[17]

Though, this may be difficult to obtain but not impossible. The difficulty lies in the need to become familiar with the target's associates and family members since the target may use them to shelter assets. Where such information is made available, tracing and investigation of assets becomes less strenuous. This was what aided the United Kingdom authorities in the

[14]Ladan, M. T., (2016), *Money Laundering, Terrorism, Corruption, Human Trafficking in Nigeria*, LAP LAMBERT, Academic Publishing, p.58.
[15]Jean-Pierre B., Larissa G. Clive S. and Kevin M. S., op.cit, p.13.
[16]Vlasic M and Noell N (2014), "Fighting Impunity: Recent International Asset Recovery Efforts to Combat Corruption", *Cayman Financial Review*, available @ *www.compasscayman.com*, accessed on 26th August, 2016. 2:11 A.M.
[17]Ladan, M.T., op.cit.p.60.

tracing, prosecution and recovery of £16 million from two persons in respect of value added tax evasion (VAT fraud). The defendants defrauded UK government of the sum and channeled it through discretionary trusts, first in Jersey in the Channel Islands and then to Liechtenstein and the British Virgin Islands. In order to access the money and still keep their distance from the administration of the trusts, the defendants only access the funds by writing to the trustees requesting for funds to be granted in the form of loans to them or family members either for a particular business venture or the purchase of properties. There was no evidence of the trustees not complying with the request, and there was 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.[18]

4.2.2 Tracing and Identification of Assets through International Cooperation

Corruption cases and most complex money laundering cases may be committed in another jurisdiction. For instance, a company paying bribes for a contract may be from a jurisdiction outside the jurisdiction in which the bribes are paid, and the officials receiving the bribes may launder their ill-gotten gains in another jurisdiction.[19] Tracing such assets may require months, if not years, because of illicit nature of corruption and money laundering.[20] Thus, successful tracing in such circumstance will often depend upon assistance from foreign jurisdictions. It is for this reason that governments often sought assistance from governments and legal specialists to find funds hidden abroad and to build an evidentiary basis for their recovery.[21]

For instance, Nigeria through international cooperation successfully traced and recovered assets in the case against Diepreye Peter Solomon Alaieyeseigha, Joshua Dariye and

[18] Jean-Pierre B., Larissa G. Clive S. and Kevin M. S., op.cit, p.14.
[19] 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.27.
[20] Larissa Gray et al., (2014), *Few and Far: The Hard Facts on Stolen Asset Recovery*, Washington, DC: World Bank, p.43.
[21] Ibid.

more recently, James Ibori. Alamieyeseigha was arrested by Metropolitan Police in London at Heathrow airport in September 2005 on suspicion of money laundering. An investigation and close cooperation between the EFCC and London Metropolitan Police's Proceeds of Corruption Unit led to the recovery of US$1.5 million in cash from his London home. Alamieyeseigha was released on bail. However, after losing his appeal on this decision, he jumped bail in November 2005 and returned to Nigeria.[22] In Dariye's case, the law enforcement officers in the United Kingdom became aware of allegations of corruption and misappropriation of assets by Joshua Dariye. Using investigative techniques, they were able to trace and link the assets to the offence. First, the investigators conducted public record searches for information on Dariye in the United Kingdom (through property, vehicle and corporate registries) and sought intelligence on Dariye from other governmental agencies, including the financial intelligence unit, 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 investigations revealed that Dariye operated a Barclaycard Account which was being paid off each month through the bank account of Joyce Oyebanjo, Dariye's banker in the UK who was also paying utilities on behalf of Dariye, including the fees paid to a private school for his two children.[23]

Similarly, the Speed Joyeros case, considered a model of international bilateral cooperation between the United States and Panama, resulted in the tracing and confiscation of assets from a Panamanian firm and prosecution in a United States court. During the course of the investigation, more than US$2 million was seized in the form of cash and/or bank cheques. Four cheques totaling more than US$862,000 had been issued to a Panama-based company identified

[22] Jean-Pierre B., Larissa G. Clive S. and Kevin M. S., op.cit, p.18.
[23] Ladan, M.T., op.cit. p.61.

as Speed Joyeros S.A. Numerous drug-related assets were identified in Panama and later seized by the Panamanian authorities in accordance with a seizure order issued in the Eastern District of New York as part of these cases. The investigation resulted in the first United States indictment of an offshore business engaged in the illicit black market peso exchange, a money-laundering operation in which narcotics proceeds earned in the United States were exchanged for Colombian pesos and then used to purchase goods in the Colón Free Zone. During the course of the investigation, Yardena Hebroni and Eliahu Mizrani were identified as major money-launderers based in Panama. They used the Speed Joyeros S.A. wholesale jewellery business and a related company identified as Argento Vivo S.A. to facilitate their activities. Hebroni and her companies were involved in a money-laundering conspiracy that included coordinating and receiving drug proceeds from the United States through cash pick-ups, wire transfers and third party bank cheques.[24]

The successes recorded in the above cases, would have been difficult to achieve if only the law enforcement agencies in the requesting state were used. Unlike their domestic counterpart, foreign law enforcement agencies can be more effective in providing factual basis that may lead to locating the assets because they are legally and operationally independent from the Executive control in the requesting states.[25] Most importantly, they are more conversant with the application of their legal regime in this regard.[26]

4.2.3 Problems with tracing through mixed funds

In complex corruption cases, it is common for illicit monies to pass through multiple bank accounts, such that it becomes difficult, if not impossible, to show the exact path the assets took

[24]United Nations Office on Drugs and Crime Vienna (UNDOC), Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime, (2012), p.11
[25]Zinkernagel, G.F., et'al, op.cit, p.50.
[26] Ibid.

to reach the wrongdoer. What is however certain is that, the requirement for tracing and recovery of such funds varies depending on the jurisdiction. In the English authority of *Sinclair Investments (UK) Ltd vs. Versailles Trade Finance Ltd*[27], the court was of the view that, when tracing the proceeds of crime, it is necessary for a plaintiff to adduce sufficient evidence to show a "clear link" between his property and the assets in the hands of the wrongdoer as well as identifying the proceeds of his or her property as it passes between persons who have handled it prior to those assets arriving in the hands of the wrongdoer. However, in *Federal Republic of Brazil and Anor vs. Durant International Corporation and Anor*,[28] the Jersey Royal Court took a different view to that of *Sinclair Investments (UK) Ltd vs. Versailles Trade Finance Ltd* (supra). It maintained that, while the "clear link" principle remains good law, assets recovery should not fail simply because the wrongdoer has acted particularly dishonestly or 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 or her 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 or hers. Further the Royal Court extends the application of this principle to circumstances where the plaintiff's assets passed through multiple pools of funds. The Court endorsed this approach noting that, 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 assets' journey through life" as required by another English case of *Borden UK Ltd vs. Scottish Timber Products Ltd*[29] was too formalistic. In that case, the court took the position that, in the absence of establishing a clear link movement of funds, the tracing would fail.

[27] (2011) EWCA Civ 347.
[28] (2010), JLR, 421.
[29](1981) Ch. 25.

The Royal Court's ruling means that, the necessary links can be inferred from the circumstances, even in the absence of direct evidence. This judgment provides a clear statement of intent as to Jersey's approach to those who use the Island to launder money and in particular to the evidential processes the Court will now employ to trace the proceeds of crime through the Island. Though, these positions have raised the question of conflict and choice of law, which will be addressed shortly.

4.3 Securing the Assets

At the investigative phase, proceeds and instrumentalities subject to confiscation must be secured to avoid dissipation, movement or destruction.[30] The freezing of assets is one of the sanctions introduced as part of the efforts to fight international terrorism. However, their use has shifted to combating corruption.[31] Today, freezing or forfeiture order has been used by courts to fast track prosecution of corruption and related crimes as a response to the realization of the tendency to dissipate assets or move it out of the jurisdiction in order to frustrate any recovery effort.[32] This explains why freezing order is made ex parte, i.e., without notice to the defendant, as putting the defendant on notice may give him the opportunity to dissipate the assets.[33]

Freezing order can apply to all types of assets, including bank accounts and physical assets, provided that the respondents have a legal or beneficial interest in those assets. The law enforcement agencies can apply for an order of attachment or to freeze the accounts associated with persons they are investigating to prevent dissipation of the assets. In *Federal Republic of Nigeria vs. Esai Dangabar* & 5 others,[34] an action was instituted against the accused persons before the High Court of Justice, Federal Capital Territory Abuja for criminal breach of trust.

[30]Adekunle, A., op.cit. ,p.12.
[31]Melissa van den Broek, et'al, (2010), "Asset Freezing: Smart Sanction or Criminal Charge?" *Merkourios*, Vol. 27/Issue 72, p. 21.
[32]Adekunle, A., op.cit.,p.17.
[33]Simon. B., (2014), *International Asset Recovery Enforcement Strategies*, Thomson Reuters (Professional), UK Limited, p.16.
[34] FCT/CR /64/2012.

They pleaded not guilty and were granted bail. Prosecution by an Ex-Parte application sought for an order of the Court to grant an interim attachment/forfeiture of the assets of the accused persons and to freeze their bank account pending the hearing and final determination of the case. The Court accordingly granted an order. The accused who was dissatisfied, appealed to the Court of Appeal. Dismissing the appeal, the court held among others that in Common Law Jurisdiction, the Court is empowered to grant interim reliefs including freezing injunction against assets within the Jurisdiction and outside the Jurisdiction including the assets in the name of third parties in order to prevent the assets from dissipation.

In *Federal Republic of Nigeria and 2 Ors vs. Atlantic Energy Drilling Concept Nig. Ltd and 3 Ors*[35], the courts have shown that freezing order can also be granted in respect of assets located abroad through Mutual Legal Assistance (MLA) or Informal International Cooperation particularly when there is an application to that effect. Just like freezing order applicable within the country, freezing order outside the jurisdiction if granted, also prohibit the person by whom the property is held from dealing with the property. Thus, foreign states can be asked to freeze assets believed to represent the proceeds of crime at the outset of, or during, criminal investigations. The typical test for a freeze of assets by law enforcement agencies is a reasonable suspicion that the assets represent the proceeds of crime, or similar wording, provided that a criminal investigation is ongoing.[36] This is a relatively low threshold. Mutual legal assistance can therefore be an effective and cheap method of securing assets at an early stage, pending later attempts to recover those assets.[37]

4.3.1 Factors to be considered before granting Freezing Order

[35] FHC/L/CS/2016
[36] Simon. B., op.cit., p.20.
[37] Vlassis, D., et'al, "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.

Freezing or interim order of attachment is a very powerful tool available to courts. Since such orders are made against the offender in person and not his assets, the offender is prevented from dealing in the assets up to the maximum value of a state's claim. Third parties, such as banks who are in control of the offender's funds are also bound by freezing orders and may incur stiff penalties in the event of non-compliance.[38] However, as important as this order may seem, if granted irrationally, it can affects the defendant or third party's basic rights. Thus, they are granted subject to satisfying certain conditions. In *Federal Republic of Nigeria vs. Malabu Oil and Gas Limited & Ors*,[39] the court set aside an order of forfeiture granted to the plaintiff against the respondent on the ground that the plaintiff has failed to meet the conditions for the enjoyment of such order. The court has accordingly listed these conditions to include:

4.3.1.1 Good Arguable Case

The state must show that it has a good arguable case, that is, a case to answer. In other words, there must be some sort of evidence that the assets are the proceeds of corruption. This does not mean a strong case; a *prima facie* case would be sufficient.[40] In *Allen vs. White Eagle Modern Building Solutions Ltd*[41], the issues before the court was whether there was good arguable case to warrant the continuation of the freezing order. In its ruling, the court upheld the applicant's application for continuation of the freezing order. The court based its decision on the three (3) grounds. First, there was evidence that the respondent had, on several occasions, asked the applicant to alter the payment arrangements so as to make some staged payments to its employees rather than to the respondent's own bank account. Secondly, the respondent had abruptly left without warning having been paid for work that it had not completed. Finally, the

[38]*Esai Dangabar vs. Federal Republic of Nigeria* (2012) Suit No: CA/A/256/2012.
[39]Suit No. HC/ABJ/CR/268/2016.
[40]American Cynamid Co. vs. Ethicon Ltd., (1975) 1 ALL ER 504.
[41](2015) EWHC 2359 (QB).

respondent's bank accounts showed evidence that it had assets within the jurisdiction against which a freezing order would be effective. Though, what constitute good arguable case may depend on the facts and circumstances of each, however, it appears the last condition must always be established. Without having assets in the jurisdiction, even common sense would suggest against granting such order because it amount to an exercise in futility.

4.3.1.2 Real Risk of Dissipation of Assets

The state must show also that there is a real risk that the offender would dissipate or conceal his assets if the freezing order is not granted. The risk of dissipation must exist at the moment of the application.[42] It is not necessary to show an intention to dissipate. The Court applies an objective test (i.e. whether a reasonable person would think there is a risk of dissipation) and will consider whether the effect of the respondent's actions to date indicate a real risk of dissipation. This is often very difficult to prove. It is not enough to argue that the commencement of enforcement proceedings might, itself, prompt the respondent to hide their assets and therefore create a risk of dissipation.[43] Relevant factors in demonstrating a risk of dissipation include:

i. The ease with which the assets in question could be moved out of the applicant's reach.
ii. Whether there is any adverse inference to be drawn from the respondent's incorporation in a tax or finance haven.
iii. Any failure by the respondent to file accounts when obliged to do so.
iv. The respondent's past and present credit record, i.e. whether the respondent has previously been declared bankrupt.
v. Evidence of dishonesty, particularly in relation to misuse of assets.[44]

In *SPL Private Finance (PF1) IC Ltd vs. Arch Financial Products LLP*[45], the issues before court is whether there was a real risk of dissipation of assets. The court held that, a

[42]Scott, N., et'al, (2016), *A Guide to Freezing Injunctions and Related Orders,* Memery Crystal, London, p.4.
[43]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.
[44]Scott, N., et'al, op.cit. p.7.

decision to continue or set aside a freezing order required a particular consideration of whether there was a real risk of dissipation. There must be solid evidence (as opposed to mere suspicions) of a likelihood of dissipation. In this respect, the mere identification of a finding of dishonesty was insufficient; there still had to be consideration of whether the dishonesty justifies an inference that there is a real risk of dissipation. However, the fact that there had been very strong dishonesty findings at trial and adverse credibility findings in respect of the respondent's evidence at trial provided a strong basis for an inference of real risk of dissipation. In *U&M Mining Zambia vs. Konkola Copper Mines*[46], 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. Although none of that conduct amounted to dealing with its assets, the court held that such an entity might well seek to deal with its assets in a way to make recovery more difficult. Accordingly, a risk of dissipation was established. However, in *IOT Engineering vs. Dangote Fertilizer*[47], the English Court of Appeal dismissed an appeal against an earlier refusal by the court to continue a freezing order. 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 a well-resourced party could delay enforcement for a considerable period of time by pursuing constitutional rights of appeal). Rejecting the Claimant contention, the Court held that, it is self-evidently absurd to argue that, any party who contracts with a Nigerian company and may in due course need to enforce against assets in that jurisdiction can, without more, assert a significant risk of dissipation arising out of delay in enforcement.

[45](2015) EWHC 1124.
[46]EWHC/Comm/2014/3250.
[47]EWCA/Civ/2014/1348.

Question could be asked whether establishing good arguable case, can equally raise the presumption of risk of dissipation. The court seems to answer this in the negative. In *Dinglis Properties Ltd vs. Dinglis Management Ltd*[48], the issue was whether the defendant's acceptance of good arguable case on the merits of a claim for breaches of Director's duties was sufficient to allow the court to infer that there was a real risk of dissipation. The claimants argued that the defendant's acceptance of good arguable case on the allegations should also be taken as their acceptance that the allegations provided the necessary evidence of a real risk of dissipation for the purposes of the freezing order. The court however rejected their contention and granted the defendant's application for the discharge of the freezing order on the ground that, there was insufficient evidence of a propensity to dissipate assets on the part of the defendants. The Court maintained further that, if it was in a position to draw the proper inference just from the facts as pleaded that the defendant's breaches of duty were dishonest, then that inference was capable without more of providing evidence of real risk of dissipation.

From the above case, it is obvious that, the facts pleaded by the claimant did a double duty of showing both good arguable case and real risk of dissipation. However, the claimant needed to do more. For instance, if the facts as the claimant pleaded were consistent with breaches of duty, then he had to adduce further evidence to show that there was a real risk of dissipation. The claimants perhaps still had to establish that the defendant's assets were the kind of assets which were capable of being dissipated.

4.3.1.3 Duty of Full and Frank Disclosure

A state must disclose fully all matters relevant to the application, including anything which is detrimental to its own case. Failure to do so may lead to the discharge of a freezing order and

[48](2016) EWHC 818.

cost sanctions. In *Alliance Bank JSC vs. Baglan Abdullayevich Zhunus*[49], in considering the effect of non-disclosures during application freezing order, the court observed that material non-disclosure, the test of materiality of a non-disclosed matter was whether it would have been relevant to the exercise of the court's discretion. If a fact would have influenced the judge when deciding whether to grant the freezing order, then it was material and it should have been disclosed at the time. Consequently, the court held 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. Failure to disclose these highly material points was sufficient to justify setting aside the freezing order.

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 practice was allowed in the case of *JSC Mezhdunarodniy Promyshlenniy Bank vs. Pugachev*[50], 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 immediate steps to begin the process of recovering the assets.[51]

4.3.1.4 Undertaking as to Damages

Another principle that guides the court in the grant of freezing order is the requirement that the plaintiff will be required to give an undertaking as to damages in case the order turns to affect the interest of the defendant. In *Ekanem vs. Umanah*[52] it was held that, the Court will have to

[49](2015) EWHC 714.
[50](2015), EWHC 2623
[51]*BDW Trading Ltd vs. Fitzpatrick* (2015) EWHC 3490 (Ch)
[52](2006) 11NWLR (PT 992) 510.

consider the benefit which the order will confer on the plaintiff and the detriment which it will cause the defendant and, a plaintiff should not be permitted to insist on an order which will confer no appreciable benefit on himself and will be materially detrimental to the defendant. Thus, where the order in the opinion of the court, is capable of conferring benefit on the plaintiff but, is 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 the interest of the defendant.[53] In other words, the Prosecution must give an undertaking to compensate the offender if the court later finds out that the freezing order should not have been granted and where, as a result of the order, the alleged offender has suffered loss. In *Energy Venture vs. 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.

One may asked whether the defendant can, based on the loss he stands to suffer, apply to increase the amount of the undertaking. In *Energy Venture v Malabu* (supra), the defendant applied to increase the amount of the cross-undertaking and the court granted his application. On appeal, the Court of Appeal while dismissing the appeal, provided a test to apply when determining whether fortification should be provided. It held as follows:

1. The court must make an "intelligible estimate" of the defendant's likely loss resulting from the freezing order.
2. The defendant must show a sufficient level of risk of loss to require fortification.
3. The defendant must also show that the contemplated loss would be caused by the grant of the injunction.
4. The normal level of compensation for the loss of the use of money is an interest claim based on the usual cost of borrowing an equivalent sum. The cost of borrowing in this

[53]Ibid, *Foseco Int. Ltd vs. Fordath Ltd*, (1975) F.S.R. 507.
[54]EWCA/Civ/2014/1295.

case (where the defendant is a Nigerian company) was claimed to be not less than the US Prime Rate (3.25% at the relevant date). The claimant had not looked like he would be good for such a sum and hence fortification had been required.

It follows that, the defendant can always apply to the court for increase in the amount of undertaking as to damages if what has been proposed cannot cover the loss he stands to suffer, provided he can satisfy the above conditions. In summary, the essential test for fortification of undertaking as to damages is one of fairness. The competing interests of the trustees (who had been represented at the hearing) and the respondents (who were not represented) had to be balanced. But most importantly, it is appropriate to limit any undertaking or fortification of it to the amount of money or value of the assets.

4.3.1.4 Just and Convenient

It is the right of an applicant not to be deprived of any order to which he is entitled even if it would be disadvantageous to the defendant.[55] However, it is the duty of the applicant to show that the order is just and convenient in all circumstances. In other words, the court must be satisfied that the likely effect of the freezing order will be to promote the doing of justice overall and not to work unfairly or oppressively.[56] A state must apply as early as possible for a freezing order once there is sufficient evidence to justify the preservation of the assets, unless there is lack of resources or length of time needed to conduct investigations.[57] Otherwise, anything short of this may give room for the dissipation of the assets thereby making a mockery not only of the recovery process but also of the entire anti-corruption scheme.

4.4 Confiscation or Forfeiture of Assets

[55]Ibid.
[56]Scott, N., et'al, op.cit. p.8.
[57]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.

There are different methods a state can use to confiscate the proceeds and instrumentalities of crime as would be discussed below. What is however certain is that, these methods share the same objective namely: to deprive the criminal of the proceeds and instrumentalities of crime. It other words, those who commit unlawful activity should not be allowed to profit from their crimes. Proceeds should be forfeited and used to compensate the victim, whether it is the state or an individual. Second, unlawful activity should be deterred. Removing the economic gain from crime discourages the criminal conduct in the first instance. Forfeiture of instrumentalities ensures that such assets will not be used for further criminal purposes; it likewise serves as a deterrent.[58] Below are the major methods and processes used for confiscation of assets:

4.4.1 Criminal or Conviction Based Confiscation

Criminal forfeiture is an in *personam* order, which means that it is against the individual and it involves the prosecution indicting the property used in or obtained with the proceeds of the illegal activity.[58] It requires a criminal trial and conviction, and is often part of the sentencing process.[59] Thus, criminal forfeiture is an integral part of a criminal case which is imposed by a court on the defendant, once convicted. The defendant could in addition, be required to pay a financial penalty, recompense the victims of the crime and be compelled to disgorge the proceeds of the crime or the property utilized in the commission of the criminal offence. Some jurisdictions apply a lower standard of proof (that is, the balance of probabilities) for the forfeiture process than for the criminal portion of the process. Nonetheless, the requirement of a criminal conviction means that the government must first establish guilt "beyond a reasonable doubt".[60]

[58]Jacinta A. O., et al., (2014), *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, StAR/World Bank/UNODC, p. 143.
[58]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.
[59] Ibid.
[60]*United States vs. Sandini*, 816 F.2d 869, 873 (3d 1987).

The criminal forfeiture systems can be traced back to the medieval times in England. In cases of treason or other serious crimes, the guilty person's chattels and estates were confiscated and the guilty person was subject to the death penalty and the "*peine forte et dure"* (hard and forceful punishment). By the late eighteenth century the number of cases of criminal forfeiture decreased considerably in England and in America. These changes took place because the criminal system undergone major changes in the United Kingdom and the United States and the penalties mentioned above were eliminated.[61] The significance of forfeiture in modern times, as a substantive penal measure is more noticeable in relation to its deterrence as well as destabilizing effect on criminals or crime organizations. If in addition to conventional penal measures like imprisonment, punishment is able to strike at the motivating factor of the crime (which is the financial benefit), it is likely to discourage many persons from committing such crimes.[62] Another basis for forfeiture is to facilitate compensation or restitution of victims of crimes of fraud. An order of restitution may be enforced by the victim or by the prosecutor on behalf of the victim in the same manner as a judgment in a civil action.[63]

Criminal forfeiture systems can be object-based, which means that the prosecuting authority must prove that the assets in question are proceeds or instrumentalities of the crime. Alternatively, they can be value-based regimes, which allow for the forfeiture of the value of the offender's benefit from the crime, without proving the connection between the crime and the specific object of property. In jurisdiction such as the USA for instance, if the defendant is found guilty, a separate criminal forfeiture proceedings are conducted in court before a judge and they could result in a decision of forfeiting property either 'used' or 'obtained' in the crime. The defendant could be required to pay a financial penalty, recompense the victims of the crime and be

[61] Adekunle, A., op.cit. p.8.
[62] Zinkernagel, G.F., et'al, op.cit., p.69.
[63] S. 11, Advanced fee fraud and Other Related Offences Act, 2007.

compelled to disgorge the proceeds of the crime or the property utilized in the commission of the criminal offence. Their courts apply the preponderance standard of proof in these proceedings, reasoning that forfeiture is part of the criminal sentence and not the substantive offense.[64]

The UK also adopts a similar approach. However, in order to grant a confiscation order, the UK court must consider two questions. First, whether the defendant has a criminal lifestyle? Secondly, has the defendant profited from their illegal behaviour? A defendant is regarded to have had a 'criminal lifestyle' if one of the following three conditions is met, and there has to be a minimum benefit of £5,000 for the final two to be met: it is a 'lifestyle offence;[65] it is part of a course of criminal conduct,[66] and it is an offence committed over a period of at least 6 months and the defendant has benefited from it.[67] A person is regarded as having a criminal lifestyle if he is convicted of an offence of drug trafficking, money laundering, directing terrorism, people trafficking, arms trafficking, counterfeiting and intellectual property offences.[58] The second condition "course of criminal conduct" is satisfied if the defendant has benefited from the conduct. Once the court feels that this criterion has been met, it will determine a recoverable amount and grant a confiscation order that compels the defendant to pay.

4.4.1.1 Advantages of Criminal Forfeiture

From the above decision, a couple of advantages of criminal confiscation can be identified. First, it allows for the confiscation of assets or value recovery. The court can order the payment of a money judgment or forfeiture of substitute assets. This is possible because criminal forfeiture

[64] *United States vs. Cherry*, 330 F.3d 658, 670 (4th Cir. 2003).
[65]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.
[66]S.75(2) (b), Proceeds of Crime Act, 2002.
[67] S. 75 (2) (c), Ibid.
[58]Schedule 2 to the Proceeds of Crime Act, Ibid.

may be object-based or value-based.[69] Thus, where the defendant has dissipated the specific assets, a criminal forfeiture order is enforceable against substitute assets. Furthermore, convicted co-defendants are liable equally for satisfying any money judgment of forfeiture. Though, James Ibori has finished serving his 13-year sentence in UK for his crimes, his case offers a good example in this regard. James Ibori was arrested and charged in Nigeria for money laundering and conspiracy to defraud the Delta State of Nigeria in 2007, but the charges against him were dismissed. However, he was rearrested in Dubai in 2010 on a British warrant and extradited to the UK to face ten counts of money laundering and conspiracy to defraud the Delta State of Nigeria. In July 2012, U.S. Department of Justice secured a restraining order in the US District Court in the District of Columbia against more than $3 million in corruption proceeds related to James Ibori, formerly the governor of Delta State in Nigeria. Three months thereafter, in October 2012, the DOJ executed a restraining order issued by the United States District Court in the District of Columbia against an additional $4 million in Ibori's assets, including the proceeds from the sale of a penthouse unit in the Ritz-Carlton in Washington, D.C.[70] Ibori pleaded guilty in London's Southwark Crown Court. Consequently, the following possessions were also 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 cash and shipped directly to his mansion in South Africa.[71] Before then, in June, 2010, juries in the UK convicted Ibori's wife, Theresa Ibori; his sister, Christine Ibori-Ibie; and his associate, Udoamaka Onuigbo. The court issued confiscation orders in the sum of £5.1 million, £829,786.44, and £2.7

[69]Davis, E.H., "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

[70]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.

[71] Ibid.

million against all three of them, respectively. Furthermore, Solicitor Bhadresh Gohil, Ibori's "bag-man"; Daniel Benedict McCann, Ibori's fiduciary agent; and Lambertus De Boer, his corporate financier, were all convicted and jailed for a total of 30 years for their role in the criminal enterprise.[72]

The case of Riggs Bank and its role in facilitating money laundering for corrupt government officials in Equatorial Guinea and Chile is another example. Riggs Bank was punished for its involvement in the criminal enterprise. The Office of the Comptroller of Currency imposed a U.S. $25 million fine on Riggs Bank, for its failure to report suspicious transactions in the Equatorial Guinean accounts. Additionally, Riggs Bank was sentenced to a $16 million criminal fine in April 2005 for the laundering of accounts owned and controlled by Augusto Pinochet of Chile. The decision seeks and prosecutes everyone involved in the entire grand corruption chain, including those who help the primary offenders launder and hide the proceeds of the crime.[73]

Another advantage of criminal forfeiture is, time limits do not exist for filing an indictment following seizure of property.[74] Furthermore, criminal forfeiture excludes the property of bona fide third parties. Thus, property belonging to a third party cannot be forfeited criminally. The forfeiture will be declared null and void where a third party establishes that he was the true owner of the property at the time of the crime or acquired it later as a bona fide purchaser for value.[75]

4.4.1.2 Disadvantages of Criminal Forfeiture

[72]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.

[73]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.

[74]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.

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

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.[76] Proving financial crime of corruption and money laundering beyond reasonable doubt is not always an easy task considering the complex and illicit nature of these crimes as well as the fact that corporate vehicles and computer network are often used to confuse trail. Hence in most cases, the relevant information needed to recovery assets through this method, reside only in the knowledge of the perpetrators.[77] Also, in developing countries, 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.[78]

Secondly, recovering assets through criminal confiscation is often difficult because the defendants especially if he a PEPs, can hire the best lawyers that would frustrate the process through technicalities and frivolous adjournments. In Nigeria, these reasons have resulted to the slow pace in the recovery of a considerable number of illicit assets acquired by past Governors whose cases are in court for close to eight years after leaving office as shown above. Notable among these include: Orji Uzo Kalu (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

[76]Art. 54(1) (c) of UNCAC, 2003, envisages the above circumstances and requires states to take other necessary measures to allow forfeiture of assets without a criminal conviction. Such measures include civil forfeiture.
[77]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.
[78] 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.

billion; and Saminu Turaki (Jigawa State) N36 billion.[79] Though, the problem of ineffectiveness of criminal forfeiture as a tool for assets recovery seems to be more pronounced in developing countries like Nigeria. In the UK for instance, 640,000 offenders were convicted in 2014–15. Over the same period 5,924 confiscation orders were made, meaning that less than 1% of convictions led to a confiscation order.[80] In the USA, the Attorney's Office for the Western District of Louisiana recovered $8, 839,501.29 in 2016 through criminal confiscation order.[81]

4.4.2 Non-Conviction Based Forfeiture or Civil Forfeiture

Non Conviction Based Forfeiture (NCB) or civil forfeiture is an action against the asset itself (for example, *Federal Republic of Nigeria vs. N10, 000*) and not against an individual.[82] It is an action *in rem*, against the thing or property which is suspected to be the proceeds or instrumentality of corruption and not against the offender. This method of confiscation does not require a criminal conviction in order for corrupt proceeds to be attached. Proceedings which are civil in nature are brought against the property itself.[83] The Supreme Court in *United States vs. Various Items of Personal Property*[84] stated that, in rem, is the property which is proceeded against and, by resort to a legal fiction, held guilty and condemned. The established mechanism for confiscation is through criminal proceedings particularly where course of even such as the accused is found in the territory of a State and there is sufficient evidence to support a criminal prosecution.

[79]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.
[80]National Audit Office, Confiscation Orders: progress review, HC 886, March 2016, p. 14.
[81]Department of Justice, U.S. Attorney's Office of Louisiana, December 19, 2016.,p.2 available@*https://www.justice.gov/usao-wdla/pr/us-attorney's-office-collect-more-135-million-civil-criminal-assets-forfeiture-actions,* accessed on 25th June, 2017, 3:54. P.M.
[82]Campbell, L., (2014), "The Recovery of Criminal Assets in New Zealand, Ireland and England: Fighting Organized and Serious Crime in the Civil Realm", *41 Victoria University Wellington Law Review*, p.24.
[83] Ibid.
[84]82 US 577, 581.

However, where these conditions do not exit, an appropriate mechanism would be to adopt a NCB process.[85]

The concept of civil forfeiture has roots in feudal England where subjects who committed treason had to forfeit their lives and interest in their land and chattels. Forfeiture was also an important concept in admiralty law where *in rem* orders were passed against ships.[86] In the United States of America, civil forfeiture laws were enacted first in the seventeenth century for smuggling and subsequently piracy and slave trafficking cases. In cases where the owner of the property could not be found or was in another jurisdiction, cargo and ships were forfeited. With time, its application was extended to combating organized crime, especially in relation to the enforcement of laws on the possession or sale of controlled substances and drug trafficking.[87] Today, civil forfeiture has gained ground through the global proliferation of civil forfeiture laws and has been applied mostly in cases where criminal forfeiture has proved impossible.[88] It has spread steadily to other jurisdictions, mainly those in the common law system, including the United Kingdom, Ireland, Australia, South Africa and Canada, where it has been used to address corruption, organized crime and other social evils.[89]

In the US, for example, the Department of Justice (DOJ) has developed an asset forfeiture scheme known as the Kleptocracy Asset Recovery Initiative. Lodged in the Criminal Division's Asset Forfeiture and Money Laundering Section, the initiative is underpinned by a commitment to civil actions aimed at securing forfeiture of the proceeds of foreign official corruption.[90] The first complaint filed under the initiative sought the seizure of over $1 million in assets (including a

[85]Jonathan, T. et'al, (2017), "Getting the Deal through Assets Recovery", *Law Business Research Ltd 87 Lancaster Road London*, W11 1QQ, UK, p.5
[86] Ibid., p.7.
[87]Chapter 6, US Racketeer Influence and Corrupt Organisations (RICO) Act, 1961.
[88] Civil Asset Forfeiture Reform in Texas, Texas Public Policy Foundation, Center for Effective Justice (2014), p. 10.
[89] Jonathan, T. et'al, op.cit.p.5.
[90]Lisanawati, G., (2015), "Best Principles for Criminal Assets Management: Conceptual Framework", 1 *IPBJ* , Vol. 7 (1), p.8.

$600,000 home in the State of Maryland) owned by Diepreye Solomon Peter Alamieyeseigha.[91] Subsequently, on October 13, 2011, and again on October 25, 2011, a civil forfeiture case was filed in the United States District Court for the Central District of California and the United States Court for the District of Columbia, respectively, in which the DOJ sought the forfeiture of over $70 million in assets owned by Teodoro Nguema Obiang Mangue, the son of the president of Equatorial Guinea and that country's Minister of Agriculture. Among the items for forfeiture are a Gulfstream jet, a mansion in Malibu, California, and Michael Jackson memorabilia worth $1.8 million.[91] In USA, the Attorney's Office for the Western District of Louisiana recovered $3, 757, 876.02 in 2016 through civil forfeiture because it was possible to obtain the proceeds of crime in a short period of time without incurring significant costs.[92] Similarly, in UK, £155 million was recovered civil forfeiture orders from 2014–15.[93]

4.4.2.1 Advantages of Non Conviction Based Forfeiture

NCB allows an action to be brought against the assets once it can be proven that it is tainted with corruption. Because the action is not against an individual defendant, but against the property, the owner of the property is a third party having the right to defend the property.[94] Thus, NCB asset forfeiture process can proceed regardless of flight, immunity against prosecution or death.[95] In Abacha's case for instance, the Swiss court used the provisions of Article 58 of Swiss Penal Code for confiscation without a criminal conviction and the reversal of the burden of proof under

[91] Ibid.
[91] *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.
[92] Department of Justice, U.S. Attorney's Office of Louisiana, op.cit.p.2.
[93] National Audit Office, Confiscation Orders: progress review, op.cit. p. 14.
[94] Jefferson Holcomb et al., (2014), "Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States", *39 J. Criminal Justice,* 273, 274.
[95] Stefan D. Cassella, (2013), *Civil Asset Recovery: The American Experience*, Oxford University Press, p.30.

Article 59 of the same to secure a conviction.[96] In addition, an important feature of civil forfeiture is that, it attaches liability, which means that a separate action for the execution of the judgment against that property is not required as is in the case of criminal forfeiture.[97]

Furthermore, civil forfeiture is relatively easier because of lower standard of proof. The prosecution needs to prove only the connection between the property and the crime on a balance probability or preponderance of the evidence.[98] Once this is done, the burden would shift to the property owner to prove that the property was not implicated in the alleged crime.[99] The requirement to prove such offence on the balance of probability eases the burden on the government and means that it may be possible to obtain forfeiture when there is insufficient evidence to support a criminal conviction. In 2004, Hertfordshire police executed search warrants and found traces of proceeds of crime, but found insufficient evidence to secure a conviction. The case was referred to the British Assets Recovery Agency (ARA), which successfully obtained a property freezing order on assets worth £1.5 million. In obtaining the order, the ARA contended the subject's assets were derived from a wide range of unlawful conduct, including drug trafficking, money laundering, and mortgage fraud, and that properties held in the name of a family member and a corporation were funded by the subject. The subject had set up several companies with associates who had drug convictions, financial statements had not been filed for the majority of these companies, and it was impossible for the subject to have funded his property and businesses with any legitimate resources available to him.[100]

4.4.2.2 Disadvantages of Non Conviction Based Forfeiture

[96]Zinkernagel, G.F., et'al, op.cit., p.71.
[97]Richard, M. Thompson, (2015), "Asset Forfeiture: Selected Legal Issues and Reforms Legislative Attorney", *Congressional Research Service*, p.2., and Civil Asset Forfeiture Reform in Texas, Texas Public Policy Foundation, Center for Effective Justice, op. cit. p. 11.
[98]Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis, 16 Tex. J. on Civil Liberties & Civil Rights (2010), p. 7.
[99] *Chatterjee vs. Ontario (Attorney General)*, 2009 SCC 19, (2009) 1 S.C.R. 624.
[100]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..

One of the drawbacks of NCB is that it is restrictive when compared to criminal forfeiture. The confiscation is limited to the assets linked directly to the offence. In other words, the forfeiture is limited to property that was gained through illegal activities.[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 only useful if the alleged offender actually owns assets that can be located and are worth forfeiting. If the prosecution suspects based on the offender's previous involvement in illicit activities that, he should own a certain amount of funds that cannot be located, then criminal forfeiture would appropriate in this circumstance.[102] In addition, as the case is instituted as a civil matter, there might be statute of limitations within which to file the case.[103]

4.4.3 Issues in Non-Conviction Based Forfeiture

Non-Conviction Based Forfeiture process is a bit technical and controversial. The process appears to be contrary to the conventional process of court proceedings, particularly as it relates to the issue of retrospectivity, fundamental rights and its relationship to criminal proceedings. Thus, to aid the understanding of civil asset forfeiture as a mechanism for recovery of corruptly acquired assets, some of these issues would be examined below.

4.4.3.1 Relationship between Civil and Criminal Prosecution

Reduction of crime is, in general, best secured by criminal prosecutions, convictions, and forfeiture. Civil forfeiture of assets is often adopted as complementary to criminal forfeiture, particularly where criminal prosecution would be difficult to assets due reasons already mentioned above. This implies that, there are instances in some jurisdiction, where both system could be allowed to run concurrently. In Thailand for instance, there is discretion to proceed with

[101]Tim Daniel & James Maton, "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.
[103]Rahn, R. (2014), "Abusive Civil Forfeiture Laws", p.13. , available *@www.cato.org/publications/commentary/abusive-civil-asset-forfeiture*, accessed on 12th August, 2016, 2:29. P.M.

NCB asset forfeiture simultaneously with criminal prosecution.[104] In the USA however, a stay of proceedings in the civil forfeiture action may be sought until conclusion of the criminal case, particularly where civil forfeiture will prejudice the government's ability to conduct a criminal investigation or prosecution.[99]

Nigeria is one of the beneficiaries of instituting criminal and civil forfeiture instituted concurrently, as was evidenced in the case of Diepreye Peter Solomon Alaieyeseigha former Governor Bayelsa State. When Alamieyeseigha jumped bail from UK in November 2005, he was subsequently impeached by Bayelsa state's lawmakers thus, losing his immunity from prosecution. The EFCC charged him with forty counts of money laundering and corruption and secured a court order freezing assets held in Nigeria. The agency also discovered that Alamieyeseigha had used companies registered in the United Kingdom, South Africa, Seychelles, the British Virgin Islands, and the Bahamas to launder the proceeds and confiscation of these assets required Alamieyeseigha's conviction. In addition, the pursuit of legal proceedings in each of these jurisdictions would be a daunting prospect and the EFCC had little evidence linking Alamieyeseigha to these assets showing it is proceeds of corruption. As a result, Nigerian brought civil proceedings in the United Kingdom, while simultaneously pursing its criminal proceedings in Nigeria. Consequently, the United Kingdom High Court issued the worldwide freezing order in December 2005 and simultaneously ordered the disclosure of documents held at banks and by Alamieyeseigha's associates. In parallel to the criminal proceedings in Nigeria and the civil proceedings in the United Kingdom, the South African Asset Forfeiture Unit initiated proceedings to seize Alamieyeseigha's luxury penthouse using non-conviction based confiscation. These allowed the South African authorities to seize the stolen assets without the need for a criminal

[104]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.

[99] Lisanawati, G., op. cit. p.10.

conviction by demonstrating the illegal origin of the funds. Funds were returned to Nigeria following the sale of the property in January 2007. In July 2007, Alamieyeseigha pleaded guilty before a Nigerian High Court to six charges of making false declaration of assets and caused his companies to plead guilty to 23 charges of money laundering. Alamieyeseigha was sentenced to two years in prison and the court ordered the seizure of assets in Nigeria.

However, despite the possibility of instituting criminal and civil simultaneously, in certain instances however, allowing it is more likely to affects the defendant's right against self-incrimination. This right confers immunity in criminal proceedings from an obligation to provide information tending to prove one's guilt. Thus, the defendant is not bound to give evidence that may expose him to conviction for a crime. Section 36(11) of the Constitution of the Federal Republic of Nigeria,[100] for instance, provides that: "No person who is tried for a criminal offence shall be compelled to give evidence at the trial." In *Payton vs. R,*[101] the defendant was charged with a criminal offence before the Crown Court. 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 to the Court of Appeal, it was argued on his behalf that the civil proceedings constituted an abuse of process resulting in unfairness to the defendant. 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, stressing the importance of a fair trial, 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.

[100]Cap. C23, op.cit.
[101](2006) EWCA Crim. 1226.

It can be gathered from the above case that, it is possible to institute civil and criminal forfeiture to run concurrently. This does not guarantee the defendant's right against self-incrimination. Perhaps, the best strategy to protect such right would have been to stay the civil proceeding until the conclusion of the criminal proceeding It should also be noted that, criminal prosecution does not constitute a bar to civil forfeiture actions. In *Ayodele Olusegun Olupitan and another vs. Director of the Assets Recovery Agency*[102], the English Court of Appeal 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 ground that a property acquired as a result of mortgage fraud was recoverable property. It was not necessary for the Director of the Assets Recovery Agency (ARA) to allege and prove a specific criminal offence. 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 proceedings.

4.4.3.2 Retrospective Application of Civil Forfeiture Law.

The retroactive or retrospective[103] application of NCB asset forfeiture laws against assets that were acquired before the enactment of the forfeiture laws is an important concept. In the context of NCB asset forfeiture, the issue has been raised and resolved by courts in both civil and common law jurisdictions. Courts have held that the prohibitions do not apply because forfeiture is not criminal or penal in nature, but is instead a civil law consequence of the fact that a perpetrator or other beneficiaries had obtained assets from an unlawful act. Nor does the seizure

[102] (2008) EWCA Civ. 104.

[103]To explain the terms "retroactivity" and "retrospectivity," the Supreme Court of Canada in *Benner vs. Canada (Secretary of State)*, (1997) 1 S.C.R. 358 adopted the definition of E. A. Driedger, in "Statutes: Retroactive Retrospective Reflections" (1978), 56 Can. Bar Rev. 264, at pp. 268–69: A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates backwards. A retrospective statute operates forwards, but it looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.

or forfeiture amount to a "penalty" that would violate the prohibition. In *U.S. vs. Four Tracts of Property on the Waters of Leiper's Creek,*[104] the Court held that retroactive application of NCB asset forfeiture laws was constitutional and such laws are not penal in nature because they do not attach new consequences to past conduct because the conduct has always carried criminal penalties and the claimants never had a vested right to property obtained illegally. Similarly, in *Dassa Foundation vs. Liechtenstein,*[105] the European Court of Human Rights had to decide whether civil forfeiture legislation could be applied retroactively to forfeit proceeds of bribery without offending Section 61 of the Liechenstein Criminal Code and Article 7 of the European Convention on Human Rights both of which provide for the right to property. The court held that civil forfeiture law was comparable to civil restitution of unjust enrichment and retroactive application of the law would not constitute a penalty.

It follows from the cases that NCB legislation can be retroactively applied without offending the basic law, provided that the act that generated the proceeds was criminal at the time the act was committed. Without such a provision, a possible loophole could be created that may effectively legitimize criminal assets thus, given the defendants the opportunity to profit from acts that were illegal at the time they were committed. Furthermore, allowing the retroactive application of the law is particularly important for recovering proceeds of corruption against officials who are in power for lengthy periods and have had years of opportunity to steal state funds. Though, retroactive application may appear to conflict with countries' constitutions and basic law. In Nigeria, for instance, Section 36 (8) of the Constitution prohibits the application of a *criminal* offense or punishment to an act that did not constitute a criminal offense at the time it was committed, as well as the imposition of heavier penalties than would

[104]181 F.3d 104, 1999 WL 357773 at 3–4 (6th Cir. 1999).
[105]ECHR Application number 696/05 (10 July 2007)

have been applicable at the time the criminal offense was committed.[106] Thus, without consequential alteration to the relevant sections of such constitutions, retrospective application of civil forfeiture will remain a serious challenge.

4.4.3.3 Breach of Fundamental Rights

The law prescribes for respect and observance of all legal rights of the accused person. The underlying rationale stems from the fact that in the administration of justice, society places upon itself the entire risk of error, thus requiring the state to prove its case against the accused beyond a reasonable doubt.[107] The rights which are contested often in civil forfeiture proceedings are the right to be presumed innocent and the right to property. These rights are affirmed by international, regional and national human rights regime.[108] However, the courts have insisted that the application of civil forfeiture regime does not the aforementioned rights. *In Butler vs. UK*,[109] the case concerned a cash seizure of £239,010. The Government alleged that there was no evidence to substantiate the applicant's claim that he had won the money from betting since 1994. The applicant challenged the forfeiture on two grounds that his right to a presumption of innocence and enjoyment of his property has been violated. The European Court of Human Right (ECtHR) held that, the forfeiture action was instituted against the property (cash) not the defendant, so there is no basis for raising the issue of presumption of innocence. On property rights, the court maintained that, since civil forfeiture actions are actions in rem, that is, actions against property, the property is the defendant.

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[106]Constitution of Federal Republic of Nigeria, Cap. C23, LFN, op.cit.
[107]Simser, J. (2014), "Asset Recovery and Kleptocracy", 17 (3), *Journal of Financial Crime*, p.332.
[108]Article 11 of the Universal Declaration of Human Rights, 1945 provides as follows: "Everyone charged with a penal offence shall have the right to be presumed innocent until proved guilty according to law". Similarly, Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 7(1) of the African Charter on Human and Peoples' Rights also provides for the right of the accused person to be presumed innocent until the contrary is proved. The Constitution of the Federal Republic of Nigeria reinforces this right in section 36(5). It provides that "every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty". Sections 43 and 44 of the Constitution safeguard the citizen's right to property.
[109]41661/98, 27th June 2002.

It follows that in NCB proceeding, any assertion of ownership by the claimant would simply be met with the argument that the property in itself has no constitutional rights. This argument is reinforced by the fact that, in such proceeding, the guilt of the property owner is irrelevant. Hence, a claim of owner's right to property will afford no defense. Theoretically therefore, the owner is not punished because the forfeiture is directed against the property. This forfeiture method is dependent on the idea that the property is capable of criminal behaviour. This issue was revisited in 2010 were the UK Supreme Court in *Gale vs. SOCA*[110] held that civil forfeiture does not violate the applicant rights to presumption of innocence as contained in Article 6 of the European Convention on Human Rights. Stating the general rationale behind this doctrine, the court maintained that, this trend is justified by the need to rescue society from the alarming growth of corruption and conquer the ingenuity with which perpetrators conceal corruptly-acquired assets in order to frustrate the state's recovery efforts.

4.4.3.4 Is civil forfeiture proceedings the same as criminal proceeding?

There is argument that civil forfeiture actions, is a criminal forfeiture in disguise. For example, if the national law allows civil forfeiture of property used in the commission of crime, the property might be forfeited on the basis that an occupier used it to commit the crime. This might be properly seen as a penalty for transgression of the criminal law and so a criminal proceeding. However, the reality is that, in respect of civil forfeiture, no jurisdiction has found that the proceedings are criminal. In *Walsh vs. United Kingdom*[111], an action for civil recovery of the applicant's assets, the applicant contended that the proceedings for recovery of his assets were

[110]UKSC 2010/190.
[111](2006) EHCR 1154.

not civil but criminal in nature. The ECtHR had to decide whether the recovery proceeding is criminal. The court considered three important criteria, namely, the domestic classification of the matter, the nature of the charge and the penalty to which a person becomes liable. Firstly, the court found that, according to the UK domestic law, the recovery proceedings were regarded as civil and not criminal. Secondly, the purpose of the proceedings was not punitive or deterrent but to recover assets to which the defendant lawfully was not entitled. The court further confirmed that there was no finding of guilt of specific offences and that though the recovery order made by the lower court involved a huge sum (£70 250), it was not intended to be punitive. Therefore the application was declared inadmissible.

Similarly, in the UK, in the case of *Charrington*[112] the Court of Appeal explained that in the matter before it, there was no charge, arrest, conviction, penalty or criminal record. In the absence of such hallmarks, the proceedings were civil. Furthermore, in *US vs. Ursery,*[113] the defendants had already been prosecuted, yet faced civil forfeiture proceedings. The Fifth Amendment double jeopardy clause prohibits a second prosecution for the same offence. The issue was therefore whether a civil forfeiture action amounted to a second prosecution. The Supreme Court held it did not on the basis that, in national law in rem, civil forfeitures did not amount to punishment. It was merely the removal of property to which the owner had no right.

4.5 Administrative Confiscation

NCB confiscation must be distinguished with administrative confiscation. While the former requires a civil action to be brought against the assets, administrative confiscation generally involves a non-judicial mechanism for confiscating assets used or involved in the commission of

[112](2005) EWCA Civ 335.
[113](1996) 135 L Ed 2D549.

the offense.[114] In other words, it occurs in circumstances where there is no need for judicial intervention. Most often, administrative confiscation happens in cases where the seizure, freezing or confiscation is not contested.[115] Thus, administrative orders to freeze or confiscate assets are issued by a government rather than the judiciary and can bypass mutual legal assistance requests from foreign countries in cases of urgency. For example, after the Arab Spring, administrative measures were implemented to facilitate the rapid freezing of assets of corrupt former leaders in the Arab world. Canada, the US, Switzerland and the EU introduced legislation allowing their governments to order financial institutions to freeze assets without a judicial order or mutual legal assistance request from the corrupt officials' countries.[116]

In Nigeria, administrative confiscation is typically performed by an authorized agency, such as a police, EFCC, ICPC, DNLEA, NAPTIP etc. Generally administrative confiscation is restricted to low-value assets or certain classes of assets (for example, any amount of cash can be seized, but not real property.[117] For instance, EFCC has seized over $6.555m and €248, 340 from 55 money laundering suspects at the airports in Lagos, Kano and Abuja. The cash includes $3, 902, 229 and €248, 340 from 49 suspects at the Murtala Muhammed International Airport in Lagos; $2, 198, 900 (Lagos Domestic Airport); $454, 050 from four suspects at the Mallam Aminu Kano International Airport in Kano; and $99, 000 from a suspect at the private wing of the Nnamdi Azikiwe International Airport, Abuja.[118]

4.6 Civil Proceedings in Personam

[114]Ladan, M.T., op.cit.p.62.
[115]Abiodun, O. (2014), "Assets Repatriation and Global Best Practices: Lessons for Nigeria", *AUDA*, vol. 6, no. 1. p.12.
[116]Larissa, Gray, et al, op.cit. p. 41.
[117]Nuhu, Ribadu, (2016), "Assets Recovery in Nigeria: Experiences from the Past", available@*www.nigeriatoday.ng/2016/07/*, accessed on 24th August, 2016. 2:28. P.M.
[118]Lawrence, O. M., (2016), "The Plunderers and Challenges of Socio-Economic Development in Nigeria", *Public Policy and Administration Research*, Vol.6, No.1,p.12.

Civil proceeding is a direct method of recovering corruptly acquired assets. This mechanism allows a state or a private citizen to bring a claim in the civil courts of a foreign jurisdiction where corruptly acquired assets are located.[119] Unlike the NCB where an action is maintained against the assets, in the case of civil proceeding, the matter is brought against the defendant himself. It is far simpler to pursue recovery of assets located in foreign jurisdictions through civil proceeding in personam than in local courts. This is particularly so, in situations where a public official holds corruptly acquired assets abroad in the names of foreign trusts, companies or associates, and domestic confiscation or civil forfeiture orders are not available or enforceable against such assets due to difference in legal system.[120]

Civil proceedings are usually more efficient than criminal proceedings because of lower burden of proof ("balance of probabilities" instead of "beyond a reasonable doubt") and once it is proved that the defendant cannot justify the source of his wealth, the court can proceed even in the absence of a defendant if he or she does not co-operate with the process.[121] Although a defendant might be able to frustrate post-judgment execution of the judgment amount or payment of the damages quantum, it is difficult for him or her to prevent progress in the proceedings overall. Instead, a court is likely to be satisfied and willing to proceed so long as the defendant has been properly served notice of the proceedings.[122] In fact, in the UK, the High Court has held that serving notice on a lawyer acting on behalf of a defendant in hiding is good

[119]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.
[120]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.
[121]Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis," 16 Tex. J. on Civil Liberties & Civil Rights op.cit., p. 12.
[122]Edward, W. op.cit.p.8.

service and no bar to the proceedings moving forward.[123] Though, the disadvantages of this mechanism include high cost of private litigation.[124]

Nigeria has adopted this procedure in the UK in two suits to recover assets in Dariye's case.[125] However, 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 jurisdiction or the defendant lives within jurisdiction. Any act of connection between the defendant, the items and the receiving country is sufficient to confer jurisdiction on the foreign country. The family members, relatives and business associates may also be joined as defendants. For example, the English Courts have jurisdiction to determine a claim if the defendant is present in England, or if the claim concerns assets located in England. However, English Court may still decline to hear the case on the basis that the claim would more appropriately be determined elsewhere, for example, in the courts of the state that has suffered the corruption. For instance, in *Islamic Republic of Pakistan vs. Asif Ali Zardari and Ors*[126], the English Court 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 a corruption case with complete foreign elements.

Another importance of this form of assets recovery proceeding is that, a successful claimant in a property-based action will have priority over the defendant's other creditors.[127] Furthermore, in common law jurisdictions, through civil proceeding in personam, claimants can use constructive trusts to recover beneficial ownership of assets acquired through breach of trust or fiduciary duty.

[123]*Republic of Nigeria vs. Joshua Dariye* (2005), QBD, High Court, London.
[124]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.
[125]*The Federal Republic of Nigeria vs. Joshua Chibi Dariye & Anor* (2007) EWHC 708 (Ch).
[126]*(2006) EWCA, and the Federal Republic of Nigeria vs. Joshua Chibi Dariye & Anor* (2007) S.R, (D), 179.
[127]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.

When public funds or property are embezzled or misappropriated, the state will be the beneficial owner of the stolen property, any profits derived from it, or any property into which the stolen property is converted. The state's beneficial ownership will stick to the asset as it goes through successive transactions, unless there is a bona fide purchaser for value without notice of the breach of trust. For example, Saadi Qadafi 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, since it was owned by a shell company of which he was the beneficial owner. The court found that Qadafi held beneficial ownership of the house in constructive trust for Libya, it therefore, allow the house to be transferred to the state of Libya.[128]

The same logic of constructive trust has been extended to situations where a state or other principal claims a proprietary interest in a bribe accepted by an agent. A successful proprietary claim allows the principal to recover the bribe and any increases in its value. The case of *Kartika Ratna Thahir vs. Pertamina*[129] provides an example of the use of constructive trust to return a bribe to the bribe-taker's principal. Pertamina, a state-owned oil and gas company, discovered that one of its executives had accepted bribes from contractors seeking preferential treatment. The court held that the Executive breached his fiduciary duty by accepting the bribe, and therefore the bribe was held in trust for Pertamina. Furthermore, the House of Lords stated in *the Attorney General for Hong Kong vs. Charles Warwick Reid and Judith Margaret Reid and Marc Molloy*[130] that, when a bribe is accepted by a fiduciary 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 fiduciary must pay the difference between that value and the initial amount of the bribe because he should

[128]Jean-Pierre Brun et al, (2015), Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets, the World Bank, p.50.
[129]Kartika Ratna Thahir vs. PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina), (1994) 3 SGCA 105 (Singapore).
[130] (1994) 1 All ER 1.

not have accepted the bribe or incurred the risk of loss. If the property increases in value, the fiduciary is not entitled to any surplus in excess of the initial value of the bribe because he is not allowed by any means to make a profit out of a breach of duty.

Furthermore, insolvency proceeding or receivership proceedings, the state claimant may be able to recover property through civil proceeding in personam simply by showing that it owns it. It is also easier to reclaim assets that have been transferred away, for example, by fraud.[131] The insolvency office holder has the power to access information and demand testimony and has proved powerful and pivotal in large asset recovery cases. Within an insolvency proceeding, an insolvency office holder can compel the testimony of witnesses, including the directors or managers who may have been culpable in hiding assets.[132] Refusal to cooperate can lead to imprisonment, which may motivate testimony that helps the office holder to locate and subsequently recover substantial assets.[133] Though, the challenge with this process is that, in pursuing assets across borders, a plaintiff or creditor will need to pursue the assets under the insolvency laws of that country.[134] Thus, the insolvency laws of the country where the assets are located will influence the effectiveness of approaching asset recovery through insolvency.

4.7 Confiscation through International Cooperation

The recovery of proceeds of corruption and money laundering that have been moved beyond domestic borders often requires cooperation with foreign jurisdictions.[135] Three options are usually available for the recovery of such assets. First, domestic confiscation proceedings may be

[131]Abiola O. M. (2013), *Private Remedies for Corruption*, the Hague, Eleven International Publishing, p. 408.
[132]Padideh A., (2014), "Civil Consequences of Corruption in International Commercial Contracts", *62 Am J Comp L*, 185, p.211.
[133]John, H. (2014), *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa*, Cheltenham, UK: Edward Elgar, p. 327.
[134]Abiola, O.M., op.cit., p.329.
[135]Abdullahi Y. S., op.cit. p.197.

enforced in the foreign jurisdiction through MLA and returned to the victim jurisdiction; secondly, confiscation proceedings may be initiated in the foreign jurisdiction and the assets returned to the victim jurisdiction; and thirdly, both domestic and foreign confiscation proceedings may be pursued in tandem.[136] On the first option, overseas enforcement of confiscation or civil forfeiture orders offers an effective route to the recovery of assets, where available in a realistic time-frame. However, any delay may give the corrupt official ample opportunity to transfer funds to bank uncooperative jurisdictions or dissipate it.[137] Furthermore, since it is necessary first to obtain a binding domestic order, if the order is based on civil forfeiture process, its implementation would not be possible for countries that do not have civil forfeiture regime.[138]

As for the second option, there is an obvious advantage in the sense that the foreign country were the assets are kept may be in a better position to undertake a thorough investigation than the authorities in the requesting state. For example, the foreign state may be in a position to better establish the full extent of the funds transferred. Furthermore, the fact that the authorities of the country where the assets are hidden are more independent or not hampered by some legal constraints such as questions of immunity from prosecution means that this can be an effective weapon in assets recovery. Nigeria has employed this option in the case of Joshua Chibi Dariye. Dariye's administration misappropriated more than $11.9 million and siphoned to accounts in the United Kindom. The accounts were held by his proxies and under his pseudonym "Joseph Dagwan". Dariye also purchased properties in the UK under the fictitious name. Dariye's ill-gotten wealth in the United Kingdom was confiscated through two civil actions against him by the

[136]Art. 54 (a-b), UNCAC, 2003. Olutoyin, B.I., op.cit, p.115.
[137]Marco, A. and Leonardo S. Borlini, (2014), *Corruption: Economic Analysis and International Law*, Edward Elgar Publishing Limited, p.481.
[138]Stolpe, O, (2015), op.cit. p.286., and Simon. B., op.cit. p.19.

Federal Government of Nigeria. Properties worth GBP 395,000 and assets worth US $5.7 million were respectively recovered in the two cases.[139] The third option was adopted in the case of Diepreye Peter Solomon Alaieyeseigha. As shown above, when Alamieyeseigha jumped bail from UK in November 2005, he was subsequently impeached and 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. While 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.[140]

4.7.1 Conflict and Choice of Law situation in Assets Recovery

Generally speaking, there are instances where asset recovery actions will include an international element, i.e., involving people of different nationality. 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 vs. Durant International Corporation and Anor*[141] the Jersey Royal Court held that the test to be applied is the one set out by Lord Goff in *Spiliada Maritime Corp vs. Cansulex Limted.*[142] 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:

i. Matters concerning convenience or expense (e.g., location of witnesses and documents relative to the proposed forum);
ii. The governing law of the transaction; and

[139] *The Federal Republic of Nigeria vs. Joshua Chibi Dariye & Anor* (2007) EWHC 708 (Ch), Ladan, M.T., op.cit.p.19.
[140] Edward, A.P., et'al, (2008), *Recovering Stolen Assets: A case Study*, IBA Conference Paris, 24th-25th, April, 2008, p.10.
[141] (2010) JLR, 421.
[142] (1987) AC 460.

iii. 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 vs. 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 and analysis, one will think that, the choice of applicable law in asset recovery matter involving foreign elements would not be a problem once the 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.[143] 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.

4.8 Asset Repatriation

This is the last step in the process of asset recovery. It involves returning the assets to the victims which include the individuals, states or country from which the assets originated. There is today a universal principle that confiscated funds should be returned to their legitimate owner, which, in the case of corruption and misappropriation of state funds, would be the state from which such funds have been stolen.[144] It is noteworthy that there is no one-size-fits-all procedure for the return of corruptly-acquired assets. Much depends on the peculiarity of each situation. In cases where direct restitution is impracticable, the recovered assets may be used for the partial settlement of debts at a bilateral or multilateral level. In the alternative, returned assets may be used in development programmes.

A number of policy issues are likely to arise during any efforts to recover assets in corruption cases. Requested jurisdictions may be concerned that the funds will be siphoned off again through continued or renewed corruption in the requesting jurisdictions, especially if the corrupt official is still in power or holds significant influence. Moreover, requesting jurisdictions may object to a requested country's attempts to impose conditions and other views on how the

[143]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.
[144]Article 57 (1,2, and 4) UNCAC, 2003, and also Seminar on Identifying, Restraining and Recovering Stolen Assets in the Organization for Security and Cooperation in Europe (OSCE) Region Background Paper, Vienna, 3-5 September 2012, p.5.

confiscated assets should be used. In some cases, international organizations such as the World Bank and civil society organizations have been used to facilitate the return and monitoring of recovered funds.[145] For example, in 2007, the U.S. Department of Justice filed a civil confiscation action against a U.S. citizen indicted in 2003 for allegedly paying bribes to Kazakh officials for oil and gas deals. The action was for approximately $84 million in proceeds. The American citizen agreed to transfer those proceeds to a World Bank trust fund for use on projects in Kazakhstan.[146]

Judges in the United States and the United Kingdom have, in a number of cases, made orders directing corrupt public officials and money launderers as well as corporations and their agents involved in bribery of public officials to pay compensation or damages to a State that has been harmed by corruption offences.[147] For instance, when the British construction and engineering firm Mabey & Johnson disclosed to the United Kingdom Serious Fraud Office that it had paid bribes in several jurisdictions, it was ordered to make reparations of about £658,000 to Ghana, £618,000 to Iraq and £139,000 to Jamaica.[148] In the United States, Robert Antoine, director of operations for Haiti's State-owned telecommunications entity, and executives of the telecommunications companies who bribed him were jointly ordered to pay $2.2 million in restitution to the government of Haiti. 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

[145]U.S. Attorney for S.D.N.Y, Government Files Civil Forfeiture Action Against $84 Million Allegedly Traceable to Illegal Payments and Agrees to Conditional Release of Funds to Foundation to Benefit Poor Children in Kazakhstan, news release no. 07-108, May 30, 2007; World Bank, "Kazakhstan BOTA Foundation Established," news release no. 2008/07/KZ, June 4, 2008, available@ *http://siteresources.worldbank.org/* accessed on 24th June, 2017. 6:11. P.M.
[146]Ibid.
[147]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.
[148]Ibid.

make restitution to the government of Trinidad and Tobago in the amounts of $4 million, $2 million and $100,000 respectively.[149]

4.9 Management and the Monitoring of the use of Returned Assets

Management of assets that have been seized pending confiscation order, and the monitoring of assets that are repatriated to the victim country are two important elements that are also central or germane in the asset recovery process. Management of seized assets that are pending a confiscation order is matter that is inherently characterized with some form of practical challenges. This includes the cost of maintenance of the property, and whether the taxes that are due during the seizure or the cost of up-keeping it in storage while the seizure is pending a confiscation order, as well as the depreciation that the asset may have during its storage.[150] In the UK for instance, in dealing with these problems, such asset could be given to the person that committed the corrupt act who will promise before a court that he/she will not sell the asset and will maintain it in good condition.[151] Whatever the option chosen, the process is expected to address the challenges raised above.

On the monitoring of returned assets, some countries returning assets have in the past requested or conditioned the return of proceeds of corruption and other criminal acts to spending on specific projects or areas mutually determined by both countries. The argument used by returning countries is that this is an attempt to avoid the returned assets being recycled out of the country again through further corruption or other criminal acts. Some victim countries, in turn, argue that such imposition and conditioning of the returned assets is a violation of their

[149]Elena, H., & Selvan, L., (2015), "Using the Anti-Money Laundering Framework in Asset Tracing in Tracing Illegal Assets: A Practitioner's Guide", *International Centre for Asset Recovery*, Basel: Basel Institute on Governance, p.73.

[150]Jimu, I. (2009), "Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Philippines and Kazakhstan", *available@https://www.baselgovernance.org/sites/collective.localhost/files/publications/biog_working_paper_06.pdf*, accessed on 26th June, 2017. 11:43. A.M.

[151]International Centre for Asset Recovery, "Development Assistance, Asset Recovery and Money Laundering: Making the Connection" (Basel: Basel Institute on Governance, International Centre for Asset Recovery, (2011), p.18.,*available@https://www.baselgovernance.org/sites/collective.localhost/files/publications/dfid_brochure_final_version_for_print.pdf*, accessed on 26th June, 2017. 12: 07. P.M.

sovereign right to decide how to spend or invest returned money.[152] Thus, monitoring of returned assets must be mutually decided upon both the recipient and victim countries in a case-by-case scenario, ensuring transparency and dialogue in the process. For instance, in Kazakhstan in 2007, the US DOJ brought a civil forfeiture action against $84 million held in a Swiss bank account. The money was tied to unlawful bribery transactions between oil and gas companies and Kazakh officials. In 2007, a memorandum of understanding between the governments of Kazakhstan, the US and Switzerland created the BOTA Foundation, which was established to ensure funds were used to benefit disadvantaged citizens in Kazakhstan. The MOU stipulated that the Foundation would be independent from the Kazakh government, its officials and their associates. The Foundation was also monitored by the US and Switzerland and supervised by the World Bank. In order to continue receiving BOTA's funds, Kazakhstan had to participate in a program to improve budget accountability and increase transparency of oil and gas revenues. According to Aaron Bornstein, the executive director of the BOTA Foundation until it closed in 2014, the Foundation used the $115 million from the bank account and interest to help 200,000 poor children, youth and their families.[153] The Foundation disbursed $80 million directly to families and also funded various programs such as a tuition assistance program. Because of BOTA's success, discussions are currently underway to set up a similar arrangement in the Ukraine. However, recovering the proceeds of corruption is often impossible. As a result, civil society organizations and transparency advocates argue that money from FCPA settlements should also be used to compensate victims, just as settlements in environmental cases often go towards affected communities.[154]

[152]Osawanoye, B., "International Perspective of Recovered Assets", 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, p.257.
[153]Aaron, B., (2015), "The BOTA Foundation Explained: How Effective was BOTA?" *The FCPA Blog*, p.11.
[154]Larissa Gray, et' al, op.cit. p. 45.

4.10 Challenges of successful Assets recovery

Flowing from the above discussion, one can safely assert that there has been concerted effort both at national and international levels in recovering stolen assets. The procedural processes have enabled investigators and prosecutors in the country to pursue such proceeds. However, there are a number of impediments to recovering corruptly-acquired assets. Despites the efforts to recover such assets, corrupt officials continue to amass and enjoy assets with seemingly little prospect of such assets being recovered. Some of these challenges relate to the conditions in the victim state, while others relate to difficulties encountered in seeking international co-operation in recovery matters.

4.10.1 Differences in Legal System

Differences between approaches taken in civil and common law systems, especially concerning jurisdiction, confiscation proceedings and admission of evidence, also pose challenges. Requesting states parties that seek to recover assets often face obstacles in developed countries in the form of high evidentiary and procedural requirements.[155] The problem is heightened where there are no bilateral or multilateral treaties between the countries. In the case of 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.[156] Additionally, some jurisdictions recognize only requests for confiscation

[155]United Nations General Assembly (2006), Report of the Secretary General Preventing and Combatting Corrupt Practices and Transfer of Assets of Illicit Origin and Returning Such Assets to the Countries of Origin A/61/177, p.34.
[156]Vlassis D, et'al, op.cit. p.14.

arising out of a criminal conviction. This is a serious challenge, given that usually corrupt officials take advantage of immunities or may escape.[157]

4.10.2 Problem of International Cooperation

Even where above hurdles have been crossed successfully, the processing of requests for mutual legal assistance often takes a long time. This may frustrate the entire recovery process. 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 the Philippines, and in the Abacha case, it took nearly four years before bank documents required for evidentiary purposes were transmitted to the Nigerian government.[158] Luxembourg, which froze over 600 million USD traced to Abacha and his cronies in its territory, has repeatedly refused to repatriate any funds despite passing new laws that restrict bank secrecy in response to international pressure.[159] The case of United Kingdom is even more perplexing. In the wake of the Abacha scandal, the Financial Services Authority (FSA) conducted an enquiry which confirmed that 23 British banks had received over 900 million GBP linked to Abacha between 1996 and 2000. Yet, none of these 23 banks were publicly identified, let alone penalized.[160] Despite the repeated requests by Nigeria, the British government has done very little to date to ensure the repatriation of these funds.[161] In December 2003, after considerable pressure, the United Kingdom returned a sum of 3 million GBP to Nigeria. This action was made possible by the conviction in a Swiss court of Uri David, who was one of the financiers of Tony Blair's Labour Party, for laundering millions of US dollars for the late Abacha. This was followed by an announcement by British Foreign Office minister Chris

[157]Ibid.
[158]Stephenson, Kevin M., et al. op.cit., p.17.
[159]What has become of Abacha's Loot? Available @*https://www.naij.com/7779786-abacha-loot-saved-stolen.html*, and also Enweremadu, D., op.cit. p.69.
[160]Global Witness (2010), *International Thief: How British Banks are Complicit in Nigerian Corruption*, London: Global Witness, p.5.
[161] Enweremadu, D., op.cit.p.70.

Mullin during a visit to Nigeria that the British authorities had "discovered in British banks about £30 million smuggled out of Nigeria by Abacha, the money is frozen pending court proceedings and once the proceedings are resolved the money will be returned. However, this declaration was not matched by any action.[162] James Ibori and Joshua Dariye's loot returned to Nigeria by the United Kingdom did not take much time because the assets where recovered through direct recovery process.[163]

In the case of Switzerland, Nigeria has so far succeeded in recovering about $723 million.[164] However, these gestures cannot hide the means by which the Swiss have tried to frustrate Nigeria's demand for the repatriation of all stolen funds kept in Swiss banks, especially those linked to Abacha. To begin with, Swiss based their release of Abacha's funds on the condition that Nigeria first begin prosecution of the accused at home and sign an undertaking guaranteeing "transparent use" of any repatriated funds.[165] Even after the Nigerian authorities agreed to these terms and took steps to implement them, the Swiss still remained reluctant to Nigeria's request. It was only after protracted diplomatic exchanges between both governments (spanning about five years) that the sum of $722 million was released. Of greater concern is that no further funds have been repatriated since the release of $722 million in 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) 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.[166] Further still on 29th July 2016, the Swiss Government promised to return

[162]Mohammed, A. Y. (2012), "What Happened to Abacha's Loot?", *Leadership* (Abuja), 21 December, p.19.
[163]Global Witness, op.cit.p.5.
[164] www.vanguardngr.com/2016/03/abacha-loot-switzerland-returns-732m-to-nigeria-in-10-years/ 14th August, 2016. 11:28.A.M.
[165]World Bank and Federal Ministry of Finance (Nigeria) (2006), Utilization of Repatriated Abacha Loot: Report of the Field Monitoring Exercise, report prepared by the World Bank with cooperation from the Federal Ministry of Finance, Abuja.
[166]Pedro, G. P., op.cit. p.19.

$321 from the second batch of Abacha's loot. In furtherance of this, the parties signed another MoU that would allow for better cooperation and reduce the time for the process of transmitting requests from Nigeria to Switzerland and vice versa.[167]

4.10.3 Lack of Political Will

Political commitment to the asset recovery process in both requesting and requested States Parties is vital to the success of any asset recovery effort. In the requesting State Party, direct involvement of key government officials in the looting of state assets may hinder the asset recovery process. This is demonstrated often during the gathering of evidence, where it is foreseen that the evidence requested will expose public office holders other than those targeted. A lack of political will is demonstrated also where there is reluctance to legislate measures to enhance accountability and to promote asset recovery efforts. Also, a lack of political will on the part of the requesting State Party may pose a threat to recovering corruptly-acquired assets lodged in the territory of the requested State Party. The requested State Party may have little interest in recovery efforts where it derives economic benefits from the proceeds of corruption and money laundering activities. A request for mutual legal assistance may be turned down also if such proceedings threaten other higher interests of the requested State Party. The requested State Party may be reluctant to proceed against powerful interest groups such as banks, especially where banks are involved directly in facilitating the transfer of the tainted assets.

In conclusion, this chapter appraises the processes of assets recovery. Particular attention was placed on the key component of assets recovery such as tracing, freezing, confiscation, repatriation of assets. From the analysis, it is apparent that international community and their state counterpart have recorded relative success in assets recovery efforts across the

[167]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. 6:26. P.M.

globe. However, various impediments were also identified. Prominent among this is unnecessary delay in assets recovery through international cooperation, lack of technical capacity, sole dependent on criminal confiscation forfeiture and lack of political will. Lack of political will mainly explains the inability of some states to enact Civil Forfeiture Law. While it is conceded that civil forfeiture should not be a substitute for criminal prosecution, civil forfeiture may be the only suitable legal response to recovering the assets of politically exposed persons who have died, flee the country or enjoy immunity from criminal prosecution. The chapter therefore provides the background for assessing the effectiveness and comprehensiveness of Nigerian assets recovery regime and its implementation, which shall be examined in the next chapter.

CHAPTER FIVE
DOMESTIC IMPLEMENTATION OF ANTI-CORRUPTION CONVENTIONS

IN NIGERIA: ISSUES AND CHALLENGES

5.1 Introduction

Over the years, countries have increasingly relied on treaties for regulating their affairs. That trend became even more compelling as such treaties have established standards by which the conducts of states are exercised and measured even in matters that are within their national purview and jurisdiction.[1] In the area of corruption and money laundering for instance, their transnational character has resulted in an enormous increase in the frequency of global intervention. This is obvious because such crimes require both national and international responses.[2] Thus, where the problem cannot be adequately addressed by a country alone, acting cooperatively becomes essential for a country to protect its interests. In Chapter Three, we have shown that Nigeria has responded to the fight against corruption signing and ratifying a number of Anti-Corruption Conventions such as the United Nations Convention Against Transnational Organized Crime (UNTOC),[3] United Nations Convention Against Corruption (UNCAC)[4], African Union Convention on Preventing and Combating Corruption and Related Offences (AU Corruption Convention)[5] and Economic Community of West African States Protocol on the Fight Against Corruption (ECOWAS Protocol).[6]

Entering international treaties is a right of every sovereign state as guaranteed by Article 6 of the Vienna Convention on the Law of Treaty.[7] However Article 27 of the Convention[8]

[1]Hameed, A.A., (2016), "The Challenges of Implementing International Treaties in Third World Countries: The Case of Maritime and Environmental Treaties Implementation in Nigeria", *Journal of Law, Policy and Globalization*, Vol.50, p.2. Matthew, N., (2012), "Key Legal Issues & Challenges in Asset Recovery", a paper presented by ABA International's Rule of Law, January 26, 2012, p.8.
[2]André, S. R. (2015), "Transnational Organized Crime and the Palermo Convention: A Reality Check", *New York: International Peace Institute*, p.21.
[3]2000. Nigeria signed the Convention on 13th December 2000, and ratified it 28 June 2001.
[4]2003. Nigeria Signed the Convention on 9th December, 2003 and ratified it on 24th October 2004.
[5]2003. Nigeria ratified the AU Corruption Convention on 26th September, 2006.
[6] ECOWAS Protocol, 2001.
[7] 1969. Nigeria ratified the Convention on 31st July 1969.
[8] Ibid.

obliges every state to perform its treaty obligations in good faith. Thus, it is a duty of states which are parties to a treaty to take necessary step to ensure that there are adequate measures for giving full effect to the provisions of the treaty.[9] In Nigeria, the government has enacted a number of legislations and established agencies to combat through assets recovery. The implication is that, in Nigerian, the law on asset recovery is not contained in a single piece of legislation. This chapter therefore seeks to examine the legislative and non-legislative measures in Nigeria for the implementation of the relevant Assets Recovery provisions of the above Anti-Corruption Conventions with a view to determine whether they are effective and in consonant with the above treaties obligations.

5.2 Trend in the Domestic Implementation of Treaties in Nigeria

Generally, the legal basis for domestic implementation of treaties is often determined by two rival theories, monism and dualism. Monism holds the view that, international law and domestic law are mutually independent.[10] Monist believes that, since every matter that can be regulated by national law is open to regulation by international law as well, it is impossible for domestic law to exist separately from international law.[11] Hence, in monist countries, a ratified international treaty forms part of the domestic legal order and can directly be applied at the national level.[12]This doctrine may be beneficial, especially in African where lack of domestication of treaties often remains a serious challenge to its implementation at the domestic level.[13] Dualism

[9]Ladan, M.T., (2010), "Techniques in Domestic Implementation of International Humanitarian Law (IHL)Treaties in Nigeria: A case Study of 2008 Cluster Munitions Convention", being a paper presented at the 2nd ICRC Workshop for Legal Officer/Drafters in the Ministries of Justice, Foreign Affairs, Defense and National Assembly, Abuja, held at RockView Hotel Abuja, on 4th -5th October, 2010, p.2., Matthew, N., (2012), "Key Legal Issues & Challenges in Asset Recovery", a paper presented by ABA International's Rule of Law, January 26, 2012, p.8.

[10]Bazuaye, B., and Enabulele, O., (2016), *Teachings on Basic Topics in Public International Law*, Benin City, Ambik Press, p. 72., and Korenica, F., and Doli, D., (2012), "The Relationship Between International Treaties and Domestic Law: A View from Albanian Constitutional Law and Practice", *Pace International Law Review*, Vol. 24 Issue 1, p.12.

[11]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.11.

[12]Bahakal, Y., et' al, (2014), *Application of International Investment Agreements by Domestic Courts*, Geneva, p.3.

[13]Kabir, M.A., (2015), "Anti-Corruption Conventions in Nigeria: Legal and Administrative Challenges", *International Journal of Social, Behavioral, Educational, Economic, Business and Industrial Engineering*, Vol:9, No:4, p.1159.

on the other hand, views international and domestic law as two independent legal orders.[14] The dualists thus argued that, since neither legal order can operate in the sphere of the other, international law can neither bind individuals nor confer rights on them directly.[15] Thus, in dualist countries, a treaty takes effect internationally after being signed by the head of state. But in order for it to be binding over domestic affairs, it must be transformed into a domestic law.[15]

Nigeria is a dualist nation as can be gathered from the provisions of Section 12 (1) of the Constitution.[16] This section provides that, no treaty between the Federation and any country on matters under Exclusive Legislative List shall have the force of law unless it has been enacted into law by the National Assembly. Where however, the matter falls under Concurrent or Residuary Legislative List, Section 12 (3)[17], requires the approval of the majority of the State Houses of Assembly before it can be presented to the President for assent. Subsection 3 appear to provide check and balances on the power of the National Assembly to domesticate a treaty in Nigeria, as it requires the approval of such bill by a majority of all the House of Assembly in the Federation. The problem with section 12 (3) of the constitution however is that, it did not state whether or not, a law domesticating a treaty would be of any effect and to what extent, if it is passed without ratification by States' Houses of Assembly. However, by virtue of our experience with Child's Right Act, it seems, the treaty would only apply in the FCT.[18]

Generally, taking the provision of section 12 of the constitution into consideration, one thing is clear, namely, ratification of Anti-Corruption Conventions by Nigerian Government does

[14]Chukwuemeka .A. O., (2015), "Has the Controversy between the Superiority of International Law and Municipal Law been Resolved in Theory and Practice?" *Journal of Law, Policy and Globalization*, Vol.35, p.2.
[15]Higgins, R., "Problems and Process: International Law and How We Use It" in: Nwapi, C., (2011), *International Treaties in Nigerian and Canadian Courts*, Oxford University Press, p.44.
[15]Okeke, C.N., (2015), "The use of International Law in the Domestic Courts of Ghana and Nigeria", *Arizona Journal of International & Comparative Law*, Vol. 32, No. 2, p.398.
[16]Constitution Federal Republic of Nigeria, Cap C23, LFN, 2004 (as amended)
[17]Ibid.
[18]Omoregie, E. B., (2013), "Subsidiarity Principle and Judicial Enforcement of Federalism in Nigeria", *Nigerian Institute of Advanced Legislative Studies Journal of Constitutional Law*, 1, p.13.

not automatically translate into the power to implement them in the country. Implementation of such treaties would only be possible after they have been domesticated as part of Nigerian law in line with the requirement of the above relevant constitutional provisions. The Supreme Court affirmed this position in *Registered Trustees of National Association of Community Health Practitioners of Nigeria & Ors vs. Medical and Health Workers Union of Nigeria*[19] where it held that "an international treaty entered into by the Government of Nigeria does not become binding until enacted into law by the National Assembly, and it must not be bits and pieces found here and there in other laws of the land".

However, here lies the problem. The substantive provisions of Anti-Corruption Conventions under consideration are in form of recommendations to Member States to establish measures for their implementation. Thus, being in form of recommendation, domesticating these Conventions by re-enacting their entire text into Nigerian law as provided by the above relevant judicial and constitutional provisions will create practical implementation problems. In fact, it appears the above constitutional provision and judicial authority has been provided without the idea of treaties like the Anti-Corruption Conventions in mind. Thus, continued reliance on them as legal basis for domestication of Anti-Corruption Treaties in Nigeria, would only be an exercise in futility as they cannot be of any meaningful help. Interestingly, the wordings of the Conventions seem to exclude direct domestication. Instead, the treaties themselves provide number of measures aimed at ensuring that their provisions are effectively implemented at the domestic level.[20] It is imperative at this juncture therefore, to examine the measures established in Nigeria for the implementation of these Conventions.

5.3 Measures for Implementation of Anti-Corruption Convention in Nigeria

[19](2008) 2 NWLR (Pt. 1072) 575, 623, *Abacha vs. Fawehinmi*, (2001)51WRN29, and *Medical and Health Workers Union of Nigeria (MHWUN) vs. Minister of Health & Productivity & Ors*, (2005) 17 NWLR pt. 953 p. 120.
[20] Art. 62 of the UNCAC, 2003 and Art. 34 of the UNTOC, op.cit.

Article 65 of the UNCAC,[21] Article 34 of the UNTOC[22] and Article 5 of the AU Anti-Corruption Convention[23] oblige Parties to take the necessary legislative and non-legislative measures to ensure the implementation of its obligations under the Conventions. However, before proceeding to examine these measures, it is important to note that, these Conventions have made broader provisions to combat corruption through Preventive, Criminalization, Enforcement and Assets Recovery Measures. However, our focus here would only be restricted to legislative and non-legislative measures for recovery of proceeds of corruption in Nigeria.

5.3.1 Legislative Measures for Assets Recovery

The major legislative measures for assets recovery envisage under Article 31 of UNCAC[24], Article 16 of AU Convention[25], Article 12 of UNTOC[26] and Article 13 of ECOWAS Protocol[27] provide that, each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any proceeds of crime for the purpose of eventual confiscation. Nigeria over the years, has devised several measures to ensure domestic implementation of these obligations. Some of these measures include ones that were already in existence prior to adoption of the Conventions. What this segment of the thesis will be concern with therefore, is to examine whether Nigerian laws on assets recovery, especially those enacted in response to the demands of these Conventions, are comprehensively enough in line with the requirements of the Conventions.

5.3.1.1 Measures for Tracing and investigation of assets

[21] UNCAC, op.cit.
[22] UNTOC, op.cit.
[23] AU Anti-Corruption Convention, op.cit.
[24] UNCAC, op.cit
[25] AU, Anti-Corruption Convention, op.cit.
[26] UNTOC, op.cit.
[27] ECOWAS Protocol, op.cit.

In Nigeria, Sections 85 and 143 of the Constitution[28] for instance, created the necessity to provide checks among the institutions of government which provides a legal basis to question those who expend public resources as well as raise revenue. Section 88 of the Constitution[29] the vested on the National Assembly power to direct or cause to be directed an investigation into the conduct of affairs of person, authority, Ministry or government department charged with the responsibility for disbursing or administering moneys appropriated or to be appropriated by the National Assembly. Thus, with these powers, the National Assembly is supposed to expose corruption, embezzlement or waste in the execution, disbursement and administration of funds appropriated by it. Furthermore, under Section 6 (1) (d) of the Economic and Financial Crimes (Establishment) Act (EFCC Act)[30]and Section 37 (1) of the Corrupt Practices and Other Related Offences Act (ICPC Act),[31] have confer on the EFCC and ICPC respectively the power to investigate and trace proceeds of crime. In fact, section 7 (10) of the EFCC Act[32] extend this powers to include investigating the properties of any person if it appears that the person's life style is not justified by his source of income.

Furthermore, in case of asset located within or outside the country, Section 6 (1) (g) of the EFCC Act[33] empowered the EFCC to collaborate with government bodies within and outside Nigeria through exchange of information and the conduct of joint operations geared towards investigation of all reported cases of financial crimes with a view to identifying proceeds derived from the commission of such crimes. This provision is important and necessary given the

[28] Federal Republic of Nigeria, Cap. C23, LFN, 2004 (as Amended).
[29] Ibid.
[30] Cap. E1, LFN, 2004.
[31] Cap. C31, LFN, 2004.
[32] Cap. E1, op.cit.
[33] Ibid.

complex nature of tracing the proceeds of crime as they cross international boundaries.[34] In addition, Article 2 (g) and 19 (2) (a) of the Treaty on Mutual Legal Assistance in Criminal Matters Between the Government of the Federal Republic of Nigeria and the Government of the Republic of South Africa (Ratification and Enforcement)[35] and Section 20 (1) of the Mutual Assistance in Criminal Matters within the Commonwealth (Enactment and Enforcement) Act[36] oblige the Parties to provide mutual assistance, in accordance with the provisions of this Treaty, in connection with tracing, and identifying criminally obtained assets.

MLA is usually based on the principle of dual criminality. To this end, Section 6 (a) of the Mutual Assistance in Criminal Matters within the Commonwealth (Enactment and Enforcement) Act[37] gives the Central Authority for Nigeria the discretion to refuse to comply with a request for assistance if the criminal matter in respect of which assistance is sought does not constitute an offence under Nigerian law. Though, it could be argued that this provision seeks to protect Nigeria's sovereignty or right of self-determination, nonetheless, the requirement has the potency to slow down or deny legal assistance between States who do not share the principle of dual criminality. Another important provision though with similar implication with the above is Section 1 (d) of the Guidelines for Requests for Mutual Legal Assistance in Criminal Matters for authorities outside of the Federal Republic of Nigeria.[39] This section provides that MLA can only be observed on the basis of reciprocity. Consequently, it implies

[34]Ladan, M.T., (2013), Tracing, Freezing, Confiscation, Recovery and Forfeiture of Illegal Proceeds of Money Laundering in Nigeria, Being a Paper Presented at A 3-day Financial Investigative and Prosecutorial Anti-money Laundering Training Workshop Organized by the US Department of State, Bureau of International Narcotics and law Enforcement and the US Department of Justice, Office of Overseas Prosecutorial Development, Assistance and Training, held at EFCC Training Academy, Abuja, Nigeria, on 9-13 December, 2013, p.15.

[35]Treaty on Mutual Legal Assistance in Criminal Matters Between the Government of the Federal Republic of Nigeria and the Government of the Republic of South Africa (Ratification and Enforcement), 2005.

[36] Cap. M24, LFN, 2004.

[37] Ibid.

[39]Guidelines for Requests for Mutual Legal Assistance in Criminal Matters for authorities outside of the Federal Republic of Nigeria, 2013.

that Nigeria's proceeds of crime hidden in countries outside the jurisdiction of its MLA partners would be difficult to trace and recover through MLA.

A number of successes have been recorded in the implementation of this measure in Nigeria. The EFCC for instance, in 2015 investigated and traced N15 billion belonging to Taraba State into the accounts of five companies allegedly owned by Abdul-Aziz the son of former Governor of the state Murtala Nyako. Investigation further revealed that between 2007 and 2011, Nyako had allegedly directed that all of the state-owned accounts domiciled in various banks be transferred to the new generation bank.[40] Furthermore, the EFCC has traced and investigated loots in connection to Colonel Sambo Dasuki alleged laundering of $2.1 billion arms funds as well as $115 million Diezani Allison Madweke Money Laundering/Election Fraud. On Sambo Dasuki alleged arms deal, the Commission has through negotiated settlement recovered N350 million, N75, million and N100, million (making a total of N525 million) from three persons respectively. Similarly, on Diezani's Money Laundering/Election Fraud, the Commission recovered N5, billion, 5million dollars, N49million from Executives of three Commercial Banks involved, while N2 million and N5 million was recovered from two other persons respectively.[41]

The above achievement by the anti-corruption agencies is no doubt commendable. However, the inability of the agencies to make any direct recoveries from Dasuki and Diezani (especially considering that some of the persons who directly or indirectly benefited from them have voluntarily returned their loot), further question the investigative capacity of these agencies in high profile corruption cases. Furthermore, in Nigeria, sometimes investigation and tracing of assets is hardly effective because of the tendency by the corrupt persons in authority to interfere or frustrate the process. For instance, in 2016, the Attorney General of the Federation (AGF)

[40]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
[41]Buhari Anti-Corruption War: One Year After, A Data Pro Special Report, 2016.

requested the EFCC to investigate a complaint alleging the criminal diversion of N11 billion from the account of River State Government. However, the Attorney General of River State challenged the competence of the AGF to direct the EFCC to investigate the alleged missing funds. The AGF was asked to leave the suspected looters alone as the money alleged to have been criminally diverted is owned by River State Government. With respect, the position of the Attorney General of River State does not represent the correct position of the law with respect to accountability in Nigeria.[42] In *Dariye vs. FRN*,[43] wherein the Supreme Court held that "the owner of subject matter of a charge is immaterial, what is material is that a Federal enactment has been violated". Thus, in view of the fact the AGF has advised the EFCC to investigate the alleged violation of Federal Law with respect to stolen funds belonging to River State, it is hoped that the Attorney General of River State will advise the parties to cooperate with the EFCC considering that in view of the above decision, the ownership of the alleged N11 billion is immaterial.

5.3.1.2 Freezing or Seizure of Assets

In Nigeria, measures to restrain assets for eventual confiscation can be found in Section 26 (1) (a) of the EFCC, Act[44] and Section 37 ICPC Act.[45] These sections empower anti-corruption agencies to seize proceeds of crime either in the course of an arrest, search or pursuant to an order of court following an application made by the Commission. Though, the above unilateral seizure is permitted, Section 27(4), 28 and 29 of the EFCC Act[46] provides that such a seizure must be followed by an application to court for an interim order of forfeiture. Furthermore,

[42]Ibid.
[43](2015), 10, N.W.L.R (Pt 1467), 352.
[44]Cap. E1, LFN, op.cit.
[45]Cap.C31, LFN, op.cit.
[46]Cap.E1, LFN, op.cit.

Section 34 (1) (2) of the EFCC Act[47] and section 45 (1) of the ICPC Act[48] empower any officer of these agencies, if satisfied that the money in the account of a person is made through the commission of an offence, to apply to the Court ex-parte to issue an order to freeze the account. In the implementation of this measure between May 2015 and May 2016 a number of assets were seized in Nigeria as shown the table below:

Agency	Item	Naira	US Dollar	GB Pounds	Euro
EFCC	Recoveries under Interim Forfeiture	Naira	US Dollar	GB Pounds	Euro
	Cash in the bank under interim forfeiture	N8,281,577,243.92	1,819,866,364.73	3,800.00	113,399.17
	Amount frozen in bank	N48,159,179,518.90	7,131,369,498.48	605,647.55	
	Value of properties under interim forfeiture	N41,534,605,998.00	77,844,600.00	1,875,000.	190.000.
	Value of cars under interim forfeiture	N52,500,000.00			
	Cash in bank under final forfeiture	N103,225,209.41	17,165,547.00		
ONSA	Value of assets recovered	512,000,000,00			
	Funds under interim forfeiture	N27,001,464,125,20	43,771,433.73		
	Assets under interim forfeiture	N260,000,000,00			
DSS	Recoveries frozen in banks	N260,000,000,00			
Total		N126,563,481,095.43	9,090,243,920.15	2,484,447.55	303,399.17
Grant Total		**N204,888,835,727.25**	**9,275,363,504.76**	**5,992,803.01**	**314,649.17**
Items	Non Cash Recoveries	ICPC	EFCC	ONSA	
	Farmland	22			
	Plot of land	4			
	Uncompleted building	1			
	Vehicles	22	3		

[47]Ibid.
[48]Cap.C31, LFN, op.cit

	Maritime Vessels	5			
	Completed building	33	145	4	
Total		**87**	**148**	**4**	

Source: Ministry of Finance, 2016.

The mandate to freeze assets comes with an implied obligation. It definitely requires measures to be put in place to facilitate preservation of their maximum value that may depreciate while frozen or seized. Accordingly, Article 31 (3) of the UNCAC[49] mandate each State Party to establish legislative and other measures that may be enable regulation and the administration frozen or seized property. Section 38 (3) (4) of the ICPC Act[50] gives the Officer of the Commission who seized movable property, the discretion to temporarily return the property to the owner or to the person from whose possession it was seized, subject to sufficient security being furnished to ensure that the property shall be provided on demand. Where the person fails to surrender such property on demand or to comply with any condition imposed, the security furnished in respect of such property shall be forfeited; and that person shall be guilty of an offence and shall on conviction be liable to a fine of not less than two times the amount of the security furnished by him, and to imprisonment for a term not exceeding two years.[51] In the case of EFCC, the Assets Forfeiture Unit of the Commission performs that function and also takes inventory of seized or forfeited assets and enforces outstanding forfeiture orders. Though, one questions the rational for requiring anti-corruption agencies who should concentrate on investigation and recovery of assets, to manage such assets.[52]

[49] UNCAC, op.cit.
[50] Cap. C31, LFN, op.cit.
[51] Ibid.
[52] Ladan, M.T., (2016), *Money Laundering, Terrorism, Corruption, Human Trafficking in Nigeria*, LAP LAMBERT Academic Publishing p.68.

Where property seized is liable to speedy decay, Section 38 (7) of the ICPC Act[53] and Section 336 of the Administration of Criminal Justice Act (ACJA)[54] allow the agency concerned to sell it at the prevailing market value and to hold the proceeds, after deducting the costs and expenses of the maintenance and of the sale of the property. Thereafter, the court may order the proceeds be dealt with as it may direct until some person establishes a right to it. Where no person establishes a right to it within six months from the date seizure, the proceeds would be paid into the Consolidated Revenue Fund of the Federation or State.[55] It is however not clear what this money would be used for and none of these sections have given a hint in that regard or identified a specific project to be executed with such money.

Furthermore, implementation of Article 31 (9) of the UNCAC[56] and Article 8 of the UNTOC[57] in Nigeria remains a little controversial. The Articles require setting legal mechanism that will ensure the rights of bona fide third parties or defendants are not prejudice during freezing. Section 43 and 36 (11) of the Constitution[58] indeed recognized that defendant's or third parties' has right to property and presumption of innocence. The courts have however in line with European counterpart, insisted that freezing or seizure assets do not violate these rights. In *Federal Republic of Nigeria vs. Esai Dangabar & 5 others,*[59] the court held that an order of interim attachment and forfeiture of the assets pending hearing and final determination of the case is not inconsistent with his right to property as guaranteed under section 43 and 44 of the 1999 Constitution as sections 44(2) (K) of the Constitution allows temporary taking of possession of property for the purpose of any examination, investigation or inquiry or forfeiture

[53] Cap. C31, LFN, op.cit.
[54] No.1, 2015.
[55] Ibid.
[56] UNCAC, op.cit.
[57] UNTOC, op.cit.
[58] Federal Republic of Nigeria, Cap. C23, op.cit.
[59] FCT/CR /64/2012.

of any property acquired in breach of any law. The court further held that such interim order pending the determination of the case does not also amount to the violation of the accused person's right to innocence under section 36 (11) of the 1999 Constitution.

However, it is important to note that seizure of assets for the purpose of restraining defendant from dealing in the assets is not covered by section 44(2) (k) of the Constitution relied upon by the court. The seizure envisaged under this provision is for the purpose of investigation but not to preserve assets in anticipation of forfeiture. Seizure or freezing is not within the realm of investigation, it is a preliminary judicial action.[60] Furthermore, justifying unilateral seizure during arrest or search for the purpose of forfeiture of any property acquired in breach of any law raises the question thus: what parameter will be used to determine that the asset was acquired in breach of a law when the matter has not yet been brought before the court. Section 36 (11) of the Constitution[61] provides that every person who is charged with a criminal offence is entitled to be presumed innocent until the contrary is proved. The implication of the above provisions considered together with the power of anti-graft to carry out unilateral seizure, it appears that the presumption of innocence is manifestly violated if the EFCC can seize property of a suspect who has not even been arraigned before the court. It raises the presumption that the suspect is guilty even before bringing him to court.

In terms of protection of defendant or third party' right during freezing or seizure, the closest effort in this regard is Section 5 and 57 of the Proceeds of Crime Bill (POCB).[62] the Bill requires the agency to give notice within fourteen working days after the making of the preservation and restraint order to persons having an interest in the property, and the notice must be published it in two widely circulated national newspapers. Once served, the notice remains in

[60]Ladan, M.T., (2013), op.cit.p.2.
[61]Constitution of Federal Republic of Nigeria, Cap. C23, LFN, op.cit.
[62]Proceeds of Crime Bill (POCB), 2017.

force until the end of the period specified in the order or time the Court directs. Accordingly, upon receiving such notice, the sections allow any person who has an interest in the property to, within fourteen working days, give notice of his intention to oppose the making of a forfeiture order or apply for an order excluding his interest in the property concerned.

Furthermore, once assets are seized, the defendant is stripped of the right to control or use the assets pending the conclusion of the trial. At the end of the trial, the assets may be forfeited permanently to the state or returned to the defendant. However, in Nigeria if the assets are eventually returned to the defendant, there is no further measure to provide compensation to him for loss suffered as a result of the seizure. Section 33 (3) of the EFCC Act[63] only provides that, where an interim order is revoked by a Court, all assets and properties of the person concerned shall be released to him by the Commission. Unfortunately, the period from the date of granting the restraint order to the granting of a confiscation order may be a very lengthy which may take months or years. Thus, while it is important to freeze or seize assets in order to prevent it from being dissipated however, this public interest must be balanced against the right of the defendant or third party as this would inevitably have a profound effect on the defendant or third party's financial position.

Though, in case of administrative seizure, Section 32 and 36 (4) and (5) of the POCB[64] require cash seized and held for more than seventy two hours, to be placed in an interest-bearing account and the interest accruing shall be added to the cash on its forfeiture or release. Where the agency defaulted, the court may order for compensation to be paid to the applicant based on what would have accrued in interest during the period the money was not placed in the account. Furthermore, where no forfeiture order was made and the court is satisfied that an applicant has

[63] Cap. E1, LFN, op.cit.
[64] POCB, op.cit.

suffered loss due to the detention of his cash, it may order additional compensation to be paid to him from Confiscated and Forfeited Properties Account. In addition, Section 11 and 55 of the Bill[65] requires the court granting a preservation or restraint order, to make provision for reasonable legal and living expenses in respect of the person (and his close defendants) holding an interest in the property. This is however subject to a court appointed assessor certifying that legal expenses have been incurred, or the court is satisfied that the person cannot meet the expenses from his remaining properties. Though, it is not clear which parameter the court will use to determine what is reasonable living expenses. Moreover, an interested party whose asset is under restraint order stands in a better position to know who can manage the asset in a manner that his interest would be protected. Thus, Section 12 (3) (4) of the Bill[66] gives anybody whose asset is under preservation order, the right to appoint a manger to manage the assets if believes that his interest in the property would be affected by the manager appointed by the court.

These measures are commendable. They can at least safeguard the property right or financial interests of a defendant or bona fide third party particularly where the cash seized is a proceeds of or capital for a legitimate business. In fact, Section 36 (4) and (5) of the Bill is of particular important because, if the agency seize assets for the purpose of investigation, but are ultimately unsuccessful in satisfying the court that these are criminal proceeds, of course, compensation be payable especially where the owner suffered financial loss. This position reflects what obtains in UK. Section 283 of the Proceeds of Crime Act[67] provides that, where property has been subject to an interim receiving order, and the court does not make a recovery order, the person whose property it is, may apply to the court for compensation and if the court is satisfied that the party has suffered loss as a result of the interim forfeiture order, will require the

[65] Ibid.
[66] Ibid.
[67] 2002. Similar provision can be found in Section 16 of the Irish Proceeds of Crime Act, 1996.

agency to pay compensation. However, the compensatory scheme under Section 36 (4) and (5) of the Bill is too restrictive. It only applies to administrative seizure of cash being imported or exported from the country. The implication of this is that, as far as this section is concern, anything seized other than cash imported or exported from the country no compensation would be paid to a bona fide third party, no matter the financial loss he suffered.

Nigeria also not complied with Article 30 (2) of the UNCAC[68] and Article 7 of AU Anti-Corruption Convention[69] as there is no measure that permits public officials who are accorded immunity to be investigated and prosecuted for financial crimes. Section 308 of the Constitution[70] grants immunity against prosecution to the President, Vice President, Governor and Deputy Governor. Thus, freezing being a preliminary judicial action in personam, freezing the assets of this class of persons would be difficult during their tenure of office. This further explains why the freezing of the N1.2b belonging to Ekiti State Governor Mr. Ayodele Fayose, which was traced from the office of the National Security Adviser to a Zenith Bank Account,[71] was not successful. Unfortunately, there is no guarantee that the assets would not be dissipated before the expiration of his tenure thereby frustrating any recovery effort. Though, the Senate has commenced the process of amending this constitutional provision. In the proposed amendment, the new Section 308 (2) allows an action to be instituted against these political office holders on any matter connected to financial crimes and action not germane to their work.[72] This proposed amendment is almost similar to the practice in the USA. For instance, Mr. Spiro Agnew a sitting Vice President, under President Nixon was tried and convicted of tax evasion. Bill Clinton, a sitting President was also brought before a Grand Jury by an independent

[68]UNCAC, op.cit.
[69]AU Anti-Corruption Convention, op.cit.
[70] Constitution Federal Republic of Nigeria, Cap. C23, op.cit.
[71]*FRN vs. Zenith Bank Plc,* FHC/CS/871/2016.
[72]*available@http://senate-remove-immunity-president-governors-deputie, dailypost.ng/2016/12/29,* accessed on 24th January, 2017. 3:22. P.M.

Counsel Kenneth Starr for perjury, and finally, Elliot Spitzer as a sitting Governor of New York was tried and convicted for illicit solicitation for sex.[73] Thus, this effort by the Senate commendable, it will be of immense benefit in assets recovery effort in the country. It is hoped that, the Bill will be given a speedy passage into law.

For assets located outside the country, Section 46 (1) of the ICPC Act[74] empower the Chairmen of the Commissions to apply to the Court for an order prohibiting any person by whom proceeds of corruption is held outside Nigeria from dealing with it. The effect of such prohibitive order will be to freeze the said assets so as to prevent any person from dealing with it. For instance, in May 2012, pursuant to a Mutual Assistance request from the United Kingdom, United States has freeze Ibori's assets in the US.[75] Similarly, in 2005, both United Kingdom and the Government of South Africa had through NCB forfeiture proceeding following a request by Nigeria seize Alamieyeseigha's assets in their jurisdiction.[76] In 2015, as a further demonstration of Nigeria' persistent drive in recovery and repatriation of stolen assets back to the country, the EFCC Chairman Ibrahim Lamorde had announced the Commission had secured a UK restraining order on accounts of Nigerians involved in the fuel subsidy scam. UK Government is formalizing ways to get the funds forfeited and repatriated to Nigeria.[77] Though, the funds are yet to be repatriated back to the country. One major challenge in the freezing of assets abroad as noted earlier is that, there must be a bilateral treaty between the countries otherwise the restrained order of the requesting state cannot be registered and enforced in the requested state.

[73] Ibid.
[74] Cap. C31, LFN, op.cit.
[75]Wall Street Journal, 24 July 2012, US Restrains $ 3 Million of Nigerian Ibori's Asset, available@ *www.blogs./wsj.com/corruption currents/2012/07/24/us-restrains-3-million-of-nigerian-iborisus- assets/*, accessed on 24th June, 2016. 3:16. P.M.
[76] Edward, A.P., et'al, (2008), *Recovering Stolen Assets: A case Study*, IBA Conference Paris, 24th-25th, April, 2008, p.10.
[77]Osawanoye, B., "International Perspective of Recovered Assets", 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, p.259.

It follows therefore that, it would be difficult for Nigeria to effectively freeze or seize proceeds of crime hidden in countries outside the countries it does not share MLA with.

5.3.1.3 Measures for Criminal forfeiture or confiscation

There are a number of laws that made provisions for confiscation of proceeds of crime in Nigeria. For instance, Section 20 of the EFCC Act[78] requires that, a person convicted of an offence under this Act shall in addition to any sentence, forfeit to the Federal Government all the assets and properties which are the subject of an interim order of the Court after an attachment by the Commission as specified in section 26 of the Act or any asset derived from commission of crime offence or instrumentality of crime. Section 21 of the Act[79] further provides that, "for the avoidance of doubt…all the properties of a person convicted of an offence under this Act and shown to be derived or acquired from such economic or financial crime and already the subject of an interim order shall be forfeited to the Federal Government". Forfeiture as provided under Section 20 and 21 of the Act[80] does not arise automatically after conviction. It is subject to an application to that effect. Section 30 of the Act[81] makes it clear that, where a person is convicted of an offence, the Commission shall apply to the Court for the order of forfeiture of the convicted person's assets acquired as a result of the crime.

Furthermore, Section 333 of the ACJA[82] allow the court to make an order for the forfeiture of any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence, even if the offence is not proved against the accused provided the court is satisfied that the accused is not the true and lawful owner of such property and that no other person is entitled to the property in good faith. Forfeiture under this section does

[78] Cap. E1, LFN, op.cit.
[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] ACJA, No.1, 2015.

not necessarily depend on the conviction of the accused person. The only thing needed to show is that, the property is instrumentality of crime and nobody including the accused is entitled to the property in good faith. This section would take care of instances where corrupt persons would use certain properties to commit money laundering or corruption related offence, such that even when charged to court, there is no way they can be linked to the crime. Thus, in cases, the instrumentality of the crime can be confiscated.

In addition, Section 19 (1) of the Criminal Code[83] requires that, when a person is convicted of an offence of corruption and abuse of office[84], extortion by public officers[85], bargaining for offices in public service[86], compounding felonies[87] and secret commissions and corrupt practices such as corrupt acceptance of gift[88], the court may, in addition to or in lieu of any penalty which may be imposed, order the forfeiture to the State of any property used in the commission of the offence or, if such property cannot be forfeited or cannot be found, the court may order the forfeiture of the value of such property. Similarly, Section 68 of the Penal Code Act[89] makes provision for forfeiture of assets as one of the punishments to which offenders are liable under the provisions of the Act.

The above provisions of the relevant laws show that, in Nigeria, confiscation entails an enquiry by the court into any benefit that the defendant derived from the offences in respect of

[83] Cap. C30, LFN, 2004.
[84] I.e., public official inviting bribes, etc., on account of own actions. S. 98 (1), Ibid.
[85] I.e., where a person employed in the public service, takes, or accepts from any person, for the performance of his duty as such officer, any reward beyond his proper pay. S.99 (1), Ibid.
[86] I.e., to corruptly receive, or obtain any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him or any other person, with regard to the appointment or contemplated appointment of any person to any office or employment in the public service, or with regard to any application by any person for employment in the public service. S. 112 (1), Ibid.
[87] I.e., to obtain or receive any property or benefit of any kind upon any agreement that the person receiving such benefit will compound or conceal a felony, or will abstain from, discontinue, or delay a prosecution for a felony, or will withhold any evidence thereof. S. 127 (1), Ibid.
[88] I.e., as an agent, to corruptly accepts or obtain from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or for forbearing to do or for having after the commencement of this code done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or do favour to any person in relation to his principal's affairs or business. S. 494 (1), Ibid.
[89] Cap. P3.LFN, 2004.

which he has been convicted. The enquiry manifests in a confiscation order or the defendant may be required to pay a specific sum of money to the state or both. Thus, even when Section 21 of the EFCC Act and Section 19 of the Criminal Code use the expression "Forfeiture of Property", and "Forfeiture of bribes" respectively, in reality, part of the sections also aim at confiscating nothing. Instead, they place obligation on a convicted defendant to pay a sum of money to the state regardless of the amount of corrupt assets or benefit obtained. And only the court determines the appropriate amount it may order the defendant to pay the state. Given such framework however, there is possibility that a corrupt judge may exercise his discretion irrationally. In *Federal Republic of Nigeria vs. Michael Igbinedion & Ors*[90], the accused persons were convicted of a money laundering charges amounting to N25 billion. The first accused person was sentenced to two years imprisonment with an option of N3 million fine while the second accused was sentenced to 20 years imprisonment in addition to compulsory fine of 250, 000. The court also ordered that PMI Security Nigeria Limited, a company used as instrumentality for the crime, be wound up and its assets forfeited to the Federal Government. Further example of the implementation of this measure in Nigeria can be seen in the table below:

Cases		Arrest	Amount	Dates of arrest/ Appearance in court	Conviction	Assets Recovered
1	NIMASA Scam	Raymond Omatseye	N1.5b	May, 2016	Convicted 5 years	None
2	Police Equipment Fraud	George Uboh	N50b	May, 2016	Convicted 3yrs or fine of N4m	None
3	Other Cases					
	Fraud	Gabriel Daudu	N1.4b		Convicted 154yrs	None
	Money Laundering	John Elias Babani	N51.1m		Convicted 10yrs	None

[90]Unreported Suit No. FHC/11C/2016.

	Fraud	Mrs. Idowu Oluronke	$8.4m		Convicted 10yrs	None
	Money Laundering	Oladimeji M. Edun	N82.5m		Convicted 6 months	None
	Money Laundering	Bitrus Malam	N8.6m		Convicted 1yr	None

Source: **EFCC Record of Convictions, 2016**.

In Nigeria, Section 95 and 66 of the POCB[91] has also proposed confiscation outside a criminal proceeding, i.e. in a separate proceeding after conviction and confiscation order in the course of proceedings. What is common to both however is, the applicant bears the onus of proving the matters necessary to establish the grounds for making the order applied for. And Section 39 (3) of the Bill[92] requires that, this shall be based on a balance of probabilities.[93] This position reflects what obtains in the USA. The reason is that, forfeiture is part of the criminal sentence and not the substantive offense.[94] However, since this lower standard of prove only applies to confiscation proceedings, it means that, the requirement of proving the substantive matter beyond reasonable doubt, still remains the same challenge it has always been.

Another measure which for now, only exist under the proposed POCB relate to confiscation of proceeds of corruption belonging to defendant who dies or absconds during trial. Section 68 of the Bill[95] permits the court to make forfeiture order where a person charged with an offence died during trial. In such case, the Executor or the Administrator of the estate of the deceased shall appear before the Court and make representations for purposes of the enquiry into any benefit the deceased derived from that offence for eventual confiscation. In such circumstance, by virtue of Section 39 (1) and (2) of the Bill[96], the criminal proceeding automatically becomes civil proceedings for the purpose of forfeiture order, with the

[91]POCB, op.cit.
[92]Ibid.
[93]Ibid.
[94]*United States vs. Cherry, 330 F.3d 658, 670 (4th Cir. 2003).*
[95]POCB, op.cit.
[96]Ibid.

consequence also that, the matter will be decided on a balance of probabilities. In the case where the defendant absconded, Section 90 (1) of the Bill[98], empower the court to enquire into any benefit the person may have derived from that offence for the purpose of making a confiscation order. This is however subject to the condition that the defendant must have been absence for a period of six months and on the application of the Agency, the court has are reasonable grounds to believe that a confiscation order would have been made against him if not for his absence. This is what is called under Article 320 of the Swiss Code of Criminal Procedure[99] as, ruling of abandonment of proceedings.

In addition, where a joint owner of the forfeited property died before the order is made, but after the Agency applied for the order; or while a restraint order covering the property was in force, Section 75 (1) of the Bill[100] provides that, the property is deemed to have been vested in the Agency immediately before the person's death, and in case of restraint order, the order is also deemed to have continued to apply to the property as if the person had not died.[101] On the general note, this Section is commendable. With this measure, it is indeed certain that Nigeria legal regime for criminal forfeiture has taken a positive approach toward ensuring that, even after death or flight, proceeds of corruption must be confiscated and returned to their rightful owners.

Furthermore, the Bill complied with the obligation to protect the right of bona fide third party during confiscation as require by Article 31 (9) of the UNCAC[102]and Article 8 of the UNTOC.[103] Section 71 (1) (2) of the Bill[104] obliges the agency to give notice of the application for a forfeiture order to the person convicted or any person who has an interest in property unless

[98]Ibid.
[99]2007.
[100]POCB, op.cit.
[101]S. 75 (2), Ibid.
[102]UNCAC, op.cit.
[103]UNTOC, op.cit.
[104]POCB, op.cit.

the person has absconded. Any such persons with interest in the assets are required by Section 73 of the Bill[105] to appear and adduce evidence at the hearing of the application. The Court may nevertheless make a forfeiture order where a person entitled to be given notice of the relevant application received notice, but fails to appear at the hearing of the application.[106] However, in making a forfeiture order, Section 69 (2) of the Bill[107] empowers the Court to make ancillary orders directing the Agency to pay a person an amount as the value of the person's interest in the property, particularly taking into consideration the nature, extent and value of the person's interest in the property concerned.

The problem however is, the Bill did not explain the effect of failure to give notice to a bona fide third party who has interest in the assets. Perhaps, an important option available in such situation is for him to appeal the confiscation order under Section 154 (1) of the Bill.[108] Though, this section did not mention failure to be served notice as a ground for appeals, it has however given third parties who have interest in the property right to appeal a confiscation order. So, presumably, a bona fide third may still rely on failure to be served notice as a ground to appeal. Furthermore, it is quite possible that the amount to be paid by the agency as the value of the person's interest in the property pursuant to an ancillary order by the court may not be enough. In such circumstance, Section 69 (2) of the Bill did not state whether the affected person has the right to challenge such decision.

Another important provision under the POCB is the one which seeks to confiscate to tainted gifts. Section 87 of the Bill[109] allows for confiscation of tainted gifts made to or by a defendant, especially where the gift was made in connection with an offence committed. A

[105]Ibid.
[106]S.73 (3), Ibid.
[107]Ibid.
[108]Which states that, A person against whom a confiscation order is made; or who has an interest in a property against which a forfeiture order is made, may appeal against the confiscation or forfeiture order in the manner set out in this section
[109] Ibid.

noticeable advantage of this provision is, it would make it easier to check situations where proceeds of corruption could be laundered through gifts to associates or family members or as donations to faith based organization. It will also impose an implied obligation on the recipients of such gifts to ask critical questions particularly relating to the source of the gifts. Perhaps if this measure was in place, it would have helped tremendously in the proceedings relating of the $9.8m and 74 pounds seized from Andrew Yakubu, a Former Group Managing Director of NNPC, which he alleged that it was given to him as gift by friends.[110]

Generally, a critical look at the confiscation regime considered above particularly under the POCB, it will reveal that confiscations order is value-based. In other words, it is made in respect of the value of criminal benefit, not the property itself. Thus, in effect, confiscation under the Bill is akin to a debt. Section 92 (1) of the POCB[111] categorically provides that, any amount payable by a person to the Agency under a confiscation order a civil debt due by the person to the Agency on behalf of the Federal Government. Thus, in case of default, the Court may order the defaulter to be committed to prison in addition to any other fine.[112] The challenge here is not imposing fine, but recovering it together with judgment debt. Even in developed world like UK, record shows that, this has been very challenging. UK has adopted separate confiscation proceeding as at 2002 with the enactment of Proceeds of Crime Act, yet as at 2017, it is facing a similar problem. For instance, as at September 2016, there was £1.61 billion total debt

[110] *available@http://www.cambellsblog.com./2017/02/court-orders-forfeitue-of-yakubus-98.html*, accessed on 20th February, 2017. 2:13.P.M.

[111] POCB, op.cit.

[112] S.92(5), Ibid. such sentence may include fine as follows: Default for 7 days (An amount not exceeding N50,000), 14 days (An amount exceeding N50,000 but not exceeding N150,000), 28 days (An amount exceeding N150,000 but not exceeding N250,000), 45 days (An amount exceeding N250,000 but not exceeding N700,000), 3 months (An amount exceeding N700,000 but not exceeding N1,400,000), 6 months (An amount exceeding N1,400,000 but not exceeding N2,800,000), 12 months (An amount exceeding N2,800,000 but not exceeding N5,600,000),18 months (An amount exceeding N5,600,000 but not exceeding N14,000,000), 2 years (An amount exceeding N14,000,000 but not exceeding N28,000,000), 3 years (An amount exceeding N28,000,000 but not exceeding N70,000,000), 5 years (An amount exceeding N70,000,000 but not exceeding N150,000,000) and 10 years (An amount exceeding N150,000,000). Schedule II to the Bill, op.cit.

outstanding from confiscation orders from £1.46 billion in September 2013.[113] The major issue identified as being responsible for this problem, is lack of interest in confiscation orders among prosecutors and judges, which has led in turn to a lack of training and specialist skills as well as financial position of the defendants. To combat this trend, one of the measures enlisted was the creation of specialist confiscation courts. The argument was that, establishment of a specialist confiscation court, comprising of judges and support staff with a specialization in confiscation and ancillary law, will give court the expertise and time available to hear and properly deal with confiscation order and restraint applications. It was also argued that, this measure would further enable complex confiscation hearings to be dealt with more efficiently and with much greater expertise, with the added bonus of leaving Crown Courts more time to focus on criminal trials.[114] Though, the UK government is still working toward implementation of this report, so there is no record yet to asses it viability.[115] However, it is important to take note or be weary of this problem and to set up preventive measures.

5.3.1.4 Plea Bargaining

In view of the difficulties associated with recovery of assets through criminal forfeiture, another measure often adopted to deprive PEPs their illegal gains in Nigeria is plea bargaining system.[117] The legal basis for this practice can be traced to Section 14 (2) (3) of the EFCC Act.[118] This section has given EFCC power to compound any offence punishable under the Act by accepting such money as it thinks fit, exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence. This power is however, subject to the power

[113] Committee analysis of data provided in National Audit Office, Confiscation Orders: progress review, HC 886, March 2016, p.2.
[114] House of Commons, Home Affairs Committee, Proceeds of crime, Fifth Report of Session 2016–17, p.11.
[115] Ibid.
[117] Ted. C. E., et'al (2015), "A Critical Appraisal of the Concept of Plea bargaining in Criminal Justice Delivery in Nigeria", *Global Journal of Politics and Law Research*, Vol.3, No.4, p.31.
[118] Cap. E1, LFN, op.cit.

of the Attorney-General of the Federation to institute, continue, takeover or discontinue criminal proceedings against any person in any court of law.[119] Furthermore, Section 270 (1) of the ACJA[120] empowered the prosecutor to receive or give a plea bargain to a defendant charged with an offence if doing so would be in the interest of justice, the public interest and the need to prevent abuse of legal process. This is with a further condition that, the plea bargaining must be with the consent of the victim; the evidence of the prosecution is insufficient to prove the offence charged beyond reasonable doubt; and the defendant has pleaded guilty and agreed to make restitution to the victim. Once these conditions are met, the prosecutor may enter into a plea bargain with the defendant and thereafter inform the court. The judge after confirming the correctness of the agreement from the defendant, would make an order sanctioning the plea bargaining.

Though, the provision relating to plea bargaining under ACJA has not yet been tested in court, however, prior to 2015, the EFCC has applied this procedure in some high profile corruption case. For instance, Diepreye Alamieyeseigha[121] who pleaded guilty to money laundering and corruption offences in July 2007, and was sentenced to two years in prison, entered into plea bargaining and total sum of N17.7 million was recovered from him. Furthermore, Tafa Balogun[122] a former Inspector-General of the Nigerian Police Force was charged, tried, convicted and sentenced for corruption and money laundry related charges. He secured a plea bargaining and assets worth over N17 billion were recovered from him and returned to the Federal Government. Similarly, Lucky Igbinedion[123] a former Governor of Edo State was arraigned on charges of corruption, money laundering and embezzlement of N2.9

[119] S. 174 Constitution of the Federal Republic of Nigeria, Cap. C23, LFN, op.cit.
[120] ACJA, op.cit.
[121] *Federal Government of Nigeria (FGN) vs. Alamieyeseigha* Suit No. FHC/L/329C/05)
[122] Inspector-General Tafa Balogun Convicted: Jailed for Six Months" Law, Crime & Judiciary Available @ *www.transparencyng.com*, accessed on 14th February, 2016. 1:17.P.M.
[123] *FGN vs. Chief Lucky NosakhareIgbinedion*. No FHC/EN/6C/2008.

billion. He entered into plea bargaining and a 191-count was reduced to a one-count charge. He was convicted and the EFFCC was able to recover N500 million from him. Later, the EFCC filed a fresh count of corruption against Igbinedion who promptly raised the defense of double jeopardy and the case was struck out.[124] Additionally, there is the case of Cecilia Ibru[125] the former Chief Executive Officer of Oceanic Bank. She was charged and convicted of offences related to corruption; authorizing 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 Nigeria. The most recent one is that of Mr. John Yakubu[126] who on January 2013, who got a punishment of two years imprisonment or the option of a fine of Seven Hundred and Fifty Thousand Naira (N750, 000, 00) under a plea bargain agreement with the EFCC after stealing N23 billion from Pension Fund.

Obviously, plea bargaining as practiced in Nigeria reveals a number of problems. First, the system is simply an admission of weakness or inability of the anti-corruption agencies to convict looters. Secondly, plea bargaining does not really help in fighting high profile corruption in Nigeria. Instead, the process seems to encourage corruption as it often end with the recovery of only a fraction of what has been looted. Then I ask: of what importance is plea bargaining in Nigeria? Part of the problem may not be unconnected with the fact that the discretionary power given to EFCC by Section 14 (2) of the EFCC Act[127] is too wide. There is no adequate provision to guide the parties in determining the amount to be paid in a plea bargaining process. The Commission can only accept any money "as it thinks fit" exceeding the maximum amount which

[124]*Chief Lucky NosakhareIgbinedion vs. FGN.* Suit No FHC/B/HC/2011.
[125]*FGN vs. Dr (Mrs) Cecilia Ibru*. FHC/L/297C/ 2009
[126]Ozekhome, M.A., (2012), "Coercion to Compromise, the Imperative to Plea in Plea Bargain in Nigeria, Law and Practice", Nigerian Institute Advanced Legislative Studies, Abuja, p. 249.
[127]Cap.E1, LFN, op.cit

that person would have been liable if he had been convicted of that offence. Regrettably, in the exercise of this power, the Commission deem it fit and proper to accept N750, 000, 00 under a plea bargain agreement with a man who stole N23 billion from Pension Fund. Unfortunately, provisions such this, cannot ensure that crime does not pay in Nigeria. In addition, Section 270 (1) of ACJA[129] make entering plea bargaining subject to obtaining the consent of victim. Though plea bargaining is not yet brought before the court under this section, however, effective implementation of the section may be difficult. This is in view of the fact that if plea bargaining is to be recommended only when the evidence of the prosecution is insufficient to prove the offence charged beyond reasonable doubt, the defendant may as well insist that he does not want plea bargaining because naturally, the case would be determined in his favour since the prosecution's evidence is insufficient to prove the offence charged beyond reasonable doubt.

5.3.1.5 Measures for Non-Conviction Based Forfeiture

In Nigeria at the moment, there is no measure for recovery of assets through non-conviction based forfeiture (NCB) as require by Article 54 (1) (c) of the UNCAC.[130] The closest the law came in this regard is Section 48 (1) of the ICPC Act[131] which empowers the Chairman of the Commission to apply to the Court for an order of forfeiture of any proceeds of corrupt activity seized, if there is no prosecution or conviction before the expiration of twelve months from the date of the seizure. This position of the law is rather confusing. One of the conditions for grant of freezing order is that the suspect will be charged with an offence.[132] One therefore wonders, instead of releasing the suspect's assets since the agency could not prosecute him, he is instead being punish with forfeiture order for the failure of the agency to prosecute the matter.

[129]ACJA, op.cit.
[130]UNCAC, op.cit.
[131]Cap. C31, op.cit.
[132]Scott, N., et'al, (2016), *A Guide to Freezing Injunctions and Related Orders*, Memery Crystal, London, p.9.

Better and appreciable provision on NCB can be found under POCB. Section 15 (1) (2) of the Bill[133] require that, where a preservation order is in force against a property, the agency may apply to the court for a forfeiture order against the property where it finds on a balance of probabilities that the property is a proceed or instrumentality of crime. Considering that NCB action is brought against the assets, Sub section (4) provide further that, the absence of a person whose interest in property may be affected by a forfeiture order does not prevent the Court from making the order.[134] In addition, the validity of a civil forfeiture order is not affected by the outcome of criminal proceedings or of an investigation with a view to instituting such proceedings, in respect of an offence which the property concerned is associated.[135]

The implication of Section 15 (2) and (4) above is that, defense of double jeopardy, presumption of innocence as well as right to ownership and enjoyment of property[136] cannot be raised to defeat a civil forfeiture order. The simple reason as pointed out in Section 15 (4) of the Bill[137] is that, the action is instituted against the assets not an individual. Thus, the action not being against a person, there is no ground for which anybody can raise a defense of double jeopardy, presumption of innocence or right to property. Presumably, it is for this singular reason that the Bill in all the sections relating to civil forfeiture, starting from Section 3 to 38, avoided using the word "defendant", instead, "persons connected with the property", is used. Another implication of Section 15 (4) of the Bill is that, it allows criminal forfeiture and civil forfeiture to run currently in Nigeria, with no provision of stay of proceedings. In fact, Section 153 (2) of the

[133]POCB, op.cit.
[134]S.15 (2), (4), Ibid.
[135]Ibid.
[136]S.36 (9) of the Constitution of Federal Republic of Nigeria, Cap. C23, LFN, op.cit., provides that "No person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior court".
[137]Ibid.

Bill,[138] clearly state that an application for the stay of proceedings shall only be entertained at the stage of final judgment on the substantive matter, and the fact that criminal proceedings have been instituted shall not constitute a ground for stay of proceedings.

It should be noted that in order to protect the interest of any person connected to the property, and to give them opportunity to protect such interest, Section 13 (1) of the POCB[140] obliges the agency to give fourteen working days' notice of the application to every person having an interest in the property, to appear at the hearing to either oppose the making of the order or apply for an order excluding his interest in the property from the operation of the order, or varying the operation of the order in respect of the property, and may adduce evidence at the hearing of the application. Where the Court grants the forfeiture order, the property shall be forfeited to the Agency.

Furthermore, Section 17 (3), (4), (5), of the Bill[141] makes provision for retrospective application of the Act (if passed into law) in Nigeria. The section for instance, allows the court, on application by Agency to order on a balance of probabilities, forfeiture of proceeds of an offence which had occurred before the commencement of the Act. This is however subject to the condition that, the person having interest in such property has not since the commencement of the Act taken all reasonable steps to prevent the use of the property concerned in connection with unlawful activity. Though, the section did not state how to determine whether or not, the person having interest in a property has taken all reasonable steps to prevent the use of the asset in connection with unlawful activity. Perhaps this could be determined when the looter voluntarily surrender the assets or enter into negotiated settlement before the Bill comes into force. This section obviously intends to make sure that corruption, no matter how long it takes, does not pay.

[138]Ibid.
[140]Ibid.
[141]Ibid.

It further clearly demonstrates the unique advantage of civil forfeiture law which cannot be faulted by Section 36 (8) of Constitution[142], which requires that, a person shall not be held to be guilty of a criminal offence on account of any act or omission that did not constitute an offence at the time it took place. The reason is, the proceeding is not criminal but civil and secondly, as earlier stated, the action is against the assets not an individual.

Finally, Section 18 (1) of Bill[143] makes provision for forfeiture by default. The section empowers the Court, pursuant to an application by Agency, to make a forfeiture order by default if it is satisfied that no person has appeared on the date upon which an application is to be heard. The forfeiture by default as envisage by this section is however subject to the condition that, all notices must have served on all the interested persons. Though, even after the order is granted, any interested person may within ninety days, apply to the court to vary or rescind the order. The Court may, upon good cause shown, grant the order or give any other direction on such terms, as it deems appropriate.[144] Though, the Bill is not yet passed into law, however, in February 2017, a Federal High Court sitting Lagos has adopted a similar approach to the provision of Section 18 of this Bill, and ordered the final forfeiture of N9.08b and $5m linked to the Former Minister of Petroleum, Diezani Alison-Madueke. The Order followed an application by the EFCC seeking a forfeiture of the funds on the ground that they are proceeds of crime. The court earlier, granted an interim Order for temporary forfeiture of the sum to the Federal Government with the condition that, if within 14 days no interested party appear and prove the legitimacy of the money, the funds would be permanently forfeited to the Federal Government. Accordingly, since

[142]Constitution of the Federal Republic of Nigeria, C23, LFN, op.cit.
[143]POCB, op.cit.
[144]S.18 (3) (4), Ibid.

nobody appears to claim the ownership of the funds, the court made an order forfeiting it permanently to the Federal Government.[145]

5.3.1.6 Measures for Direct Recovery of Assets

Nigeria is yet to set up comprehensive measures for direct recovery of assets[146] as mandatorily required by Article 53 of the UNCAC.[147] For instance, there is no measure for initiating civil proceedings in personam in Nigeria for asset recovery whether by another state party or individual. However, there is a provision which seeks to allow victims of crimes to claim compensation for damages. For instance, Article 19 (1) of the of the Treaty on Mutual Legal Assistance in Criminal Matters Between the Government of the Federal Republic of Nigeria and the Government of the Republic of South Africa (Ratification and Enforcement)[148], permit the Contracting States to assist each other in the compensation or restitution to victims of crime. Though, it is not clear whether the requesting state would initiate the proceeding in the requested state or the latter would initiate the proceeding in its own court and collect such compensation on behalf of the former.

In addition, Section 41 (1) of the POCB[149] permits the Court to make an order forfeiting any property within Nigeria which represents the proceeds of unlawful activity or instrumentality of an offence under the laws of a foreign country within whose jurisdiction such offence or activity will be punishable by imprisonment for a term exceeding one year and which will be punishable by imprisonment under the laws of Nigeria if the act or activity had occurred within Nigeria. This provision is regulated by the principle of double criminality. Thus, another State's

[145]Onyekwere, J. (2017), Court Orders Permenant Forfeiture of $153.3m Linked to Diezani, *available@m.guardian.ng/news-court-orders-permenant-of-$153.3m-linked-to-diezani*, accessed on 14th February, 2017. 12:21.P.M.
[146]Nuhu, Ribadu, (2016), "Assets Recovery in Nigeria: Experiences from the Past", available@ *www.nigeriatoday.ng/2016/07/assets-recovery-in-nigeria-experiences-from-the past/*, accessed on 24th August, 2016. 2:28. P.M.
[147]UNCAC, op.cit.
[148]Treaty on Mutual Legal Assistance in Criminal Matters Between the Government of the Federal Republic of Nigeria and the Government of the Republic of South Africa (Ratification and Enforcement), Act, 2005.
[149]POCB, op.cit.

claim as owner of a property would fail if the illegal activity is not punishable under Nigerian law or if the punishment prescribed for that offence in the requesting state law, does not exceed one year imprisonment. Of course, in the implementation of this requirement, may encounter practical difficulties considering that there is not universal jurisdiction for corruption and punishment for corrupt offences differs across the globe.

5.3.1.7 Measures for Indirect Recovery of Assets[150]

In compliance with Article 54 (1) (a) (b) and 55 of the UNCAC[151], Article 13 of the UNTOC[152] and Article 16 (2) of AU Anti-Corruption Convention,[153] Nigeria has made provision for Measures for indirect recovery of assets or recovery of assets through international cooperation. Section 22 of the EFCC Act[154] provides the basis for this form of recovery. The section requires the Agency to confiscate corruptly acquired assets or instrumentalities of crime hidden in foreign countries by corrupt Nigerians. This is made possible because even prior to adoption of these Conventions and enactment of the EFCC Act, Nigeria has entered into in a number of bilateral treaties on MLA in criminal matters with countries such as the United States of America,[155] UK and Northern Ireland[156] and South Africa.[157] The Government also enacted the Mutual Assistance in Criminal Matters within the Commonwealth (Enactment and Enforcement) Act[158] applicable in all the Common Wealth jurisdictions. Article 2 (g) and 19 (1) (2) (a) of the Treaty on Mutual Legal Assistance in Criminal Matters Between the Government of the Federal

[150] This is also known as recovery of assets through international cooperation.
[151] UNCAC, op.cit.
[152] UNTOC, op.cit.
[153] AU Anti-Corruption Convention, op.cit.
[154] Cap.E1, LFN, op.cit.
[155] Treaty between the Federal Republic of Nigeria and the United States of America on Mutual Legal Assistance in Criminal Matters signed in Washington on 2nd November, 1987 and Extradition (United States of America) Order 1967, i.e, Legal Notice 33 of 1967.
[156] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Republic of Nigeria Concerning the Investigation and Prosecution of Crime and the Confiscation of the Proceeds of Crime Signed at London on 18th September, 1989.
[157] Treaty on Mutual Legal Assistance in Criminal Matters between the Government of the Federal Republic of Nigeria and the Government of the Republic of South Africa (Ratification and Enforcement) Act, 2005.
[158] Cap. M24, LFN, op.cit.

Republic of Nigeria and the Government of the Republic of South Africa (Ratification and Enforcement) Act[159] permit the Contracting States to provide mutual assistance in tracing, and identifying criminally obtained assets. Section 5 (1) and 20 (1) of the Mutual Assistance in Criminal Matters within the Commonwealth (Enactment and Enforcement) Act[160] also make similar provision. This legal regime greatly play a key role in confiscation and return of assets from foreign jurisdiction as would be shown in the next table.

5.3.1.8 Repatriation or return and Disposal of asset

In Nigeria, the legislative measure for repatriation of assets depends on where such assets are recovered from. For assets confiscated within country, Section 20 (1) (b) of the EFCC Act[161], Section 36 of the ICPC Act[162] and Section 7 of the Advance Fee Fraud Act[163] require assets confiscated particularly through conviction for an offence, be to forfeit to the Federal Government, while Section 22 (1) of the EFCC Act[164] requires same for assets hidden in foreign country by corrupt Nigerians. The measure provided for the disposal of such assets by virtue of Section 31 (1) of the EFCC Act[165] is by sale and the proceeds paid into the Consolidated Revenue Fund of the Federation. In the implementation of these provisions, a number of assets have been returned both from within and outside the country. A brief summary of assets returned from outside the country includes:

Case	Amount stolen	Amount Returned	Country returned from	Year of returned
Sani Abacha	$5b	$723m	Switzerland	2004-2014

[159]Treaty on Mutual Legal Assistance in Criminal Matters Between the Government of the Federal Republic of Nigeria and the Government of the Republic of South Africa (Ratification and Enforcement) Act, op.cit.
[160] Cap. M24, LFN, op.cit.
[161] Cap. E1, LFN, op.cit.
[162] Cap.C30, LFN, op.cit.
[163] 2007.
[164] Cap. E1, LFN, op.cit.
[165]Ibid.

		$400m	Liechtenstein	2014
		£140m	Channel Island	2014
		$480m	USA	2014
		$1.1m	France	2005
		£150m	UK	2012
		£140m	Island of Jersey	2014
		$321m	Switzerland	2018
Abacha's loot awaiting return		£6.9m	UK	
		$11.9	UAE	
		$6.3	USA	
Alamieyeseigha		£1.5m	UK	2005
Joshua Dariye		£5.7m	UK	2007
James Ibori	£6.8m	£1.2m	UK	2014
Ibori's loot awaiting return		£5.6m	UK	

Source: Ministry of Justice, 2016.

Furthermore, international cooperation between the EFCC and other transnational bodies have reportedly led to the recovery and return of $242 million to a Brazilian bank, $4 million to a Hong Kong National and $ 500,000 to sundry US citizens.[166] The challenge however is, once the assets are located outside the jurisdiction of the Contracting Parties, the Government cannot pursuant to relevant provisions of the above MLA Treaties, effectively recover them. Though the Attorney General of the Federation has visited United Arab Emirates and has initiated the

[166]Nigeria's struggle with Corruption': Being an abridged and edited version of presentation to US Congressional House Committee on International Development, Washington, DC on 18 May 2006, p.14.

signing of bilateral agreements for the purpose of returning of assets illicitly transferred to the country by Nigerians,[167] it is hoped that this effort would yield desired results.

5.3.1.9 Measures for Assets Management

Article 31 (3) of UNCAC[168] obliges State Party to adopt legislative and other measures to regulate the administration of confiscated property covered. In Nigeria, the legislative measure for the management of recovered proceeds of corruption is not yet in place. Though, Section 96 of the POCB[169] has proposed a "Proceeds of Crimes Recovery and Management Agency". Section 97 and 101 of the Bill[170] saddled the Agency with the statutory mandate to enforce and administer the provisions of the Act; co-ordinate and enforce all other laws on the investigation, identification, tracing and recovery of the proceeds and instrumentalities of unlawful activity and the recovery and management of proceeds of crime; as well as the regulation, supervision and ensuring the effective administration of recovery and management of proceeds of crime and other related matters in Nigeria. The agency is further require to negotiate the return and management of all assets seized by foreign countries on behalf of the Federal and State Governments for the benefit of Nigerians under the direction of the Attorney General of the Federation; recommend the proper application of all returned assets and proceeds of unlawful activities; collaborate with relevant organizations in the investigation of the proceeds of unlawful activity or the instrumentalities of offences; maintain statistics as to amounts traced, managed and recovered by the Agency; and collaborate with other government bodies within and outside Nigeria that are carrying on functions wholly or in part similar with those of the Agency.

[167] Activities of the Attorney General of the Federation and Minister of Justice in the First Year of the Present Administration (2016), p.6.
[168] UNCAC, op.cit.
[169] POCB, op.cit.
[170] Ibid.

A closer look at Section 97 of the Bill, one objective of the section can easily be identified namely; it has completely removed assets recovery function from all the existing agencies in Nigeria and vested it on Proceeds of Crimes Recovery and Management Agency. In case of assets recovered by the existing agencies prior to the enactment of the Act, Section 103 (2) of the Bill also require such assets to be transfer to the new agency once the Bill is passed into law. To further settle any conflict that may arise in this regard as to duplication of functions, Section 157 of the Bill[171] provides that, where a provision of any Act other the Constitution, is inconsistent with a provision of this Act, the provision of this Act shall prevail. The problem however is, sometimes, most of these assets the Federal Government institute action to recover are looted by State Governors, hence belong to the states. Thus, considering that States are independent from the Federal Government, it is therefore not clear whether the power of the agency will also include managing assets that belong to States. Going by case the of Joshua Dariye, where Plateau State Government had to threaten legal action against the Federal Government for the release of Dariye's loot to the State, one can safely say that, an attempt to apply this law nationally will be faced with serious opposition from states. Unfortunately, effective management of such funds by states cannot be guaranteed as some state as some states do not have a legal framework in that regard.

5.3.1.10 Anti-Corruption Agencies

Article 6 of UNCAC[172], Article 5(h) AU Anti-Corruption Convention[173] and Article 5 (3) of ECOWAS Protocol[168] require State Parties to establish bodies that prevent corruption and to grant them the necessary independence, to carry their functions effectively and free from any

[171] Ibid.
[172] UNCAC, op.cit.
[173] AU Anti-Corruption Convention, op.cit.
[168] ECOWAS Protocol, op.cit.

undue influence. Nigeria has complied with this obligation in part. For instance, it has established a number of anti-corruption agencies.[169] However, the thesis will only focus on the core anti-corruption agencies (ICPC and EFCC) charged with the statutory mandate of the recovery of proceeds of corruption. The ICPC was established by Section 3 (1) of the ICPC Act.[170] The Chairman of the Commission is appointed by the President, upon confirmation by the senate[171] and may at any time be removed from the office by the President acting on an address supported by two-thirds (2/3) majority of the Senate praying that the Chairman be removed for inability to discharge the functions of the office or for misconduct.[172] Commission is empowered under Section 6 (b) of the Act[173] to investigate corrupt offences and, in appropriate cases, prosecute the offenders. The EFCC on the other hand, is established by Section 1 (1) of the EFCC Act.[174] The Commission empowers in Section 6 (d) of the Act[181] to adopt measures to identify, trace, freeze, confiscate or seize proceeds derived from economic and financial crime related offences or the properties the value of which corresponds to such proceeds.

We have shown above the amount recovered by these agencies in Nigeria in the discharge of this statutory mandate. However, one issue that is of grave concern is, as assets recovery agencies, their structure did not make provision for accountability. This raises suspicion that recovered funds could be used for personal benefits. Ex-Chairman of the Commission Mr. Ibrahim Lamorde, for instance, could not account for N1 trillion of recovered funds and when

[169]Such as Special Control Unit Against Money laundering (SCUML), the Fiscal Responsibility Commission (FRC) and Bureau for Public Procurement (BPP). This is in addition to the existing agencies such as the Code of Conduct Bureau (CCB), Nigerian Police Force (NPF), and the courts. Raimi, L., et'al, (2013), "Role of Economic and Financial Crimes Commission and Independent Corrupt Practices & Other Related Offences Commission at Ensuring Accountability and Corporate Governance in Nigeria", *Journal of Business Administration and Education*, Vol. 3, No. 2, p. 105.
[170]Cap. C31, LFN, op.cit.
[171]S. 3 (6), Ibid.
[172]S. 3 (8), Ibid.
[173]Ibid.
[174]Cap. E1, LFN, op.cit.
[181]Ibid.

summoned by the Nigerian Senate, he refused to honour the invitation.[182] In fact, the Acting Chairman of the EFCC, Ibrahim Magu while answering questions during his screening at the Senate said, he doesn't know the exact figure of the assets recovered in the country. This has prompted the President to give a Directive that, EFCC, ICPC, DSS, Minister of Finance, and the Central Bank of Nigeria (CBN) should on 7th April, 2017 provide a detailed submission on amount of monies recovered since the beginning of the administration in June 2015. However, only the CBN was able to comply with the directive.[183] But even if all of them complied, what is the guarantee that they are going to give the exact record of what has been recovered. Put differently, how would Nigerians ascertain that, that is all what has been recovered since there is no proper accounting process?

Furthermore, in line with the requirement of the above relevant Articles of the Anti-Corruption Convention, EFCC as one of the principal anti-corruption agency is not independent by its enabling law. The Commission is funded directly from the Presidency, and though, Section 3 (1&2) and 2 (3) of the Act[184], the Chairman of the Commission is appointed by the President subject to the confirmation by the Senate, he may however, be removed by the President without recourse to the Senate. This has raised concerns about the agency's neutrality and freedom from undue influence from the Executive. For instance, for fear of being removed it is doubtful if the Chairman of the agency can confiscate the assets of some key members of the Executive. This concern appears to be confirmed by the inability of the past leadership of the Commission to prosecute top Members of the Executive serving in the same regime with them. Prosecutions of

[182]Charles E. et'al, (2016), "The Irony of Nigeria's Fight against Corruption: An Appraisal of President Muhammadu Buhari's first Eight Months in Office", *International Journal of History and Philosophical Research*, Vol.4, No.1, p.69.
[183]Ebhomele, E. (2017), "Buhari issues new Directives to EFCC, AGF, others on Recovered Loot", available@ *https://www.naij.com/1098370-buhari-issues-directives-efcc-agf-recovered-loot.html*, accessed on 30th June, 2017. 5:11. P.M.
[184]Cap. E1, LFN, op.cit.

such corrupt former officials are often carried out by the new leadership of the Commission in the new regime.[185]

In addition, the legal framework for the appointment of heads of Anti-Corruption Agencies is characterized a number of loopholes. Take the case of EFCC for instance, Section 3 (1) (2) of the EFCC Act[186] requires that a person nominated by the President as Chairman of the Commission can only assume office if confirmed by the Senate. However, the Section did not explain the effect of the rejection by the Senate of such nominee, and whether the same person can still be re-nominated. This lacuna has created confusion following the rejection by the Senate on two different occasions, to confirm the Acting Chairman of the EFCC, Ibrahim Magu as substantive Chairman of the Commission. The challenge is, while there is no provision under the EFCC Act that prevents the President from re-nominating the same person for as many times as possible, Oder 131 of the Senate Standing Rule[187] prevents the Senate from confirming any nominee which was previously not confirmed during the session or within 21 days in case of Ministerial nominee. By this Order, such a nominee shall be returned by the Clerk of the National Assembly to the President of the Federal Republic of Nigeria and shall not again be made to the Senate by the President. Thus, it would amount to an exercise in futility for the President to re-nominate the same person to the Senate. This further raises another questions as to the legality or otherwise of Magu to continue in that office on acting capacity and for how long. Perhaps, the answer to this question could be found in Section 171 (1) (d) of the Constitution.[188] This section has given the President power to appoint the head of any extra-ministerial department to hold office in an acting capacity. The section did not state the duration

[185] EFCC Not Equipped To Recover Criminal Proceeds, available@ *https://www.naij.com/51454.html*, accessed on 24th August, 2016. 4:56. P.M.
[186]Cap.E1, LFN, op.cit.
[187]Order 131 of the Senate Standing Rule, 2015.
[188]Federal Republic of Nigeria, Cap. C23, LFN, op.cit

for holding such office in acting capacity. What is however clear is, the holder of the office does not require confirmation by the Senate. By implication, the President has the power to allow a person to hold the office of the Chairman of the EFCC in acting capacity for as long as the tenure of the President last.

The procedure for appointment of the Chairman of the EFCC whether on permanent or acting capacity has its advantage as well as disadvantage depending on the circumstances. For instance, Section 171 (1) (d) of the Constitution has an advantage of giving the President the power to hold onto any Acting Chairman of the EFCC who the President believes is the best man for the job if the Senate refuses to confirm him. But the section could also give a corrupt President the opportunity to insist on a man that he believes can protect his interest. Furthermore, one understands that, Senate can reject a nominee where it is in the interest of the nation to do so. However, this procedure can also be taken advantage of by corrupt members of the Senate for personal or political interests. They can use this same process to frustrate the appointment of a viable nominee. For instance, the Senate has threatened to stop the confirmation of any nominee sent to it by the Presidency unless Ibrahim Magu is dismissed as Acting Chairman of the EFCC. This is therefore, one area that needs urgent legislative attention. Otherwise, such personal and political interest could ground Nigeria's anti-corruption campaign to halt.

Furthermore, POCB made provisions for Proceeds of Crimes Recovery and Management Agency[190] which merit consideration. Section 99 (1) of the Bill[191] makes provision for the Appointment and tenure of the Director-General (DG) of the Agency. It provides that, there shall be for the Agency, a DG who shall be appointed by the President on the recommendation of the Attorney-General of the Federation. The DG is required to hold office for a period of four years.

[190] S.96, POCB, op.cit
[191] Ibid.

The President may however, re-appoint him for a further term of four years. Thereafter, and if need be, the President could still appointed him on such other terms and conditions as may be specified in his letter of appointment.[192] A number of things are conspicuously missing from this section. First, the section did not make for removal of the DG and the circumstance under which that would happen. Though, the power to appoint goes with an express or implied corresponding power to fire.[193] However, failing to state the grounds for which the appointee can be removed from office implies that, he can be removed at will. This is unfortunate as lack of security of tenure can compromise the independence of the agency. Secondly, there is no requirement for confirmation by the Senate. This would no doubt guarantee speedy appointment of a DG of the agency. However, this approach must be taken with caution. Without proper checks and balances, a President who is corrupt or has corrupt associate, may exercise this power of appointment arbitrarily by appointing a person that would shield them. The only thing the President needs is the recommendation of one of his appointees-the Attorney General of the Federation. This process has the tendency to compromise the agency's neutrality and independence from executive interference. This is especially so, considering that agency also funded under the Presidency.[194]

5.3.2 Non-Legislative Measures

Article 65 of the UNCAC[195] and Article 34 of the UNTOC[196] oblige each State Party to take the necessary legislative and non-legislative measures to ensure the implementation of its obligations under the Conventions. Thus, having examined some of the legislative measures, this segment of

[192] S. 99 (4), Ibid.
[193] *Masetlha vs. President of the Republic of South Africa & Anor*, (CCT 01/07)(2007), ZACC 20.
[194] S.105, Ibid.
[195] UNCAC, op.cit.
[196] UNTOC, op.cit.

the paper will discuss the non-legislative measures establishing for assets recovery in Nigeria pursuant to the provisions of these Conventions. These measures include:

5.3.2.1 Assets Recovery Policy/Initiative

Article 5 (1) of the UNCAC[197] (though Article 31 of the UNTOC[198] makes it optional), mandate Parties to develop effective anti-corruption policies that promote the participation of society. In Nigeria, as part of the measures adopted for the implementation of this provision, a new Policy on Whistle-Blowers was set up. The Policy promises 5% of the loot recovered, to any successful Whistle Blower who provides information leading to the recovery. The Policy allows Whistle-Blowers who acted in good faith, but feel they have been victimized, to file a complaint.[199] Furthermore, the ICPC has launched a mobile application that will aid anonymous whistle blowers to report corrupt practices.[199] This measure is important because the financial incentives provided for reporting persons would encourage people to provide relevant information that may lead to tracking of assets.

Implementation of this measure in Nigeria has led to the discovery and temporarily seizure of $ 9.8m and £74 belonging to Andrew Yakubu;[200] N250, 558, 670 from a Bureau de Change Operator in Lagos;[201] $34.4m, £27, 800 and N23.2m from the 7th Floor of a four-bedroom apartment at Osborne Towers, Ikoyi Lagos[202] and N49m at Kaduna Airport.[203] Though, the challenge is that, this policy is not fully embraced by all the organs of government

[197] UNCAC, op.cit.
[198] UNTOC, op.cit.
[199] Available @ *www.vanguardngr.com/2016/12/whistle-blower-receive-5%-loot-recovered-fg/*, accessed on 24th January, 2017. 2:36. P.M.
[199] Available@ *https://oak.tv./govt-launches-apps-whistle-blowing-apps-nigeria/*, accessed on 11th January, 2017. 12:13.P.M.
[200] Available@ *http://www.cambellsblog.com./2017/02/court-orders-forfeitue-of-yakubus-98.html*, accessed on 20th February, 2017. 2:13.P.M.
[201] Available@ *http://www.cambellsblog.com/2017/04/efcc-recovers-anothe-250-million-cash.html*, accessed on 8th April, 2017. 4:11. P.M.
[202] Available @ *http://www.cambellsblog.com/2017/04/whistle-blowing-efcc-to-recovers-huge.html*, accessed on 11th April, 2017.1 :16. P.M.
[203] Daniel, S. (2017), "EFCC intercepts N49m at Kaduna Airport", available @ *www.vangurdngr.com/2017/03/breaking-efcc intercepts-n49m-kaduna-airport/* accessed on 10th April, 2017. 5: 07. P.M.

in the country, particular the legislature. For instance, the recent suspension of House of Representative Member, Abdulmumin Jibril for blowing whistle on budget padding clearly shows that, the National Assembly does not support internal whistle blowing. One wonders therefore that, if blowing whistle by a member of the National Assembly against his colleague gets no attention, how would blowing whistle by an ordinary Nigerian against a member of the National Assembly gets attention. It is important to point out that, in the case of Jibril, the National Assembly and by extension, the Government as a whole is not leading by example.

The Federal Government has also set up Presidential Committee on Assets Recovery (PCAR) to oversee anti-corruption agenda and coordinate assets recovery process. PCAR coordinate the collation and categorization of recovered assets from 2015-2016 as well as verifying the records and status of assets such as building recovered under the past administration and setting up the Framework for the Management of Recovered Stolen Assets to avoid re-looting and mismanagement of the assets.[204] Though, one problem with this initiative is that, PCAR appears to be performing the same duty meant for the proposed "Proceeds of Crimes Recovery and Management Agency" as contained in Section 97 of the POCB.[205] With this framework, there is likelihood of conflict and duplication of duty when the Bill is eventually passed into law. Furthermore, the Directive given by the President to Anti-Corruption Agencies to provide a detailed submission on amount of monies recovered since the beginning of the administration in June 2015,[206] implies that PCAR has not lived up to its mandate of coordinating the collation and categorization of recovered assets from 2015-2016.

[204]Amaefule, E. (2016), "President Buhari Sets up Committee on Recovery of Looted Assets", PUNCH, vailable*@www.punch.com/buhari-sets-committee-recovery-looted-assets*, accessed on 19th February, 2017. 4:31. P.M.
[205]POCB, op.cit.
[206]Ebhomele, E., op.cit. p.2.

5.3.2.2 Negotiated Settlement

Another initiative adopted in Nigeria to recover proceeds of corruption is negotiated settlement. Settlement is part of the process for depriving Politically Exposed Persons (PEPs) of the proceeds of crime. It could be reached through different means and be used for different reasons. Common law jurisdictions tend to prefer a negotiated process, in which the two sides, (prosecution and defendant) reach a mutually acceptable agreement.[207] Settlements of this type can be found in the United Kingdom, United States, Switzerland and out-of-court restitution arrangements in Nigeria.[208] For example, in October 2010, Nigeria filed charges against multinational company, Siemens in connection with allegations of foreign bribery. In November, 2010, Nigeria entered into an out-of-court settlement with Siemens, agreeing to end all investigations and dismiss charges in exchange for millions of dollars. Although the terms of the Siemens-Nigeria settlement have remained confidential, the Attorney General of Nigeria placed on the public record that the cases have been resolved and yielded a total of $170.8 million in monetary sanctions.[209] In fact, the Federal Government in 2016 entered into negotiated settlement with treasury looters in Nigeria, which resulted in the voluntary return of corruptly acquired funds as shown in the table above.

However, a major challenge in the use of negotiated settlement in Nigeria lies in the absence or lack transparency with regard to the content of settlements. This could create an impression that full justice is not done. For example, there is no information about the amount stolen by each person and the amounts recovered against each person, and whether there is an

[207] Jacinta, A. O.,et'al, (2014), "Left out of the Bargain Settlements in Foreign Bribery Cases and Implications for Asset Recovery", International Bank for Reconstruction and Development / The World Bank, 1818 H Street NW, Washington DC, p.21.

[208] Ibid.

[209] Mohammed Bello Adoke (Attorney General of Nigeria), "Ministerial Media Briefing on the Activities of the Federal Ministry of Justice, Delivered at the Federal Ministry of Justice Annual Press Briefing, December 22, 2010," 10, 11. Adoke cited weaknesses in Nigerian criminal provisions concerning corporate liability reported that fewer than 10 percent of pending criminal cases had been resolved during the year 2010, noting "it is obvious that a substantial number of criminal cases are still pending in various courts."

undertaking to return assets on a later date. The consequence of refusing to make such settlement public is that, a party may decide to deny its existence. This was what happened when the Nigerian government reached an agreement with the Abacha family in April 2002 to return $1 billion (out of $1.1 billion) of frozen funds in Switzerland, the United Kingdom, Luxembourg, Liechtenstein and Jersey. In exchange, all legal actions instituted by the Nigerian government against them were to be dropped, and the latter would also be entitled to keep $100 million. However, this agreement was unilaterally repudiated by Abacha's eldest son, who after being released from detention, claimed that no such agreement had ever existed.[210] Perhaps to avoid a repeat of this, there has been call in Nigeria for the Government to make available the names of looters who voluntarily returned their loots. For instance, in *Socio-Economic Rights and Accountability Project vs. Federal Government of Nigeria (SERAP),*[211] the plaintiff filed a suit seeking the court to compel the Federal Government to make the names of the looters public. SERAP argued that by virtue of Section 4 (a) of the Freedom of Information Act[212] the defendant was under an obligation to publish the names of the looters as it has requested. The court upheld the plaintiff contention and held that, the defendant is under a binding obligation to provide the plaintiff with up-to-date information as regards the names of the high-ranking public officials from whom the funds were recovered as well as the circumstances under which the stolen public funds were returned.

5.3.2.3 Bilateral Agreement for Return of Assets

Article 57 (5) of UNCAC[213], in a non-mandatory terms, require Parties to give special consideration to concluding mutually arrangements, for the final disposal of confiscated

[210] Enwerenmadu, D.U., (2013), "Nigeria's Quest to Recover Looted Assets: The Abacha's Affairs", *African Spectrum*, 48, 2, p.61.
[211] Unreported suit No. FHC/CS/964/2016.
[212] Freedom of Information Act, 2011.
[213] UNCAC, op.cit

property. Pursuant to this Article and the efforts to ensure the return of Ibori's loot confiscated in the UK, and such other assets that may be confiscated in the future, the Federal Government has entered into a Memorandum of Understanding (MoU)[214] with the Government of the United Kingdom (UK). The MoU reflects the willingness of both Parties to continue co-operation for the transparent return to FGN of stolen assets recovered and confiscated in the UK. As part of the conditions for the return of the asset, the Parties agreed that the returned assets must be used for the benefit of the people in line with the budget of the Federal Republic of Nigeria for projects that will impact on the poorest segment of the society. To ensure compliance with this, it is agreed that the agreement will be shared with the media in the jurisdictions of both Parties. Furthermore**,** the Federal Government will provide a report on the activities implemented with returned funds to the Nigerian National Assembly and the British Department for International Development (DFID). The report, which will cover the period of two years after funds were returned to Nigeria, will be published by the Federal Government.[215]

Though, asset repatriation through Bilateral Treaty is more than just the signing of the treaty. This is despite the provisions of Article 57 of the UNCAC[216] requiring countries to return assets to victim countries where it is proven that the assets were illegitimately acquired from that country. As seen above, the returned of such assets depend on certain conditions. And until these conditions are fulfilled, the requested states hardly return such assets. In the case of Switzerland for instance, they based the release of Abacha loots confiscated in their court on the condition that, Nigeria must prosecute the accused and sign an undertaking guaranteeing transparent use of the funds. Even at that, it was only after protracted diplomatic exchanges between both

[214]Memorandum of Understanding Between The Government of the United Kingdom of Great Britain and Northern Ireland And the Federal Government of Nigeria On The Modalities For The Return Of Stolen Assets Confiscated By The United Kingdom, 2016.
[215] Ibid.
[216] UNCAC, op.cit.

governments that the sum of $723m was released in 2005.[217] Regarding the return of the remaining funds, Nigeria had to sign a Memorandum of Understanding (MoU) with Switzerland in 2010, but nothing was returned.[218] On 29th July 2016, the Swiss Government promised to return $321. Consequently, the parties signed another MoU that require transparent management of the assets and reduce the time for the process of transmitting requests from Nigeria to Switzerland and vice versa.[219] It hoped that the parties would be sincere to the terms of the MoU.

5.3.2.4 Capacity Building

Article 60 of the UNCAC[220] requires each State to develop specific training programmes to build the capacity of its personnel responsible for combating corruption. In Nigeria, pursuant to this Article, Section 11 of the EFCC Act[221] obliges the Commission to develop specific training programmes for detection of the movement methods used for money laundering. In practice however, the EFCC and ICPC seem to lack this capacity. Kemi Pinheiro SAN, who prosecute matters for EFCC, noted that: "I have found as a fact that assets are poorly traced by the EFCC. There is capacity deficiency. Consequently, cases are sometimes closed due to insufficient evidence to support prosecutions, often caused by poor investigating skills and capacities".[222] This seems to be what played out in some high profile corruption cases. For instance, in 2017, EFCC lost four high profile corruption cases in 96 hour. The first was the unfreezing the account of Ozekhome (SAN) on the Order of Federal High Court, Lagos. The account contained a sum of 75m professional fee paid to him by Governor Ayo Fayose of Ekiti State which according to the

[217] World Bank and Federal Ministry of Finance (Nigeria) (2006), Utilization of Repatriated Abacha Loot: Report of the Field Monitoring Exercise, report prepared by the World Bank with cooperation from the Federal Ministry of Finance, Abuja, p.11.
[218] Pedro, G. P., (2016), Analytical Study on Mechanisms for Asset Recovery and Confiscation in Moldova, Basel Institute on Governance, International Centre for Asset Recovery, Basel, Switzerland, p.14.
[219] Available @ *www.vanguardngr.com/2016/03/abacha-loot-switzerland-returns-732m-to-nigeria-in-10-years/* 14th May, 2017. 11:28.A.M.
[220] UNCAC, op.cit
[221] Cap.E1, LFN, op.cit.
[222] EFCC Not Equipped to Recover Criminal Proceeds, available @ *https://www.naij.com/51454.html*, accessed on 24th August, 2016. 4:56. P.M.

EFCC, the money was a proceeds of corruption. The second is the discharge and acquittal of Justice Adeniyi Ademola and his wife of charges of corruption and possession of firearms. Thirdly, the initial temporary forfeiture of the sum of $5m found in the account of Patience Jonathan was similarly reversed on the Order of Federal High Court Lagos State, and finally, Godsday Orubebe, a former Minister of Niger Delta, was also discharge and acquitted after the Attorney General of the Federation Abubakar Malami told the ICPC that the case filed against the former Minister did not exist. The ICPC had accused Orubebe of diverting N1.97b meant for the compensation of owners of property on the Eket Urban Section of the East-West road in Eket, Akwa Ibom State.[223]

This situation clearly suggests that EFCC needs to develop better strategy in their investigation. Though, the Commission has recorded some successes in prosecuting ordinary Nigerians as shown elsewhere in this paper. However, it has not been able replicate the same level of success when it comes to politically exposed persons. In some cases, the Commission arrests an individual, and detains him before conducting investigation into the alleged crime. Without gathering enough evidence and intelligence to have a strong case, they leak the stories to the press for media trial.[224] Such detention raises the question of presumption of innocence as guarantee under Section 36 (5) of the Constitution[225] which state that, "every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty". Though, the Bill[226] seeking to amend the EFCC Act, particularly Section 13 of the Principal Act, propose a new subsection 4 which requires that, the Human Right Preservation Unit shall ensure that: (1) the Fundamental Human Right of suspect invited for question are not violated either by

[223]Wale, A., (2017), "Obasanjo reveals why EFCC lost 4 cases in 96 hours", *available @ https://www.naij.com/1098525-obasanjo-reveals-why-efcc-lost-4-cases-in-96-hours.html*, accessed on 13th June, 2017. 2: 18. P.M.
[224] Lawrence, E.O., (2016), "Economic and Financial Crimes Commission (EFCC) and the Challenges of Managing Corruption in Nigeria: a Critical Analysis", *International Journal of Scientific and Research Publications*, Vol. 6, Issue 4, p.346.
[225]Federal of Nigeria, Cap. C23, op.cit.
[226]Economic and Financial Crimes Commission Act (Amendment) Bill, 2016.

torture, unlawful detention or intimidation, and (2) suspect who are invited for questioning at the investigation stage are release promptly, and shall not be detained for whatever reason for more than 24 hours.

The situation also suggests that the conferring both investigative and prosecutorial functions on the ICPC and EFCC is too much for the agencies to effectively discharge. Section 6, 7, and 12 of the EFCC Act[175] confers investigative and prosecutorial functions on EFCC. Section 12 of the Act for instance, provides for establishment of Legal and Prosecution Unit, and confers on it the power to prosecute offenders under the Act. In a same vein, Section 6 of the ICPC Act[176] also confers on the ICPC similar powers. However, sometimes investigative and prosecutorial powers do not always go well together. Where an investigator is also expected to prosecute, there is danger that he may not be objective in his investigation and that his eventual decision to prosecute may not be the product of a well thought out process. The need to appear or give an impression that the investigator is really working, may result in attempt to prosecute at all cost even without sufficient evidence.

In the UK, it was in consideration of this problem that Crown Prosecution Service was established based on the Report of the Royal Commission of Criminal Procedure 1981. The Report recommended among others that, the Police should not investigate offence and decide whether to prosecute. The officer who investigated the case could not be relied on to make a fair decision whether to prosecute. According to the Report, allowing the police to prosecute has resulted in many weak cases to come to court which in turn led to a high percentage of judge directed acquittal.[177]

[175] Cap. E1, LFN, op.cit.
[176] Cap.C31, LFN, op.cit.
[177]Vlasic, M. and 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.

To some extent, the criticism made by the Royal Commission is also applicable to Nigeria. By fusing investigative and prosecutorial powers in the EFCC and the ICPC, the legislators seem to have placed an unnecessary burden on both agencies. A system where law enforcement agencies are limited to investigation is most likely to aid the performance of their functions in the criminal justice system. Perhaps this explains why Federal Bureau of Investigation (FBI) is only responsible for investigating possible violation of Federal Law in the United States of America. It does not give an opinion or decide whether an individual would be prosecuted. The Federal Prosecutors employed by the Department of Justice or US Attorney Offices are responsible for making this and conducting the prosecution of cases. The researcher believes that Nigeria can borrow from this system.[178]

Though, even if the function of EFCC and ICPC is limited to investigation, the concern is that the agencies do not seem to have the necessary capacity as required by Article 60 of the UNCAC[179] to discharge this function. In keeping pace with the growing sophistication in the methods used to launder proceeds of corruption in the 21st ICT age, the use of intelligence in tracing such proceeds cannot be overemphasized. This is because financial criminals often use experts, corporate vehicles as well as computer network to confuse trail. Thus, using traditional method of building of files of information on individuals and stolen assets does not provide much insight and information that can provide effective lead to tracing of such assets.[227] Today, there are software developed to assist in intelligence gathering, such as "goFAMILY", "goCASE", "goINTEL", "goASSES", and "goIDM". These software are developed by the United Nations Office on Drugs and Crime (UNODC) as investigative case management and

[178] Asset Recovery Handbook- A Guide for Practitioners, StAR Stolen Asset Recovery Initiative, The World Bank/UNODC (2011), p.13.
[179] UNCAC, op.cit.
[227] Tracing, Freezing, Confiscation, Recovery and Forfeiture of Illegal Proceeds of Money Laundering in Nigeria, op.cit. p.15.

intelligence analysis tool for Financial Intelligence Units (FIUs), and law enforcement agencies generally, though their specific functions differ.[228] The goFAMILY enables partners to interface with each other and encourages inter-agency, and cross border cooperation and information sharing at national and international level. goCASE facilitate the collection, development and analysis of intelligence, as well as the investigation and prosecution of financial crime. When proper information is inserted, goSACE provides historical data of cases, investigative techniques, persons, places and entities of interest.[229] goINTEL on the other hand, is designed to assist domestic clusters intelligence and law enforcement agencies to share information from agency to agency or through centralized hub. This software is a key solution for the construction centralized platform that provides an efficient means that streamline the identification, prevention and investigation of criminal activities. It brings heterogeneous information sources and human expertise together in a cooperative environment to fight crime. goASSES provides a comprehensive assessment framework for evaluators to enter their evaluation criteria and customize them according to a country's need. It covers the process of preparation for interviews, missions, drafting of report by the team during mission, post-mission review and final report production. Finally, goIDM assist partners with the capacity to manage information ranging from basic human resource data to highly confidential information and to monitor and manage performance and quality control.[230] This is the only software EFCC has at the moment.[231]

[228]Available @ *http://goaml.undoc.org/goaml/en/product.htn,* accessed on 24th March, 2017. 3:16. P.M.
[229]Available @ *http://www.imolin.org/imolin/en/goAMLgoCASE. html#goaml*, accessed on 24th March, 2017. 4:21. P.M.
[230]Available @ *http://goidm.undoc.org,* accessed on 24th March, 2017. 4:46. P.M.
[231]Ibid.

5.4 Benefits of Implementation of Anti-Corruption Conventions in Nigeria

Resort to these Conventions by way of given effect to some of their provisions has resulted in significant success in recovery of proceeds of corruption in Nigeria over the years as shown above. However, a better way to determine the benefits of providing comprehensive measures for domestic implementation of these Conventions is to examine what Nigeria is losing due to the inadequacy of these measures. To put it differently, what does Nigeria stand to gain in terms of assets recovery if inadequate measures for the implementation of these Conventions were put in place? Based on our analysis thus far, the answer to this question can easily be named. Without doubt, Nigeria would have achieved better result than what is currently available. For instance, Ibori's £5.6m confiscated in UK would have been returned to Nigeria. The UK Government insists that Nigeria must provide legal framework for the management of the funds as one of conditions for the returned of the assets. Furthermore, the 1.2 billion traced from the office of the National Security Adviser to a Zenith Bank Account belonging to Ekiti State Governor Mr. Ayodele Fayose, would have remained frozen and possibly confiscated if Article 30 of the UNCAC[232] was domesticated in Nigeria. Unfortunately, there is guarantee that the assets would not be dissipated before the expiration of the Governor's tenure thereby frustrating any recovery effort by anti-corruption agencies.

In addition, lack of domestication of Article 54 (1) (c) of the UNCAC[233], has deprived Nigeria of the benefit of proceeding against corruptly acquired assets of the Former Minister of Petroleum Resouces, Mrs Diezani Madueke who has fled the country. Intelligent reports have shown that there were more funds to be recovered from her[234], but she has fled the country and

[232]UNCAC, op.cit.
[233]Ibid.
[234]Wale, O., (2016), "Presidency explains Challenge in Recovering Loot, Begs UK group for Money", available @ *www.dailypost.ng/2016/02/21/presidency-explains-challenge-in-recovering-loot-begs-uk-group-for-money/*,accessed on 24th August, 2016. 4:12. P.M.

there is no NCB regime to proceeds against the assets. The same goes with the 1.3billion poultry fraud suit against Ayodele Fayose. Being the sitting Governor of Ekiti State, he enjoys immunity against prosecution, until after the expiration of the tenure of his office.[235] In similar vein, if Nigeria had domesticated Article 53 of the UNCAC[236], some of the high profile corruption cases in court for more than seven (7) years, would have been concluded by now. However, the absence of this measure has deprived Nigeria of speedy recovery of these funds as shown against each looter: Senator Ahmed Sani Yarima (N1billion), Danjuma Goje (N25billion), Abdullahi Adamu (N15billion), Joshua Chibi Dariye (N1.2billion), Godswill Obot Akpabio (N108billion), Sam Egwu (N80billion), Theodore Orji (47billion) and Adamu Aleiro (N10.2billion).[237]

5.5 Issues and Challenges in the Implementation of Anti-Corruption Conventions in Nigeria

The international and regional conventions signed and ratified by Nigeria have no doubt engendered renewed interests in fight against corruption through assets recovery in Nigeria. Since the ratification of these instruments, the national frameworks of assets recovery are to some extent being reviewed in line with the international best practices and global standards embedded in the conventions. Nonetheless, the challenges and obstacles along the way cannot also be ignored. In particular, failure to comprehensively establish measures for the full implementation of Convention has remained a clog in the way of full realization of the international obligations to which Nigeria as signatory state has committed itself. This has consequently, denied Nigerians the opportunity to also realize the full benefits envisage under these instruments. Though, some of the factors responsible for this have been examined above

[235]S. 308 of the Constitution Federal Republic of Nigeria, Cap. C23, op.cit. grants immunity against prosecution to the President, Vice President, Governor and Deputy Governor. Action Aid Nigeria. (2015). Corruption and Poverty in Nigeria: A Report. *http://www.actionaid.org/sites/files/actionaid/pc_report_content.pdf*. 14th August, 2016. 5:11. P.M.
[236] UNCAC, op.cit.
[237]Action Aid Nigeria. (2015). Corruption and Poverty in Nigeria: A Report. Available @ http://www.actionaid.org/. 14th August, 2016. 5:11. P.M.

such lack of capacity for sufficient intelligent gathering. However, there few that need particular attention. These include the following:

5.5.1 Lack of Political Will

There appear is a disconnect between the enthusiasm of the Nigerian government in participating in the negotiation of these Conventions and the country's willingness to provides comprehensive measures for the implementation of the obligations embodied in these Conventions.[238] Successive government in the recent past seems to have turned the question of implementation of Anti-Corruption Treaties in Nigeria into a political issue as reactions to pressures from donor agencies and Non-Governmental Organizations, some of which tie development aids to transparency and anti-corruption.[239] Consequently, Bills designed for this purpose are often abandoned at the end of such administration. For instance, the administration of Late President Umaru Musa Yar' Adua prepared a "Non-Conviction Based Forfeiture of Proceeds and Instrumentalities of unlawful Activity Bill, 2009". The Bill passed 2nd Reading.[240] However, after his demise, the administration of President Goodluck Jonathan abandoned the Bill and prepared a new one titled "Proceeds of Crime Bill 2004". And few days to the expiration of the administration, Senate passed 46 Bills into law within ten minute.[241] Unfortunately, it didn't include the "Proceeds of Crime Bill 2004". When President Muhammadu Buhari took over office, he sent a new Proceeds of Crime Bill 2017 to the National Assembly, signaling that he has also jettisoned the Proceeds of Crime Bill 2004, which he was reported have signed into

[238]Onomrerhinor, F.A., (2016), "A Re-Examination of the Requirement of Domestication of Treaties in Nigeria", *Nnamdi Azikiwe University Journal of International and Jurisprudence*, p.24.,
[239]Available *@http://234next.com/csp/cms/sites/Next/Home/5557754146/jonathan_appeals_to_lawmakers_to_pass.csp*. accessed on 13th October, 2016. 5:21. P.M.
[240]Chiedozie, I., (2009), "FEC Okays Bill for Seizure of Proceeds from Crime", available @ *www.nigerianbestforum.com/* accessed on 13th October, 2016. 4:06. P.M.
[241]Agbakwuru, J. and Erunke, J., (2015), "How Senate Passed 46 Bills in 10 Minutes", available *@www.vanguardngr.com/* accessed on 13th October, 2016. 3:56. P.M.

law.[242] It is hoped that this Bill will be passed into law during the tenure of his office. Otherwise, it may also be abandoned when the new administration comes on board.

The problem of lack of political will to provide measures for implementation of treaties in Nigeria is not peculiar to the above Conventions. Domestic implementation of Labour related treaties also faced a similar challenge in the past.[243] However, a clause was introduced by way of amendment to the Constitution in 2010 which took care of this problem. This clause as contained in Section 254 (c) (2) of the Constitution[244] provides for the direct application of any international instrument relating to labour law which Nigeria has ratified. This provision has taken care of lack of political will which often serve as a major obstacle to the domestic implementation of labour treaties in Nigeria. Thus, unless another similar strategy is devised, it would be difficult to determine when Nigeria will be able to establish comprehensive measures for the implementation of these Conventions. There is an immediate demand for these measures as stated in the National Anti-Corruption Strategy 2017-2020. The strategy aims among others, to recover asset and transparently manage it for the benefits of the citizens. It however, made realization of this goal dependent on the passage into law of Proceeds of Crime Bill[245] and amendment of Administration of Criminal Justice Act[246] for effective adjudication of Corruption cases across all the courts in the country, as well as amendment of Section 308 of the Constitution[247] to allow for the prosecution of all political office holder for corrupt related offences. Thus, without a constitutional mechanism to facilitate quick passage of these Bills into

[242]Bamidele, A.O., (2015), "President Buhari sign the Proceeds of Crime Bill into Law", *www.premiumtimes.com/2015/07/14/* Accessed on 13th October, 2016. 4:41. P.M.
[243]Atilola, B., (2014), "National Industrial Court and Jurisdiction over International Labour Treaties under the Third Alteration Act", available @, *nicn.gov.ng/*accessed on 24th May 2016. 4:11. P.M.
[244] Federal Republic of Nigeria (Third Alteration) Act 2010.
[245] POCB, op.cit
[246] ACJA, op.cit.
[247] Cap. C23, LFN, op.cit.

law, effective assets recovery and the transparent management of same, may hardly be realize within the time frame of the National Anti-Corruption Strategy.

5.5.2 Problem of Corruption

In Nigeria, perpetrators or beneficiaries of corruption cut across the Arms of Government in the country.[248] At the National Assembly for instance, provision of comprehensive measures for domestic implementation of these Conventions in Nigeria is likely to be frustrated because some Senators and Former Governors[249] are still facing corruption charges. These persons and their allies may seek to obstruct or delay the process[250] since they are likely to be among the first persons to face the wrath of such legislative measures. In the judiciary, corruption still poses a great danger to the implantation of the available measures for recovery assets in the country. President Muhammadu Buhari in 2016 was quoted as saying: "Judiciary is my worse headache in fighting corruption in Nigeria".[251] There are allegations of judges collecting money to make a favourable decision.[252] The effect is that where a Judge accepts payment to make a favourable decision, he becomes subordinated to the individual who pays the bribe. When a Judge is subordinated to someone else, we can no longer speak of credibility, which is the very essence of justice system.[253] The problems of corruption in the judiciary exact substantial and enduring costs on effective criminal based forfeiture of assets in Nigeria.[254]

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[248]Folashade B. O., (2012), "Corruption as Impediment to Implementation of Anti -Money Laundering Standards in Nigeria", *American International Journal of Contemporary Research*, Vol. 2 No., p.186.

[249]This includes Senator Ahmed Sani Yarima (N1billion), Danjuma Goje (N25billion), Abdullahi Adamu (N15billion), Joshua Chibi Dariye (N1.2billion), Godswill Obot Akpabio (N108billion), Sam Egwu (N80billion), Theodore Orji (47billion) and Adamu Aleiro (N10.2billion).

[250]Abdullahi Y. S., op.cit.p.199.

[251]Anti-corruption war: Judiciary my main headache, Daily Post, February 1, 2016, available @https/dailypostngr, accessed on 24th June, 2016. 10:22. A.M.

[252]Charles E. et'al, (2016), "The Irony of Nigeria's Fight against Corruption: An Appraisal of President Muhammadu Buhari's first Eight Months in Office", *International Journal of History and Philosophical Research*, Vol.4, No.1, p.69,

[253]Egbewole, W., (2015), "Nigerian Judiciary and the Challenge of Corruption: Islamic Options as Panacea", *Journal of Islam in Nigeria*, Vol. 1 No 1, p.90.

[254]Banjoko, A.A.I., (2015), "Corruption in the Judicial Process: Myth or Reality", paper delivered at the National Workshop for Judicial Officers on Judicial Ethics, Anti-Corruption and Performance Evaluation, 25th to 26th May 2015, p.9

5.5.3 Slow Nature of Criminal Forfeiture Regime in Nigeria

The machinery of asset recovery through conviction based forfeiture in Nigeria is very slow. As at 2016, there are over 400 corruption cases are pending in Nigerian courts.[255] One of the causes such delay is several unnecessary adjournments.[256] To encourage speedy dispensation of cases, Section 396 of the ACJA[257] requires that when an objection is raised after the plea has been taken, such objection should be considered along with the substantive issues and the ruling be made at the time of delivery of judgment. And after arraignment, if day to day trial is impracticable, no party should be entitled to more than five adjournments. If however it is impracticable to achieve that, the interval from one adjournment to the other should not exceed seven days inclusive of weekends and the court may award reasonable costs in order to discourage frivolous adjournments. However, despites this, criminal trials take long period in court at the instance of the parties who always seek for adjournment on unnecessary ground such as failure to produce the accused person in court.[258] And awarding cost to discourage frivolous adjournment as a means to encourage speedy trial has not really guarantee speedy trial in some cases. In high profile corruption cases, payment of such cost does not deter the defendants. Rather, they encourage the payment in order to delay the trial in the hope that they will benefit.[259] Though, Bala Ngilari, Rev. Jolly Nyame, and Joshua Chibi Dariye all Former Governors of Adamawa, Taraba, and Plateau State were convicted for five, 14, and 14years for embezzling N167.8m, (N1.2billion) respectively, although they appeal against their convictions. But apart from these, there are many high profile corruption cases instituted under the Act have

[255]PROBITAS REPORT, available @ *www.protbitasreport.com/400-corruption-cases-pending-in-nigerian-courts-icpc/*, accessed on 12th July, 2016. 9:23 A.M.
[256]Agbude, G. A. ,et'al, (2016), "The Psychological Imperative in Political Processes in Nigeria", *Arts and Social Sciences Journal*, Vol.6, Issue 2, p.24.
[257] ACJA, op.cit
[258] Adewumi, A.A. (2016), "The Import of Section 396 of the Administration of Criminal Justice Act (ACJA) 2015: Case Study of Federal Republic of Nigeria vs. Dr Olubukola Abubakar Saraki", *NAUJILJ*, p.151.
[259]Ibid.

not made appreciable progress. One of these is the trial of Former National Security Adviser, Colonel Sambo Dasuki. This case was instituted since September, 2015 on charges diversion of $2.1 billion arm deal. However, the trial seems to have stalled due to the intermittent failure of Department of State Services (DSS) to produce Dasuki in court. Others include contract fraud trial of former military officer such as Ex-Chief of Defense Staff, Alex Bade, Former Air Chiefs, Mohammed Dikko and Adeola Amosu. These cases have suffered setbacks such that none has been convicted and sentence.[260] This is also the case with some Former Governors shown above, whose corruption cases are in court for more than seven years now.

Another cause of delay in the criminal forfeiture regime in Nigeria is the high standard of prove require for criminal cases. In case of financial crime, the challenge is, it is often difficult for the prosecution to prove it beyond reasonable doubt as most times, the knowledge of such crimes reside entirely in the accused person.[263] Perhaps this explains why Article 12 (7) of the UNTOC[261] and Article 31 (8) of the UNCAC[262] in a non-mandatory term recommend that States Parties may consider reversing the burden of proof to the accused by requiring him to explain the lawful origin of the assets. However, in Nigeria, Section 36 (11) of the Constitution[263] has placed a constitutional restraint on such shifting of the burden of proof as the section indeed recognizes that the defendant has the right to presumption of innocence until proven guilty. The duty of proving the defendant's guilt is squarely saddled on the prosecution as Section 131 and 135 (2) of the Evidence Act[264] clearly establish that the burden of proving any allegation lies on the person who asserts it. In the context of corruption, these provisions

[260] Azu, J.C., (2017), "How Anti-Corruption is Strangling Anti-graft war", Daily Trust, Sunday, June 10, 2017, p.14
[263]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.16.
[261] UNTOC, op.cit.
[262] UNCAC, op.cit.
[263]Constitution of the Federal Republic of Nigeria, Cap. C23, LFN, op.cit.
[264] Evidence Act, 2011.

seem to be assisting corrupt people. The provisions often leave the prosecution struggling to prove financial crimes such as unjust enrichment whose knowledge only reside with the accused. It is easy to suspect unjust enrichment especially if the accused is living above his means. But it is difficult to prove it. Thus, considering that corrupt offences are often committed secretly, lack of legal framework of accusatorial nature that permits reversing the burden of prove to require the accused explain the source of wealth would be counterproductive to Nigeria' anti-corruption crusade in general and assets recovery in particular.

Though, in general sense, shifting the burden of proof onto a defendant would be repugnant to ordinary notions of fairness[265] because presumption of innocence is an important right of the citizens.[266] Thus, in trials of serious or violent crimes, it is usually essential to the proper conduct of a criminal trial that the prosecution prove the guilt of the accused and do so by admissible evidence. Ordinarily, the accused does not need to prove his or her innocence.[267] However, laws reversing the onus of proof have been justified for a few reasons. One of such is when the subject matter of the legal burden would be peculiarly in the knowledge of the accused. In *DPP vs. Forsey*[268], Mr. Forsey received payment of 10, 000; 10, 000; and 60, 000 Euros respectively from a property developer in 2006 while he was a Member and Vice Chairman of Dungarvan Urban District Council. Mr. Forsey claimed that the payments were loans. The prosecution reversed the burden of proof by relying on the Section 4 of Prevention of Corruption Act 2001, which provides that any gift, consideration advantage given to, or received by a person and the person giving it had an interest in the discharge of any function by the person receiving it, such give gift consideration or advantage shall be deemed as corrupt inducement unless the

[265]*Sheldrake vs. DPP* (2004) UKHL 43.
[266] *Momcilovic vs. The Queen* (2011) 245 CLR 1, 47
[267]*Carr vs. Western Australia* (2007) 232 CLR 138, 172
[268](2016) IECA, 233.

contrary is proved. The Mr. Forsey was convicted because he could not prove beyond reasonable doubt that the payments he received were loans. He appealed, but his conviction was affirmed by the Court of Appeal. In the UK, Isaacs J in *Williamson vs. Ah On,*[269] explained that the evidentiary burden will necessarily shift depending on which party has the requisite knowledge and evidence to adduce the truth in proceedings. He observed that burden of proof at common law rests where justice will be best served having regard to the circumstances both public and private. The above decision implies that, a fair balance must be struck between the demands of the general interest of the country and the protection of the fundamental rights of the individual. Thus, by this principle, if reversal of the burden of proof is necessary to effectively combat corruption in Nigeria for the good of all, such reversal would not constitute an infringement on the defendant's right to presumption of innocence.

In addition, even if the above challenges are effectively resolved, our High Courts which are conferred with the jurisdiction to trial corruption cases are overstretched. The level of congestions in these courts would make it difficult to achieve speedy dispensation of corrupt cases. Section 36 (4) of the Constitution requires that the accused person must be tried within reasonable time. However, the average time of five to seven years in litigating corrupt cases at the High Court does not meet the requirement of reasonable time stipulated by the Constitution. This perhaps led to the clamour for the creation of anti-corruption court. Though, while this would certainly reduced congestions in our courts, at the moment however, it does not seem to be the best option. This is particularly when one considers the fact that multiplicity of courts in Nigeria without adequate funding has resulted to corruption in the judiciary. Apart from this,

[269](1926) 39 CLR 95, 113. A similar decision was reached in *Sliney vs. Havering London Borough Council* (2002) EWCA Crim 2558

with the current agitation to cut the cost of governance in the country, creating an additional may not really help in this regard.

The High Court is not the first on the ladder of courts in Nigeria. Counting on the basis of criminal jurisdiction, the Magistrate Courts arguably are the lowest. One therefore questions the rationale behind insisting that all corruption cases must be prosecuted at the high courts. The Magistrate Courts have jurisdiction in all offences except those punishable with death. Thus, it is the considered opinion of the researcher that the strategy of limiting the prosecution of all corrupt offence at the High Court has not really achieved the desired result.

Furthermore, if machinery of asset recovery through conviction based forfeiture in Nigeria is very slow because of high standard of proof, at least there are certain corrupt acts that are both crime and civil wrong. One example in this regard is unjust enrichment. In cases involving unjust enrichment in Nigeria, one wonders why the insistence by government or individuals on criminal proceeding when it is obvious that the high standard of proof causes system unnecessary delay. The Supreme Court has identified the tort of unjust enrichment as a cause in the case of *F.B.N vs. Ozokwere*.[270]Although unjust enrichment was not the cause of action in the suit, however the court gave direction that restitution is available on a claim of unjust enrichment. Similarly, in *Eboni Finance & SEC vs. Ojo Technical Service*,[271] the court held that where a party unjustly enriches himself at the expense of another, the fraudulent must be made to disgorge it. Specifically the court held that in consonant with principles of restitution, a remedy shall be made available whenever the defendant has unjustly enriched himself at the expense of the plaintiff. Furthermore, political leaders are trustees to the citizens. Undoubtedly, it is based on this reasoning that the Supreme Court in a unanimous decision in *AG Federation vs.*

[270] (2013), 12 (Pt II), M.J.S.C, 60, 77-78.
[271] (1996), 7, NWLR (Pt. 461), 464, 478.

AG Abia State & Ors[272] held that the Federation Account into which certain revenue of the Federal Republic of Nigeria is paid and shared among the Federal and the States Governments is held on constructive trusts by the Federal Government. Thus, as constructive trustee, the government is saddled with responsibility of managing this account. But most importantly, it is their duty to ensure whenever an individual enriches himself unjustly at the expense of another or the citizens, he must be made account and make restitution accordingly through a process that speedy and less technical.

5.5.6 Federal Structure

Domestic implementation of treaty in a federation is very often beclouded by problems arising from the division of powers between the federal government and constituent units. Issues of federalism may arise where the matter dealt with by the treaty relates to powers assigned to the states.[273]Despite the non-involvement of states in conclusion of treaties in matters on Exclusive Legislative List, they do have a stake in providing implementation measures which bear on their constitutionally assigned competence.[274] However, "corruption" as a legislative item is not listed *per se* in the Exclusive or Concurrent Lists of the constitution. It is therefore a legislative item within the legislative competence of the states in their exercise of residual powers.[275] The challenge however is, provision of certain measures for implementation of these Convention by Federal Government is likely not to be applicable at the Federal Level. This is particularly the case with measures for assets management. It has been shown above that, in Nigeria, sometimes, the assets recovered are looted by State Governors, therefore, belong to the states. It is the

[272] (2002), 4 SCNJ 1.
[273]Omoregie, E.B., (2015), Implementation of Treaties in Nigeria: Constitutional Provisions, Federalism Imperative and the Subsidiarity Principle, A paper delivered at the International Conference on Public Policy (ICPP) held 1-4 July 2015 in Milan, Italy under the auspices of the International Public Policy Association (IPPA), p.12
[274]S.12 (1), Constitution of Federal Republic of Nigeria, Cap. C23, LFN, op.cit., and Abebe, A.K., (2013), Umpiring Federalism in Africa, Institutional Mosaic and Innovation, African Studies Quarterly, 13: 4, p.261.
[275]Omoregie, E. B., (2013), "Subsidiarity Principle and Judicial Enforcement of Federalism in Nigeria", *NIALS Journal of Constitutional Law*, 1, p.75.

responsibility of the states therefore, to set up management mechanism to manage such assets. For this reason, even if the POCB is passed into law, the problem of management of proceeds of corruption in Nigeria will only be solved by half because the Bill itself has limited its application to federal assets. Unfortunately, without a transparent legal framework to manage such assets at the state level, the assets are most likely to be re-looted.

5.5.7 High Cost of Asset recovery

Asset recovery is costly exercise. For instance, for the recovery of Abacha's loot alone, Nigeria paid a legal fee of $14 million.[276] Ongoing investigations into the diversion of arms funds by the National Security Adviser shows that significant money needed for development were still in the pockets and bank accounts of looters of public funds. Furthermore, intelligent reports and court rulings elsewhere have shown that there were more funds to be recovered from Diezani Alison-Madueke; fraudulent sale of OPL245 Malabu Oil and Gas, a company owned by Dan Etete; James Ibori; and Sani Abacha. However, due to exorbitant charges of professionals such as lawyers, forensic financial investigators and the ability of the suspected officials to use part of the looted funds to challenge the recovery of the funds, the government no doubt needs huge flow of resources.[277] Unfortunately, the Presidential Advisory Committee on Corruption (PACC) noted that, Nigeria is faced with the problem of insufficient resources to trace, freeze and confiscate assets at the international level. There is no money currently available to engage these professionals due to the dwindling oil revenue.[278]

In conclusion, this Chapter examines the measures for domestic implementation of Anti-Corruption in Nigeria. It has shown that Nigeria has demonstrated a level of commitment to fight

[276]Switzerlad, Nigeria and the Repatriation of Looted Funds, available*@www.eurodad.org/uploadedfiles/whats-new/news/eurodad%2520switzerland-nigeria-stolen-lootpdf*, accessed on 25th August, 2016. 3:21. P.M.
[277] Wale, O., op.cit. p.12.
[278] Ibid.

against corruption through assets recovery by provision of a number of legislative and non-legislative measures to that effect. However, the country is still short of meeting the Conventions' obligations particularly in the area of assets recovery. Some of the challenges identified include corruption and lack political will to provide comprehensive measures for effective domestic implementation of the Conventions. There is tendency that, these challenges can impact negatively on assets recovery effort in Nigeria because, if legal the framework is not effective and comprehensive, it is doubtful if the process of assets recovery would record a resounding success.

CHAPTER SIX
SUMMARY AND CONCLSION

6.1 Summary

This thesis has examined "Assets Recovery in Financial Crime in Nigeria: A case Study of Domestic Implementation in Nigeria". The thesis generally comprises of Six Chapters. Chapter one provided a general introduction to the work. It has shown that, corruption has led to enormous loss of public funds meant for development as officials divert these funds for private

use. To effectively combat this, the international community in collaboration with their domestic counterpart adopted assets recovery as part of the enforcement measures. This is based on the realization that the traditional model of punishment or sentencing without confiscating the proceeds of crime allows the criminals even while in prison to enjoy their illegal gains. Thus, apart from the fact that the recovered assets if effectively managed could provide funds for necessary development in a country, assets recovery is also a potent weapon against corruption. When obtainable, it represents society's credible commitment to ensure that crimes do not pay. The concluded by and also highlighting the statements of the problem, objectives of the research, scope, methodology, significance of the study, literature review and organizational layout.

Chapter two provided a conceptual frame. This is necessitated by the fact that, the same words may have different meaning to people, especially if they work in various disciplines. Hence, the needs to provide clarification of key terms that are used in this thesis. Thus, the chapter has provided definition of these terms, as proffer by different scholars and authors. In doing that however, the chapter tried as much as possible to provide a general definition of these terms, as well as providing salient distinguishing features between them and other similar terms where necessary. Furthermore, terms that are wider in scope such as assets and financial crimes, are restricted and defined within the context of research. This is intended to help our understanding of these terms whenever we come across them in the thesis.

Chapter Three particularly examines the International and Regional Legal Framework of Assets Recovery adopted to combat corruption. These include: United Nations Convention Against Corruption (UNCAC); United Nations Convention Against Transnational Organized Crime (UNTOC); African Union Convention on Preventing and Combating Corruption and Related Offences (AU Anti-Corruption Convention); and Economic Community of West African

States Protocol on the Fight Against Corruption (ECOWAS Protocol). These instruments in both mandatory and non-mandatory terms require state parties to set up measures that enable tracing, freezing confiscation and return of assets. This is to ensure that justice is meted out and offenders are prevented from enjoying the fruits of their misconduct. These instruments as discussed in this chapter, address a host of provisions and measures contributing to the effective identification, apprehension, prosecution, adjudication and sanctioning of those engaged in corrupt practices. In particular, these measures are recommended alongside compensation for damages. Instrumental and necessary in this respect is also the adequate protection of witnesses, victims and others who collaborate in the investigation or prosecution of offences established in accordance with the Convention. Finally, all of these processes can only be effective through national and international cooperation not only among relevant public authorities, but also between national authorities and the private sect.

Chapter Four Appraise the Form and Processes of Assets Recovery developed Pursuant to the requirements of the relevant Articles of the above Conventions. These processes enable the relevant authorities to identify, trace, and freeze or seize proceeds, property and instrumentalities of financial crime for the purpose of confiscation. Unlike murders or other crimes of violence, corruption and money laundering leave no readily visible signs that alert authorities to their occurrence, or the proceeds generated from their occurrence. Thus, an investigative process aimed at tracing the assets and collating evidence becomes an essential component in any asset recovery effort. With tracing, it would be possible to gather information that would provide a lead to identify assets for recovery, location of evidence, other criminal actors such as bribe payers, money Launderers, witnesses and persons extorted, and new leads for investigation. This information would help the law enforcement agencies to connect the asset to the illegal activity,

which is an important requirement needed to prosecute corrupt official for corruption and money laundering or to initiate the process of voluntary return of assets.

During tracing, assets subject to confiscation must be secured through freezing order or interim seizure, particularly where they are likely to be dissipated or moved to frustrate confiscation. Since such orders are made against the offender in person and not his assets, thus, he is prevented from dealing in the assets. This also applies to third parties, such as banks who are in control of the offender's funds. Such order if granted irrationally can affect the defendant or third party's basic rights. Hence, certain requirements must be satisfied by the applicant before the court can grant the order. For instance, the prosecution must establish the existence of the following: good arguable case, real risk of dissipation of assets, full and frank disclosure of all relevant information, undertaking as to damages, and that it just and convenient to freeze the assets. Freezing is intended to secure the assets for eventual confiscation. Confiscation could be Criminal or Conviction Based Confiscation (NCB). Criminal forfeiture requires a criminal trial and conviction, before the defendant could be deprived of his assets. One advantage of criminal confiscation is that, it allows for the confiscation of assets or value of the assets. Furthermore, convicted co-defendants are liable equally for satisfying any money judgment of forfeiture. However, criminal forfeiture 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 or where the defendant enjoy immunity against prosecution.

In such circumstance, Non Conviction Based Forfeiture (NCB) readily provides the solution. NCB asset forfeiture or civil forfeiture is an action against the asset itself and not against an individual. It is an action in *rem*, against the thing or property which is suspected to be the proceeds or instrumentality of corruption and not against the offender. This method of

confiscation does not require a criminal conviction in order for corrupt proceeds to be attached. Proceedings which are civil in nature are brought against the property itself. One advantage that flow from this is, since the action is instituted against the property, NCB law can be applied retrospectively. For this same reason also NCB forfeiture regime does not violate an individual right to presumption of innocent and the right to property. Although, a major disadvantage of NCB is that, it is limited to assets linked directly to the offence. Thus, the court cannot order the confiscation of other property or money as a replacement for a lost asset. Alternative, where it would be difficult to recover assets criminal confiscation due to high standard of prove, civil proceedings in *personam* may be used. This is a direct method of recovering corruptly acquired assets. This mechanism allows a state or a private citizen to bring a claim in the civil courts of a foreign jurisdiction where corruptly acquired assets are located. The standard of proof is based on balance of probabilities.

Chapter Five examined the Domestic Implementation of Anti-Corruption Conventions in Nigeria. It has particularly examined legislative and non-legislative measures for the implementation of these instruments in the country. The chapter has shown that, as a State Party, Nigeria has demonstrated commitment to combating corruption through assets recovery in the country by setting up legislative and non-legislative measures pursuant to the relevant provisions of the above international and regional legal instrument. Though, some of these measures include ones that were already in existence prior to adoption of the Conventions. Nonetheless, they have made provisions aimed at tracing, freezing, and confiscation of assets. In the implementation of these measures, a number of successes have been recorded. However, pitched against the funds looted in the country, this effort cannot be described as resounding success. This could generally be attributed to fact that, Nigeria is still short of meeting the Conventions' obligations

particularly in the area of provision of key legislative measures for assets recovery. There is high tendency therefore, that this can impact negatively on assets recovery effort in Nigeria. Chapter Six summarizes the work, highlight some major findings and make recommendations accordingly.

6.2 Findings

In view of all that have been discussed in the preceding chapters, the thesis makes the following findings:

1. It is found that Nigeria has made provision for Criminal Forfeiture Regime pursuant to Article 31 of the United Nations Convention Against Corruption (UNCAC), Article 12 of the United Nations Convention Against Transnational Organised Crime, and Article 16 of the African Union Convention on Preventing and Combating Corruption. However, the implementation of this measure in Nigeria is very slow particularly in high profile corruption cases. Section 396 of the Administration Criminal Justice Act which was enacted with the aim of achieving speedy trial, has not really helped much in terms of meeting this objective. Sometimes, criminal trials take long period in court at the instance of the parties who always seek for adjournment on unnecessary ground such as failure to produce the accused person in court. And awarding cost to discourage frivolous adjournment as a means to encourage speedy trial has not really guarantee speedy trial in some cases. In high profile corruption cases, payment of such cost does not deter the defendants. Rather, they encourage the payment in order to delay the trial in the hope that they will benefit.
2. Nigeria has no measure for Non-Conviction Based (NCB) forfeiture and Civil Forfeiture in *Persomam* pursuant to Article 54 and 53 of UNCAC. Consequently, corruptly acquired

assets of defendants who died cannot be recovered. For defendants who enjoy immunity against prosecution, such assets can only be recovered after the expiration of their tenure of office during which the asset is most likely to be dissipated to frustrate eventual recovery. Recovery of the value of the dissipated asset may not also be easy as there is no measure for value recovery through civil proceeding in *personam*. Thus, criminal forfeiture regime would to be relied upon with all its challenges.

3. Plea bargaining as practice in Nigeria does not really discourage corruption. Rather, it encourages corruption by allowing looters to safely go home with enormous proceeds of corruption. This is partly because Section 14 (2) EFCC Act and Section 270 of the ACJA which regulate plea bargaining in Nigeria have not made any provision to guide the parties in determining the amount to be paid in a plea bargaining process. Consequently, this has often led to the recovery of ridiculous amount out of the total amount stolen thereby allowing corrupt persons to escape with funds that would have help in the development of the nation. Furthermore, Section 270 of the ACJA would make it difficult to initiate plea bargaining in Nigeria as it requires such bargain only when the matter cannot be proven beyond reasonable doubt. But in doing that, that the consent of the victim(s) must be sought. The defendant may decide there is no need for plea bargaining, since the allegation against him cannot be proven beyond reasonable doubt in the first place.
4. Nigeria has complied with Article 60 of the UNCAC in Section 11 of the EFCC Act which requires the Commission to train its personnel in the area of investigation and prosecution of corrupt offences. Despite this provision however, effective recovery of proceeds of corruption in Nigeria still remains difficult due to institutional weakness. In practice the EFCC and ICPC seem to lack this capacity for effective investigation and

tracing of assets as well as prosecutions of offenders. Thus, conferring both investigative and prosecutorial functions on the ICPC and EFCC is seems to be too much for the agencies to effectively discharge. Consequently, sometimes cases are closed due to insufficient evidence to support prosecutions, often caused by poor investigating skills and capacities.

5. Another challenge in the recovery of proceeds of corruption in Nigeria through conviction based forfeiture is the congestion in the courts. This has made day to day trial as provided by Section 396 ACJA very difficult. With this problem, sometimes it is difficult to hear restrain applications and corrupt cases as urgent as the situation demands. Consequently, sometimes such cases remained in court for more than 7 years.
6. The thesis also found that the government lack political will to provide comprehensive measures for domestic implementation of Anti-Corruption Convention in Nigeria. Consequently, amendment to existing laws or enactment of new ones to give the needed "teeth" to assets recovery effort in Nigeria remains an issue that cannot be determined with certainty. Corrupt public or political office holders who would be victims of such amendments or laws are most likely to campaign against it.

6.3 Recommendations

In view of the forgoing, the paper makes the following recommendations:

1. **Provision of Time Frame for the Completion of Criminal Forfeiture Proceeding**

   The Administration of Justice Act needs to be amended to provide time limits for completion of corruption cases and appeals. The amendment should specifically states the duration within which the prosecution and defense are expected to open and close their case respectively. A corruption case should be dismissed where the prosecution

failed to close its case within the statutory time frame and judgment should be entered against the defense where it failed to close the within the time frame. However, in computing the time which corruption trial must start and end, certain factor should be taken into consideration. These include: any delay arising from any criminal charges against the accused, delay resulting from pre-trial proceeding, and finally, weekends, public holidays, period of strike, and any period of inactivity on the case arising from the absence of the trial judge for whatever reason. The advantages of this measure are many. On the side of the defense, it will prevent the accused from sitting in jail for an indefinite period before trials. It will also encourage the preparation of an adequate defense as long delay may cause witnesses to become weary or crucial evidence may be lost or destroyed in the process.

On the side of the prosecution, it will encourage them to develop their capacity in the area of intelligence gathering, particularly through adopting strategies and gargets that will provide reliable intelligence. Anti-corruption agency would not charge a person to court before starting investigation into the matter. The nation also stands to benefit from this measure as it will save or reduce the cost of prosecution. It will also minimize anxiety and concern that long delay will impair the possibility of effective dispensation of justice in the matter.

Furthermore, to encourage speedy conclusion of criminal forfeiture action in Nigeria, Section 131 and 135 of the Evidence Act should be amended to make provision for reversal of burden of proof in cases of corrupt offence. In order to prevent such amendment from conflicting with the constitution, Section 36 (11) of the Constitution should also be amended by inserting a proviso to the effect that reversal of

burden of proof in corruption cases does violate a defendant right to presumption of innocence.

2. Enactment of Comprehensive Civil Forfeiture Law

There is an urgent need for Proceeds of Crime Bill to be passed in law. This is one of the major legislations required for effective assets recovery in Nigeria at the moment. If enacted into law, it would complement the existing criminal forfeiture regime. It would be particularly useful in assets recovery (not recovery) where the defendant is out of the country, or enjoy immunity against prosecution or where there is no sufficient evidence to prove the guilt beyond reasonable doubt. Furthermore, passage of this Bill into law would allow the dedicated agency, "Proceeds of Crimes Recovery and Management Agency" to manage and account for recovered assets in Nigeria. However, since the function of the agency is limited to managing loots owned and recovered by the Federal Government, there is also the need for States and Local Governments to set up their respective agencies to manage returned assets toward achieving some stated objectives. The independence of such agency both in terms of appointments of its principal officers, security of tenure, and financial autonomy should be clearly provided in its enabling law. This would ensure effective management and proper accountability in respect of returned assets across the country and further ensure that the assets are used for the benefit of citizens.

There is need to establish measures for direct recovery of assets (civil proceeding in *personam*) as required by Article 53 of UNCAC. This would give the Government and the citizenry an important additional option in assets recovery. For instance, where criminal forfeiture would be difficult because the evidence is not

enough to prove the case beyond reasonable doubt, and NCB also cannot apply because it is value recovery, then resort can had to civil proceeding in *personam*. This is the best and fastest option in this circumstance as the plaintiff only needs to prove the matter on the balance of probability. The measure will also permit courts through civil proceeding to order those who have committed corruption related offences to pay adequate compensation to victims of fraud and other corrupt related activities. In addition, there is need to make provision as required by Article 31 (9) of the UNCAC to compensate defendants or third parties who are victim of administrative seizure or who may have suffered any financial loss as a result of freezing or interim order of attachment. This will safeguard the financial interest of such parties in the assets.

3. Strengthening Guidelines for Plea Bargaining

The employment of plea bargaining in corruption cases in Nigeria should be abolished because it encourages corruption. Or alternatively, Section 270 (1) of the ACJA and section 14 (2) of the EFCC Act need to be amended to clearly provide objective criteria that would guide the parties in fixing the amount in a plea bargaining process. For instance, the amendment should introduce percentage system as criteria for determining the amount. It may for example, require that 100 percent of the looted asset be returned or 100 percent of the value of the proceeds of corruption be paid. This will ensure that a substantial amount is returned to victims of such crime. Furthermore, Section 270 (1) of the ACJA also needs to be amended to remove the condition that plea bargaining should only be resorted to when the matter cannot be proven beyond reasonable doubt. This is because no defendant would accept plea bargaining knowing that the allegation against him cannot be proven beyond reasonable doubt. He would conclude that there is no need

for that as matter would be struck by the court. Furthermore, the section should also be amended clearly define how the consent of victims can be obtained for the purpose of plea bargaining. This is necessary since existence of such consent has become condition precedent to the conclusion of plea bargaining in Nigeria.

4.Separation of Investigative and Prosecutorial Functions

Section 6 and 12 of the EFCC Act as well as Section 6 of the ICPC Act should be amended to remove the prosecutorial functions of the EFCC and ICPC and confer it on the Federal Directorate of Public Prosecution (DPP). The amendment would allow the EFCC and ICPC to concentrate and channel their strength toward investigation. This measure would increase the efficiency and effectiveness of the agencies in the discharge of their investigative functions. Furthermore, removing prosecutorial powers from EFCC and ICPC and vesting it on DPP would bring accountability in the system as there would be checks and balances in the process of investigation, indictment, prosecution and conviction. In addition, this measure would reduce the likelihood of political persecution and unfair prosecution of the accused.

5.Creation of special section within the existing Courts for trial of corruption cases

There is need to create a separate adjudicative section within the courts in Nigeria, particularly from Magistrate to Supreme Courts, for the trial of corruption cases. For instance, corrupt cases involving all politicians and PEPs could be instituted at the State and Federal High Courts and be tried under these special sections, while those involving other citizens could be commenced at the Magistrates Courts. Though, experts have advocated for the creation of anti-corruption courts as a measure to enhance speedy determination of corruption cases in Nigeria. Agreed, however, building special courts

with all the necessary equipments and staffs to man them is not the best option for Nigeria especially considering that the existing ones are poorly equipped and not well funded. But creating a special section within these courts for trial of corruption cases is the best option for a number of reasons. First, apart from enabling corruption cases to be dealt with speedily, it comes with an added advantage of cutting cost of governance. For instance, the equipments, facilities and salaries of the Judges, Magistrates and their respective staffs would not constitute any serious burden on the government as they are readily available.

Secondly, if the anti-corruption sections in the High Courts are used only as courts of first instance in corrupt cases involving PEPs, it would reduce the volume of corrupt cases that flood these courts, as well as the volume of appeals that go to the Court of Appeal and the Supreme Court. The advantage of this is that it would ease congestion and consequently, give these courts respectively the time to deal with the corrupt cases efficiently and speedily. Corrupt cases other than those involving PEPs, commenced at the Magistrate Courts, can be appealed by an aggrieved party to the High Courts, Court of Appeal and Supreme Court, but the need for appeal may not be necessary if the aggrieved party is satisfied with the outcome of the appeal at the High Court.

Thirdly, using Magistrate Courts to try corrupt cases would result in speedy dispensation of such cases as this type of court is widely spread in Nigeria. They are visibly in virtually all Local Government in the country. It would be difficult for the proposed anti-corruption courts to have this kind of coverage. Furthermore, trials at the Magistrate Courts are summary trials and the procedure is simple. This means corruption trial would be done with minimum formalities. Consequently, the average justice delivery

in corruption cases in Magistrate Courts would not be frustrated with too much technicalities. However, to make this possible, Section 6 of the Constitution which defines the powers of judiciary in Nigeria as well Section 19 of the EFCC Act which limits the prosecution of corruption cases by the EFCC to the Federal and State High Court must be amended. In sum, this measure would reduce congestion in the court which is an important factor that will help in meeting the time limits for completion of corruption cases and appeals as recommended above.

6. Amendment to Constitution

The constitution should be amended to include a clause giving automatic force of law to any Bill for the provision of measure for the implementation of these Conventions, if not passed into law within a particular period of time, say one years. Such a provision will take care of the problem of corruption and lack of political will which has over the years, frustrated effort at establishment of comprehensive measures for implementation of the Conventions in Nigeria. This legislative measure may be difficult to be enacted as corrupt legislators in the National Assembly may frustrate any such Bill from coming into effect. However, it is not impossible. With pressure from Nigerians and most importantly from Civil Society Organization, such a Bill will eventually be passed into law.

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