International Regulations on Laundering and Repatriation of Illicit Funds: The Need for Reforms

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Abstract

The international community has been embattled with curbing corruption especially the one involving the embezzlement and looting of public treasuries in developing countries. One of the proactive steps taken includes regulations to prevent the laundering of such illicit funds and facilitating repatriation of such funds to the Victim's Countries. However, in spite of such efforts, the aims of the regulations appear not to be far-reaching. Reports by international organisations such as the World Bank, Organisation for Economic Cooperation and Development (OECD) and Transparency International (TI) are used as yardsticks to measure adequacy of the existing international legal and institutional frameworks regulating the laundering and repatriation of illicit funds with emphasis on developing countries in Africa. This paper finds that efficient prevention of laundering and repatriation of illicit funds is contingent upon a functional system of international prosecution and asset recovery mechanism which includes diligent implementation of existing legal framework and adoption of new repressive measures such as an international adjudicatory mechanism. Therefore, it is recommended that the existing operative regulations should be fully deployed and efforts should be made by the international community towards establishing a new international adjudicatory mechanism that will prosecute offenders and facilitate prompt repatriation of illicit funds.

Keywords: Illicit funds, OECD, Laundering, Repatriation

Introduction

The practice of moving money across borders has been known from time immemorial. Till date, the volume of legitimate international

businesses results in millions of people transferring money in cash through various channels such as financial institutions, securities and exchange markets, or through the purchase of assets worldwide.

Agreed, with the globalisation of the world economy, this acceptable movement of money has enhanced inter-state economic relationships and eased international businesses. However, it has also resulted in a world-web of transnational organised criminal activities including money laundering among others. Money laundering is defined as "the act of transferring illegally obtained money through legitimate people or accounts so that its source cannot be traced" (Garner, 2009). The act involves three stages of moving, disguising and resurfacing of the money through multiple channels (IMOLIN, 2019). The bulk of this laundered money is either proceed of a crime committed (having criminal origins) or meant to be used to perpetrate crime (having criminal destination). The former entails bulk of illicit funds diverted due to corruption which takes several forms including transferring funds to evade tax payment or laundering of funds acquired through embezzlement by public officials or fraud, through multi-jurisdictional structures in order to hide their ownership (OECD, 2013), while the latter refers to money used for drugs, wildlife, and human trafficking, terrorism financing, purchase of illegal weapons, bribery of officials by international companies, tax evasion, etc.

The growth of money laundering as an international crime, alongside the huge political and economic security challenges posed by the diversion of illicit funds on developing countries, has prompted the adoption of legal and institutional mechanisms to regulate it at all levels. Several international and regional instruments have been adopted. These regulations largely focused on the prevention of the crime by obliging states to trace and confiscate the proceeds of the crime, with seemingly vague provisions for protecting the victim state from which the money was taken and ought to be returned. It is in the light of the foregoing that this paper seeks to review the current stake in curtailing the laundering of illicit funds due to corruption and return of the same to the victim states. The paper opens with a historical review of the legal and regulatory frameworks on laundering and repatriation of illicit funds and further assesses their adequacy or

otherwise in achieving their aim**.** In doing this, an analysis of the impact of the frameworks on preventing the laundering of illicit funds and repatriation of the said funds was made. Therefrom, challenges faced by developing countries in recovery of assets from foreign jurisdictions were identified and recommendations were made to make the international regime more effective.

International Legal and Regulatory Frameworks on Laundering and Repatriation of Illicit Funds

A historical review of the regulations showed that the international community was initially focused on making regulations for the prevention and prosecution of money laundering. This is evident from the provisions in most of the instruments. The Vienna Convention (1988) is considered to be the first international legal instrument imposing legal obligations on states to curtail money laundering (Le Nguyen, 2014: 53). Article 3(1b) of the instrument identifies the following as some of the components of money laundering:

- The conversion or transfer of property, knowing that such property is derived from an offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his action;
- 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 offence or offences;
- The acquisition, possession, or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences.

The provisions of the Vienna Convention were mainly concerned with preventing the laundering of money either to be used for trafficking of narcotics or money gotten from already trafficked narcotics (proceeds of the crime). Therefore, Articles 3 and 5 of the Convention place an obligation on Member States to criminalise such acts of laundering and confiscate such laundered money.

In an attempt to comply with the obligations imposed by the Vienna Convention, in 1993, Commonwealth Ministers resolved, individually and collectively to put in place comprehensive provisions for criminalising money laundering and confiscation of the proceeds of crime, making money laundering extraditable, and promoting international cooperation for same purposes (Communiqué on Meeting, 1993).

To actualise the above resolution, they adopted the Global Action Plan on Organised Crime (GAPOC) at the Naples Conference (Naples Political Declaration, 1994). The Naples Conference was an unprecedented global convergence against money laundering as it brought together representatives from 113 countries and International Organisations (Evans, 1996:197). The GAPOC presented a broad range of measures to combat organised crime including national legislation; international cooperation at the investigative, prosecutorial and judicial levels for the prevention and control of money laundering.

These adopted measures culminated into the Palermo Convention (UNTOC) which strengthened the legal impositions already prescribed by the above Vienna Convention. In addition to that, the UNTOC encouraged international cooperation in the investigation and prosecution of organised crime by providing a framework for extradition and Mutual Legal Assistance between the Member States (UNTOC, 2003).

In response to the mounting concern over money laundering and its attendant negative effects, the Financial Action Task Force on Money Laundering (FATF) was established. Its objectives are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. It made 40 recommendations that are intended to establish anti-money laundering (AML) Standards, thus, providing a comprehensive plan of action to combat money laundering. The FATF conducts annual assessments of Countries' legislative and regulatory compliance with the FATF Recommendations, and publicly identifies "high-risk and non-cooperative jurisdictions" to alert other countries and mount political pressure on such countries to

comply with the AML standards (FATF Recommendations, 1990). In November 2015, FATF produced guidance on Anti-Money Laundering/Terrorism Financing- related data and statistics, with publications to help strengthen countries' understanding of the risks related to such transnational crimes (FATF, 2015).

However, with time, the international community realised that in addition to money used to perpetrate crime, the bulk of the laundered money traced were proceeds of cross-border corruption crimes perpetrated by individuals, especially from developing countries. This included the transfer of illicit funds by public officials; transfer of funds to evade payment of tax and bribery of officials or multinational corporations for various reasons. Therefore, the focus was gradually shifted towards preventing such crimes and repatriation of the proceeds to the victim countries. This culminated in the adoption of additional regional and international mechanisms (Wouters *et. al.*, 2012:5-34).

The first response was the OECD Anti-Bribery Convention which is an anti-corruption convention aimed at reducing political and corporate corruption concerning bribery in international business transactions (OECD Convention, 1997). The convention obliges State Parties to criminalise the bribery of foreign government officials for all intents (Article 1), take measures to establish the liability of legal persons for commission of bribery (Article 2) and provide mutual legal assistance (Article 9) and make bribery a predicate offence of money laundering crimes (Article 7). The OECD monitors the implementation of the Convention through its Working Group on Bribery and publishes its reports.

Thereafter, the United Nations Convention against Corruption (UNCAC) was also adopted. Although, it is considered the first binding international instrument to regulate corruption (Le Nguyen, 2014:58), the Convention does not define 'corruption' but defines international standards on the criminalisation of corruption by prescribing specific offences as corrupt acts. The Convention covers the following offences- bribery of national and foreign officials, officials of international organisations (Articles 15&16); Embezzlement and misappropriation in both private and public sectors (Articles 17 & 22); Trading in influence (Article 18); Abuse

of office or functions (Article 19); Illicit enrichment (Article 20); Money laundering (Article 23); Concealment and obstruction of justice (Articles 24 &25). However, many attempts have been made by several scholars and agencies to define the concept of corruption (Liu, 2016). An adopted definition within the context of this paper is provided by Transparency International thus: "Corruption involves behaviour on the part of officials in the public sector, whether politicians or civil servants, in whom they improperly and unlawfully enrich themselves or those close to them, by the misuse of the public power entrusted to them" (OECD, 2007).

The UNCAC outlines both preventive and punitive measures to be adopted by countries to facilitate the prevention of laundering of illicit funds and facilitate the return of such funds obtained through corrupt activities. Article 14 of the Convention mandates parties to take measures for prevention of money laundering while Article 31(2) obliges each state party to take such measures as may be necessary to enable the identification, tracing, freezing or seizure of, the proceeds derived from corruption for eventual confiscation. Chapter V of the Convention deals with asset recovery and mandates countries to which the criminal assets have been diverted to return the assets to the country from which they were acquired unlawfully (Articles 51, 52, 55 and 57).

Additionally, there are independent international anti-corruption agencies and UN organisations which also monitor, provide all kinds of assistance and initiate discussions on issues surrounding the laundering and repatriation of illicit funds across the globe. One of these organisations is the Stolen Assets Recovery Initiative (StAR), which is a partnership between the World Bank Group and the United Nations Office on Drugs and Crime (UNODC) that supports international efforts to end safe havens for corrupt funds. StAR works with developing countries and international financial centres to prevent the laundering of proceeds of corruption and to facilitate a more systematic and timely return of stolen assets. It publishes a database of its reports on the monitoring activities.

Another such organisation is Transparency International (TI) established in 1993 and focused on demonstrating the harmful effects of corruption on development, democracy, and good governance. It

also advocates both legal and operational mechanisms to curtail this crime. It conducts researches and issues the 'Corruption Perceptions Index' which is a global indicator of corruption in the public sector.

Global Financial Integrity (GFI) established in 2006 is also one of such organisations committed to lead efforts in curtailing illicit financial flows and enhancing global development and security. It publishes reports on empirical analysis of illicit financial flows to and from countries. Such reports include the 'Trade-Related Illicit Financial Flows in 135 Developing Countries: 2008-2017' (GFI, 2020), and 'Illicit Financial Flows from Africa: A Hidden Resource for Development' (GFI, 2010).

The United Nations Development Programme (UNDP) also gathers reports to assist countries with information on laundered illicit funds from their countries. An example of such reports is the 'Illicit Financial Flows from the Least Developed Countries: 1990–2008 (UNDP, 2011). Similarly, United Nations Economic Commission (UNEC) also works in collaboration with other agencies to monitor the economic developments of countries and provide reports similar to that of the UNDP above. An example of UNEC reports is the '2015 Report of the High-Level Panel on Illicit Financial Flows from Africa' (UNEC, 2015). Other institutions such as the International Monetary Fund (IMF) and the World Bank (WB) also encourage and use economic incentives to pressure state parties to Anti-Money Laundering conventions to implement the embodied standards and obligations.

There are additional regional efforts in regulating the laundering and repatriation of illicit funds. In Africa, the efforts began with the adoption of the Nyanga Declaration on the Recovery and Repatriation of Africa's wealth in 11 African states by Transparency International (TI, 2001). During the adoption, it was lamented that an estimated US$ 20-40 billion has over the decades been illegally and corruptly appropriated from some of the world's poorest countries most of them in Africa, by politicians, soldiers, business persons, and other leaders, and kept abroad in form of cash, stocks and bonds, real estate and other assets (Evans, 1996:199).

The Declaration called upon the then Organisation of African Unity (now African Union) to "take a leadership role in representing

the interests of Africa concerning the return of Africa's stolen wealth wherever it may be found on the globe and, as a first step, should adopt all reasonable measures to prevent the illegal appropriation and transfer of money from Africa's treasuries" (TI, 2001).

Pursuant to the call, the AU adopted the Convention on Preventing and Combating Corruption (AU Convention, 2003). Foremost among its objectives are preventing, detecting, punishing and complete eradication of corruption and related offences in Africa. The AU Convention outlines measures to coordinate and harmonise the policies and legislation across member states for the achievement of its objectives. Article 4(a-i) lists certain conducts regarded as acts of corruption to which the AU Convention applies. This includes bribery in the private and public sectors, embezzlement, illicit enrichment, concealment of proceeds of corrupt acts. It further urges state parties to adopt necessary measures to criminalise and prevent the laundering of the proceeds of corruption (Article 6).

In Europe, the Council of Europe had made attempts in regulating money laundering by targeting the confiscation of the proceeds of the crime. It had earlier on adopted the European Convention on Laundering, Search, Seizure, and Confiscation of Proceeds from Crime (EU Convention, 1990) and 15 years later, revised the same to include regulations on money laundered for financing terrorism (EU Convention, 2005). The focus of the latter Convention is to enhance international cooperation among the EU members for the prevention and punishment of laundering proceeds of crime, either for terrorism financing or for all other intent.

The Impact of the Legal Regime in Preventing the Laundering of Illicit Funds

Money laundering is considered a global phenomenon and concerted efforts are made internationally and regionally to curb the menace. The bulk of the instruments, outlined measures and set standards are to be implemented by states to prevent laundering of money from and to their jurisdictions. However, global reviews of money laundering reveal that the said instruments have not solved the problem. From 2017 till date, the UNDP estimates the amount of money laundered globally to be as much as US$800 billion-US$2 trillion each year

(UNODC, 2017). In terms of country assessment, the Basel AML report indicated little progress in countering money laundering by individual countries between 2012 and 2018, with about 64% of the 129 countries assessed considered at high risk of money laundering, with inefficient Anti-Money laundering frameworks (Basel, 2018). In 2019, the report indicated that few countries improved with very slow progress while some had moved backwards, while most countries (75 out of 125 assessed) are still at significant risk of damaging effects of money laundering (Basel, 2019). However, these reports include money laundering perpetrated with funds from both legal and illegal origins. That is, the reports include legal money which was laundered to evade tax or to be used to perpetrate crime and illegal money which was proceed of corrupt crimes itself. With respect to the latter which is the focus of this paper, statistics have also shown that the bulk of this money laundered were illicit funds stolen or diverted from the coffers of developing countries.

Boyce and Ndikumana (2001) conducted a study which showed that the 25 sub-Saharan African countries in their sample lost a total of US$285 billion from 1970 to 1996 through illicit capital outflows. Subsequently, the UNDP explored the illicit financial flows from 48 developing countries and found that such illicit flows from these countries increased from US$9.7 billion in 1990 to US$26.3 billion in 2008 (UNDP, 2011). Additionally, GFI in its study found that about US$1.8 trillion were illegally taken out of Africa from 1970–2008 (GFI, 2010). Recently, the United Nations Conference on Trade and Development (UNCTAD), the United Nations Economic Commission for Africa (UNECA) and the UNODC, at the UN Conference on Trade and Development in March 2018, presented their new project to improve statistics on the money Africa loses through illicit financial flows that rob the continent of billions each year, where estimates put the annual loss at around US$50 billion (UNCTAD, 2018). These mind boggling reports show that the operative instruments have not succeeded in preventing the laundering of illicit funds especially from the developed countries.

In almost all developing countries in the world, corruption is seen as a clog in the wheel of development. This is specifically true to Africa, which is considered the most afflicted region with leaders that

rob its resources; the fortunes of 11 African Heads of State were published by French weekly (May 1997) to the tune of $36.7 billion (Lawal, 2007; 4). Lawal further argued that the inability to break the cycle of underdevelopment in Africa has been induced by the enormous corruption in the continent (Lawal, 2007:7). For instance, it was estimated that the former Nigerian President, Sani Abacha, stole and laundered as much as US$5bn of Nigerian public money during his military rule from 1993 until he died in 1998 (Al Jazeera, 2020). The Central Bank Governor of Angola, José Massano, declared that at least US$30 billion of Angolan money is held abroad, though that figure includes legal deposits (Eisenhammer & Maclean, 2017). The World Bank had also conducted a study on the development impact of money laundering on the economies of Malawi and Namibia. The report estimated that the loss of revenues linked to laundering of illicit funds due to corruption and tax evasion amounts to 5% to 10% of their GDP (Mason, 2013).

In the wake of these terrible statistics, it becomes imperative to review the international measures put in place to curb the laundering of illicit funds and make efforts in a bid to salvage the victim countries. The above statistics show that there are still gaps that need to be addressed to curb corruption and prevent the stealing of public funds by corrupt officials.

From the preceding discussions on the international frameworks above, it is evident that the UNCAC is the only legally binding universal anti-corruption instrument that regulates the laundering of illicit funds and mandates return of the same, from the Custodial State to the Victim State. Most of the other regulations provide soft law, merely calling on States to adhere to their provisions and observe established standards. Besides, the institutions merely provide model legislation; periodic reports on laundered illicit funds, and technical assistance in litigations involving money laundering or recovery of laundered assets, etc. which can only serve as working tools for interested member States. For instance, only the 36 OECD countries and 8 non-OECD countries - Argentina, Brazil, Bulgaria, Colombia, Costa Rica, Peru, Russia and South Africa - have adopted the OECD Convention on Bribery OECD Convention (OECD Convention, 2007).

Looking at the UNCAC, although it has as one of its aims, the strengthening of international law enforcement and judicial cooperation between states concerning prevention of corruption and recovery of its proceeds, a look at the above statistics of laundered illicit funds show that the aim is far from being achieved. To this end, the UNCAC is criticised for being devoid of providing country-specific measures (Heckler *et*. *al*., 2019). In agreeing with that position, the paper posits that the UN needs to take cognisance of the specific legal and structural limitations of developing states in implementing the measures outlined by the UNCAC. For instance, the obligation for tracing proceeds of laundered illicit funds entails the employment of advanced technological, professional and infrastructural facilities, which are deficient in many of the African-victim countries.

Additionally, the UNTOC also provides a solid basis for mutual legal assistance and law-enforcement cooperation in the fight against money laundering by providing a framework of international legislation and facilitating cooperation between state parties. However, just like the UNCAC, the advancement in the nature of criminal networks using new technology and economic facets make the UNTOC inefficient in dealing with crimes such as money laundering. In analysing the inadequacy of the UNTOC in combating transnational organised crime as a whole, Livey (2017) is of the view that state parties remain wary of using the UNTOC as it does not provide a clear, elaborate concept upon which states may rely, legislate and train around (Livey, 2017:3). She posits that the interplay between the transnational crimes, state sovereignty and political power also make the UNTOC incapable of addressing such crimes (Livey, 2017:36). This is particularly true to money laundering perpetrated by corrupt officials; the perpetrators are mostly politically exposed persons highly placed in their home countries thus difficult to prosecute. The act is done through various interstate channels using evolving technologies and professional expertise that make it difficult to investigate and prosecute using traditional measures in the UNTOC.

Similarly, whereas the adoption of the AU Corruption Convention is a significant step, a little while after it came into force in 2006, it was posited that the real impact will depend on several crucial considerations, including clarity of the substantive obligations

imposed, conformity of the newly adopted norms with existing legal and human rights obligations, proper municipal implementation of these norms, good governance, proper monitoring, and robust international enforcement (Snider *et*. *al*., 2007). Analysis of its impact, a decade later, found that the adoption of the measures outlined in the Convention did not reduce the corruption index in about 46 African Countries (Barkley & Maduka, 2017:72). This can also be emphasised with the various reviewed reports cited above showing that the bulk of existing instruments are not effective. In fact, more money is reported to be illegally diverted now than ever before, with very few of the culprits brought to book (FATF, 2019).

In similar contexts, criticisms abound the EU AML and repatriation System (StAR, OECD 2011:41-42). It is undisputed that the EU has also made efforts towards curbing the laundering of illicit funds. For instance, it has made attempts at monitoring and reviewing both international and national tax issues to prevent laundering for tax evasion, and also improved regional cooperation by overcoming certain bottlenecks posed by lack of adequate national laws. One of such achievements is the encouragement of recovery in Non-Conviction Based (NCB) cases between the EU countries, even in the absence of domestic NCB confiscation laws in the EU Countries. Non-Conviction Based Confiscation (NCB) is the confiscation of traced assets in the absence of a conviction. It is considered to be an effective mechanism for freezing and confiscating assets. Between January 2010 and June 2012, almost $60 million of $146.2 million in proceeds returned were captured under NCB confiscation actions. However, these efforts can only have an impact on those countries without taking cognisance of the spill over effects of flows from other countries. Although another author (Ritter, 2015) believes that these countries deliberately make regulations that are inadequate to regulate the flow of money from developed countries and facilitate return of same. Ritter points out that the perpetrators of money laundering take advantage of ambiguous legislation. He, therefore, concludes that the developed countries that provide safe havens for these launderers must take appropriate measures by reviewing their laws for the benefit of the developing ones, who are usually the victim countries (Ritter, 2015:27). That being said, it is therefore safe to conclude that all of

these treaties seem not to present a concerted response to curb money laundering because their vaguely worded obligations are not adequately implemented due to the lack of effective implementation mechanisms. This inadequacy extends to international asset recovery which entails the recovery of such illicit funds laundered by corrupt officials from their home countries to foreign jurisdictions.

Challenges and Limitations in International Asset Recovery

International asset recovery is defined as the process of tracing, freezing, and returning illegally acquired assets to a foreign jurisdiction. Asset recovery cases generally require preliminary investigations in both the victim state and the custodial state to gather the information that will assist in tracing and freezing the laundered assets. Thereafter, legal actions are instituted for the recovery of such assets in the custodial state. International cooperation is needed to share evidence in support of actions instituted in foreign jurisdictions by the victim states or to enforce a domestic order of confiscation in cases instituted by the custodial state (Vlassis *et. al*., 2013). As mentioned earlier, the UNCAC mandates state parties to take measures to facilitate the recovery and return of laundered proceeds of corruption. Hence, the UNCAC and other operational international regulations prescribe measures to be adopted by state parties to provide each other with the necessary cooperation in pursuing such legal actions. Notably, Article 31 of UNCAC that deals with 'Freezing, seizure and confiscation of assets.' It provides that each state party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of: (a) Proceeds of crime derived from offences established in accordance with the Convention or property the value of which corresponds to that of such proceeds; (b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with the Convention. Additionally, Article 57(3) provides a precise obligation upon the custodial state to return assets derived from embezzlement of public funds or money-laundering. However, a critical analysis of the current stakes in the recovery of assets beyond the borders of the victim state shows some challenges do exist in the process.

In terms of seeking repatriation of proceeds of corruption, the practice that only the governments of a victim state can seek the recovery of illicit funds to the exclusion of other stakeholders is detrimental to the development of the state, where the said government does not take proactive steps to do so. An analyst posits that most developing countries lack the political will to recover due to relative reasons (Davis, 2016:292-293). Some of such reasons include family or political affiliations with the perpetrators of the corrupt acts or sheer incompetence on the part of the administrators. A classic example can be seen from the Abacha loot in Nigeria where the Goodluck Jonathan's administration was widely criticised for its efforts in the repatriation of the final sum of the Abacha loot from Switzerland (Etemiku, 2018). The criticisms focused on the agreement which is said to contain many clauses to the disadvantage of the country. The contentious provisions included the exorbitant percentage of commissions to be paid for legal services and that Nigeria must write off any uncovered assets presumed to remain in Switzerland as a condition for repatriation of the said USD$322.5m.

Even when the governments are proactive, problems abound which hinder efficient recovery. These problems range from difficulty in international cooperation in conducting investigations and prosecution of asset recovery cases to lack of harmony in national laws concerning confiscation and return of assets to foreign jurisdictions. In its efforts to assist governments with asset recovery, reports by StAR show that identifying, seizing and repatriating stolen assets is no easy task. The Anti-corruption Resource Centre calls asset recovery "one of the greatest challenges for the global anti-corruption movement" (Zinkernagel *et. al*., 2014). This is true for both developing and some developed countries. Vlassis *et. al*. (2013) posited that the victim states often struggle with asset tracking and financial investigations, understanding requests made by the custodial states, and gathering the needed evidence.

Although, in attempts to carry out their treaty obligations which mandate states to harmonise their domestic criminal laws with the provisions set out in the conventions to remove frictions caused by the differences between national criminal laws to enhance inter-state cooperation in the recovery of assets, some states have made relevant

national legislations. However, the provisions of the national laws do not reflect such harmony. Most of the laws enable the state to freeze any such illicit funds or assets without provisions on how to ease recovery of those assets by the victim country. For example, Canada enacted the Freezing Assets of Corrupt Foreign Officials Act requiring banks, companies, and other entities to freeze the assets of corrupt individuals. However, the legislation does not address the return of same to the victim countries. Similarly, the United States Department of Justice (Asset Forfeiture and Money Laundering Section) created a new policy called the Kleptocracy Asset Recovery Initiative. Its stated objectives are 'to identify the proceeds of foreign official corruption, forfeit them, and repatriate the recouped funds for the benefit of the people harmed' (USDOJ). However, the policy for the operations by the initiative has a solid legal framework for the seizure of assets but not for the return of such assets as that is still subject to formal requests and recovery process by the Victim countries (Norman, 2017).

Suffice it to say that there have been successful collaborations between the victim states and the custodial states to facilitate the repatriation of illicit funds. For instance, the United Kingdom through its Proceeds and Corruption Unit (PoCU) under the DFID has been actively involved in investigations in close collaboration with the Arab Republic of Egypt, Malawi, Nigeria, Uganda, and Zambia. They have pursued money laundering charges through the U.K. courts, provided evidence for similar prosecutions overseas, and supported the freezing and confiscation of assets, including securing the conviction in a U.K. court of the former Nigerian state governor James Ibori, several of his associates, and his U.K. solicitor (Gray *et. al.*, 2014). Recently, The United States, Government of Jersey and Nigeria made an agreement to repatriate US$308million of illicit funds connected to the former Nigerian military ruler, General Sani Abacha (US Mission, 2020a). Sequel to the agreement, the Nigerian Attorney General, Abubakar Malami, was reported saying "this agreement has culminated in a major victory for Nigeria and other African countries as it recognises that crime does not pay and that it is important for the international community to seek for ways to support sustainable development through the recovery and repatriation of stolen assets."

However, there are more sad stories than the successful ones. A look at the span involved in the recovery of illicit funds from the custodial states shows that more is left to be desired. For instance, one of the aims of the 2020 US-Jersey-Nigeria agreement earlier cited is to obtain recovery in respect of an order for forfeiture of some assets granted by a court in the US since 2014, whereas the illicit laundering was done since when Abacha was Head of State between 1993 and 1998 (US Mission, 2020a). The negotiations for repatriation only commenced in 2018, with the actual repatriation of the said proceeds of the assets done two years after on 4 May, 2020 (US Mission, 2020b). The US Embassy stated that there are additional US$167 million in stolen assets also forfeited in the United Kingdom and France, and another US$152 million still in active litigation in the United Kingdom.

Similarly, the process of repatriation from Switzerland involving other Abacha loots also took several years with the recovery just concluded in 2018 (Ademola, 2019). Another instance is that of Liechtenstein which took 14 years of legal manoeuvring to return US$225m to Nigeria in 2014 (BBC, 2014). China had also initiated the 2014 "fox hunt" which was an attempt to recover its laundered assets to the tune of US$128.8bn but the project had limited success. The reasons were not far-fetched as analysed by the China Web Editor thus:

> The legal prerequisite for recovering officials' illicit assets is a court verdict declaring them guilty of corruption. Without such a verdict, Chinese judicial officials cannot approach their foreign counterparts for help. And since the majority of corrupt officials are yet to be arrested, China cannot recover their ill-begotten assets. This shows that the challenge of coordinating judicial practices across international borders is just one of the reasons why, despite support from governments and international institutions, the amounts recovered and returned has been woefully small compared to the vast sums of illicit flows (Anyangwe, 2014).

As mentioned above, one of such challenges is the legal requirement in Articles 54 and 55 UNCAC requesting victim states to present a legally admissible copy of the order of confiscation issued by its domestic court to be executed; or a detailed request to obtain an order of confiscation from the custodial state and execute same in that foreign jurisdiction. These alternatives have proven difficult to achieve. In respect of the former option, tracing of such laundered funds to secure domestic conviction is a herculean task because of the network of perpetrators involved in the act of laundering, while initiating fresh legal actions as entailed in the latter option requires much more efforts and collaboration from the custodial state. On the other hand, using civil claims to recover the money has the undoubted advantage of requiring a less strict burden of proof than that required in applying criminal law. However, international cooperation in this regard is also considered less developed (Borlini *et. al*., 2015). Article 43 UNCAC mandates state parties to cooperate in criminal cases for asset recovery while they simply have to consider assisting each other with regard to proceedings in civil and administrative matters. Nevertheless, this coordination appears easier said than practiced amongst the states.

One of such attempts at collaborating in judicial processes by the Nation-States is partaking in Mutual Legal Assistance Agreements (MLAs). This is also done pursuant to the measures outlined by the various international instruments (Arts 9 OECD Convention; 18 Vienna Convention (UNTOC); 46 UNCAC). These MLAs are aimed at developing a mutually acceptable framework for assistance in legal proceedings between the parties. However, they have also not proved efficient in assisting countries recover illicit funds. They are considered to be slow, formalistic, and complicated even for experienced jurisdictions, and more so for developing jurisdictions (Gray *et*. *al*., 2014:41). Successful implementation of MLAs requires robust domestic tools such as laws permitting rapid freezing of assets, Non-Conviction Based confiscation, and direct enforcement of foreign confiscation orders. These are considered lacking in most jurisdictions (StAR, OECD, 2011:43).

Even when countries have the tools, they may not be applied equally to all foreign jurisdictions. For instance, StAR reports that

between 2006 and 2009, the majority of asset freezing or recovery cases involved other developed countries. Only 11 developing countries fell outside this group, accounting for less than 40% of assets frozen and returned; and the assets were frozen pursuant to other domestic laws in the custodial states not based on MLA requests between the states (Gray *et. al*. 2014:23). Additionally, MLAs require stringent formal procedures which places an unnecessary burden on the victim countries that are required to engage several others to enter the agreements. This is particularly strenuous on the personnel and resources of the corruption-stricken countries as their funds are siphoned to almost every country available. The above excerpts highlight the far-reaching drawbacks in the legal process of international asset recovery.

Another reason for the drawback is lack of consistency in the implementation of the global aim of development by the custodial countries. Looking at statistics of the value of such laundered funds/assets identified and frozen by foreign governments, with the percentage actually repatriated even more negligible, one would be tempted to say that a greater percentage of the custodial states do not show much good faith towards the prosecution and repatriation of the laundered illicit funds having a haven in their states. According to the StAR reports (Gray *et. al*., 2014:23), despite some positive developments in repatriating laundered money, a huge gap remains between the results achieved and the billions of dollars estimated stolen from developing countries each year. Between 2006 and mid-2012, OECD Members returned US$423.5 million, compared to the estimated US$40 billion stolen each year.

In addition to the above statistics, manifestations of these selfish interests by the custodial countries can be seen in some notable decisions of courts. In the United States, two money laundering cases alleging illicit acquisition of assets, one involving a legal title of a home valued at nearly three-quarters of a million dollars in Washington, D.C., belonging to a former state governor in Nigeria, and another involving a set of original life-sized Michael Jackson statues worth millions of dollars belonging to the son of the former President of Equatorial Guinea and 'Second Vice President' culminated in forfeiture orders with the depositing of the proceeds

into a government account as the vested property of the United States (Davis, 2016:296). Interestingly, none included a criminal conviction to allow the victim states to institute actions for recovery and all were outcomes of prosecutions brought by the U.S. Department of Justice under the Kleptocracy Asset Recovery Initiative. This shows that the United States was mainly concerned with the forfeiture of the assets into its treasury and not the interest of the victim states in convicting the criminals for the offences and returning the confiscated assets.

Whereas, even where the order for confiscation is made to include the return of confiscated assets back to the victim country, the orders are made with certain ambiguous conditions that make the return difficult. Examples can be seen from the order of a Swiss court in respect of US$115 million in a frozen Swiss bank account belonging to the Government of Kazakhstan to be disbursed "to an independent foundation to benefit the people of that country," making it difficult for the country to prove such. Another such order was made in the United Kingdom involving Tanzanian assets confiscated within the UK where the court ordered that the money should only be repatriated "for the benefit of the people of Tanzania." The Government of Tanzania had to seek the assistance of the DFID, which is an organisation under the same government that gave the order, in developing a befitting proposal to get the funds repatriated. The DFID was delegated to monitor the expenditure of these funds by the Tanzanian government. Although it can be inferred that the motive of the UK government is to prevent corruption-related problems in the disbursement and none was reported, it is on record that the Tanzanian government kept encountering problems in getting the funds (G20, 2013).

These cases culminating in huge losses to the victim countries were invariably preceded by the laundering of funds stolen from the coffers of the various governments by public officials. Most of them are developing countries in need of such funds to sustain their economies. Whereas those countries providing havens for the illicit funds are mostly developed, raising the presumption that they are using those funds to develop their own economies to the detriment of the former.

Acha (2012) also observed that many developed countries through overt and covert policies have encouraged the fleecing of these developing economies by providing safe havens, which include tax

havens, secrecy jurisdictions and offshore financial centres, for illicit funds. He therefore suggested that while the developing economies particularly those in Africa are encouraged to take concrete steps to prevent the acquisition of these illicit funds locally, the developed ones should discourage their absorption in their economies, which is yet to happen. Invariably, the custodial states should use values such as good faith as motivation in dealing with the victim states, rather than their vested interests.

Having realised that the developing countries are the worst hit by this non-repatriation, the governments of such countries are at the forefront in the call for international cooperation to aid the repatriation of illicit funds. In 2017, the Angolan president was reported to have made an open request to Angolans especially public officials who have laundered money abroad to repatriate the same for the developments of the country. His call was made with a concession for non-prosecution of offenders if done within an ultimatum, otherwise, perpetrators risked forfeiture and prosecution. Lourenço is reported to have threatened non-compliant perpetrators with prosecution and confiscation of such assets wherever they may be found. However, the achievement of such feat he said is subject to collaboration with the foreign authorities and therefore seeks for the same in getting back such assets (Eisenhammer, 2017).

In 2019, at the 74th United Nations General Assembly in New York themed 'Promotion of International Cooperation to Combat Illicit Financial Flows and Strengthen Good Practices on Assets Recovery and Return to Foster Sustainable Development,' the Nigerian president, Muhammadu Buhari, joined his Zambian and Ethiopian counterparts in calling for unity among African countries to demand unconditional repatriation of assets stolen from the continent (*Punch*, 2019). According to Buhari, a combination of "international laws, different jurisdictions and justice systems" make it deliberately difficult for repatriation. He also noted that any lasting solution to the challenges would require international cooperation and coordination. In addition, Ethiopian president, Zewede, was reported saying that "innovative solutions require sustained discussion among countries and various stakeholders in the spirit of partnership and shared responsibility." Zambia's president, Edger Lungu, highlighted some challenges faced

by African governments in effectively tackling these IFFs and listed them to include a lack of harmonisation in the legal and institutional frameworks and ineffective coordination between different jurisdictions.

Recommendations

Even though there appear to be substantial efforts by the United Nations system, the World Bank, the IMF, the OECD, regional organisations such as EU and AU on curbing money laundering and repatriation, it appears there is still room for improvement. The international community has to take an alternative approach by making substantial legal and administrative reforms. This could entail either making a new legal regime to specifically address laundering of money, whether legally or illegally obtained, from developing countries to the much more developed ones and making stringent provisions for the return of same to the victim states; or amending existing instruments to make the repatriation of confiscated assets binding on the custodial states. Since enforcement of existing legal regime is difficult because of political and economic interests in the countries, it is the view of the present author that if the developing countries that are mostly the victim states and, in the majority, show strong desire to have such reforms, the developed states (usually the custodial states) will most likely oblige.

It is also recommended that nation-states should revise their laws for higher level of compliance with existing regulations. The custodial states should make relevant laws that will enhance the speedy repatriation of confiscated assets to the victim countries. The victim countries should not be made to institute fresh legal proceedings for repatriation which are unnecessarily delayed and which consequently occasions spending a substantial part of the assets on advocacy or outright forfeiture of the stolen assets to the custodial state.

To curtail the above problem, it is further recommended that a separate international court be established to adjudicate matters on corruption or money laundering in particular. This is because domestic prosecution and the MLAs made by the countries to enhance the investigation and prosecution of suspected launderers across the States have not proved efficient. More often than not, coordination of cross border prosecution is difficult and practically unsatisfactory. A

centralised international adjudicatory system will ease the process and make binding enforcement obligations on the States.

Conclusion

In line with the global agenda for development, the world has shown a concerted effort to fight corruption-related offences as evidenced by the various regional and international mechanisms adopted. This is crucial if at all the poor countries which suffer from corrupt practices are to attain any of the set-out Sustainable Development Goals. However, there are lingering problems identified concerning preventing the laundering of illicit funds from the coffers of the developing states and returning such funds when they are identified.

Although the mandatory character of the UNCAC provisions make it a unique tool for developing a comprehensive response to money-laundering resulting from corruption, lack of an international judicial body that will prosecute offenders has scuttled the fight against money laundering. The above position has relegated its prosecution to the domestic realm, which has over the years proved inefficient. Reports have shown that there are few successful convictions on charges relating to money laundering the world over in comparison with the number of actual perpetrators. This is obviously due to international administrative and legal bottlenecks in the investigation and prosecution of such cases. Even where convictions are successfully secured whether within or beyond the borders of the victim country, getting back the laundered illicit funds remains a herculean task for these victim states, who are mostly developing countries. More often than not, they are required to institute fresh actions in those countries where the funds are illegally kept with minimal success records. With respect to the nation-state's efforts, there is need for transformation in the political and legal interactions between the states on the return of laundered assets to the victim states. There is need for additional multilateral pressure on these states to stop being havens for illicit flows. The crime, though perpetrated domestically is international in nature thus needs to be tackled from both ends. Hence, the need for an alternative international legal mechanism that will prosecute offenders and facilitate the efficient repatriation of laundered money back to the victim states.

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