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THE WAR AGAINST CORRUPTION IS "A LOST CAUSE" WITHOUT ROBUST MEASURES TO REPATRIATE STOLEN ASSETS TO COUNTRIES OF ORIGIN

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ABSTRACT

The paper discusses the impediments inherent in using anti-corruption laws to repatriate stolen assets to the victim state. It examines both state laws and the international legal frameworks aimed at overcoming these obstacles. The assets in question are accrued by public officials from the proceeds of corruption, money laundering, tax avoidance and other forms of illicit financial transactions in countries where they have been hidden. While less developed countries are often the countries of origin, destination countries of stolen assets tend to be developed Western countries. There is ample evidence showing that the recovery and repatriation of stolen assets to countries of origin is more easily said than done, given the barriers they face. Victim states not only suffer a loss of revenue as a result of economic criminality, but they also incur huge expenses in attempting to recover criminal assets, without any guarantee that they will succeed in doing so. In essence, this article looks into the generic issues related to asset recovery. It examines the approaches adopted by both common law and civil law jurisdictions in Africa with respect to the repatriation of stolen assets, and explores the practicality of harmonising anti-corruption laws across the African continent, as has been done amongst member states of the European Union.

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1 INTRODUCTION

According to the World Bank, corrupt leaders in poor countries steal as much as $40 billion each year and stash the stolen assets away in offshore financial centres.[1] In 2011 the United Nations Office on Drugs and Crime (UNODC) estimated that the global detection rate of illicit funds by law enforcement agencies is as low as one per cent for criminal proceeds, and the seizure rate is possibly 0.2 per cent. Once relocated, the funds are extremely difficult to recover. A substantial volume of the criminal funds emanating from developing countries is channelled to or through the United Kingdom (UK).[2] It is estimated that between £23 billion and £57 billion of dirty money is laundered in the UK each year. The UK National Audit Office estimates that only 26 per cent of every £100 squirreled away by organised criminal syndicates is confiscated. Although it is impossible to determine the percentage of the criminal money derived specifically from corruption, the sums are considerable. The proceeds of corruption are used to facilitate the commission of other predicate crimes such as drug trafficking, prostitution, small arms trafficking and illegal currency trafficking, or they are used to acquire criminal property abroad.[3] Therefore, the success of anti-corruption policies needs to be premised on the effective implementation of comprehensive anti-corruption measures and due diligence policies, such as the application of customer due diligence and Know Your Customer (KYC) procedures.[4]

Money accrued from corruption constitutes criminal property under the municipal laws of many states.[5] Criminal property has been defined as "property of any kind that one knows or suspects to be derived from criminal conduct".[6] The United Nations Convention against Corruption (UNCAC) prescribes a range of measures that states could adopt to combat corruption. For example, Article 5 of UNCAC, which deals with preventive anti-corruption policies and practices, requires each state party to develop and implement or maintain effective, co-ordinated anti-corruption policies that encourage public participation and that

1 See www.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm (visited 15 January 2017).
2 See Transparency International UK *Asset Recovery*, available at http://www.transparency.org.uk/our-work/corrupt-money-in-the-uk/asset-recovery/ (visited 21 June 2017).
3 The centrality of corruption in facilitating cross border threats is expressed in the preamble to UNCAC.
4 Arts 52(5) and 52(6) of UNCAC.
5 In the United Kingdom, this is defined by sec 340(2) of the Proceeds of Crime Act, 2002.
6 See Recommendation 1 of the FATF's 40+9 Recommendations, 2003.

reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.

UNCAC creates mechanisms for the prevention and criminalisation of corruption, and calls upon states parties to co-operate in the fight against corruption. UNCAC provides also for mechanisms that need to be implemented for effective asset recovery. These include supporting national efforts aimed at redressing the worst effects of corruption and which are calculated to forewarn corrupt state officials that there will be no place to hide their criminal assets.[7] Therefore, article 51 of UNCAC states that the repatriation of assets to countries of origin is a fundamental principle of the Convention. Article 43 obligates states parties to extend their widest possible co-operation to one another in the investigation and prosecution of offences defined in the Convention.[8]

UNCAC works in tandem with other international legal instruments designed to prevent illicit financial transactions at the international level. For example, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention) of 1988 creates a wide array of measures, including measures to enhance co-operation among states parties on matters such as mutual legal assistance, extradition, law enforcement, and depriving criminals of the profits realised from money laundering and other predicate crimes.[9] Article 3(1) of the Vienna Convention mandates states parties to enact laws establishing a modern code of criminal offences related to illicit trafficking in all its different forms.[10] The scope of criminalisation includes broadly drug trafficking, from production, cultivation and possession to the organisation, management and financing of trafficking operations.[11] Article 3(1) requires each state party to criminalise money laundering at the national level when committed

7 See Carr I & Jago R (2014) "Corruption, the United Nations Convention against Corruption and Asset Recovery" in Walker C & King C (eds) *Dirty Asse*ts Farnham: Ashgate Publishing at 151.

8 See Carr & Jago (2014) n 9 at 151.

9 See arts 1-5 of the Vienna Convention.

10 See Gilmore WC (1999) *Dirty Money: The Evolution of Money Laundering Counter-Measures* Council of Europe Publishing at 161.

11 See generally Stewart DP (1990) "Internalising the War on Drug: The UN Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances" 18(3) *Denver Journal of International Law and Policy* 387-404.

intentionally.[12] Article 3(1)(b) requires specifically that each state party criminalise:

> (i) the conversion or transfer of property knowing that such a property is derived from any offence or offences established under the Convention in accordance with subparagraph (a) of this paragraph or from participation in such an offence or offences, for purposes of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such offence or offences to evade the legal consequences of his action;
> (ii) 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 established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences.

Thus, treaty obligations usually are binding on signatory states, depending on the stipulated time frame for their implementation, which is normally five years in the European Union. However, it bears noting that, as a treaty of the United Nations, UNCAC can generate binding legal obligations only after it has been domesticated by a member state. Apart from regulating the crime of corruption, UNCAC requires also that states criminalise other illicit financial transactions such as tax avoidance and money laundering.[13]

2 OTHER SOURCES OF ILLICIT PROCEEDS

There many other sources of proceeds of financial crimes that are siphoned off to offshore financial centres for safe custody. Tax evasion across Africa alone results in an estimated total revenue loss of $80 billion a year.[14] This figure was revealed in a report on Africa, which estimated that the continent loses more than $60 billion a year in illicit financial outflows through misinvoicing and deliberately mispriced intra-group transfers by multinationals, excluding individual tax evasion.[15] Although the United States (US) Foreign Account Tax Compliance Act of 2010 (FATCA) imposes stiff requirements on foreign financial institutions with regard to reporting to the US Internal Revenue Service certain information about their US accounts, the US tends to drag its feet when it comes to reciprocating in

12 This is elaborated upon in art 3(3) which states that "knowledge, intent or purpose required as an element of the offence or may be inferred from objective factual circumstances".
13 Art 3(1) of UNCAC.
14 Carr & Jago (2014) n 9 at 151.
15 Carr & Jago (2014) n 9 at 151.

the sharing of information with other states.[16] This snag is exacerbated by the fact that not all states co-operate to gather information on beneficial owners of shell companies that are used to shield the identity of corrupt officials, money launderers and tax dodgers.[17]

The sincerity of Switzerland's change of attitude to allow for more transparency on inflows of illicit funds emanating from corrupt national governments and other criminal sources has also been questioned.[18] It is obvious that, when illicit outflows of funds originating from African countries are aggregated, the continent becomes a net creditor to the world and not a net debtor as it is often portrayed.[19] Oxfam estimates that Africa alone is losing almost half of the global $100 billion of annual illicit financial flows.[20] The money lost by African countries, coupled with what is lost by other countries around globe, makes the crimes of tax avoidance, corruption and money laundering global threats of significant proportions.

Multinational companies (MNCs), tax evaders and money launderers use tax haven countries to place stolen wealth beyond the reach of revenue and law enforcement authorities. According to Global Financial Integrity,[21] MNCs use convoluted corporate structures involving layers of tax haven entities and accounts to disguise or alter the character of their income in ways that (often legally) reduce their corporate tax bill, a process known as 'tax avoidance' (as opposed to 'tax evasion,' which is illegal).[22] These strategies help MNCs to bring their tax bills down to zero and they subsequently are able to claim a tax refund from the state. To deal with the foregoing challenge, the OECD has called on all MNCs to disclose publicly basic financial information, such as their sales, profits, taxes paid and number of employees in each individual country in which they operate. This policy, called "country-by-country reporting", will not only help both rich and poor countries better enforce and amend their tax laws, but it will

16 Carr & Jago (2014) n 9 at 151.
17 Carr & Jago (2014) n 9 at 151.
18 Carr & Jago (2014) n 9 at 151.
19 See *Illicit Financial Flows* (Report of the High Level Panel on Illicit Financial Flows from Africa commissioned by the AU/ECA Conference of Ministers of Finance, Planning and Economic Development) (2015) at 34.
20 See *The Guardian* (2 February 2015) "Africa losing billions from fraud and tax avoidance", available at https://www.theguardian.com/global-development/2015/feb/02/africa-tax-avoidance-money-laundering-illicit-financial-flows (visited 16 June 2017).
21 This is a body that works to limit illicit financial flows by producing innovative research, promoting pragmatic policy solutions and advising governments.
22 See Global Finance Integrity "Tax Havens/Bank Secrecy", available at http://www.gfintegrity.org/issue/tax-havens-bank-secrecy/ (visited 16 June 2017).

also make free markets more transparent for investors and the public, which is important for investors' decision-making.[23]

The OECD published a report in 2014 which measured OECD country responses to illicit financial flows from developing countries.[24] The report makes a number of recommendations with regard to combating money laundering, tax evasion and international bribery. It calls on all OECD countries to ratify UNCAC as well as the United Nations Convention against Transnational Organised Crime (UNCTOC) which entered into force in 2003.[25] Domestication of these two instruments would help to establish mechanisms to enforce national laws, including non-conviction-based asset forfeiture legislation, allowing for compensation in cases involving asset recovery and enabling a quicker freeze of corrupt assets. Incorporating these two conventions into national law would enhance also the sharing of information in the area of asset recovery and would yield benefits for poorer counties in the sphere of technical assistance, capacity-building, support and case assistance.

3 CHALLENGES TO EFFECTIVE ASSET RECOVERY

The process of locating and recovering laundered assets internationally has proved to be cumbersome in practice. A policy paper published by the Center for Global Development, a US non-profit think tank based in Washington DC, offers considerable insights into how some of the challenges posed by investigations into corruption and asset recovery can be addressed.[26] Over the last two decades, much progress has been made at the international level with regard to the recovery of assets siphoned off by corrupt politicians. But there are also still barriers that need to be overcome, not least of which is a lack of political will to pursue corrupt, influential politicians and public officials. Many victim states lack the capacity, expertise and resources to prosecute offenders and to recover the assets. Other obstacles to international co-operation include the various legal and procedural hitches and misunderstandings that can plague co-operation between

23 See OECD *Country-by-Country Reporting*, available at http://www.oecd.org/tax/beps/country-by-country-reporting.htm (visited 18 January 2017).

24 OECD (2014) *Illicit Financial Flows from Developing Countries: Measuring OECD Responses*, available at https://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf (visited 18 January 2017).

25 OECD (2014) at 26.

26 See generally Marshall A (2013) *What's Yours is Mine: New Actors and New Approaches to Asset Recovery Global Corruption Cases* Washington: Center for Global Development.

states. These include problems that crop up in cross-border investigations, and the global financial system which enables corrupt officials to conceal and to move illicit funds rapidly, aided by skilled advisers.[27]

The policy paper recommends four new approaches to address problems posed by the recovery of stolen assets. They are: firstly, states will need to identify new approaches to recovering stolen funds and assets; secondly, they need to fix the problems with global financial intelligence; thirdly, they need to get tougher with corrupt politicians; and, fourthly, they should harness global support for recovering the proceeds of corruption.

The success of asset recovery efforts, whether in criminal or civil proceedings, depends on the ability to secure sufficient information and evidence on where the assets are located. Criminal investigations and prosecutions are essential for asset recovery and for enhancing co-operation between states in convicting offenders and confiscating their assets. There is a need also for intelligence gathering on politically exposed persons (PEPs). Such intelligence needs to be made available to law enforcement agencies for purposes of investigation, prosecution and confiscation of criminal assets. It should be made much harder to conceal the beneficial ownership of companies and trusts. However, there is no universally agreed upon definition of PEPs. For example, the Third Money Laundering Directive of the European Union (EU) defines PEPs as "natural persons who are or have been entrusted with prominent public functions and immediate family members, or persons known to be close associates of such person".[28] The EU's definition is similar to that set out in the 2006 Guidance of the Joint Money Laundering Steering Group (JMLSG), made up of the leading UK Trade Associations in the Financial Services Industry and aiming "to promulgate good practice in countering money laundering and to give practical assistance in interpreting the UK Money Laundering Regulations".[29] The Financial Action Task Force (FATF), in its Recommendations and the nine Special Recommendations on Terrorist Financing, defines PEPs as comprising current or former senior officials in the executive, legislative, administrative, military or judicial branch of a foreign government (elected or not); a senior official of a

27 Marshall (2013) at 8.

28 Art 3(8) of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing (25 November 2015) *Official Journal of the European Union* L309/15.

29 See JMLSG (2006) *Guidance for the UK Financial Sector*, available at http://www.jmlsg.org.uk/ (visited 16 June 2017).

major foreign political party; a senior executive of a foreign government-owned commercial enterprise, being a corporation, business or other entity formed by, or for the benefit of, any such individual; an immediate family member of such individual (spouse, parents, siblings, children, and spouse's parents or siblings); and any individual publicly known (or actually known by the relevant financial institution) to be a close personal or professional associate.[30] Definitional differences notwithstanding, comprehensive knowledge of the personal and business relationships and of the financial dealings of corrupt PEPs is crucial to the asset recovery process.

4 RECENT EXPERIENCES OF EXTRA-TERRITORIAL ASSET RECOVERY

Affected countries that are able to locate the proceeds of corruption in foreign countries have a number of options open to them. The ideal option is to obtain a domestic criminal conviction against the wrongdoer, followed by a confiscation order which is enforced against assets held abroad. However, for many countries this procedure can prove to be difficult to implement in practice. Alternatively, countries can resort to non-conviction based civil forfeiture proceedings, which seem to be more effective in the case of assets located abroad. However, in both cases the recovery process can become protracted, as the victim country can end up litigating twice because of the resistance of the asset owner overseas, or because the order cannot be enforced until all appellate procedures have been exhausted. In some cases, foreign law enforcement agencies might institute legal action on behalf of the victim country.

The evidence needed to initiate legal proceedings abroad can prove to be an insurmountable barrier, as this entails drawing on the coercive powers of criminal investigators, which is not the case in civil proceedings. Where criminal assets are located overseas private civil proceedings may well be the quickest route to recover criminal property. This is particularly the case where the evidence available suffices to satisfy the lower standard of proof in civil cases, which is proof on a balance of probabilities, whereas in criminal cases the standard of proof applied is proof beyond a reasonable doubt.

The value of civil asset recovery is illustrated by the recent under-reported case brought by the State of Libya in respect of the property situated at 7 Winnington Close in Hampstead Garden, London. Libyan investigators were unable to establish who the owner of 7 Winnington Close was until, through the

30 See FATF (2013) *Guidance on Politically Exposed Persons (Recommendations 12 and 22)* at 7 and 12.

intervention of the British treasury, it was discovered that the property was owned by former President Gaddafi's son, Saad. The Libyan embassy's legal representative, Mohamed Shaban, argued that Saad Gaddafi, a military commander with an annual salary of £34 000, could not have had the money to purchase the £10 million London house. Were it not for the co-operation of the British authorities, the court would not have ruled against Saad Gadaffi.[31] This shows that, without the co-operation of the requested state, the requesting state is hard put to having the assets located and repatriated, given the secrecy with which the crimes of laundering and corruption are committed.

UN Resolution 58/4 of 2003 requires countries to which the criminal assets have been diverted to return the assets to the country from which they were acquired unlawfully.[32] Nigeria has proposed the establishment of an international organisation and a strategic partnership among governments for purposes of overseeing, tracing and facilitating the return of stolen assets to their country of origin without any delay or preconditions.[33] At a national level, a multifaceted approach is essential for complementing the legal and institutional frameworks that already exist internationally. Needless to say, the raft of anti-money laundering and counter-financing of terrorism (AML/CFT) laws will remain toothless without robust measures to recover and repatriate criminal assets to the victim states. The African continent is awash with cases in which assets deriving from corruption have been diverted to offshore financial centres. However, the value of assets identified and frozen by foreign governments has been disappointingly trivial. Assets actually repatriated have been even more negligible.[34]

Recovering assets located overseas involves working through complex legal provisions and regulations, aside from having to overcome language barriers and adjusting to different legal cultures. Moreover, the victim state has to rely on the co-operation of foreign national agencies that often are unable or unwilling to share information in order to protect national interests. According to Article 53 of UNCAC, states are obligated to introduce robust measures to make it easy for

31 Bureau of Investigative Journalism "Libya acts to seize £10 million Gaddafi House in London", available at https://www.thebureauinvestigates.com/stories/2012-03-02/libya-acts-to-seize-10m-gaddafi-house-in-london (visited 30 May 2017).

32 Arts 54 and 55 of UNCAC deal exclusively with confiscation actions directed at identifiable stolen assets.

33 Art 55 of UNCAC.

34 Marshall (2013) at 6. See also OECD/StAR (2011) *Tracking Anti-Corruption and Asset Recovery Commitments: A Progress Report and Recommendations for Action* OECD and the International Bank for Reconstruction and Development/The World Bank at 25.

victim states to initiate court proceedings and to identify title or beneficial ownership acquired through corruption, money laundering, tax avoidance and other forms of illicit enrichment. States are required also to confiscate and, where necessary, compensate victim states whose assets have been stolen. It is in this spirit that the UK Government assisted Libyan prosecutors to locate and identify the London house owned by Gadaffi's son.

In a report published in 2011, the World Bank and UN identified 29 barriers to the recovery and repatriation of criminal assets to countries of origin. Some of these include having to persuade courts to freeze and return assets, which is not a simple task, especially where the assets are concealed in complex corporate structures in jurisdictions with strict secrecy laws and where criminal investors can afford to pay the best lawyers. Forfeiture cases are invariably complex legally, complex forensically and costly.[35] Funds pilfered by Ferdinand Marcos that were frozen in 1986 were not released to the government of the Philippines until 2002. Legal action in respect of the $200m that the UN estimates Pavlo Lazarenko, the former Ukrainian prime minister, embezzled in the 1990s, is still in progress, with a dozen parties chasing the assets in Eastern Europe, the US and Antigua.[36] A multitude of lawyers and accountants rushed to offer their legal expertise to the new Arab governments, but mostly with little returns. Libya has been plagued by investigative bounty-hunters hawking "evidence" for cash and, on its part, the post-Qaddafi government has failed to co-ordinate its response, allowing its agencies to enter into many overlapping contracts.[37]

5 INTERNATIONAL ANTI-CORRUPTION MECHANISMS

International law makes provision for a range of measures of which states can avail themselves to recover stolen wealth. One such measure is mutual legal assistance (MLA), which involves a request by one state to another state to assist in gathering and exchanging information regarding a particular person in order enforce the criminal law of the requesting state.

35 Marshall (2013) at 13.

36 Chapter V of UNCAC clearly calls for international co-operation with respect to the return of the latter, but says nothing whatsoever about the appropriate distribution of the former.

37 Arts 35, 54(b) and 57(c) of UNCAC state that states parties are obligated to provide a mechanism by which victimised parties (individuals or states) may seek compensation, and that states parties may also (in their discretion) return confiscated proceeds of crime to states or individuals who can establish that they were harmed, even where they do not otherwise have a claim on the property.

5.1 Mutual legal assistance requests

MLA is usually based on the existence of a MLA treaty between two or more countries. However, the value of a MLA treaty lies in its implementation, which often depends on the courtesy of the requested and its internal country politics. Another obstacle to extra-territorial asset recovery investigations is that in some countries prosecutors are either not well versed in the subtleties of international diplomacy or are not conversant with the intricacies of offshore financial structures. For instance, in its early post-revolutionary days, Libya is said to have triggered MLA requests without first conducting the necessary investigative work to support the requests. Besides, some developed countries have been criticised for holding back or rejecting requests on technical grounds, thus fuelling suspicions that countries with large financial centres tend to shield foreign economic criminals. The fact of the matter is that many developing countries lack proper record keeping systems, well-organised administrative management systems, and well-trained personnel. These drawbacks can constitute a handicap to successful asset tracing.

The OECD grants that the MLA approach is far from clear-cut.[38] It accordingly hints that the requesting state could contemplate instituting a civil suit in a foreign jurisdiction where the criminal assets are located. This is an effective alternative, especially where there is not enough evidence to support a criminal charge. The OECD acknowledges that in some cases the MLA approach is unlikely to lead to the freezing and recovery of assets of ongoing corruption where the corrupt regime is still in power or continues to wield influence. Bearing in mind the difficulties besetting asset recovery, it would be helpful if the OECD could elaborate more viable and perhaps more far-reaching alternatives to the traditional MLA approach.

5.2 Challenges faced in private civil proceedings

Private civil proceedings can be useful where the assets and their owners have been identified. But one major obstacle is that this evidence may only be obtainable through a criminal investigation, for the general rule is that evidence collated by law enforcement agencies cannot be used for private civil proceedings. But civil proceedings are protracted, complex and expensive. Besides, the requesting state might not be in a position to engage costly private counsel in a foreign jurisdiction. The method should be determined by the circumstances, and in most cases, where there are multiple assets, there may be

38 See OECD (2014) at 89 & 91.

a number of 'right' routes. Ideally, criminal proceedings would be the most preferable because the accused faces both being punished and being deprived of the unlawful assets. Law enforcement agencies in the country where the assets are located might even be able to commence their own criminal investigations and prosecutions to recover and repatriate the corrupt property. There needs to be greater openness amongst countries about the difficulties of recovery of the proceeds of corruption. Sometimes the best route in a particular case is private civil proceedings, and stakeholders should be frank about it. Civil lawyers need to recognise the circumstances where criminal action is preferable. But where criminal proceedings are unfeasible the victim country needs to explore all practical ways of bringing civil action.

A recent example of this was the prosecution of James Ibori, a Nigerian state governor, who pleaded guilty to 10 counts of money laundering arising from corruption in Nigeria. He was found guilty and was sentenced 13 years' imprisonment by the Southwark Crown Court. The decision in *Anwoir*[39] provides the legal basis for prosecuting someone for money laundering where there is little direct evidence of the underlying predicate crime of corruption. The court was of the view that the prosecution could also show "evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime".[40] However, the prosecution would have to meet the criminal standard of proving the case beyond a reasonable doubt, which would be difficult to do, as such an inference could be open to rebuttal. The court held that there was clearly material present on the facts upon which a jury could be sure that the property had a criminal origin. In response to a submission that it was "procedurally unfair" to allow the trial to continue past the prosecution's case, the court said that it could not see procedural unfairness arising out of the fact that the prosecution was unable to point to any particular form of criminality.

Many countries have given powers to law enforcement agencies, in the absence of a criminal conviction, to institute civil proceedings to have the proceeds of crime forfeited. In England, such cases are brought by law enforcement agencies under Part V of the Proceeds of Crime Act of 2002 (POCA). The task of law enforcement is to prove that the assets, including the assets generated by such assets, have a criminal provenance, provided that the property in the goods has not passed legitimately to an innocent third party. The

39 *R v Anwoir* [2008] 2 Cr App R 36.
40 *R v Anwoir* [2008] 2 Cr App R 36 para 21.

civil forfeiture case of *SOCA v Turrall* was decided on 9 July 2013 and theoretically provides greater scope to use Part V of POCA to pursue corrupt assets.[41] Turrall had no legal representation and was not present at the proceedings. The Court understandably put much weight on Turrall's history of criminal behaviour and forfeitures. This case is potentially helpful as a precedent for recovering corrupt assets through civil mechanisms. However, the case should probably be treated with care as a precedent, especially because it was undefended. It is nevertheless useful, as the prosecution did not specify the underlying criminality from which all of the assets were said to have derived. The inability to prove a link is often perceived as a barrier to civil forfeiture proceedings.

The *SOCA v Turrall* case highlights possible challenges to asset recovery procedures in the UK. The facts of the case were as follows. Turrall had 13 previous convictions for 30 offences committed over three decades. He had been convicted last in 1997.[42] SOCA brought an action to have various assets of Turrall forfeited. These consisted of a BMW car, a personal number plate, antique clocks and rugs, a series of watches and the proceeds of the sale of a caravan. The court inferred that all these assets were the proceeds of several crimes. This inference was based on Turrall's longstanding and wide-ranging criminal activities, especially his narcotics-related crimes and such other offences that were committed for profit.[43] The use of third parties, including family members, to hide assets was consistent with money laundering methodologies. Real estate had been obtained through fraudulent declarations of income that did not match known declarations to the tax authorities. Assets had been purchased with untraceable cash, the preferred means for those who wish to avoid leaving an audit trail leading back to unlawful conduct. Turrall put up no defence at his trial, which was unusual because he knew that he was facing criminal charges.

While acknowledging that some public officials might have legitimately earned their wealth before taking office, a huge mismatch between earnings and assets, particularly foreign assets, is a regular feature of corruption cases. Whether it is a purely civil case or a civil forfeiture case, the only evidence is the unexplained material mismatch between assets and income. After all, how is it

41 *Serious Organised Crime Agency v Turrall* [2013] All ER (D) 126.

42 See https://www.lccsa.org.uk/serious-organised-crime-agency-v-turrall-ors-2012 (visited 17 January 2017).

43 See https://www.lccsa.org.uk/serious-organised-crime-agency-v-turrall-ors-2012 (visited 17 January 2017).

possible for a public official with a limited salary to have assets that are incongruous with the salary? Foremost, perhaps, might be the failure to declare the assets as high-ranking public officials are obligated to do when taking office. Conflicting explanations for the source of assets and wealth may also exist. For example, differing accounts may have been given to financial intermediaries or advisers, investigators and the media. Honest people can explain fully and consistently and prove the sources of their substantial assets, whereas dishonest ones are unable to do so.[44]

There are relevant precedents in English law relating to private civil proceedings. For example, Edwards Wildman represented the Nigerian government in the civil case against Deprieye Alamieyesegha, the former Governor of Bayelsa State in Nigeria, who was later convicted for having acquired various properties with the proceeds of corruption.[45] Other direct evidence pointed to the fact that some assets had been obtained through corruption, which strengthened the prosecution's case for recovery of those assets. The Nigerian government nevertheless relied on different pieces of circumstantial evidence to support its claims. These included the following: Alamieyeseigha's persistent breaches of the constitutional prohibition against Nigerian state governors' maintaining or operating bank accounts in any country outside Nigeria; the fact that those breaches continued even after steps had been taken to bring disciplinary proceedings against Alamieyeseigha for contravention of that prohibition; the scale of the discrepancy between Alamieyeseigha's declared assets and income and his undeclared assets; his use of offshore companies and bank accounts in Cyprus and trusts in the Bahamas; the receipt of funds from third parties for the purchases of properties in London; the pattern of receipts in bank accounts which was entirely consistent with the proceeds of theft or corruption and very difficult to reconcile with any ordinary business operation; the lack of any legitimate explanation for Alamieyeseigha's possession of £920 000 in cash at one of his properties; and the absence of any plausible, legitimate means with which Alamieyeseigha could acquire assets outside Nigeria on such a scale whilst properly discharging his duties as governor and complying with his constitutional obligation not to hold any other executive office or paid employment in any capacity whatsoever. Alamieyeseigha was not represented in court at the successful summary judgment hearing.

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44 See Roberts S (15 October 2015) "Diepreye Alamieyeseigha, Nigerian Notorious for Corruption, Dies at 62" *New York Times* at B18.

45 *R (on the application of Alamieyeseigha) v Crown Prosecution Service* [2005] EWHC 2704 (Admin).

The *Alamieyeseigha* case raises a further interesting point, namely, that a public official would have to decide whether and how to defend a case relating to money laundering. He or she would be obligated also to disclose documents relevant to how the assets have been acquired, and documents may also be obtained from third parties. The inference that assets have a corrupt origin will strengthen if the public official is unable to give a credible explanation for the assets, or if he or she fails, without credible justification, to provide supporting documents. But getting to the disclosure stage of a case might mean having first to survive a strike-out application made on the basis that a claim has no reasonable prospect of success, although one would expect any such application to contain some evidence by the accused of the source of his or her wealth. These factors need to be considered before instituting any proceedings.

5.3 The intervention of civil society and non-governmental organisations

The role of community service organisations and non-governmental organisations (NGOs) is not only essential but crucial. The lack of political will on the part of states has prompted NGOs and the media, as well as victim groups, to encourage, train and fund some states in order to obtain and publicise evidence of corruption, to carry out investigations, to prosecute offenders or to recover assets in corruption cases. There are a number of examples of states successfully employing lawyers to bring civil proceedings to recover the proceeds of corruption. But this depends on whether the persons occupying the highest echelons of government are genuinely committed to combating corruption and are willing to facilitate investigations that will lead to legal action against corrupt state officials. Transparency International has expressed its concern over the lack of institutional and organisational co-operation in the UK in asset recovery cases.[46] Institutions and organisations are being used as repositories or intermediaries for stolen funds from several countries, including Bangladesh, Kenya, Nigeria, Pakistan and Zambia.[47] The aforementioned problem will be exacerbated by the fact that in June 2016, the UK voted to sever ties with the EU, a process which is now underway given that Article 50 of the Treaty of Lisbon (which provides a framework for countries to leave the EU) has

46 Transparency International UK (2011) *Corruption in the UK: Overview and Policy Recommendations* at 14, available at http://www.transparency.org.uk/publications/corruption-in-the-uk-overview-policy-recommendations/ (visited 23 June 2017).

47 See Transparency International UK *Asset Recovery*, available at http://www.transparency.org.uk/our-work/corrupt-money-in-the-uk/asset-recovery/ (visited 21 June 2017).

already been triggered. The UK has been urged to maintain its robust anti-money laundering framework, based on international arrangements and conventions to which it is a party, notably the FATF and UNCAC, despite its exiting the EU. It is therefore vital that the UK is able to prevent money laundering by detecting, seizing and repatriating stolen assets to countries of origin.[48] More recently, because of the impending FATF mutual evaluation of the UK's AML regime, and the advent of the Serious Crime Bill, Transparency International formally submitted its response to the British government's national risk assessment of money laundering and terrorist financing on the changes that need to be adopted.[49]

6 CONCLUSION

Corruption has remained an insurmountable challenge for many countries. The measures introduced to enhance the fight against it at international and state level have proved less effective, largely because the states to which the criminal assets are diverted lack the political will to put the measures into effect. The efforts invested by some African countries to recover stolen wealth from countries have yielded modest returns, partly because countries hosting the criminal assets use their financial and economic clout to frustrate the recovery process. The process of asset recovery is very tedious and expensive for victim countries. Added to this is the unwillingness on the part of countries where the criminal assets are secreted to release them to the countries of origin. As shown above, where recourse to criminal proceedings might prove to be problematic, the institution of civil proceedings in the host country could be a viable alternative route. In a civil action the standard of proof is lower than in a criminal trial. English law requires a prosecutor to show that the property was obtained through a particular unlawful conduct and by broadly specifying the particular type of unlawful conduct. MLA treaties are cumbersome to use for a variety of reasons — there is lack of co-operation in the country where the crime was committed, or evidence has been destroyed, assets dissipated, the suspects are abroad, or there is a lack of capacity within law enforcement agencies. The good news is that the pernicious effects of corruption and other

48 Transparency International UK published *Combating Money Laundering and Recovering Looted Gains: Raising the UK's Game* in 2009; and in 2013 it published *Closing down the Safe Havens: Ending Impunity for Corrupt Individuals by Seizing and Recovering Their Assets in the UK*.

49 See Transparency International UK (2015) *TI-UK Responds to the (HM Treasury and Home Office) UK National Risk Assessment of Money Laundering and Terrorist Financing*.

financial crimes have occasioned radical changes. Switzerland has closed its doors to receiving stolen funds from corrupt public officials. The EU Parliament recently introduced a new requirement within its Fourth Money Laundering Directive, which prescribes that member states publish a register of corporate beneficial owners. A few years ago the idea of maintaining a public register would have been regarded as ridiculous. Therefore, more radical approaches to asset recovery are needed if the war against corruption is to be won. The Global Organisation of Parliamentarians against Corruption has called for grand corruption to be declared as a crime of international law which can be prosecuted anywhere at any time. Bold ideas such as these reflect the growing appreciation of the fact that new ways to prosecute corruption and recover the corrupt assets need to be considered. However, it is important that countries move beyond the rhetoric to concrete action, for only then can progress against corruption be made.

It is imperative for victim states to introduce robust measures to reverse the haemorrhage of their financial resources at the hands of corrupt public officials to recipient countries. Nigeria, which has been plagued by corruption and loss of assets at an alarming rate, will need to develop radical measures to accelerate the repatriation of criminal assets stashed away on foreign shores. For instance, it could leverage its clout as an oil-producing country to make the implementation of oil contracts contingent upon its stolen wealth being returned. Also, some western countries will need not only to talk the talk but also walk the walk. While anti-money laundering policies, such as implementing KYC rules have been laudable in theory, in practice states have not done enough to deter culprits from depositing their ill-gotten wealth in their financial institutions.

Unless robust measures are introduced at both a national and international level to force countries where stolen assets are hidden to share information about those assets, anti-corruption and anti-money laundering laws may remain laudable in theory but will be enfeebled in practice.