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Towards Attaining Sustainable Development Goals in a "Fantastically Corrupt" World: Issues in International Legal Framework on Mutual Legal Assistance for Recovery of Proceeds of Corruption and the Nigerian Act

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Abstract

Pervasive corruption is a global phenomenon which remains a major obstacle to development in various climes. The United Nations agenda 2030 recognizes the need to solve the problem of corruption as key to achieving Sustainable Development Goals (SDG). In response to this problem, the UN Convention Against Corruption (UNCAC) was adopted in 2005 as an international instrument targeted at facilitating Mutual Legal Assistance in combating corruption, by aiding recovery of looted funds, seizure, confiscation and repatriation of stolen assets abroad. Nigeria has a history of leadership deficit and institutional failure accounting for numerous cases of corruption and siphoning of funds by the political class. To aid recovery of looted funds, Nigeria signed and ratified UNCAC, and signed into law the Mutual Legal Assistance in Criminal Matters Act in 2019. Against this backdrop, this study will analyse the provisions of UNCAC in comparison to the provisions of the Nigerian MLA Act. The aims are to ascertain limitations in the UNCAC provisions which might prevent realization of its set objectives, determine the extent to which the Nigerian MLA Act incorporates the underlining principles of UNCAC and to identify the effectiveness of both laws in addressing the various challenges of recovering stolen assets and funds prior to their advent. The study was based on comparative case study and inductive method. It was found that UNCAC has several limitations which the Nigerian MLA Act failed to remedy. It was also found that the Nigerian MLA Act has a relatively narrow scope. It limits the scope of MLA crime generally without paying par-

ticular attention to corruption. Lastly, the Act failed to capture country specific challenges such as lack of political will and poor inter-agency coordination undermining domestic anticorruption efforts which might spread to the international level. The study therefore concludes that there is need for a review of the Nigerian MLA Act to affect obvious and necessary improvements that will mitigate the current challenges bedeviling it from producing the desired outcome in Nigeria.

Keywords

Anti-Corruption, Sustainable Development Goals, Corruption, Mutual Legal Assistance

1. Introduction

Contrary to the former prime Minister of the United Kingdom (UK), David Cameron's assertion in 2016 that Nigeria and some other developing nations are "fantastically corrupt" (Nwabughiogu, 2016), the global community is indeed fantastically corrupt. Corruption is a cankerworm that operates in a circle, if there are no safe havens, there will be no looting of funds. A 2010 report showed that on a yearly basis, developing nations lose between US$20-40 billion to corruption (Studler, 2020). These are funds which ought to be invested to combat corruption, poverty, unemployment and public infrastructure. Similarly in 2019, it was found that an estimate of 100 billion pounds is siphoned into the United Kingdom (UK) from developing nations on a yearly basis. This has been the source of funding of the activities of criminal organizations such as drug trafficking. Whereas developing nations like Nigeria are perceived as corrupt, developed nations providing safe haven for the looted funds and assets are the beneficiaries of corruption and are therefore twice as corrupt. Corruption in all its forms and the availability of safe haven to perpetrate it is the major hindrance to attainment of Sustainable Development Goals (SDG) in the 21st century.

Corruption is a broadly and commonly used expression as such without necessarily dabbling into the legal meaning, it is loosely used to describe unethical behavior. Corruption refers to a pattern of behaviors both in the public and private sphere which is generally perceived as wrongful, illegal or amounting to abuse of power. Corruption is chameleonic in nature as it manifests in various forms of abuse of position of leadership including kickback, bribery, embezzlement, tribalism, nepotism, money laundering, and treasury looting and tipping (Obuah, 2010).

Corruption is a major hindrance to socio-economic development in most transitioning countries. Proceeds of corruption often exchange hands across climes, under disguised use and purposes, thereby making it difficult if not impossible to trace. In this way, billions of dollars which ought to be channeled into funding of functional infrastructure and developmental projects are lost. Within

the global land scape, an estimate of between 1 trillion and 1.6 trillion USD flows across climes as proceeds of corruption, tax evasion and other illicit activities. The proportion of funds lost to corruption in Africa and the enormous impact it has on the continents' development is quite alarming. The continent loses about 25% of her GDP to corruption, about 10% - 20% is lost in the course of public procurement, while amount lost in form of bribe to public officials annually could be as high as USD 40 billion (The World Bank, 2019).

Corruption drains the economy of funds needed for development, strangulates every sector and adversely affect every aspect of life of the people. In most economies where the leadership loot money from public treasury, the effect is that the nation is unable to fund provision of basic socio-economic facilities and public services like portable water, stable electricity, healthcare, adequate housing and security. Corruption drives inflation and access to cash flow needed for legitimate businesses, growth of the small and medium size enterprises and proper functioning of market forces (Aderonmu, 2009). These affect investor confidence. Other consequential devastating effects of corruption on the economy includes retardation of economic growth, depreciation of currency value, inflation, increased taxation, reduced tax revenue, poverty and unemployment. In Nigeria, corruption is a pervasive, historic problem directly linked to bad governance. Nigeria is said to lose about 20% of her GDP to corruption yearly, while about $ 400 billion US is said to have been looted by past leaders from the nation's treasury (Ademola, 2011). According to the World Bank, the Abacha loot is equivalent to between 1.5 and 3.7% of Nigeria's Gross Domestic Product (Jimu, 2009).

There is a direct link between historic corruption and the numerous socio-economic and developmental challenges confronting Nigeria today including election rigging, infrastructure deficit, poverty, unemployment, and the alarming rate of insecurity. The true cost of corruption is the collateral damage manifested in form of stagnated economic growth, poverty and poor living standards which drives crime and insecurity. Corruption has also been traced to abuse of rule of law at the national arena and funding of terrorism, hence the intensified effort to combat the phenomenon since the 9/11 aviation terrorism attack in the US (United Nations, 2002).

In order to recover from corruption, anti-corruption efforts must be well balanced against efforts to recover stolen assets and looted funds. However, this is often difficult because state funds and assets stolen by corrupt leaders are often kept away in developed countries, the concealment of which is aided by expert professionals like lawyers and accountants. Thus, tracing, freezing recovery of stolen assets and looted funds becomes a herculean task. Arguably, it can be stated that nations like Nigeria, Peru and Philippines have successfully repatriated some state funds looted by past leaders. However, in the absence of a legal-frame works to drive cooperation between the repatriating and receiving state, the process is often excessively difficult and time consuming (The Stolen

Assets Recovery Initiative, 2007). For instance, it took twelve years for Nigeria to have access to the money looted and deposited into n\an escrow account in the Philippine National bank and another six years before it became accessible in the national treasury.

It is against this backdrop that the United Nations Convention Against Corruption (UNCAC) assumed the force of law in 2005. Among the fundamental objectives of UNCAC is to drive inter-state cooperation and provision of Mutual Legal Assistance (MLA) to facilitate tracing, freezing and recovery of looted assets and proceeds of corruption (Brunelle-Quraishi, 2011). Nigeria signed the Convention on the 9th of December 2003 and ratified it on the 14 December 2004. Nigeria deposited its instrument of ratification with the Secretary-General of the United Nations on 14 December 2004. Further, President Muhammadu Buhari signed the Mutual Legal Assistance on Criminal Matters Bill into law in June 2019. The Act which repealed the Mutual Assistance in Criminal Matters within the Commonwealth Enactment and Enforcement Act of 2004, domesticates the provisions of UNCAC on MLA. The Act is aimed at facilitating reciprocal MLA arrangements for the identification of witnesses, suspects, and gaining access to relevant evidence to facilitate prosecution of crimes. The Act will also aid the tracing, freezing, restraint, recovery and forfeiture of proceeds of crime. The Act will facilitate investigation of criminal activities through the interception of telecommunications conversion and electronic surveillance and restraint on the illegal dealings in property and assets (Badejo, 2019). The objectives of this study are therefore to analyse the provisions of UNCAC vis-à-vis its objectives and identify its limitations. The study will also compare the provisions of UNCAC and the Nigerian MLA Act to ascertain the extent to which the Act correlates with the convention and identify the limitations that may undermine the efficiency of the Act in recovery of looted funds and assets. The study will also examine the challenges undermining MLA for recovery of looted assets at the international arena, alongside the limitations of anti-corruption efforts in Nigeria. Since efforts to combat corruption must balanced against preventive and combative measures at the domestic level against efforts to recover stolen assets and looted funds across national boundaries. The study will also identify the potential challenges which the nation is likely to face in the implementation of the Act and suggest possible remedies.

2. Conceptual Clarification

2.1. Corruption

The term corruption is a derivative of the Latin word *Corruptus* which means to break. Generally, corruption is an ambiguous expression which is incapable of being give a single universal definition (Onuoha & Onwuchekwa, 2017). Nonetheless, corruption is used to mean any form of abuse of public office or public position for private gains or benefits. It is argued that any attempt to

define corruption may lead to difficulties and definitions which are deficient in law or politics. As a result, the UN in its tool-kits on anti-corruption opted for multi-layered definition involving defining different forms of corruption. To ease definitional issues, the UN classified corruption into 'grand and petty corruption', 'active and passive corruption' (UNODC, 2004). Petty corruption involves the exchange of small amount of money, minor favours and preferential treatment induced by monetary exchanges, grand corruption is perpetrated by top officials who hide the loot under the scale of wealth being appropriated. The petty and grand corruption contrast each other, the former takes place at the level of the central administration with the greater effect of distorting the system. On the other hand, the latter takes place at a lower level of established governance and within the social framework.

The second classification recognized by the UN is the active and passive corruption. Active corruption involves the act of giving bribes while passive corruption involves the act of collecting bribes. However, because corruption generally lacks a universal definition determination of acts considered as corruption may vary from one jurisdiction to another (UNODC, 2004). An act which is seen as improper and corrupt in one jurisdiction may indeed be permissible in another clime. For instance, in 2016, the former Speaker of the House of Representative in Nigeria, Yakubu Dogara expressly declared that "budget padding is not corruption" (Ogundipe, 2016). But for the outrage of the people against this statement which was kicked against, he would have succeeded in including budget padding among permissible non-corrupt acts among the political office holders in Nigeria. The act of budget padding had been going on under-ground under several administration and only became a debatable issue because of the zero tolerance for corruption policy of the present administration. This necessitates the adoption of an acceptable definition of corruption by relevant international instruments to set the standard of acceptable behavior at the international arena, any conduct outside of which will be perceived as corrupt regardless of where it took place. This will enable the state parties to such a convention set a limit of acceptable and non-acceptable corrupt behavior.

The long lasting far reaching effects of corruption have necessitated a look into its causes. The argument that corruption is a "cultural behavior" traceable to poverty has thus been rejected. The proposition that corruption emerged as part of the behavior of dictatorial and oppressive rule has also been aptly rejected. Rather, it is suggested that corruption is rampant in most developing countries as a bye product of imposition of western leadership structures into traditional socio-political and socio-economic structure where it does not fit. It has also been argued that corruption is prevalent where wide, un-fettered powers are in the hands of leaders. The implication of this proposition being that corruption thrive where there are no adequate laws and strong institutional structure to check the excesses of political office holders, to set the limits of acceptable behavior and challenge any act which falls beyond those acceptable limits. This is ex-

actly the case of on-going impeachment enquiry against Donald Trump, the US President, for abuse of power, as initiated by the speaker of the House Nancy Pelosi. The principal allegation being that Trump had requested from Zelensky an investigation of Joe Biden, Hunter Biden and Burisma, as a favor in exchange for military aid which Trump had issued (BBC News, 2020). The point being that, in the absence of a strong legislative arm of government, the act of abuse of power for which Trump is being investigated will go un-noticed and un-challenged. This is indeed similar to the rejection of budget padding of the legislature by the executive in the Nigerian instance. It may therefore be valid to argue that lack of sound legal and institutional framework to check the excesses of political office holders is indeed a driver of corruption.

2.2. Mutual Legal Assistance (MLA)

In criminal matters, MLA is a process through which a state intending to prosecute a cross-border crime seeks assistance of the other state to facilitate preliminary steps like serving court processes, gathering of evidence and other necessary pre- and post-trial steps. Traditionally, the instrument through which MLA is rendered across states is 'Letters Rogatory'. It is a letter issued by the judiciary of the requesting state to the judiciary of the other state for the performance of certain specified actions. The actions being demanded may include collection of evidence and interviewing of witnesses on behalf of the judiciary of the requesting state. The legal rogaroty being an official instrument is transmitted through diplomatic channel (UNODC, 2018). It moves from the hands of the prosecutor of the demanding state, to the foreign ministry which then transmits same to the embassy of the requested state. Upon completion of the investigation and meeting the requisite demands, the requested state reverts through the same channel. In more recent times, state parties often have bilateral agreements into which the granting of reciprocal MLA and the term of such MLA is often negotiated.

Today, the center stage of the use of MLA is dominated by the crime of corruption and inter-state cooperation to combat it. For the purpose of combatting corruption, MLA is a formal arrangement through which states seek and provide assistance to one another to gather relevant information, investigate, trace, freeze, seize and confiscate stolen assets. MLA differs from extradition. Whereas the latter simply involves request and transfer of fugitive from one state to the other, the former though may include extradition, has a broader connotation. The scope of MLA covers supply of intelligence information which may be obtained through coercive action. MLA is particularly useful for accessing confidential information and documents like bank statements and official copies of title documents of assets. However, the use of MLA extends beyond corruption to several other transnational crimes. Tran-national crimes for which MLA are often required include illegal trafficking in narcotic drugs and psychotropic substances, human trafficking, money laundering, organized crime and corruption. As a result, there are several International instruments which provide for MLA,

including United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the United Nations Transnational Organised Crime Convention (UNTOC), the United Nations Convention against Corruption (UNCAC), Organization of Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention on Combating Bribery). In addition, there are also several regional instruments which recognise and provide for corruption. These include Inter-American Convention on Mutual Legal Assistance in Criminal Matters, the Caribbean Mutual Legal Assistance Treaty in serious Criminal Matters, the African Union Convention on Preventing and Combating Corruption (African Convention on Corruption), the Council of Europe Convention on Criminal Law on Corruption, the Economic Community of West African States Protocol on the Fight against Corruption (ECOWAS Protocol on Corruption) (UNODC, 2018). With wide acceptance of MLA for the combating trans-national crimes as reflected by the proliferation of MLA instruments at the regional and international arena, there is need to determine the effectiveness of these MLA instruments on suppression and combating of international crime. Generally, there is the influence of international politics, international relations and power asymmetry between states which affects the efficiency of such legal arrangement. Otherwise the proliferation of arms in West Africa, and the booming trafficking of humans and human organs through the West African coastline and Libya route to which several lives have been lost should be as pervasive were these instruments to be as effective as they ought to be.

Today, the United Nations Convention Against Corruption (UNCAC) is the principal international instrument for combating corruption through MLA. The Convention specifically requires that sate parties offer MLA to a requesting state towards investigation, prosecution and judicial process relating to offences recognized by the treaty. Parties are also required to offer MLA to one another to facilitate recovery of stolen assets.

3. Legal Principles Governing Request for MLA in Criminal Matters

At the 6th regional seminal of the ADB/OECD Anticorruption initiative for Asia and the Pacific held in Bali in 2007, the basic legal principles governing MLA were identified and discussed (OECD, 2012). Some of these principles were also recognized by UNCAC, they include the following:

3.1. Reciprocity

The idea of reciprocity is an important legal principle underpinning inter-state relations particularly as regards provision of MLA. Most states offer MLA in relation to recovery of proceeds of corruption subject to the precondition that the requesting state will also offer similar MLA assistance in future cases. The principle of reciprocity often underpins inter-state MLA arrangement in cases

where there is no applicable multilateral treaty or bilateral agreement binding the victim state and recipient state. A requesting state may simply be required to express willingness to offer reciprocal MLA assistance in future or such a state may be expected to show that it had once provided MLA for the offering state past. In other instance, the demand for reciprocity may not be express, but there is always an implied obligation to reciprocate MLA and obvious willingness to build on exiting inter-state relations (OECD, 2012). The principle of reciprocity helps to ward-off bureaucratic practices and general un-willingness that may account for the denial of MLA. Although the principle of reciprocity is not expressly stated in UNCAC, it is an underlining basis of relations between state parties. It is a default knowledge that a party to the convention ay request MLA from another party and is also expected to offer similar assistance on a reciprocal basis.

3.2. Dual Criminality

The principle of dual-criminality is simply to the effect that an act for which MLA is being requested must constitute an offence or crime in both the victim state and the recipient state. The traditional concept of dual-criminality requires that, the act in question must amount to a crime, with similar features under existing laws in both states. In contemporary times, the dual-criminality principle has been whittled-down. Thus, once an act amounts to a crime in both states, the requirement of dual-criminality is met. As regards principle of dual-criminality, UNCAC simply require that the act in question for which assistance is being requested must constitute a crime under the law in both the recipient and victim states. A further implication of the conduct-based approach applied to the principle of dual-criminality is to the effect that where a UNCAC party has an existing domestic law which criminalizes an act, but does not recognize the act as a crime when committed abroad, the fact that a municipal law recognizes such act as a crime will suffice and constitute sufficient basis for criminalizing it at the international arena and offering MLA. E.g. bribery of foreign officials or foreign bribery as is in the Siemen's and ENI cases in the USA.

The dual criminality principle constitutes limitation to the accessibility of MLA in combating corruption in criminal cases. For instance, an act may amount to a crime but there may be lack existing law which recognizes same as a crime at the point in time when MLA is required. Similarly, when a third state is involved and such third state does not consider the act in question as a crime MLA may be inaccessible, for instance where an offender seeks asylum in a third state. However, where there is no binding international framework governing the relations of the two states, the offer of MLA is absolutely discretional. Thus, a state may decide not to apply the principle of dual-criminality upon considering other factors such as the gravity of the offence and the applicability of coercive measures. As opposed to the principle of "dual criminality", the principle of "dual punish-ability" may be relied upon as the basis of offering MLA. This

principle is to the effect that the act in question for which MLA is requested must be punishable in both the victim and the recipient countries and in some circumstance that the punishment applicable in both states must be similar. Thus where the recipient state considers the penalty for the crime in the victim state as unduly harsh, MLA may be denied or offered conditionally.

The principle of dual criminality is recognized by UNCAC, however, a state party may still render MLA in the absence of dual criminality. The condition precedent to these are the assistance is in consonance with the objective of the convention, it is consistent with the legal system of the requested state. The Convention also require state parties to adopt measures that will allow for wider scope of assistance in the absence of dual criminality (UNCAC, Article 46(9)).

3.3. Standard of Proof of Evidence

In order to avoid breach of human rights or frivolous searches, the state requesting MLA may be required to establish that the crime in question has been committed by providing evidence of the alleged crime. The request for prove of evidence as the basis for provision of MLA is often made where the victim state makes a demand on the recipient state to take coercive action. Where both state parties are signatories to a treaty which prescribes MLA or a bilateral MLA agreement exist between them, such instrument will specify the proof of evidence required to assist in repatriation of proceeds of corruption. The standard of proof may be to "establish prima facie case", "show probable cause" or "proof beyond reasonable doubt". This may vary depending on the form of MLA being requested whether or not it involves cohesive action and the standard of proof requested. Nonetheless the standard of proof requested as the basis for offering MLA, a recipient state is required to respond to MLA request and take account of how the evidence in question was acquired, being a factor that may affect the relevancy and admissibility of such evidence at trial in the victim state.

3.4. Restriction in Admissibility of Evidence

In some cases, an existing bilateral or multilateral instrument may render evidence provided in respect of MLA request inadmissible for trial of other criminal activities incidental or corollary to the crime for which the MLA is requested. Here the evidence obtained through MLA is only made admissible for trial of the crime for which the MLA was requested. For instance, where a MLA obtained to try an accused person for money laundering also establish that the accused sponsored a pirate ship used in piracy in the course of which the funds in question was shipped, the evidence will only be used for trying the accused for money laundering and not piracy (OECD, 2012).

3.5. Differences in Procedural Law and Specification

Often times, each state has different procedural requirements to be met by a requesting state before MLA is offered. Such procedural requirements may origi-

nate from various applicable municipal laws and if un-met, MLA may be denied. But in making MLA accessible, the relevant municipal laws of the requesting state must be complied with without which such evidence may be rendered inadmissible. The requesting state may have to indicate the extent of fairness of the trial and the accused person must have right to appeal as in any other criminal trial. Language barrier may also limit access to MLA as some states will not provide MLA to other states that do not share their official language. Various permits and approval that need be obtained in a formal request for MLA may also account for undue delay.

3.6. Incidental Factors

Several other factors may account for delay or denial of MLA, factors such as need to uphold fundamental human rights, prevention of unfair trial, and prevention of inordinate or illegal punishment or unreasonable trial. MLA may also be denied where the offence in question is political in nature or where such trial will be pre-judicial to natural justice. Where MLA is required to prosecute a political office holder who is protected by executive immunity, such assistance will be denied (CFRN, 1999, Section 308).

4. Comparative Analysis of the Provisions of the United Nations Convention against Corruption and the Mutual Legal Assistance on Criminal Matters Act

In recent times, the global community has become increasingly conscious of the transnational nature of corruption which requires the adoption of trans-national remedies to adequately address it. In many developing nations, the result of political corruption is that a chunk of their GDP which ought to be channeled towards development is locked-up in banks, at various foreign countries like Switzerland which has over the years been recognized as haven for proceeds of corruption. Thus, an effective international anti-corruption regime must incorporate measures which facilitate the recovery of looted funds. More so, proceeds of corruptions are known to be used for illegal purposes and trans-national crimes like human trafficking, arms deal and terrorism. Thus, the war on corruption cannot be restricted to the national level. Although the United Nations Convention Against Transnational Organized Crime (UNTOC), adopted in year 2000, does contain certain provisions aimed at addressing some of the issues relating to trans-national corruption, it was not sufficient. This necessitated the adoption of a separate instrument to address trans-national corruption. The global community under the auspices of the UN began to take overt preparatory steps for this purpose. Thus in 2003 UNCAC was signed into law and it assumed the force of law in 2005 having been signed by 14 nations and ratified by 50 of the member states (Webb, 2005).

The primary objectives which UNCAC set-out to achieve includes promotion of measures to combat corruption in a more effective way, promotion of inter-

national cooperation and technical assistance to prevent and combat corruption as well as recover stolen government assets. The convention will also promote integrity, accountability and proper management of public assets and affairs. Structurally, UNCAC is divided into four main chapters these are chapters on preventive measures, criminalization, international cooperation and asset recovery.

The Nigerian Mutual Legal Assistance in Criminal Matters (MLA) Act was recently signed into law in 2019. Prior to this time, the applicable MLA law in the country was the Mutual Assistance in Criminal Matters within the Common Wealth (Enactment and Enforcement Act, 2004). However, the 2004 Act had limited application as it was restricted to commonwealth countries. The limited scope of the Act led Nigeria to the signing of bilateral MLA agreements with non-common law countries as a temporary remedy to the problem. Thus, the signing of the MLA Act this year is indeed a welcomed development. The Act is made up of ten parts and eighty-nine chapters. Chapter one specifies the objectives, scope and extent of applicability of the law. The objective of the Act is to facilitate provision of evidence for criminal investigation and repatriation of proceeds of crime. It specifically provides for freezing, forfeiting, confiscating and recovery of proceeds of crime. Whereas the emphasis of UNCAC is specifically on corruption, by facilitating international cooperation to combat the phenomenon and promote transparency, the NMLA refers to crime generally. However, the broader scope of the MLA Act is most desirable for combating transnational organized crimes in general without limiting it to corruption.

4.1. Preventive Measures

Because corruption is multi-dimensional and pervasive in nature, suitable preventive measures must be multifaceted and extensive in nature. Where preventive measures are found to be inadequate, reliance is often placed on punishment which may not be adequate in serving as deterrence. Although, on a general note, preventive measures are sound to ensuring deterrence and preventing corruption (Carr, 2006). UNCAC impose an obligation on state parties to adopt coordinated corruption preventive policies and ensure adequate implementation of such policies. The adopted preventive measures must be made applicable to both private and public sectors. Prescribed preventive measures include adoption of transparent public procurement process, incorporation of merit as the basis of recruitment and promotion in the civil service, eliminating al avenue for conflict of interest in the public service, ensuring effective access to public information, introduction of auditing and other standard practice to private companies, promoting judicial independence, active civil service involvement in combating corruption and adoption of anti-money laundering measures (Chapter II). The Convention specifically requires that a periodic review of the anti-corruption regulations be carried-out, both the preventive ones and the combative ones. Although certain provisions are with financial implications which

the state may not be able to effectively meet subject of population. One of such provisions is the requirement relating to training in the public service. For a nation like Nigeria, the public service population is relatively high, this will have huge financial implication, which may require being incorporated in the already tight budget. Another potential challenge of the convention relates to the issue of enforcement and implementation as some of the provisions of the convention already contained in substantive laws but are limited by implementation issues. For instance, similar provisions relating to transparency in public procurement are already contained in the Infrastructure Concession Regulatory Commission Act, but have from time suffered due implementation.

The fact of addressing anti-corruption provisions to both private and public sectors helps take care of all avenues for corruption. However, the article begins with a relatively broad proviso by subjecting any measures to be adopted to fundamental principles of domestic laws of the concerned state. The provisions focus on accounting and auditing standards and it is to be enforced via civil, criminal and administrative measures. The major challenge lies in the excessive discretion of the state parties to base measures on the principles of their domestic law. The implication being that if the existing domestic laws are inadequate and or the institutions are weak, it will become relatively difficult to combat corruption in the private sector.

The Convention also recognizes the role of the judiciary in combating corruption as crucial. The leverage that anti-corruption measures within the judiciary be in accordance with the fundamental principles of the respective legal system renders futile the idea of uniformity of anticorruption standards and gives room for corruption within the judiciary (UNCAC, Article 5-11). Whereas state parties are to adopt measures to strengthen integrity in the judiciary thereby eliminating all avenues for corruption, the fact that the prescribed measures are not identified makes the provision relatively verbose and grants excessive discretion to the respective states. Another important preventive anti-corruption provision of UNCAC relates to funding of elections. The Convention obliges every state party to prescribe criteria to be met by candidates contesting for elections and take steps to enhance transparency in the funding of election of candidates into public office and funding of political parties. This is an important provision as it relates to one of the biggest avenue through which corruption is perpetrated, mostly but the incumbent. In Nigeria for instance, electoral corruption is one of the most profound form of corruption in the country. Following the decades of intermittent military intervention in politics and the recurring flaunt of power by the successive administrations, election has become a commodity for the highest bidder who eventually occupies the office. Electoral corruption in Nigeria has been an issue since the first republic. This usually begins from the time of campaigning, funding pre-election campaigns, political organizations, pressure groups, mass media and publicity group, and at the very least bribing the electorates (Oluwole, 2019). One of the principal factors responsible for electoral cor-

ruption in Nigeria is illegal political party financing. These are no sound rules on how political parties are to be funded, thus parties organize fund raising, in the course of which businesses donate with the intent to be benefitted through contracts if and when such a party eventually gets to power. For instance, during PDD fund raising in the year 2000, a whooping sum of N200 million naira was donated by Julius Berger Nigeria Limited. This was a driver of corruption and a breach of Section 38(2) of the Companies and Allied Matters Act (Omenka & Apam, 2006). In a similar vein, the former Governor of Plateau state Chief Joshua Dariye revealed that he distributed the sum of US $ 1.6 Billion of state fund to the financing of party campaign of some PDP chapters and some big shuts (Ayeni, 2019). It therefore follows that the success of this provision of UNCAC is dependent on the political will to implement it. However, the language of the provision is not formidable enough to meet the severity and seriousness of political corruption in a country like Nigeria. The provision is excessively discretionary as such it only requires member states to consider putting in place measures to regulate funding of elections.

As regards the Nigerian MLA Act, provisions relating to preventing measures are incorporated in PART V, as interception of communication. The Act provides that where a foreign state suspect that an information obtained through interception will be relevant to prevention of an impending crime within its Jurisdiction, such state may request assistance to intercept telecommunications, postal items, electronic surveillance and computer data to facilitate criminal investigation. Upon making of such request, where the information to be so intercepted relates to telecommunication of companies operating in Nigeria, the Attorney General shall apply expert to the court for an interception order. Thereafter, the Attorney General shall ensure that the appropriate authority makes the requisite telecommunication accessible for lawful interception.

The scope of preventive measure in the Act is extremely narrow. As opposed to UNCAC, it does not specify corruption and also fails to apply to combating of crime within Nigeria. There are issues relating to political communications, individual communications inter-company communication which may facilitate corruption. Similarly, like UNCAC provides, preventive measures ought to cover all avenue through which corruption and other crimes may be perpetrated. These include private sector, public sector, funding of elections, public service, public procurement and the judiciary. Thus as regards corruption preventive measures, the MLA Act failed to adequately domesticate UNCAC and may not serve the purpose of nipping corruption in the bud as a result of the extremely narrow scope.

4.2. Criminalization and Lawful Enforcement

A) Criminalization of Corruption Related Offence

UNCAC designates a chapter to criminalization and lawful enforcement. The chapter identifies and defines various offences and acts amounting to corruption

and makes provision for application of law and enforcement relating to those offences. There is the general lack of definition of what corruption is, however the crime of public corruption is seen from the purview of bribery. Bribery is the most identified form of corruption, and it is the standard relied upon by most international anti-corruption instruments. However, beyond bribery, there are several other crimes capable of amounting to corruption. The act of restricting the scope of corruption to bribery results in neglect of other corrupt behavior. To avoid omitting some offences, UNCAC extends beyond sheer bribery to bribery related offences like embezzlement, trading in influence, abuse of functions, unlawful enrichment, money laundering and obstruction of justice. In various climes, bribery is usually condemned for three major reasons, first because of the need to uphold integrity in public administration, to enhance proper functioning of public administration and to ensure transparency and accountability in the allocation and used of national income (Hechler, 2017).

UNCAC adopts a broad definition of bribery including bribery of public officials at the national level, bribery of foreign public officials and officials of international organizations. All state parties are required to put in place legislative and other necessary measures to criminalise corruption related offences when committed. Acts to be criminalized include offering, giving or receiving undue advantage from public officers or other persons in the course of public administration, in a manner that induce them to carry-out or refrain from carrying out their official duties. The convention also criminalizes solicitation or acceptance of undue advantage from public officers in a manner that induces them to act or refrain from doing their official duties. Since no act will be considered as a crime unless it is expressly so recognized by an existing law and its punishment is so stipulated, the Convention requires state parties to put laws in place which criminalize corruption and all forms of undue advantage in the public sector. In a similar vein, states are required to put laws and other measures in place which recognize as crime acts which when committed intentionally, or acts like promise, offering or giving to a foreign public officer and official of an international organization directly or indirectly any undue advantage in the course of an international business. State parties are also required to criminalise acts which when committed internationally amount to asking for or giving undue advantage to an officer of a public international organization to induce them to act of refrain from acting in the course of their official duties. In order to adopt a definition which is broad enough to capture all acts of corruption, UNCAC replaces the popular expression "bribery" with "undue advantage". The convention does not define undue advantage, but it broadly captures all manner of undue influence and advantage whether material, immaterial, pecuniary or non-pecuniary. All acts of soliciting, giving or receiving undue advantage are expressly criminalized. The said undue advantage must be out of the ordinary reach of the public officer and must be such that the ordinary duty or responsibility of the public officer is adversely influenced. The said undue advantage must be made to the

public officer in an official capacity, but may also be made to a third party so connected to the public officer as to amount to conflict of interest. The only grey area in the provision relates to the definition of domestic "public officials". Here public officers are inclusive of workers of all branches of government including the legislature, executive, and judiciary both under permanent and temporary employment. This also includes persons in the employment of public enterprises or public agencies as defined by domestic laws. The fact of leaving the definition of public enterprise and public agencies to domestic definition gives room for lack of broad definition and lack of uniformity of what the term connotes among state parties. Foreign public officers include persons occupying legislative, executive or judicial position in a foreign country whether appointed or elected. The fact that the convention's definition of undue advantage takes into account both the demand and supply, active and passive side of bribery implies that shows a deep intent to discourage corruption at all ends. However, the effectiveness of the provisions is still largely dependent on the willingness of the concerned states to back it with relevant domestic laws and requisite enforcement capacity (Hechler, 2017).

In addition to bribery of public officers, UNCAC also requires state parties to criminalize other bribery related offences including embezzlement, misappropriation of funds, money laundering both in private and public sector, amassing wealth, security or property which is entrusted in a person by virtue of their position. State parties to the convention are also required to enact laws which criminalise all acts of abuse of office, by doing an act, or failing to do an act in an official capacity in order to accrue undue advantage. Other corrupt acts expressly recognized includes illicit enrichment, embezzlement of property in the private sector, laundering of proceeds of crime, concealment, obstruction of justice, participation or attempt to participate in any crime recognized by the convention. In order that the official act or refrain from acting in the exercise of his or her official duties.

Illicit enrichment which the convention requires state parties to criminalise is any sudden increase in the asset of a public official beyond what he or she can reasonably explain. This provision requires state parties to install a sound system of asset declaration and asset monitoring for all public officials. It is only with the existence of such formidable system backed by anti-corruption laws and institutions that illicit enrichment can be timorously discovered and challenged.

Another interesting provision of the Convention relates to both bribery and embezzlement of property in the private sector. Any act of promise, offering, soliciting or accepting undue advantage directly or indirectly in any capacity in the private sector is to be criminalized by respective state parties through a legislative framework. Likewise embezzlement of property or securities in the private sector by any person to who it is entrusted is to be identified as crime by state parties through a legal instrument. State parties are to criminalize laundering of proceeds of corruption whether as money, property or assets, within the juris-

diction of the concerned state and outside the jurisdiction provided that there is an existing law which criminalizes same. This provision is crucial to address the long time practice of siphoning of funds abroad (Hechler, 2017).

The Nigerian MLA Act on the other hand is largely silent on criminalization of acts and defining of corruption and corrupt related acts. The Act does not define offences to which it applies, rather it appears to apply to inter-state mutual legal assistance for the trial of criminal activities in general. The closest provision to criminalization in the Nigerian MLA Act is the identification of those wrongful acts to which the Act does not apply. Section 20 specifically provides that the Act does not apply to political offences like offence against the life of Head of State or his family, offence against the like of Head of Government or a minister in his government, offence under a treaty, which Nigeria and other affected state have agreed not to declare as a political offence for which MLA is required. The most likely basis for this provision is to prevent the use of the Act as a tool for witch hunting political opponents or from being used for personal vendetta by the incumbent administration.

B) Enforcement of the Law on Corrupt Related Offences

The provisions on enforcement are quite extensive, covering intent, sanction, jurisdiction, investigation and procedural aspect of the enforcement process.

1) Intent

Before the prosecution for an offence can take place, intent or *mens rea* is an important element which the law requires parties to prove. In a similar vein, UNCAC requires that intent must be established before prosecution can commence for any offence recognized by the Convention (Article 15-27). Although the interpretation of intent may vary based on legal system, in a common law jurisdiction, there must be an intention to commit the crime and to intend the natural consequences of crime (Shehu, 2005). However, for ease of establishing the said offence, UNCAC permits the parties to infer intent from the circumstance of the case. It is also encouraged that state parties establish longer statute of limitation for offences recognized by the convention. The basis of requiring a longer duration for corruption related offences is because it may take a long time for before the corrupt act is detected, it may even take longer duration to retrieve evidence and proceed to trial. For instance the Abacha took over one decade before the nation began to recover the loot, and till, over two decades after the looting the nation is still recovering the money. There are no provisions in the Nigerian MLA Act relating to the intent which formed the basis of the offence in question.

2) Sanction

In relation to sanction, UNCAC recognizes several corruption related offences, however in sanctioning offenders, the state parties shall consider the gravity for such offences. The question which readily comes to mind is whether it is the gravity of the offence or the gravity of the consequences of the offence. The fact that the sentencing for the various offences will be dependent on the

respective states and the consideration of gravity of the offences is also dependent on the respective state will lead to disparity in the punishment system for corruption related offences recognized by UNCAC.

A fundamental issue which often affects liability of political office holders for the offences committed in office is the issue of immunity. UNCAC requires that each state party adopt such measures in accordance with its legal system to establish and maintain constitutional principles such as the balance between immunities and any other constitutional privileges enjoyed by public officers in the course of their duties as may be necessary for effective investigation, prosecution and adjudication of offences recognized by the convention (UNCAC, Article 27-30). Here, UNCAC grants member states the wide discretion to determine the extent of immunity to grant to political office holders which may prevent them from any form of investigation, sentencing or punishment for any corruption related offences while in office. The issue of immunity used to be a major impediment at the national level. Thus, recognition of immunity may be an impediment to the success of UNCAC in combating corruption. The implication being that where a state has full constitutional immunity for political office holder and it adopts same in line with UNCAC, a corrupt political office holder will remain untired for the offence of corruption till the end of his tenure of office. This will be a major problem inhibiting the success of efforts to combat corruption. Using Nigeria as a case study, political office holders have continued to latch on the immunity provision to embezzle and siphoned state money. At the expiration of their tenure of office, they often hide under the umbrella of a terminal ailment to avoid proper sanction and often times, only a fraction of the siphoned sum is retrievable (Sahara Reporters, 2019).

The Nigerian MLA Act has provisions relating to immunities and privileges. The Act protects a person who makes an application to Nigeria to render assistance or give evidence in a criminal trial. Such a person is immune from detention, prosecution and punishment for offences committed before exit from the foreign country. The person will not be required to give evidence in a criminal relating to the offence and will also not be subjected to civil suit in relation to acts or omission which occurred prior to departure from the foreign state. The immunity shall cease where the person has left Nigeria, or has had the opportunity to leave after the request but has remained. It is most noticeable that the concept of immunity as referred to by UNCAC differs from immunity in the Nigerian MLA Act. The UNCAC idea of immunity relates to statutorily recognized privileges available to certain group of people against trial, such as immunity of the executive arm of Government in Section 308 of the Nigerian 1999 Constitution. Conversely, immunity as contained in the MLA Act relates to immunity to be enjoyed by any person who applies for MLA. The Act reads:

"A person upon request to Nigeria to render assistance or give evidence in a criminal trial is protected by the Act"

This provision however fails to reflect the usual MLA which is often an in-

ter-state diplomatic relation as such it is not applied for by the individual concerned.

3) Jurisdiction

Another important issue in the prosecution of corruption related offence is the issue of jurisdiction. Article 42 of UNCAC is dedicated to Jurisdiction. The basis of state jurisdiction over an offence includes commission of the said offence within the territory of the state, commission of the offence by or against the national of the state, or against the state itself. Generally, these provisions appears to have failed to adequately capture the nature of corruption related offences, since they are capable of being committed inter-state. The provision is grossly inadequate for trying offences like money laundering, and use of siphoned funds for assets abroad, in which the crime may be investigated and tried in two jurisdictions. Thus, failure of UNCAC to consider inter-sate jurisdiction for offences might affect its efficiency. The MLA Act also fails to address the issue of jurisdiction over offences.

4) Enforcement Authority

In order to aid effect war on corruption, UNCAC specifically requires the establishment of specialized institutions or bodies by respective states, for combating corruption. Such bodies shall be independent, and shall accordance with the fundamental principles of the respective legal systems carry-out their functions without undue influence. And the staff of such agencies shall obtain requisite training (UNCAC, Article 36 and 37). Other important provisions include state parties' enactment of laws that will compel the persons being tried to cooperate with the law enforcement authority, will drive inter-agency cooperation, compel the private sector, nationals and other persons domiciling within the state to cooperate with the concerned anti-corruption agency. Other enforcement related provisions include the requirement that state parties ensure that all bank private information that may be required for criminal investigation should be made accessible. The convention also permits reference to previous conviction of a suspect in another state.

The Nigerian MLA Act designates the Attorney General (AG) of the Federation as the central authority responsible for making, receiving and transmitting requests for MLA and for negotiating terms and conditions for receiving MLA under the Act. Except where there is a subsisting MLA Agreement, the AG communicates with the central authority of the requesting state. The requested demand must be in writing, signed and the AG then communicate the modalities of the requested assistance (Article 38-40). Whereas UNCAC focuses on an institution or agency of government with whom the inter-state requested for MLA will be communicated and which will be responsible for negotiating modalities, the Nigeria MLA Act does not identify an agency of government as being responsible for rendering MLA rather it vest the authority in an individual the AG. As far as Nigeria is concerned, this may have serious implications. First, there are several anti-graft institutions in Nigeria including the EFCC, ICPC,

FU, DSS and so one besides the regular law enforcement agencies. This may lead to lack of inter-agency coordination and inter-agency squabbles which might hinder the war on corruption. Also, the AG is vested with excessive powers over deciding MLA matters, without provisions for any check whatsoever, this make the office of the AG prone to abuse of power and corruption (Badejo, 2019).

a) Asset Recovery

i) General Provisions

UNCAC dedicates a chapter to recovery of assets, this is one of the fundamental basis for which the Convention was actually put into place. The importance which the convention attribute to the recovery of stolen assets and embezzled sum is such that member states are required to grant one another the highest possible level of support and cooperation to facilitate stolen assets and siphoned funds (Vlasic & Noell, 2010). Asset recovery is specifically recognized as a fundamental principle of the Convention as a result, state parties are required to grant one another highest cooperation necessary to make asset recovery possible. These includes putting in place necessary laws requiring financial institutions to cooperate in the tracing beneficiary of suspected funds, value of such accounts belonging to prominent figures and their families and to trace suspicious transactions in such accounts in order to report same to appropriate authorities (Article 51-52). Further steps shall be taken to this end including determining appropriate measures, intimating financial institutions of such measures, implementing the measures, establishing financial disclosure system under the domestic law to facilitate transparency and putting in place sanctions for non-compliance. State parties may also require public officials having foreign accounts to make a disclosure of such account and maintain records transactions in such account, breach of which may attract sanction (Article 52). These provisions are important to combat creation of multiple accounts to be used for embezzlement of funds. At the domestic arena, various accounts owned by a single individual can be traced to the person and fishy transactions there-in can be detected. The provision relating to foreign accounts is also important to combat siphoning of funds abroad. In Nigeria the administration of President Muhamadu Buhari has introduced several measures to aid transparency and eliminate all avenue for illegal transactions. These include Treasury Single Account (TSA), Biometric Time and Attendance, Integrated Payroll and Personnel Information System (IPPIS), Prepaid Meter. Other initiatives include e-passport, online registration of Joint Admission Matriculation Board (JAMB) by candidates, introduction of computer based examination to reduce exam malpractice, the use of card reader during election (Ojo, 2019). Although these all are welcomed development, their effectiveness is still largely dependent on strict supervision and monitoring. However, the TSA in particular has been helpful in eliminating the use of fictitious account for money laundering and other corrupt purposes.

ii) Domestic Recovery of Assets

Each state party is required to put measures in place that will facilitate direct

recovery property, both by the state itself and by a third state. The measures shall also facilitate the initiation of court action to aid the determination the ownership of property acquired in the course of committing a crime. These also includes measures that will enable state parties, through competent authorities to legitimately confiscate property acquired through commission of crime. State parties shall adopt laws that will enable them give effect to confiscation order issued in another state, enable competent authorities confiscate foreign properties which are proceeds of money laundering and provide mutual legal assistance in the seizing and freezing of assets which are proceeds of corruption.

Whereas Article 53 and 54 both deal with recovery of stolen assets and assets, the have different mechanisms. The former deals with direct recovery of assets while the latter deals with indirect recovery of assets. In case of direct recovery of assets, state parties are required to adopt measures under domestic laws which enable them to institute civil right action in common law, necessary to establish title to property, obtained through corruption. This provisions is proffer combination of civil and criminal proceedings, making it possible for the plaintiff to opt for a civil action which is less stringent than criminal proceedings. At the same time it incorporates the civil procedure into the criminal procedure as such the more stringent part can be avoided yet the same result will be achieved (Article 52-53). The Convention also recognizes indirect measures which can be resorted to without formal court process such as obtaining of confiscation orders, seizing and freezing stolen assets pending formal investigation.

iii) International Recovery of Assets

International cooperate for recovery of stolen assets is one of the hallmarks of UNCAC. Where a state party receives request from another state party for the confiscation of proceeds of crime, the requested state must submit requested information, provided that it relates to proceeds of crime situate in that state, and each state parties shall also furnish the law and regulations that are applicable to this provision. State parties shall adopt suitable laws that will enable them receive confiscated properties in respect of which final judgment has been received, from the requested state, to requesting state once the prior ownership of the requesting state has been established.

An important provision relates to establishment of financial intelligence unit. In order to prevent the transfer of proceeds of crime, state parties shall consider establishment of a Financial Intelligence Unit which will be responsible for the analysis and dissemination of suspicious financial transactions to competent authorities. This is an important preventive anti-corruption provision targeted at exchanging intelligence among states to eliminate all safe havens to which stolen funds and assets are usually saved. However, the language of the provision is extremely discretionary, as such it may not be implemented since it is only a direction. But on a genera note, state parties are required to give priority to returning confiscated property to original owner or compensate the victims of such crime. Although state parties may reach agreements to finally dispose confiscated

property based on specific cases. The Convention recognizes the role of continuous cooperation in combating crime. Thus, it further encourages state parties to further sign bilateral and multilateral agreements which will facilitate international cooperation towards attaining the objectives of the Convention (Article 55-59).

The Nigerian MLA Act provides for both the request for assistance by Nigeria from a foreign state for the recovery of stolen assets and funds and the request by foreign state from Nigeria. The Act empowers the Nigerian state to make request from foreign state for assistance to make a person respond to the request made by Nigeria, to attend proceedings in Nigeria. The nation may also request assistance to locate and serve processes to persons abroad. The Act also provides for the right of a foreign state to request for assistance from Nigeria for the production of evidence which is to be used for the prosecution of criminal matters abroad, for ensuring attendance of witnesses, and for the enforcement of foreign forfeiture order. A foreign state may apply to court for an order which makes these possible (Article 38). The Act however, grants the AG the power to deny a foreign request for assistance in certain circumstances. Such request may be denied where such assistance will prejudice sovereignty, security, public order or public interest of Nigeria. The request may also be declined where the requesting state has failed to comply with the terms of an existing bilateral agreement with Nigeria. A request may also be declined where the act for which the offender is to be tried would not amount to crime recognized by the Nigerian criminal law, rather it would only be a military offence. Another ground for refusal of such request is where the investigated person is about to be tried on the basis of race, religion, sex, ethnicity, origin, nationality or political affiliations. Where the fact which forms the basis of the request does not point to serious offence or an offence recognized in Nigeria.

This analysis further shows that the Nigerian MLA Act is not really a domestication of UNCAC, rather it addresses mutual legal assistance between Nigeria and other states for the trial of crimes in General. Considering the enormity and far reaching effects of corruption in Nigeria and the numerous challenges confronting the war of corruption in Nigeria, the nation will still need to put a law in place which specifically domestic UNCAC and focus on mutual assistance to prevent and combat corruption in the country.

b) Technical Assistance and Information Exchange

UNCAC also contains extensive provisions targeted at facilitating technical assistance between state parties to ease their ability to enforce and comply with the provisions of the Convention. The Chapter on technical assistance covers provision of training, material and human resources, research and exchange of information. State parties are encouraged to collaborate to provide training specific aspects related to trial including methods of investigation, planning, development of strategic anti-corruption policies, preparation of request for mutual legal assistance, public finance management, victims and witness protection

in criminal cases. Inter-state technical assistance is also to be provided in the aspect of carrying-out evaluations and studies on forms, causes and cost of corruption in order to facilitate the development of improved policies to tackle the problem (UNCAC, Article 60-71).

5. Limitations of UNCAC

UNCAC is a unique international instrument, being the first international treaty which attempts to harmonize efforts to combat corruption through reciprocal MLA considering the trans-national nature of the crime. Being and international instrument, there are certain challenges which generally undermine the effectiveness of such instruments. However, in addition to those general challenges, there are also other specific challenge unique to UNCAC itself.

5.1. General Limitations of International Instruments Undermining Effectiveness of UNCAC

One of the most popular challenges which often affect the effectiveness of international instruments is the issue of compliance. Compliance is simply the willingness of state parties to comply with obligations imposed by the instrument. Although a legal instrument without more may not successfully eliminate corruption, it may drive political will and determination at the state arena which may suppress the menace to the barest minimum possible (Altamirano, 2007).

Generally, multilateral instruments are confronted with the problem of enforcement and compliance as such the value of a treaty is said to be dependent on its ability to bind its members. Various scholars have attempted to ascertain the factors responsible for enforcement and compliance challenges which confront international treaties.

Hass opined that the major factors which determine the extent to which a state will comply with her obligation under an international instrument include political and technical capacity, national concern, inadequate institutional capacity, and poor monitoring mechanisms (Henning, 2000). Whereas the author referred to several important factors which might influence compliance with treaty obligations by a state party, it failed to consider other important factors. These include the language of the treaty, political will, effect of international politics and socio-economic factors. For instance, political will, poor institutional capacity and economic challenges often prevent developing nations from complying with their treaty obligations.

Chayes and Chayes also identify three factors which often account for the failure of states to comply with their treaty obligations. These include lack of clarity or ambiguity of the language in which the treaty was couched, inadequate domestic enforcement capacity as well as socio-political challenges (Chayes & Chayes, 1997). The factors refereed to are indeed relevant and true of constituting barrier to effective implementation of international instruments. The socio-political factor relating to the loss of time between signing and adoption of

an instrument and its actual implementation as recognized by the authors is one of the most serious challenge. Often times, state parties sign agreements without looking into its enforcement. This however points to the general lack of mechanism for monitoring compliance. An international agreement which makes provisions for compliance monitoring will easily follow-up with members on enforcement. These limitations are however applicable to UNCAC.

5.2. UNCAC Peculiar Challenges Capable of Undermining Its Effective Implementation

Benvenisti identified more than several challenges which undermines effective implementation of international instruments (Brunelle-Quraishi, 2011). They include the population of the state parties, the body language and behavior of members, domestic capacity of respective state parties, including financial policy and intuitional capacity. Most of these challenges will be applicable to UNCAC, however there are other specific challenges which are unique to UNCAC.

1) The Use of Ambiguous Language and Expression

The negotiation of UNCAC involved several state parties, generally the more the parties to an agreement the more likelihood the difficulty of reaching an agreement that will balance the interest of all. As a result, certain ambiguous expressions were used in the treaty, which may however constitute challenges to adequate implementation later. This is because these expressions constitute lack of clarity which of expression making these expressions prone numerous convention interpretations.

One of such words is "shall". Several paragraphs of UNCAC express the obligations of state parties using the word shall. The Vienna Convention on the Law of Treaties requires that a term in a treaty be interpreted in line with the general objectives and purpose of the instrument (United Nations Convention on the Law of Treaties, 1969). Since UNCAC targets creation of criminal responsibility and punishment of corruption, the term should imply an obligation of state parties. Nonetheless, it is still prone to numerous convenient interpretations by state parties. Another expression which might present lack of clarity is "Corruption". UNCAC does not present a definition of corruption which is necessary to ascertain its scope. Meanwhile, corruption by its very nature is amoeboid in nature, it is a changing phenomenon which is capable of continuous mutations. Although UNCAC attempted to identify actions which amount to corruption such as "undue advantage" and "bribery", the crimes identified cannot be exhaustive. The act of setting an acceptable definition will set the boundary between mere immoral behavior and acts which expressly amount to crime. The ambiguity also makes it difficult for parties to distinguish between permissible and prohibited acts. For instance, the Convention does not address the legality or otherwise of "facilitating payments"; such as payments for obtaining licenses, permits and in some occasions receipts. Some of these payments may not be receipted. The OECD anti-corruption instrument for instance treats such as a do-

mestic offence which does not fall within the purview of bribery and corruption at the international arena (Wilder & Ahrens, 2001). As far as UNCAC is concerned, this gives room for ambiguity and lack of uniformity in interpretation. Such ambiguities make treaty obligations mutable, malleable and adversely affect effective implementation. A member state may result to literal rule of interpretation, golden rule, and mischief rule or may simply rely on the principle of *expressio unius est exclusio alterius*.

Another specific challenge of UNCAC is the use of phrases and expressions in a manner that reflects that compliance is obligatory for state parties, without backing it with directions as to how such implementation is to achieved.

2) Lack of Mechanisms for Monitoring Compliance and Enforcement

In order for an international instrument to be effective, it is important to put mechanisms in place to follow-up on implementation by state parties. The role of a monitoring mechanism includes urging state parties to take necessary steps after signing the agreement including ensuring ratification and domestication where necessary. The need to put effective monitoring mechanism is particularly crucial for international agreements that are not self-executing, and must be implemented through decisive positive steps. UNCAC is not self-executing, yet there are no mechanisms in place for monitoring implementation at the domestic level. These mere fact that some states have failed to enforce the agreement may also encourage other states to be in default. In order to fully implemented, the socio-cultural and economic landscape must be suitable for facilitating such implementation.

Although UNCAC dedicates an article to the provision of mechanisms for implementation, which identified two implementation bodies, "Conference of State Parties to the Convention" (COSP) and the "Secretary General to the United Nations". The COSP is primarily responsible for facilitating inter-state cooperation to promote the objectives of the cooperation. In the course of its duties, the COSP will periodically review the implementation of the convention by members and make recommendations to aid improvement. So far the COSP has met a couple of times, first in 2006 and for the second time in 2008 and later in 2009. The sittings considered important issues including technical issues, asset recovery mechanisms and the determination of future implementation review, however the meeting did not lead to any firm decision making. The UNCAC review process is a form of peer review, which simply involves peer examination and assessment of state performance, in order to adopt suitable polices and measures that will aid improvement. The assessment is highly dependent on mutual trust and believes in the review process. The adopted review body and mechanism of UNCAC lacks the requisite authority needed to monitor enforcement, compliance and promote the objectives of the convention (Heimann & Dell, 2007).

3) Lack of Sanctions for Non-Compliance

One of the principal means of ensuring that people obey the law is through

application of sanction or punishment for non-compliance. Although the debate on whether or not international treaties should prescribe punitive or monetary sanction has favored cooperative punitive methods as opposed to sanction. It is further argued that international instruments are better subject to consensual rather than adversarial system. There is also the argument that sanction in whatever form does not aid treaty enforcement in any way. This is because it is the weakest states who are most often victims of sanction, while most developed nations can afford to pay economic sanction. Meanwhile enforcement gulp-in concerted efforts and serious economic and political investments (Koh, 1997). In any case, UNCAC does not prescribe any sanction for failure to enforce or implement its provisions. This might give rise to over relaxed attitude towards compliance and may lead to non-compliance.

6. International Challenges Confronting Recovery of Stolen Assets and Funds in Nigeria

Corruption is one of the most serious governance challenge in Nigeria, it has produced adverse effects of good governance, development and has led to numerous socio-political issues. Corruption in Nigeria assume numerous forms including embezzlement and misappropriation of state finances, diversions of public funds and assets by government officials, bribery of Government officials, inflation of contracts and public procurement projects, abuse of official and dominant position for personal gains, trading in "influence" and siphoning of government funds abroad (Ademola, 2011). Corruption in Nigeria is historic, dating as far back as the first republic and the efforts to combat the menace at the national level has also been continuous, yet success achieved is negligible. History of corruption in the country dates as far back as the 60 ties. In 1962, Coker Commission of Enquiry found Chief Obafemi Awolowo (first Prime Minister off Western Region) guilty of corruption (Magid, 1976). Likewise the Buhari Idiagbon regime sentenced several state governors of its predecessor administration to several jail terms for corruption (Ijewereme, & Dunmade, 2014). As far back as the administration of Muritala Muhammed, ten of the twelve military state governors who served during his tenure were found to be guilty of corruption (Osipitan, 2001).

The looting of public treasury and siphoning of funds abroad for several decades is a reflection of failure of the various anti-corruption policy measures in the country. Nigeria traditionally apply both policy and regulatory measures to combat corruption. Among the legal and policy measures which have been adopted and applied are the corrupt practices decree 1975, public officer (investigation of Assets) Decree No 5 of 1976, ethical revolution of 1979-1983, War Against Indiscipline and Corruption (WAI) 1983-1985, setting-up of National committee on corruption and other Economics crimes between 1985-1993, the corrupt practice and Economic crime Decree of 1990 and the "Indiscipline, corrupt practices and Economic crime (prohibition) Decree 1994 (Adeniran, 2018).

Since the onset of the fourth republic in 1999, various anti-corruption laws and institutions have also been put in place at the national arena.

The current laws include Corrupt Practices and Other Related Offences Act 2000 (ICPC Act); the Economic and Financial Crimes (Establishment) Act 2004 (EFCC Act); the Money Laundering (Prohibition) Act 2011 (as amended) (MLPA); the Code of Conduct Bureau and Tribunal Act 1991 (CCBTA); the Electoral Act 2010 (as amended) (EA); the Public Procurement Act 2007 (PPA); and, the Freedom of Information Act 2011 (FOIA). While dedicated government institutions responsible for combating corruption includes Independent Corrupt Practices and Other Related Offences Commission (ICPC), the Economic and Financial Crimes Commission (EFCC), the Code of Conduct Bureau (CCB), the Bureau of Public Procurement (BPP), and the Nigerian Financial Intelligence Unit (NFIU). The nation also has sector-specific anticorruption instruments, some of which are sector specific, such as Technical Unit on Governance and Anti-Corruption Reforms (TUGAR). TUGAR is responsible for analyzing gaps in compliance with the various anti-corruption initiatives in the country vis-à-vis regional and global anti-corruption. It publishes reports of studies and findings on corruption risk assessment by virtue of authority granted to it by the Presidential Fiat of July 27, 2006.

Despite the array of laws and institutions, Nigeria has some of the worst cases of corruption, theft of public assets and looting of state treasury cases. Although corruption evolved alongside the political development of Nigeria, since the institutionalization of corruption during the Babangida and Abacha regime, which marked the use of corruption as a tool for political control things have moved from bad to worst. The continuous war on corruption since the return to democracy in the fourth republic have yielded little or no success. Thus, besides the monumental wanton looting of public treasury in the pre-fourth republic such as popular Abacha loot of $ 3 billion US Dollars and that of his predecessor Babangida of about $ 12.2 Billion US Dollars in oil revenue money laundering and looting of public treasury into various accounts abroad and or purchase of properties has continued to be a problem till date (Tignor, 1993). More recent cases such as that of the former Petroleum Resources Minister, Diezani Alison-Maduekwe, (Odebode & Adetayo, 2018), infiltration of the judiciary which ought to the last hope of the common man by corrupt elements as seen in the indictment of the former Chief Justice of the Federation Walter Onnoghen and the recent forfeiture of property belonging to the former Speaker of the national Assembly as a state property falsely declared by him points to the failure of the anti-corruption system in the fourth republic. It also reflects the inadequacy of the legal, policy and institutional framework for preventing and combating corruption in the country. The weak domestic anti-corruption system encourage monumental financial corruption to thrive in public and private sector and wanton looting of public treasury. Meanwhile, the domestic anti-corruption system forms the foundational basis for application of the international regime. In

2016, Transparency International found that the ten least corrupt countries within the global community Denmark, New Zealand, Finland, Sweden, Switzerland, Norway, Singapore, Netherlands, Canada, and Germany derive their ability to combat the phenomenon from strong domestic Anti-corruption policy which gives zero tolerance to corruption.

In Nigeria, like most states, the stolen funds are channeled out of the country, with the aid of professionals like accounts and lawyers, both home and abroad, dissipated into foreign accounts and used for the purchase of assets. In most cases, recovery of the looted funds is usually a herculean task, despite the existence of sound international frameworks to aid MLA to aid conduct of investigation, trial, freezing and repatriation of stolen assets. For instance, o the Abacha loot, Nigeria only recouped the first installment of US$ 723 million in 2006 and a large proportion of the loot remains unaccounted for. Recovery of proceeds of corruption is usually met by stiff difficulty at the international arena, which conflicts the objective UNCAC and other similar MLA instruments. According to Femi Falana, nations like United States of America and Switzerland have constantly frustrated efforts of the Nigerian Government to recover stolen funds in their country. The USA severally raised unnecessary objections to suits filed for the recovery of over $ 300 m of the Abacha loot in New Jersey. Similarly, Switzerland insisted that it will only repatriate the sum of $ 321 m of the Abacha loot if the World Bank monitor the disbursement. According to Him, Nigeria is yet to recover between $ 74.5 bn and N2.5 trn (Ramon, 2018).

Efforts to recoup stolen funds and assets at the international arena are usually undermined by several impediments. These actors includes

6.1. The Banking Policies of the Recipient State

The applicable banking policies of a state determine the extent to which it can detect the inflow of funds in circumstances suspicious of being corrupt and whether or not it will respond timorously to request for investigation into accounts, freezing of accounts and actual repatriation of looted funds. As at the time of the Abacha loot, most states had no sound laws governing the handling of suspicious foreign account transactions and dealings with looted funds. In Switzerland for instance, the banking practice did not take cognizance of such unclean transaction, it was after the Abacha incident that the country resorted to reform of her banking practice and regulations. One of such reforms which were put in place was the directive on Politically Exposed Persons (PEP) issued by the Swiss Bank. The directive prohibited inflow of funds suspected of being proceeds of corruption and mandate banks to submit reports of any suspicious transactions. However, there are several developed nations where the banking regulation is yet to be reformed to prevent those states from being corruption haven (Enweremadu, 2013). Nations like United Kingdom, Luxembourg and Liechtenstein are within the categories. With the experience of countries like Nigeria, Peru, the Philippines and Kazakhstan, it is obvious that developing nations with

relatively weak governance, legal and institutional frameworks are the victims of wanton looting of public treasury while developed nations are the beneficiary. It is therefore important that an international instrument on MLA to combat corruption like UNCAC provide for the shared responsibility of the various states. The treaty should mandate state parties to reform their banking laws and policies to eliminate all avenues for the inflow of illicit capital and facilitate the refund of the money already in their coffers.

6.2. Reluctance of Host State to Disgorge Looted Fund

Another challenge to the realization of UNCAC objectives is the reluctance of safe havens to repatriate illicit looted funds in their custody. For instance, in the case of the Abacha loot, Switzerland repatriated the first instalment of $ 750 million US dollars after about seven years of Nigeria's demands and numerous diplomatic exchanges between the nations. Despite the fact that after the first installment, about $ 1 billion USD of the Abacha loot was still in their custody, the Swiss government went silent and became unduly reluctant about further refunds. This implies that the UNCAC MLA provisions will lack requisite effectiveness in the absence of provisions mandating the host states to cooperate with the demanding state in order to timorously refund the looted sum.

6.3. Deliberate Frustration of Efforts of the Demanding State by the Host State

The Abacha loot being one of the foremost cases of inter-state corruption reflects the most obvious challenges of repatriating looted funds. One of which is the deliberate frustration of efforts of the state demanding the repatriation of loots by the host state due to the reluctance to refund such loot. Obasanjo's administration made several efforts to recover Abacha loot, but the efforts were futile, as the Swiss Government hid under the umbrella of the inadequate legal framework. However, the concerted efforts of Obansanjo's successor pressured Switzerland to reform relevant laws. This also brought about the enactment of new laws including additional money laundering ordinance 8 of 2010, Restitution of Assets of PEPs Obtained by Unlawful Means (RIAA) 2011 and Federal Personnel Act of 2011 (Wheeler & Fearns, 2011). These laws filled the lacuna on how to deal with recovery of stolen assets and proceeds of corruption. The Swiss government convicted one of Abacha's Sons of participating in criminal organization and issued an order to forfeit his asset valued at $350 million USD, after he was extradited from Germany.

Despite the existence of a sound legal basis for provisions of MLA with the aim to combat corruption, the Swiss government severally frustrated efforts of the Nigerian government to recover looted funds in her custody. The refund of $750 million USD was not voluntary on the part of the Swiss government. The cooperation by the Swiss government was only a response to pressure from the international community. The release of the Abacha loot was predicated on

stringent conditions including prove of criminal source of the fund and the signing of an undertaking as to transparent use of the fund upon repatriation.

6.4. Host Country Investment of Looted Fund

More often than not, looted funds are huge amounts of money which the host state resort to use for capital investment, consequently they are reluctant to release such funds to the rightful owners. Many developed nations like Switzerland and Germany are known to deliberately invest looted funds. During his tenure as president, Olusegun Obasanjo stated that $ 1 billion USD of the Abacha loot is with the Swiss bank. Likewise, the former finance minister Kemi Adeosun stated that Nigeria is to recoup the sum of $ 321 million USD from Switzerland as part of the Abacha loot (BBC News, 2017). Where the investment of looted funds in the host account becomes a challenge to recovering it, the international MLA regulations need incorporate specific provisions stating the conditions for investing looted funds and how to dislodge such investment.

7. Conclusion

Corruption is a global problem which hinders economic growth and sustainable development. It drives poverty, social inequality and enables societal vices like crime, insecurity, gender based violence unemployment to thrive. The phenomenon engendered leadership deficit, poor governance, lack of political will, disregard for the rule of law, inadequate laws and weak institutional framework. The seriousness of corruption is not limited to its ability to mutate and spread decay across all sectors and strata of the society, but also because it produces a band wagon adverse effect which affects the society in the immediate and also spans into the future. Corruption is a major clog in the wheel of the global sustainable development goals of the UN because it channels cross border illicit flow of public assets and income from the treasury of developing nations where it is most needed to developed nations. Corrupt leaders from various parts of the world siphon funds and assets of staggering magnitude from their countries and this produces collateral damage economy, development driving poverty, unemployment and infrastructure decay which spans across generations. Efforts to recover these stolen assets and fund were often met by stiff challenges principal among which are legal and institutional. This necessitated a paradigm shift from the traditional anti-corruption efforts which focus on weak governance and other issues at the domestic level to adoption of legal framework which will aid MLA for cross border investigation, freezing and recovery of stolen assets and funds. Hence the adoption of UNCAC in 2003, Nigeria signed UNCAC in 2003 and ratified it in 2004. In 2019, the Nigerian Mutual Legal Assistance in Criminal Matters Act was signed into law. Expectedly, the provision of UNCAC should be domesticated in order for it to take effect in Nigeria by virtue of Section 12 (1) and (2) of the Nigerian 1999 Constitution. Thus, there is the anticipation that the MLA Act will reflect UNCAC and its principles relating to recovery

of funds and assets. However, based on its objectives the Act is simply to facilitate prosecution of cross-border crime to eliminate cross border crime in all its dimensions including terrorism, money laundering, advanced fee fraud, economic crimes, money laundering, oil theft and other offences.

The United Nations Convention against Corruption (UNCAC) presents a global universal framework combating cross-border corruption. It sets the basis for recognizing the phenomenon as an international problem, lasting solution to which requires inter-state cooperation. The convention also forms the basis of MLA for the recovery of stolen assets, stolen funds and trial of corrupt persons across national boundaries. It specifically identifies corruption related offences, criminalizes those offences and provides guidelines for prosecution. It requires member state to adopt relevant laws to criminalise corruption related offences, aid investigation of those offences and facilitate freezing, seizing, confiscation and recovery of stolen assets, funds and other proceeds of corruption. Despite the progressive nature of UNCAC, the convention has certain inherent limitation capable of undermining its effectiveness in combating corruption. Among these is the definitional problem. For instance, it failed to adopt a precise definition of corruption rather it used a broader expression "undue advantage" thereby giving room for ambiguity. Another obvious lacuna is the failure to use an expression of obligation, rather it uses shall, which depicts discretion, as a result of which lacks the force needed to archive its set objective and combat a serious crime like corruption. Also, UNCAC lacks mechanisms for monitoring compliance and ensuring enforcement of its provisions among member states. These might undermine its effectiveness.

Nigeria is one of the most corruption nations across the globe, in 2016, the UK Prime Minister David Cameron described Nigeria as "fantastically corrupt" (Akintayo, 2016).

Nigeria is yet to fully domesticate UNCAC, the nation does have exiting legal, policy and institutional structures for combating corruption at the domestic arena, some of which reflect the principles in UNCAC. However, Nigeria being a victim of massive income loss from national treasury, most of which have been dissipated into foreign accounts abroad must have a sound MLA legal framework to facilitate recovery of those funds and stolen assets. So far, efforts have been made to repatriate some of the stolen funds, and some have been received, several other billions of dollars and assets worth billions of dollars are yet to be recovered. Although the Nigerian government recently enacted the MLA Act, the Act is not a domestication of UNCAC per se. Rather, it provides guidelines on MLA to combat crime in general. It is not tailored towards the reciprocal MLA for combating corruption, aiding freezing, confiscation and recovery of stolen assets as seen in UNCAC. This study therefore recommends, that in order to harness the benefits UNCAC to recover looted funds and stolen assets for facilitating development, Nigeria must fully domesticate UNCAC in a manner that suppresses the limitations of the convention. The domestication must also avoid

the limitation of the present MLA Act, principal among which is the grant of excess power to the AG.

The current anti-corruption system in Nigeria is complex, with multiple institutions carrying-out related tasks thereby resulting in functional overlap. The ICPC investigates corruption, oversee the activities of public institutions and provide public enlightenment (Independent Corrupt Practices and other Related Offences Act 2000, Section 6). This is similar to the mandate of the EFCC which also conduct investigation into corruption cases, enforce laws and conduct public awareness campaigns on economic and financial crimes (Economic and Financial Crimes Commission (Establishment) Act 2004, section 5). The Code of Conduct Bureau is responsible for administering the Code of Conduct for Public Officers, monitoring asset receiving and asset declaration to eliminate corruption in the public service (Code of Conduct Bureau Tribunal Act, Chapter 58 LFN 1990, Section 3).

Although Nigeria is yet to domesticate UNCAC formally, several of the UNCAC provisions are already being applied to a fair extent. There is however need to harmonise the laws and institution for preventing and combating corruption in the country to eliminate the duplication of offices and inter-agency rivalry which leads to inefficiency. The harmonized laws and institution may however be expanded as a domesticated version of UNCAC which accommodate both the domestic and international anticorruption legal, institutional and policy frameworks. In order for Nigeria to make the most of UNCAC for the recovery of her numerous assets and funds in safe havens abroad, the provisions of UNCAC must be full domesticated in a manner that suppresses the limitations of the convention. However, there may also be need to the international arena to amend UNCAC to grant it the requisite force and compliance mechanism needed to facilitate its effectiveness. Preventive and combative anticorruption efforts need be balanced against elimination of safe haven and recovery of stolen funds and assets and this is the basis of UNCAC. However, respective state needs build a formidable legal and institutional framework for preventing corruption at the domestic arena in order to provide the foundation for adopting and implementing UNCAC. Thus, Nigeria needs reform and harmonise her anti-corruption laws and institutions and domesticate UNCAC in order to have an al-round anticorruption system. Further, the nation need adopt pragmatic measures and policies which reflect zero tolerance for corruption and drive massive public sensitization against the phenomenon in order to have lasting solution to the problems. There is also need for improved political will as the laws and institutions without more cannot cater for the enormity of the problem of corruption in the country.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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