

Transnational Criminal Law and the Tracing of the Proceeds of Transnational Crimes in Nigeria

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Abstract

In recent years, the international community, particularly developing countries with weak institutions and bad governance has grappled with the endemic challenge of trans-boundary criminal activity. To take one example, in the area of drug trafficking, the international community has been aggressively combating drug trafficking for more than 40 years, yet supplies of drugs are undiminished and prices have not risen. Under international law, an emerging discipline known as transnational criminal law seeks the regulation of this particular global problem. A combination of UN instruments and international rules and standards operate in conjunction with domestic legal frameworks to establish a transverse relationship and tackle this existential problem plaguing the international community. As things stand, the global community is failing to curtail transnational crime. This is because law enforcement is focused on the materials and manifestations of the crimes rather than on the money the crimes generate. The present paper is an analysis of the international and domestic framework for the transnational tracing of the proceeds of crime with a focus on Nigeria.

Keywords: Crime, Transnational Criminal Law, International Law, Civil and Criminal Procedure, Asset Recovery.

1.0 Introduction

In recent years, the international community, particularly developing countries with weak institutions and bad governance has grappled with the endemic challenge of transboundary criminal activity. With drug trafficking as an example, the international community has been aggressively combating drug trafficking for more than 40 years, yet supplies of drugs are undiminished and prices have not risen. The issue here is that these activities often lead to the compromise of important institutions and lead to a drain on national coffers as these transnational crimes are often organized and involve international cartels that include the most influential public figures in these developing societies as collaborators. With regards to human trafficking, these organizations often utilize the same channels - human trafficking for forced labor and sexual exploitation has exploded. On paper, counterfeiting and pirating of pharmaceuticals, consumables, luxury goods, and intellectual property is the biggest single transnational criminal activity, likely exceeding US\$1 trillion in retail value. In addition, illegal logging, mining, fishing, wildlife trade, oil theft, and trafficking in cultural property withdraw hundreds of billions of dollars of resources from developing countries. The illegal organ trade preys upon the poor, while arms trafficking protects the criminals. Nigeria as a developing country with porous borders, weakening security infrastructure, endemic corruption, and poor leadership is inevitably susceptible to these transnational crimes. The worst of all is oil theft which has greatly dealt a blow to the national revenue leading to intermittent borrowing by successive governments.

Under international law, an emerging discipline known as transnational criminal law seeks to regulate this particularly global problem. A combination of UN instruments in combination with international rules and standards operate in conjunction with domestic legal frameworks to establish a transverse relationship to tackle this existential problem plaguing the international community. As things stand, the global community is failing in efforts to curtail transnational

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crime. This is because law enforcement is focused on the materials and manifestations of the crimes rather than on the money the crimes generate. Consequently, this paper analyses the international and domestic framework for the transnational tracing of the proceeds of crime with a focus on Nigeria. The first part of the paper discusses the concept of transnational criminal law; the second part analyses the international legal framework; the third part discusses a recent critical domestic legislation in the form of the Proceeds of Crime Act (2022), and the final part concludes.

1.1 Transnational Criminal Law and the Question of Tracing Assets

Scholars have long grappled with proper conceptualization and context of the scope and extent of regulation of transnational crimes under international law. The conundrum often stems from the act, liabilities, and punishment of these crimes under the purview of international criminal law, or whether there is a need to clearly delineate it as international criminal law seeks to hold legal persons accountable for rights-related crimes. The consensus is that ‘transnational criminal law’ describes a category of domestic crimes established through treaty obligations in multilateral conventions such as the 1988 Vienna Convention¹ - the so-called ‘treaty crimes’² or ‘crimes of international concern’.³ Due to the sacrosanct nature of their sovereignty, States enforce their own criminal laws, and the reciprocity of sovereignty causes them to rely on the sovereignty of other states if they are to enforce their laws against transnational criminals that operate extraterritorially or across country boundaries. Through the crime suppression conventions, contracting state parties embrace tortuous treaty obligations to criminalize the activities specified in those conventions and to adopt procedural provisions that enable them to cooperate with other states that seek to establish and exercise jurisdiction over the criminals concerned.⁴

Thus, the label ‘transnational criminal law’ makes it possible to distinguish this category of criminal law from international criminal law strictly, i.e., criminal law applies in international criminal tribunals where individual criminal responsibility is directly applied under international law. The orthodox view was that crimes with a transnational element fell within international criminal law in an undifferentiated sense.⁵ This description now settles the age-old use of criminal law as encompassing all forms of criminal law with an international dimension, including *stricto sensu* international criminal law. It is fair to say that transnational criminal law as a specialized discipline is now fairly well accepted.

Boister is of the view that there is now a distinct system of transnational criminal law, with a distinct normative existence. Its principal distinguishing feature is its indirect nature, which contrasts with the direct nature of international criminal law, hinged on the fact that it protects limited transnational values and interests and that, unlike international criminal law’.⁶ He further delineates the content of the discipline as having a degree of coordination that varies from crime

¹United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, 1582 UNTS 95; in force 11 November 1990.

²N Boister, “Transnational Criminal Law?”, (2003) 14 *European Journal of International Law*, 953; N Boister, *An Introduction to Transnational Criminal Law* (Oxford: Oxford University Press 2012) 13–23.

³ This usage is credited to the American jurist Cherif Bassiouni. MC Bassiouni, “An Appraisal of the Growth and Developing Trends of International Criminal Law” in J Dugard and C van den Wyngaert (eds), *International Criminal Law and Procedure* (Aldershot: Dartmouth 1996) 85.

⁴ N Boister, ‘The Concept of Transnational Criminal Law’ in N Boister and RJ Currie (eds), *Routledge Handbook of Transnational Criminal Law* (New York: Routledge 2015) 11.

⁵ *Ibid.* See also MC Bassiouni, ‘The Sources and Content of International Criminal Law: A Theoretical Framework’ in MC Bassiouni (ed), *International Criminal Law: Crimes* (2nd edn. Ardsley on Hudson: Transnational 1999) 13.

⁶ Boister, ‘The Concept of Transnational Criminal Law’ (n 4).

to crime, depending on the threat of harm or actual harm perceived to be offered by the particular conduct concerned, and this is often balanced against complex factors including vested societal interests in carrying out that conduct and the spatial impact of the conduct.⁷

The basic element of transnational criminal law is the notion of transnational crime.⁸ This concept has been treated through Article 3 on the ‘Scope of Application’ of the United Nations Convention against Transnational Organized Crime (UNTOC),⁹ which applies the Convention to a range of offences ‘transnational in nature’, that are:

committed in more than one State; (b) . . . committed in one State but a substantial part of its preparation, planning, direction, or control takes place in another State; (c) . . . committed in one State but involves an organised criminal group that engages in criminal activities in more than one State; or (d) . . . committed in one State but has substantial effects in another State.

These international legal regimes that aim to suppress these crimes in conjunction with municipal law and practice are stitched together to form distinct global regimes for the prohibition of transnational networks that perpetuate offences such as drugs, money laundering and corruption, human and weapons trafficking, environmental theft and trafficking to mention a few. To the layman, he may be forgiven for thinking that transnational crimes must as of a necessity be trans-boundary. However, it is not compulsory that a transnational crime must be infused with a cross-border element. The suppression conventions reflect this by including within their scope behaviour that

- (i) actually crosses borders or
- (ii) has substantial effects in other states.

Nadelmann adds further critical insight by stating that state practice as contained in these suppression conventions also includes local crime that has only the most tenuous potential extraterritorial impact but which is of trans-boundary moral concern sufficient to include this behaviour within the scope of treaty obligations obliging its criminalization.¹⁰

Consequently, transnational criminal law may also consist of international and domestic decisions (diplomatic, administrative, judicial, etc.) made about a particular transnational criminal situation. The last thirty years have witnessed a proliferation of transnational law enforcement networks composed of non-state actors that engage in the development and application of normative activity directed at states and individuals. For example, policy formulations and actions of intergovernmental organisations such as the Financial Action Task Force (FATF), often appear detached from any justifying legislative national or international source.¹¹ Also noteworthy are

⁷ Ibid.

⁸ The term is coined by the UN Crime Prevention and Criminal Justice Branch to ‘identify certain criminal phenomena transcending international borders, transgressing the laws of several states or having an impact on another country’. See G Mueller, ‘Transnational Crime: Definitions and Concepts’ in P Williams and D Vlassis (eds), *Combating Transnational Crime* (Milan/London: ISPAC/Frank Cass 2001) 13.

⁹ 2225 UNTS 209; entered into force 29 September 2003.

¹⁰ E Nadelmann, ‘Global Prohibition Regimes: The Evolution of Norms in International Society’, (1990)44 *International Organisation* 479, 525.

¹¹ K S Blazewski, ‘The FATF and its Institutional Partners: Improving the Effectiveness and Accountability of Trans-governmental Networks’ (2008) 22 *Temple International and Comparative Law Journal* 1.

organizations such as central bankers and securities commissions,¹² transnational corporations,¹³ and non-governmental organisations,¹⁴ together with select ‘transnationalised’¹⁵ national law enforcement agencies that behave like non-state actors, all enjoy within transnational interstices some measure of de facto independence to suggest, and interpret and sometimes make rules in their areas of expertise.¹⁶ The following section takes a look at the domestic legal and policy framework for tracing the proceeds of crime within the Nigerian context.

1.2 National Regimes for Implementation: Background of the Nigerian Legal Framework

Nigeria as a developing country has a long-standing tradition of money laundering and other forms of transnational criminal activity owing to endemic corruption, weak institutions, and bad governance. The general picture is that proceeds of corruption, also referred to as illicit enrichment, constitute the main predicate for money laundering in Africa. It, therefore, remains the greatest obstacle to development. For long, corruption has undermined efforts to provide good governance and to effectively tackle social problems including the prevention and control of criminality. Corruption is prevalent, across public and private sectors and virtually endemic and institutionalized.¹⁷

The most common ways through which corrupt practices are perpetrated in Nigeria include embezzlement, misappropriation or diversion of public property/funds; bribery of government officials; inflation of contracts and over-invoicing for public works and procurement; abuse/misuse of office for personal gains; trading in “influence” to get things done or not done; and illegal transfer or sending the money abroad to mention a few.¹⁸

¹²See for example, Basel Committee on Banking Supervision (BCSB), International Organisation of Securities Commissions (IOSCO), that are taking steps to *Combat Money Laundering and the Financing of Terrorism*, June 2003 <<http://www.bis.org/publ/joint05.pdf>> accessed 1 November 2023.

¹³See, for instance, the anti-tobacco smuggling agreements signed between major tobacco products manufacturers such as Philip Morris International and the European Anti-Fraud Office (OLAF), which contain a wealth of normative content <http://ec.europa.eu/anti_fraud/investigations/eu_revenue/cigarette_smuggling_en.htm> accessed 1 November 2023.

¹⁴ See for instance efforts of the World Economic Forum (WEF) PACI Principles for Combating Corruption. See, PACI, ‘Partnering Against Corruption Initiative: Global Principles for Countering Bribery. Application & General Terms of Partnership’ (2016) <[WEF PACI Global Principles for Countering Corruption.pdf \(weforum.org\)](http://www.weforum.org/paci)> accessed 1 November 2023.

¹⁵ A clear example is seen in the Accra Initiative founded in 2017, comprising West African States and focused on preventing the spillover of terrorism from the Sahel region and to address transnational organized crime and violent extremism in member countries border. There is also the Multinational Joint Task Force (MNJTF) formed by Lake Chad Basin countries to combat terrorism in the sub-region. See International Crisis Group, ‘What Role for the Multinational Joint Task Force in Fighting Boko Haram?’ (7 July 2020) <<https://www.crisisgroup.org/africa/west-africa/291-what-role-multinational-joint-task-force-fighting-boko-haram>> accessed 5 June 2024; United Nations Development Programme, ‘Japan and UNDP Partner to Promote Efficiency in the Implementation of the Accra Initiative to Combat Violent Extremism in West Africa’ (28 May 2024) <<https://www.undp.org/ghana/press-releases/japan-and-undp-partner-promote-efficiency-implementation-accra-initiative-combat-violent-extremism-west-africa>> accessed 6 June 2024.

¹⁶Boister, ‘The Concept of Transnational Criminal Law’ *op. cit.* 20.

¹⁷AY Shehu, “Key Legal Issues and Challenges in the Recovery of the Proceeds of Crime: Lessons from Nigeria”, (2014) 3 *International Law Research* 186.

¹⁸Ibid.

In its 2017 report,¹⁹ Global Financial Integrity observed that transnational crime in multiple categories continues to grow in every region. According to the report, using the example of drug trafficking, it showed that counterfeiting and pirating of pharmaceuticals, consumables, luxury goods, and intellectual property is the biggest single transnational criminal activity, likely exceeding US\$1 trillion in retail value. It also stated that illegal logging, mining, fishing, wildlife trade, oil theft, and trafficking in cultural property withdrew hundreds of billions of dollars of resources from developing countries.²⁰

Specific to Nigeria as a resource-rich country amongst other transnational crimes perpetuated in developing countries is crude oil theft. Estimated to be worth at least US\$5.2 billion to US\$11.9 billion annually as of 2015, the report identifies Nigeria as the epicenter of worldwide crude oil theft in recent years. With 100,000 to 400,000 barrels stolen each day, which is equal to roughly 4.3 to 17.2 percent of daily domestic production Nigeria is the top country for oil theft rackets. Oil theft results in significant direct financial losses for the Government of Nigeria—more than US\$1.9 billion to \$7.6 billion in 2015, as well as additional indirect losses related to reduced production, pollution, and insecurity.²¹

Furthermore, apart from proceeds of other organized crimes, heads of governments at national and sub-national levels and other politically exposed persons in collusion with top civil servants' loot public funds. However, the consequence of public corruption on public coffers remains a worrisome trend as these activities put a drain on monies that could have otherwise been utilized for building basic infrastructure and other development projects. It is in apparent realization of the negative impact of corruption and its corrosive effects that the international community has responded accordingly by creating the necessary legal framework for the prevention of corruption and the recovery of proceeds of crime.²² A brief detail of some of the international frameworks for battling transnational crime is therefore necessary. Nigeria has obligations under international law as a signatory to important transnational crime suppression conventions among other international 'soft law' instruments. It is therefore important to highlight a few important legal instruments that could potentially benefit Nigeria if adroitly implemented.

1.3 Key UN Instruments

In response to growing concerns of its member states on the proliferation of transnational criminal activities, the UN responded by strengthening institutional frameworks through a number of global agreements and initiatives. First worthy of mention is the 1988 United Nations Convention against the Illicit Traffic of Narcotic Drugs and Psychotropic Substances (the Vienna Convention)²³ which set the path for a new generation of legal instruments prescribing the "dispossession" model, by prescribing confiscation of crime proceeds. Article 5 of the Convention sets out confiscation measures specific to drug-related offences. Article 7 provides for mutual legal assistance, while articles 8 and 10 make provisions for the transfer of proceedings in criminal matters, as well as

¹⁹ C May, "Transnational Crime and the Developing World", (Global Financial Integrity, March 2017) <https://gfintegrity.org/wp-content/uploads/2017/03/Transnational_Crime-final.pdf> accessed 22 July 2024.

²⁰ Nigeria has faced numerous counts of oil thefts and pipeline vandalism in recent years. In September 2022, the country lost 470,000 barrels of crude oil per day (bpd) due to such incidents, resulting in a monthly loss of \$700m. See S Nadig, 'NNPC seeks Help for Oil Theft and Pipeline Vandalism in Nigeria' (2024) <<https://www.offshore-technology.com/news/nnpc-seeks-help-for-oil-theft-and-pipeline-vandalism-in-nigeria/?cf-view&cf-closed>> accessed 22 July 2024.

²¹ Ibid.

²² Ibid.

²³ Entry into force on 11 November 1990; UNTS 1582, 95.

international cooperation. These provisions, though pertinent to the recovery of the proceeds of crime are not adequate to follow the money to the end. Oftentimes, these crimes are well organized and have a long chain of pecuniary beneficiaries. Thus they are not sufficient for the recovery of the proceeds of illicit enrichment.

In a similar vein to the convention above, the UN also established the United Nations Convention against Transnational Organized Crime (UNTOC) - the Palermo Convention²⁴ which covers “organized crime activities”, including corruption, obstruction of justice, and money laundering also advocate confiscation, thus, providing the legal framework for countries to develop the necessary domestic legal measures for asset recovery. Article 12, paragraph 7 of the UNTOC provides that ‘States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation’ to the extent consistent with domestic law and the nature of the proceedings.

On the subject of asset recovery, the United Nations Convention against Corruption (UNCAC)²⁵ is a groundbreaking treaty under international law. Article 53 of the UNCAC Provides that each state party shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;

(b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and

(c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party’s claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.

There are four main pillars in the Convention: (1) prevention; (2) criminalization and law enforcement; (3) asset recovery; and (4) international cooperation. The UNCAC explicitly identifies asset recovery as its fundamental principle. It enjoins States Parties to establish comprehensive domestic regulatory and supervisory regimes to prevent money laundering.²⁶ Countries that have ratified the UNCAC are required to criminalize the offence of bribery,²⁷ embezzlement, misappropriation, or other diversion of property by a public official²⁸ and the laundering of the proceeds of crime.²⁹ Furthermore, Article 21 of the UNCAC encourages Contracting States Parties to implement measures criminalizing illicit enrichment, which it defines as “a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income”.

²⁴2225 UNTS 209; entered into force 29 September 2003.

²⁵ Adopted 31 October, 2003; UNTS 2349, 41.

²⁶UNCAC art 14.

²⁷UNCAC arts 15 and 16.

²⁸*Ibid* art 17

²⁹ *Ibid* art 23

On this point, Shehu explains thus:

One of the contentious issues during the elaboration of the Convention was the issue of the burden of proof in the prosecution of accused persons for illicit enrichment (Article 25). Whereas some delegates proposed the introduction of the kind of legislation which places the burden on the accused as in ss 12A and 14 of the Hong Kong Prevention of Bribery Ordinance 1971 and s 10 of the HK Bill of Rights Ordinance (1991 as amended), as well as s 4 of the Singaporean Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1992. Others, however, expressed the strong reservation that such provisions were tantamount to the violation of the right of presumption of innocence of an accused person. It should be noted that such provision does not in any way relieve the state from discharging the general burden of proof that rests on the prosecution; what is reversed is evidentiary burden in respect of the proof of certain facts.³⁰

Applying the principles of Article 21 means that a significant increase in the assets of a public servant raises a prima facie presumption that the public official concerned benefited from illicit enrichment. This presumption can be rebutted by furnishing facts that reasonably explain the legal source of the assets. While several jurisdictions have successfully enacted and enforced illicit enrichment, others consider it inconsistent with their constitutions and fundamental principles of due process. By far, the greatest innovation of the Convention is contained in chapter five. Asset recovery and the return of such assets to countries of origin is a fundamental principle of this Convention, and this chapter contains provisions such as prevention and detection of transfers of proceeds of crime; measures for direct recovery of property; mechanisms for recovery of property through international cooperation in confiscation; international cooperation for the purposes of confiscation; return and disposal of assets; the requirement for the establishment of financial intelligence unit; as well as bilateral and multilateral agreements and arrangements (Articles 51–59).³¹

More importantly, Article 51 provides that ‘the return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.’ On matters of direct recovery of property, the Convention provides (Article 53) that each State Party shall, in accordance with its domestic law:

- (a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;
- (b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and

³⁰ See A Y Shehu *op. cit.* 189.

³¹ *Ibid.*

Other important standards include the Financial Action Task Force (FATF)³² Recommendations and the StAR Initiative.³³

1.4 Economic and Financial Crimes Commission Act, 2004

In jurisdictions where illicit enrichment is criminalized; after securing a conviction, criminal forfeiture will form part of the sentencing. In Nigeria, Section 7(1) (b) of the Economic and Financial Crimes Commission (EFCC) Act (2004) gives special powers to the Commission in this respect. It states that the “Commission has power to cause investigations to be conducted into the properties of any person if it appears to the Commission that the person’s lifestyle and extent of the properties are not justified by his source of income”. Although this provision does not go as far as to criminalize illicit enrichment, the Commission could, nonetheless, employ this section to conduct an investigation on virtually any persons that appear to be ‘living beyond their means’, particularly politically exposed persons. Thus, the power to initiate an investigation should not only be subject to financial information disseminated to the EFCC based on a suspicious transaction report by a financial institution or other reporting entities.

Section 7 grants wide powers of investigation to the EFCC. These powers ought to be used proactively by the EFCC. A key provision of the UNCAC is Article 31, which obligates States parties to take necessary measures to enable confiscation, including measures to enable the identification, tracing, freezing or seizure of such property. In instances where it may be impossible to institute criminal proceedings against the accused, such as when an accused absconds or cannot be prosecuted for reasons of immunity; Articles 53 and 54 make provision for civil remedies. Article 54 (1) (c) encourages States Parties to give consideration to measures that would allow confiscation of the proceeds of corruption without a conviction. Article 53 enjoins jurisdictions to permit another state to initiate civil action in its courts to establish title to or ownership of property acquired through the through the commission of an offence prescribed by the convention. Although the EFCC Act (2004) and the Money Laundering (Prohibition) Act (MPLA) (2022) make provisions for seizure and confiscation, there is, however, no provision under Nigerian law for non-conviction-based confiscation. This has however changed under the Proceeds of Crime Act (2022) discussed in further detail below.

³² See Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (FATF, Paris, France 2012-2023) <<https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html>> accessed 22 July 2024. The FATF recommendations are drawn from the Vienna and Palermo conventions to set down a series of 40 Recommendations, which provide a complete set of counter-measures against money laundering and terrorist financing and proliferation of weapons of mass destruction covering the law enforcement, the financial system and its regulation, and international co-operation. Recommendation 4 (confiscation and provisional measures) enjoins countries to adopt legislative measures, to enable their competent authorities to confiscate property laundered, proceeds from money laundering or predicate offences, or instrumentalities used in or intended for use in the commission of these offences. It also calls upon countries to consider adopting measures that allow proceeds and instrumentalities of crime to be confiscated without requiring criminal conviction (non-conviction-based confiscation).

³³ See *Stolen Asset Recovery Initiative, ‘Addressing Anti-Corruption, Money Laundering & Asset Recovery’* <<https://star.worldbank.org/>> accessed 22 July 2024. The Stolen Asset Recovery Initiative (StAR) is a partnership between the World Bank Group and the United Nations Office on Drugs and Crime (UNODC) that supports international efforts to end safe havens for corrupt funds. StAR helps countries establish the legal tools and institutions required to recover the proceeds of corruption.

1.5 The Proceeds of Crime Act (POCA)

Generally, in jurisdictions where illicit enrichment is criminalized, criminal forfeiture forms part of the sentencing after a conviction, criminal forfeiture will form part of the sentencing. In Nigeria, for instance, Section 7(1) (b) of the Economic and Financial Crimes Commission (EFCC) Act (2004) gives special powers to the Commission ‘to cause investigations to be conducted into the properties of any person if it appears to the Commission that the person’s lifestyle and extent of the properties are not justified by his source of income’. Although this provision does not go as far as to criminalize illicit enrichment, the Commission could, nonetheless, employ this section to conduct an investigation on virtually any persons that appear to be ‘living beyond their means’, particularly politically exposed persons. Thus, the power to initiate an investigation should not only be subject to financial information disseminated to the EFCC based on a suspicious transaction report by a financial institution or other reporting entities. Section 7 grants wide powers of investigation to the EFCC. These powers ought to be used proactively by the EFCC. But as past cases show, the EFCC is plagued with other problems such as poor investigation often leading to cases being dismissed for lack of diligent prosecution, allegations of corruption, and the general sense that the Commission is often unable to convict politically exposed persons due to their status in society and certain procedural gaps such as plea bargaining.³⁴

In response to the loopholes for effective asset recovery under Nigerian law, the Proceeds of Crime (Recovery and Management) Act (2022) (POCA) was signed into law on 12th May 2022. The Act in Section 1 seeks the provision of an effective legal and institutional framework for the recovery and management of the proceeds of crime, a non-conviction-based procedure for the recovery of proceeds of crime, strengthen criminal confiscation procedure, and collaborate among the relevant organizations in tracing properties reasonably suspected to be proceeds of unlawful activity.

1.5.1 Introduction of Non-Conviction Based Confiscation (NCB)

As earlier highlighted, there was no known legislation for recovery of the proceeds of crime in non-conviction-based judicial proceedings. In this wise, the POCA lays down a marker for asset recovery by providing for certain asset recovery powers which include confiscation of the proceeds of crime upon a finding that such realizable assets have been obtained through unscrupulous and questionable means worthy of attracting criminal sanction.³⁵ This takes place subsequently to the initiation of proceedings, civil or criminal, against any individual or a third party, although the Act empowers the court to grant preservative orders to preserve property reasonably suspected to have been derived from unlawful activities and represent instrumentality of unlawful activity or unclaimed property.³⁶ The aim to be achieved, under the relevant provisions of the Act, is to demonstrate that a convicted person should not be allowed to benefit from the proceeds of their criminal activity.³⁷ Further, the POCA aims to provide an effective process by which the total benefit from a person’s criminal activity is calculated, and an equivalent amount, where recoverable, is confiscated on behalf of the Federal Government of Nigeria; to ensure the

³⁴ Shehu thoroughly analyses the legislative, institutional, and procedural stop-gaps that prevent the EFCC from functioning effectively. Legislation such as the EFCC Act (2004) and the Money Laundering (Prohibition) Act (MLPA) (2011) as well as case law to high profile persons that were poorly prosecuted by the relevant authorities are analysed. See Shehu *op. cit.* 190 - 195.

³⁵ T Onyuike, ‘A Critique of the Nigerian Proceeds of Crime (Recovery and Management) Act 2022’ (2023) 4 *Amicus Curiae* 461, 462.

³⁶ POCA s 9(1).

³⁷ The definition of ‘proceeds of crime’ under the POCA tallies with Article 2(e) of UNTOC which implies that any property derived from or obtained, directly or indirectly, through the commission of an offence.

preservation of all realizable properties, as defined under section 53 of the Act; and to ensure that the said realizable properties are preserved and available to satisfy a confiscation order.³⁸

Also worthy of note is that the POCA Act ensures that any suspect who is detected by the ‘relevant organization’ and who may potentially face a confiscation or forfeiture order may act faster than the long arm of the law to dispose of the said properties before the final determination of the criminal case pending against them so that the law would not be able to deny them of the asset. To this end, the POCA has empowered courts to make freezing orders thereby preventing the suspect, from dealing with the proceeds of crime held by that person or the third parties on their behalf.³⁹

Along this line, the practice in other jurisdictions is to prevent the accused person from accessing the proceeds of their criminal conduct. Consequently, it is pertinent at this juncture to query whether the practice of temporarily depriving the accused person from dealing with the assets suspected to be proceeds of crime pending the determination of the civil/criminal case against them falls within the ambit of the constitution.⁴⁰

1 Dangabar v FRN⁴¹

As awkward as it may sound, freezing order made *ex parte* pursuant to the provision of extant statutes is not unconstitutional. In the case of *Dangabar v FRN*,⁴² the Court of Appeal in resolving a question on whether the *ex parte* order of the trial court freezing the account of the defendant made pursuant to the provision of the EFCC Act was unconstitutional, the Court resolved that such order is consistent with the intendment of section 44(2)(k) of the Constitution of the Federal Republic of Nigeria, 1999, (as amended) which permits the temporary taking of possession of property for the purpose of any examination, investigation or inquiry. There is no doubt that pursuant to sections 43 and 44 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) (the Constitution) all citizens of Nigeria have the right to acquire and own property anywhere in Nigeria, and their property should not be compulsorily acquired without payment of compensation. However, this right to own property is not without an exception as contained in section 44(2)(k) of the 1999 constitution which provides that ‘nothing in sub-section (1) of this section shall be construed as affecting any general law; (k) relating to the *temporary taking possession of property* for the purpose of any examination, investigation or inquiry (emphasis added).

2 The Expansion of Relevant Organizations

Among the innovations introduced into the POCA to engender coordination of security agencies is the introduction of ‘relevant organization’ into the Nigerian criminal justice legislation. The POCA establishes a group of diverse law enforcement and security agencies collectively known as Relevant Organization. The Relevant Organization is to enforce and administer the provisions of the Act. Relevant organizations include the Economic and Financial Crimes Commission (EFCC), the Independent Corrupt Practices and Other Related Offences Commission (ICPC), the Nigerian Police Force, Department of State Services, Nigerian Financial Intelligence Unit (NFIU),

³⁸ Onyuike (n35). POCA s 26(3) and (4).

³⁹ POCA pts IV, V and VI.

⁴⁰ See Constitution which permit the temporary taking of possession of property for the purpose of any examination, investigation or inquiry.

⁴¹ [2014] 12 NWLR (Part 1422) 589.

⁴² *Ibid.*

Code of Conduct Bureau, Standard Organization of Nigeria (SON), Federal Inland Revenue Service (FIRS), Nigeria Customs Service, National Drug Law Enforcement Agency (NDLEA), National Agency for Prohibition of Trafficking in Persons (NAPTIP), National Agency for Food and Drug Administration and Control (NAFDAC), Nigeria Ports Authority, Nigeria Immigration Service, Nigeria Maritime and Safety Agency, National Inland Waterways Authority (NIWA), etc and ‘such other organizations as the Attorney General of the Federation may designate from time to time’.⁴³

By implication, the POCA grants the relevant organization the power to act and make key decisions in respect of the controlled property. Along this vein the Act empowers the relevant organization to exercise the right attaching to any of the controlled property in the form of shares, securities, stocks, bonds or debentures, and equally allows the relevant organization to destroy the controlled property (on grounds of public interest, health or safety) or dispose of the controlled property—by sale or other means—if it is susceptible to deterioration or is excessively burdensome or expensive to maintain. To achieve its objectives as an enforcer of the POCA regime, the Act grants immunity to the relevant organization against

- (i) any loss or damage sustained by a person claiming interest in the controlled property, arising from the relevant organization taking custody of property;
- (ii) the cost of proceedings taken to establish an interest in the controlled property; and
- (iii) payments of any rates, land tax, municipal or statutory charges imposed under any law pertaining to the controlled property, except out of the rents or profits that had accrued from the controlled property.

With regards to cross-jurisdictional initiation of legal proceedings, the Act makes provisions for the relevant organization, under the direction of the Attorney-General of the Federation, to initiate proceedings in a foreign country for the recovery of forfeited property and also allows the relevant organization with the guidance of the Attorney General to apply for the assets or property of a convicted person in a foreign country to be forfeited to the Federal Government of Nigeria, subject to any treaty or arrangement with the foreign country.

3 Introduction of an Asset Recovery Directorate

Section 3(b)(i)-(vi) of the Act authorizes the establishment of the Proceeds of Crime Management Directorate (PCMD/the Directorate).⁴⁴ The Act enables each relevant organization to issue guidelines relating to the exercise of the duties, functions, and powers of the PCMD. Furthermore, the Attorney-General of the Federation may, in consultation with the relevant organization(s), make regulations relating to a ‘standardized automated asset forfeiture management system expedient for the efficient implementation of the provisions of this Act’.⁴⁵

⁴³POCA Ss 58 - 67.

⁴⁴This directorate may be referred to as the Asset Recovery Office in some common law jurisdictions.

⁴⁵The Directorate shall have the exclusive power to take over and assume responsibility for the proper and effective management of properties forfeited to the Federal Government of Nigeria among others. Under section 5, the Directorate shall be informed of any property seized in the course of investigation within 14 days or soon thereafter for documentation. Any property seized in the course of an investigation shall subject to the specific orders of the Court be transferred to the Directorate for its effective management within 30 days.

4 Specifics of Non-Conviction-Based Confiscation

a. The *Ibori* Case before POCA

The importance of enacting a Non-Conviction Based (NCB) asset forfeiture law in Nigeria is indicated in the *Ibori* case. Briefly stated, James Ibore, former governor of Delta State in Nigeria, pleaded guilty to money laundering offences at the Southwark Crown Court in the United Kingdom. The ex-governor admitted to fraud in excess of £50million and was convicted. After the Judgements in the British courts, the Economic and Financial Crimes Commission (EFCC), reiterated their intention to prosecute Ibore at an appropriate time, noting that the offences for which the governor pleaded guilty were only a minute part of the list of offences he committed during his tenure as governor. Most of the criminal charges against Ibore are still before Courts in Nigeria and there are no plans to vacate them. Unfortunately, the EFCC cannot proceed against Ibore until he finishes serving his jail term and there is nothing to say that the Governor will return to Nigeria after serving his jail term. Given that it is impossible to try him in absentia; a number of events might occur during the waiting period. Importantly, his associates which include highly placed politicians and public servants may assist him in dissipating assets which are acknowledged to be located all over the world. If Nigeria had NCB laws at the time, it would have aided the recovery of a considerable number of illicit assets acquired by the former Governor. NCB would have been the ideal way to recover Ibore's illicitly obtained assets. This case is a perfect example of how the NCB asset forfeiture laws could be used by prosecuting authorities as a vital tool to deprive greedy politicians of ill-gotten wealth.

Consequently, in a gap-filling move, the POCA provides for non-conviction-based recovery for the proceeds of crime. Section 82 of the POCA defines 'non-conviction-based confiscation' as confiscation through judicial procedure related to a criminal offence for which criminal conviction is not required. It requires the relevant organization to commence civil proceedings for the recovery and forfeiture of the proceeds of crime, abandoned properties or unclaimed properties reasonably suspected to be proceeds of unlawful activity, without conviction. The relevant organization may seek two orders ('preservation order' and a 'forfeiture order') from the court in recovering proceeds of crime.⁴⁶

b. Preservation Orders

It is noteworthy to mention that in granting a preservation order, the court will *inter alia* consider whether the property concerned is derived from the proceeds of unlawful activity. Along this line, it is immaterial that the said property has been transferred to another person. To this end, it is specifically provided in section 9(5) of the Act that, where the said property has been amalgamated with other property, the courts may make preservation orders on the portion of the property resulting from the purported unlawful activity.

With regards to the forfeiture order, Section 17(1) of the Act authorizes the relevant organization to, before the expiration of a preservation order, apply to the court for a forfeiture order against all or any part of the property that is subject to the preservation order. Once a forfeiture order has been obtained from the court, the relevant organization will promptly hand over the forfeited property to the Directorate. The POCA stipulates that the validity of forfeiture will not be affected 'by the

⁴⁶ The relevant organization may, by way of an *ex parte* application, apply for a preservation order to restrain a person from dealing with the property in any manner. *Prima facie*, a preservation order will last for 60 days, but may be renewed upon an application by the relevant organization to the court.

outcome of criminal proceedings or of an investigation with a view to instituting criminal proceedings in respect of an offence with which the property concerned may be associated’.

c. Recovery of Cash

On the subject of recovery of cash, the Act authorizes a designated officer to seize and detain any cash in the process of being moved within or outside Nigeria, if the designated officer has reasonable grounds for suspecting that the cash represents proceeds of unlawful activity, is intended to be an instrumentality of an offence, or exceeds the prescribed amount under the law and has not been declared to the appropriate authorities. The POCA defines ‘cash’ to include ‘jewelries and gold.’ Thus, borrowing the definition of the Money Laundering Act 2022, under which the requirement to declare relates only to cash and negotiable instruments. On the time frame for detention, cash may be detained for a period of seven days (excluding Saturdays and Sundays or any public holiday) to enable the designated officer to apply to the court for an order to detain the cash.⁴⁷ The court may extend the time frame, provided it does not exceed three months from the date the order of extension was made. Subsequent orders for continued detention are not to exceed a cumulative period of 12 months from the date of the first order. The court may also direct a release of the whole or part of the detained funds upon an application by the person from whom the cash is seized, provided the applicant can satisfy the court that the detained funds or part were not unlawfully obtained.

d. Confiscation Proceedings

Section 33 of the POCA provides for the confiscation of the proceeds of the criminal activity of a convicted person through confiscation proceedings. The objective of the POCA in this wise is to ensure that a convicted person is not allowed to benefit from the proceeds of their criminal activity, by providing an effective process for the calculation and confiscation of the total benefits of a convicted person’s criminal activity. Additionally, the Act provides for the issuance by the court of a restraint order(s) and a confiscation order(s). The purport of a restraint order is to prevent the defendant from tampering with realizable assets held under their custody or control. The application is to be made by the relevant organization by way of a motion *ex parte*, as prescribed by section 36 of the Act. Confiscation orders pursuant to section 52(2) of the Act aim to secure payment of a sum of money up to the amount that a convicted person has acquired from the offences for which the person was convicted. A confiscation order against a person may be enforced as if it were an order made in civil proceedings instituted by the relevant organization against a person to recover a debt due by that person to the Federal Government of Nigeria.⁴⁸

5 Conclusion and Recommendations for the POCA

It is apparent that the tracing of proceeds of crime across borders while problematic for most countries, can be tackled by insightful and critical legislation. The suppressive conventions as well as the standards such as the FATF recommendations already provide a blueprint for domestic law to take legislative steps that are particular to its own society. With regards to the POCA, non-

⁴⁷The court is expected to adopt procedures similar to those of summary proceedings, as provided for in the High Court (Civil Procedure) Rules 2019. See POCA s 26(5).

⁴⁸The relevant courts within the jurisdiction to entertain matters and proceedings arising under the Act are the Federal High Court, High Court of the Federal Capital Territory and State High Courts; and the Heads of these courts are equally empowered by virtue of POCA s 73(1) of the Act to designate special courts to hear and determine all cases under the Act. Furthermore, POCA s 68 establishes a designated account to be known as the Confiscated and Forfeited Properties Account (the Account) to be maintained at the Central Bank of Nigeria and managed by the head of the relevant organization that shall be responsible for providing reports to the Minister of Finance.

conviction-based confiscation seems to be an admirable approach employed by the Act to recover the proceeds and instrumentalities of crime without the burden of the weighty standard of proof in criminal proceedings. However, the jurisdiction to issue an order may be limited by the territorial jurisdiction of the court. In addition, it is not clear whether a non-conviction-based trial can be considered to be criminal proceedings for the purposes of mutual legal assistance in criminal matters. These and other suggestions highlighted above can help make an already robust law stronger and more effective. Perhaps what is most important is an adroit implementation of the relevant laws. The Nigerian state is not short of laws. However, it is fundamental that the commensurate political will is exercised by the political elite. This is because politically exposed persons are participants in these schemes that put a dent in the commonwealth of the Nigerian state. State capture and the ‘big man syndrome’ remains a bane to adroit implementation. Contained below are helpful recommendations to help address the issues on ground.

5.1 Presumption of Innocence and Evidential Burden under the POCA

Generally, a plausible deduction from a panoramic assessment of the POCA is that the legislative draftsmen arguably intended to encourage actions *in rem* against the property sought—including cash or jewelry. Thus, bringing an action *in rem* against the property or assets of such illegality gives the said assets a juristic personality, especially when the owners of the assets are unknown. Section 10 of the Act, having provided 14 days’ notice of the preservative order to be published by the relevant organization in order to notify any persons having interest in the subject property, creates a window of opportunity to challenge the preservative order so as to afford the supposed owner of the subject assets reasonable time to prove the legality of those assets.⁴⁹ Section 74 of the Act places the burden of proof on the defendant. In essence, the defendant in any proceeding under the Act bears the burden of proving that they are the legitimate owner of the assets suspected to be proceeds of crime or derived from unlawful activity or that the assets are of legitimate origin and not proceeds of unlawful activity. This section is controversial and might be tested for judicial interpretation when it is considered that it runs contrary to the provisions of section 36(5) of the 1999 Constitution which guarantees the presumption of innocence. The manner of proceedings prescribed by the POCA presupposes that the interested person challenging the order must prove that the assets were acquired through legitimate means. Notwithstanding, whether criminal or civil, the burden of proof rests on the defendant, plaintiff or the prosecution, as the case may be. The evidential burden placed on the defendant under the POCA contravenes provisions of the Constitution which provide for the presumption of innocence.

5.2 Stay of Proceedings

To ensure that there are no procedural technicalities with which to stall the recovery of proceeds by relevant organizations in court, the POCA categorically prohibits the court from entertaining any application for stay of proceedings on whatever ground.⁵⁰ This provision has been critiqued for being ‘quite blanket and does not protect public confidence in the integrity of the court’.⁵¹ Proceedings brought under the POCA are usually initiated by *ex parte* applications which are

⁴⁹Onyuike *op. cit.* 470.

⁵⁰POCA s 75 of the Act excluded the discretionary power of the court in granting stay of proceedings where the usual traditional legal practice might entertain such a notion.

⁵¹Onyuike *op. cit.* 470.

sometimes considered oppressive. Thus, there is a need for equity and fairness in the dispensation of justice to all parties.⁵²

5.3 Forfeiture Order

As earlier highlighted, section 19(4) of the Act, controversially, provides that a forfeiture order, obtained in respect of an asset under the non-conviction-based proceeding, will not be invalid or affected by the outcome of criminal proceedings or of an investigation with a view to instituting a criminal proceeding in respect of an offence with which the asset may be associated. Therefore, an accused or a suspect's property could be subjected to forfeiture irrespective of the suspect being acquitted from charges brought against them or exoneration from criminal investigation. By implication, property alleged to be derivable from crime and seized through non-conviction-based proceedings will remain confiscated even if the accused person is acquitted of the offence by which the accused person is alleged to have acquired the property.

5.4 Weak Institutional Powers of the Asset Recovery Office

One area where the POCA needs to be amended is in the nature of weak institutional powers granted to the PCMD. The Act provides that the directorate may do 'anything it considers appropriate for facilitating, or which is incidental to the performance of its functions'. However, the draftsmen of the Act missed a trick by not clearly setting the standard of the authority for the relevant organization to avoid ambiguity and duplicity of functions. The UNODC *Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime* (UNODC 2012a)⁵³ specifically recommends what powers an Asset Recovery Office should include powers to access all relevant information; to coordinate and correlate all relevant information effectively at the national level; to access information using coercive means, where necessary; to share the information both nationally and internationally, where appropriate; to protect this information and impose conditions on both its use and further transmission, nationally and internationally; to issue a short-term administrative restraint order where funds that could be dissipated quickly are identified; and to conduct joint investigations internationally. Drawing on the above, the goal should be to freeze the illicit assets, home and abroad, of the criminal offence as early as possible in the context of the larger organized crime investigation.

⁵²Therefore, before a stay of proceedings is granted on issues of jurisdiction, a court before which an application for stay is brought, must be fully satisfied and convinced that there is a genuine issue of jurisdiction involved in the matter sought to be stayed. See *Federal Republic of Nigeria & Ors v Abacha & Ors* (2007) LPELR-8177 (CA) per Sanusi JSC at 13-15, para 471.

⁵³United Nations Office on Drugs and Crime, *Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime* (United Nations Office, Vienna 2012) <https://www.unodc.org/documents/organized-crime/Publications/Confiscation_Manual_Ebook_E.pdf> accessed 25 July 2024.