Symposium on IFFs: Recover and Reinvest: Applying Recovered Proceeds of Corruption to Development Financing in Africa

By:

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It is common knowledge that several African economies have a nagging public debt burden. However, in real terms, outside of Oceania, Africa has the lowest public debt in the world. The challenge with Africa is that most of its debt is owed to non-African creditors and the debts are contracted in foreign currency thereby exposing African countries to currency volatility. Another challenge is that these non-African creditors consider the African market as risky, thereby charging higher interest on our loans.

While African countries are struggling to finance public debt which ordinarily should be within the capacity of African economies to accommodate, it is estimated that Africa loses about $140 Billion annually to corruption. Corruption on a global level has been recognised as a major impediment to development.

Most African states have over the years experienced slow growth because of corrupt practices perpetrated by public officers serving in successive governments. Public resources meant for development initiatives, public utilities and infrastructure are sometimes diverted into private coffers thereby creating a gap in development financing in Africa. The situation is further exacerbated by the fact that oftentimes, the perpetrators conceal their wealth by siphoning the proceeds to non-African jurisdictions. Moving these large chunks of money away from the continent creates a gap in the funding of key development projects such as healthcare, transport infrastructure, energy infrastructure and other capital-intensive development projects but also enriches non-African economies that we are indebted to. To bridge the funding gap created partly because of corruption, African governments have had to borrow to fund development projects, and this has resulted to increased public debts.

As part of the efforts by African states to combat corruption, the African Union in 2003 adopted the African Union Convention on Preventing and Combating Corruption. Most African states have also ratified the United Nations Convention against Corruption (UNCAC). UNCAC was created to enhance cooperation among member states in the fight against corruption. At the national level, several African states have taken steps to create institutions that are vested with the powers to fight corruption and recover proceeds of corruption. However, African states have struggled to effectively prosecute and recover proceeds of corruption thereby leading to an annual loss of $140 Billion. In utopia, judging by data which shows that Africa's external debt is currently at $1.1 trillion, the annual loses to corruption would amortise Africa's external debt in 8 years. Diverse reasons have been given as to why African states have struggled with tackling corruption. These reasons include the lack of political will, lack of financial resources and expertise in investigating cases of corruption and the legal complexity involved in tracking, prosecuting and recovering assets.

The goal of this paper is to prompt a conversation as to how best we can adopt approaches that complement the existing anticorruption framework to effectively recover proceeds of corruption and reinvest these proceeds in a sovereign fund which has the specific objective of bridging part of the existing gaps in development financing. To aid the recovery and reinvestment process,

an argument is made in favour of the use of transitional justice mechanisms of amnesty and restitution as a means of short circuiting the process of asset recovery from outgoing political office holders. This position is premised on the fact that while several African states have legislations against corruption, they have struggled with the recovery of assets from the outgoing political class and the implementation of anti-corruption legislations has not been efficacious enough to serve as a deterrent to the high-ranking political class that usually gets the largest chunk of the corruption bounty. Therefore, it stands to reason that we need to find alternative ways to mitigate the effect of corruption while we strive to implement a system that is strong enough to deter and punish corruption and at the same time promptly recover proceeds of corruption. These processes do not have to be mutually exclusive and can exist within the same anti-corruption framework to facilitate the of measures taken to eradicate corruption as provided for in Article 2 of African Union Convention on Preventing and Combating Corruption.

Finally, as part of the restitution process, a case is made for the recovered funds to be invested in a sovereign fund whose objective is to fund development projects. Creating a separate fund to manage recovered proceeds of corruption is necessary for the purposes of accountability and transparency. It would also serve as a counterweight in offsetting some of the impact of corrupt practices on development financing.

Amnesty and Restitution as a means for the recovery proceeds of corruption

The use of amnesty in the recovery of assets acquired through corruption is pragmatic given the peculiarities of the African political class. To properly situate the relevance of amnesty and restitution in the anti-corruption campaign in Africa, one must reflect on the history, nature, and formation of the African political class. Post-independence, most African states experienced decades of military rule and within this era, corruption and plundering of resources became the norm. When military rule became unpopular, the military governments transitioned into democracy. This transition created a political class that comprised of retired military officers who had metamorphosised into democrats and careered politicians who hobnobbed with military dictators before they transitioned into democrats. The political class also includes retired

civil servants who rose through the civil service ranks and careered human rights activists who also transitioned into politics. In countries that did not experience military rule, we have a cabal of political elite whose alliances cut across the divide of political parties and consider leadership their birth right to be passed on to their children for an inheritance. For countries that transitioned from military rule into democracy, this meant that the political class which was accustomed to the culture of impunity and corruption had to adopt laws and create institutions to fight corruption. Implementing the anti-corruption laws meant that they must investigate and prosecute corrupt practices of people with whom they have most likely engaged in corrupt practices. For the political elite, their entangled alliances also obscure their ability to prosecute corruption without fear or favour. The fight against corruption is thus faced with a social dilemma emanating from embedded relationships among the political class vested with the powers to eradicate corruption. The resultant effect of this social dilemma is manifested in the form of “lack of political will” to prosecute corruption.

As mentioned earlier, several African countries have institutions that are vested with the authority to investigate, prosecute, and recover proceeds of corruption. However, there are a myriad of complexities that obscure the efficacy of the system. These complexities include gaps in domestic legislation, ill equipped criminal investigation agencies, secrecy laws of offshore jurisdictions, and the slow pace of judicial proceedings. Furthermore, in several African jurisdictions, while the assets of a person accused of corruption might be temporarily forfeited during trial, a permanent forfeiture is only permitted upon conviction. Given that the burden of proof is on the prosecution to establish beyond reasonable doubt that the assets were indeed acquired through corrupt practices, it becomes more complicated to expeditiously recover assets acquired through corrupt practices. In numerous cases, corrupt officials also launder the money to other jurisdictions making traceability and recovery burdensome. For example, a London court recently confiscated $130 Million from an ex-governor of Delta state in Nigeria. This asset has been frozen in the banking system of the United Kingdom for over 10 years.

Governments that genuinely want to fight corruption but are handicap either because of their embedded relationships or just simply want to avoid the complex process of prosecution can grant amnesty to corrupt officials to

voluntarily provide information about stolen assets and make restitution to the state. In return for providing the information, they are granted immunity from prosecution. Given that corruption requires a network of individuals to work efficiently, individuals who are granted amnesty would inadvertently provide information about other members of the network who have refused to accept the amnesty program. provided through the amnesty programme can also be useful in tracing and recovering assets that have been transferred outside the jurisdiction. Chapter V of UNCAC provides for mutual assistance among member states in the recovery of assets that have been acquired through corrupt means and transferred to offshore jurisdictions for the purposes of concealment. Having access to information about offshore accounts without having to trace the assets would shorten the asset recovery period. The recovery process of assets transferred abroad is usually lengthy and entails both legal manoeuvres and political lobbying. A simple example can be drawn from Nigeria in the recovery of assets illicitly acquired by Sani Abacha and the recovery process has taken over 20 years. Such lengthy delays create a setback for the country and does not serve the justice that the citizens deserve.

As a corollary to the amnesty program would be restitution. Restitution is needed to clawback as much stolen assets that are recoverable. Recovering the assets is essential on two levels. The first being that it prevents the perpetrator from continuing to enjoy his largesse at that expense of the citizens. The other is that the state can apply the recovered resources in developing various sectors. In Nigeria for instance, recovered proceeds of corruption have been invested in social programs which were created for the benefit of the citizens. This approach is logical because corruption is a social and economic crime which is perpetrated against the citizens.

Article 3 (3) of the AU Convention on Preventing and Combating Corruption requires State Parties to ensure transparency and accountability in the management of public affairs. For the efficient and transparent management of recovered resources, there is a need to create a framework whereby recovered proceeds of corruption are reinvested in the economy through a fund dedicated for managing recovered assets. Since corruption contributes to increased public debt, developing a system that reinvests recovered proceeds of corruption is necessary to serve as a counterweight to the rising public debt challenge that

several African states currently face. Creating a fund also addresses the issue of accountability that is often raised by the global north as a guise not to promptly repatriate stolen funds within their custody. For example, in the case of the Sani Abacha loot, Switzerland only agreed to return the loot to Nigeria in instalments under the supervision of the World Bank. A fund that strictly manages proceeds of corruption would give visibility to the government's fight against corruption because the fruits of the anti -corruption campaign would be made manifest in the investments made by the fund.

Finally, it is important to reiterate that the position of this paper is not to undermine the existing formalistic and prosecutorial approach embedded in our existing anti-corruption frameworks. These anti-corruption frameworks are necessary to serve as deterrent against corrupt practices and shape the way the emerging political class should view corruption. However, there is the need to also create a window of opportunity for states to efficiently and expeditiously recover assets which might be lost forever to offshore jurisdictions.

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