

COUNTERMEASURES AGAINST TRANSNATIONAL ORGANIZED CRIME: THE 20TH ANNIVERSARY OF UNTOC – A KENYAN PERSPECTIVE

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I. INTRODUCTION

Organized crime has been an emerging crime trend not only affecting Kenya but as a global problem as well transcending borders, hence the term transnational organized crime. Section 3 of the Prevention of Organised Crimes Act (POCA)¹ outlines various criminal activities that form part of organized criminal activities, and these include, inter alia:

- a) Membership to an organized group;
- b) Knowingly advising or recruiting other persons to join an organized group;
- c) Acting in concert with others to commit a serious offence (punishable by imprisonment of more than six months) for the purpose of obtaining material or financial benefit;
- d) Threatens to commit or facilitate commission of an act of violence;
- e) Being a member of an organized criminal group, kidnapping or attempts to kidnap any person with intention to extort or gain from the said person; and
- f) Being a member of such group that endangers the life of any person or causes serious damage to the person's property.

From the above definition, the same is limited to offences done in concert with another and does not consider emerging offences and criminal trends such as Online Child Sexual Exploitation and Abuse (OSCEA), terrorism and violent extremism, drug trafficking, human trafficking, wildlife trafficking and poaching, cybercrime, racketeering to name but a few.

This paper will look at the larger definition of these crimes and not be limited to POCA as the writer notes these offences pose threats not only directly to the country, but also opens avenues for predicate offences. Predicate offences are the root offences leading to money-laundering. They are capable of generating huge amounts of money and involve crimes such as corruption, bribery, drug trafficking, illicit wildlife trafficking/poaching, illegal arms sales, counterfeiting and extortion which makes it a viable "venture" for such offenders.

The main challenge for my country in countering transnational organized crime is mainly with regard to Kenya's geographical positioning. Kenya is not a land locked country; therefore, it has access to not only air, rail and road networks but the seas as well. The Indian Ocean located in the coastal area of Kenya opens its waters to many other countries and continents, thus making the country a transit route for transnational organized crime such as drug and illegal wildlife trafficking.

Kenya also faces terrorism financing risk arising from the neighbouring countries with active terrorist groups. The vulnerabilities associated with the above offences are *hawala* activities (*hawala* being a system of money transfer without the physical movement of money) resulting in unregulated cross-border currency movements; economic sabotage, child related offences such as abduction and defilement; human trafficking, proliferation of arms, banditry, piracy and even degradation of the environment.

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¹ Prevention of Organised Crimes Act, Act No. 6 of 2010

This paper will seek to establish Kenya's position and, in particular, in tackling these crimes, and good practices adopted in addressing the situation. The paper will also outline various challenges faced by not only the country but also the criminal justice actors such as my Office, the Office of Director of Public Prosecutions (ODPP Kenya) in curbing these crimes. It will thereafter submit recommendations and possible solutions in addressing the challenges and conclude by availing a few case citations.

II. KENYA'S LEGISLATIVE FRAMEWORK TOUCHING ON ORGANIZED CRIME

The legislative framework comprises both national legislation as well as international instruments with the Constitution of Kenya (CoK)² being the Supreme Law of the Land. By virtue of Article 2(6) of the Constitution, Kenya also relies on international instruments so long as they have been ratified by the country. The legislation and specific provisions thereto are discussed below.

A. Prevention of Organised Crimes Act (POCA)

Section 3 as earlier indicated lists the various types of organized criminal activities, while Section 2 of POCA provides for the definition of organized criminal group to mean a structured group of three or more persons acting in concert to commit a serious crime for their own financial or material benefit.

POCA also outlines the sentences for all the outlawed offences; the procedure for property tracing, seizure and forfeiture; restraint orders to avoid depletion and lastly makes provision for mutual legal assistance in combating the offence.

B. Proceeds of Crime and Anti Money Laundering Act (POCAMLA)³

POCAMLA criminalizes money-laundering as well as defines what reporting institutions are and their respective obligations. The institutions include the Asset Recovery Agency (ARA), the Financial Reporting Centre (FRC) and the Anti-Money Laundering Advisory Board (AMLAB), which are institutions mandated to provide for asset tracing, preservation, recovery, seizure and confiscation.

Under Kenya's system, asset recovery can either be done through civil applications as well as criminal applications, save that for criminal procedures they are conviction based as compared to the civil procedure.

Another key provision of this Act is that it establishes the Criminal Assets Recovery Fund⁴ into which all recoveries made by the reporting institutions are deposited. The Act further makes provision for international cooperation in combating money-laundering offences.

C. Prevention of Terrorism Act (POTA)⁵

POTA provides for key definitions of funds, terrorism, terrorist group, terrorist property to name but a few. The definitions are found under Section 2 of the Act and include what constitutes as funds, terrorist group and terrorist property.

POTA also outlines the different types of terrorism offences, including criminalizing the collection of funds of terrorism, soliciting and giving support to terrorist groups, facilitating terrorist acts, seizure and confiscation as well as establishing the National Counter-Terrorism Centre which is an inter-agency body comprising officers from the ODPP, National Intelligence Service (NIS), National Police Service (NPS), Immigration Department to name but a few, with the key responsibility of coordinating national counter-terrorism efforts in order to detect, deter and disrupt terrorism acts.

D. Other Legislation

² The Constitution of Kenya, 2010.

³ The Proceeds of Crime and Anti-Money Laundering Act, Act No. 9 of 2009 (Revised 2012).

⁴ Section 109-110 of the Proceeds of Crime and Anti- Money Laundering Act.

⁵ Prevention of Terrorism, Act No. 30 of 2012.

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1. Anti-Corruption and Economic Crimes Act (ACECA)⁶ which outlines the various economic crimes and the sentences thereto.
2. Mutual Legal Assistance Act (MLA Act),⁷ which provides for the procedures for mutual legal assistance to be given and received by Kenya in investigations, prosecutions and judicial proceedings in relation to criminal matters and connected matters.
3. The Extradition Acts (Caps 76⁸ & 77⁹): these two Acts make provision for the surrender and treatment of the accused persons/suspect by Kenya to other commonwealth countries and non-commonwealth countries (which Kenya has signed MLA Agreements with).
4. Criminal Procedure Code,¹⁰ Evidence Act,¹¹ which outlines the trial process and evidence needed from time of arrest to conviction.
5. Other laws on addressing specific transnational organized crimes such as Narcotics¹²; Food, Drugs & Chemicals¹³; Wildlife¹⁴; Firearms¹⁵; Human Trafficking and Smugglings¹⁶ act to name but a few.

III. ROLE OF ODPP KENYA IN COMBATING TRANSNATIONAL ORGANIZED CRIME

A. Introduction

The Office of Director of Public Prosecutions (ODPP Kenya) is established under Article 157 of the Constitution and operationalized by the ODPP Act.¹⁷

The Office is headed by a Director of Public Prosecutions (DPP) whose nomination has to be approved by the National Assembly (Parliament) of Kenya and thereafter appointed by the President. He/she serves for only one term of eight (8) years and is not eligible for re-appointment.¹⁸ The current DPP is Mr. Noordin M. Haji, CBS, OGW who came into office in March 2018.

The mandate of the ODPP is to exercise state powers of prosecutions. In exercising prosecutorial authority, the ODPP has due regard to public interest, interests of administration of justice and the need to prevent and avoid abuse of the legal process.¹⁹ While doing so, the ODPP strives to provide quality, impartial and timely services in a manner that is professional, efficient and fair.

B. ODPP's Functions

The core mandate of the Office is to exercise state powers of prosecution and in this regard the ODPP performs the following functions:

- Institute and undertake criminal proceedings in any court, other than court martial in respect of any offence committed;
- Take over and continue any criminal proceeding instituted by any other party or authority with their

⁶ Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003.

⁷ Mutual Legal Assistance Act, Act No. 36 of 2011.

⁸ Extradition (Contiguous and Foreign Countries) Act, Chapter 76 of Laws of Kenya, 1987 (Revised 2012).

⁹ Extradition (Commonwealth Countries) Act, Chapter 77 of the Laws of Kenya, 1985 (Revised 2012).

¹⁰ Criminal Procedure Code, Chapter 75 of the Laws of Kenya (Revised 2012).

¹¹ Evidence Act, Chapter 80 of the Laws of Kenya (Revised 2014).

¹² Narcotic Drugs and Psychotropic Substances (Control) Act, No. 4 of 1994 (Revised 2012).

¹³ Food, Drugs and Chemical Substances Act, Chapter 254 of Laws of Kenya (Revised 2013).

¹⁴ Wildlife Conservation and Management Act, 2013.

¹⁵ Firearms Act, Chapter 114 of the Laws of Kenya (Revised 2012).

¹⁶ Counter-Trafficking in Persons Act, Act No. 8 of 2010 (Revised 2012).

¹⁷ The Office of the Director of Public Prosecutions Act, Act No. 2 of 2013.

¹⁸ Article 157 (2) and (5) respectively, of the Constitution.

¹⁹ Article 157(11) of the Constitution.

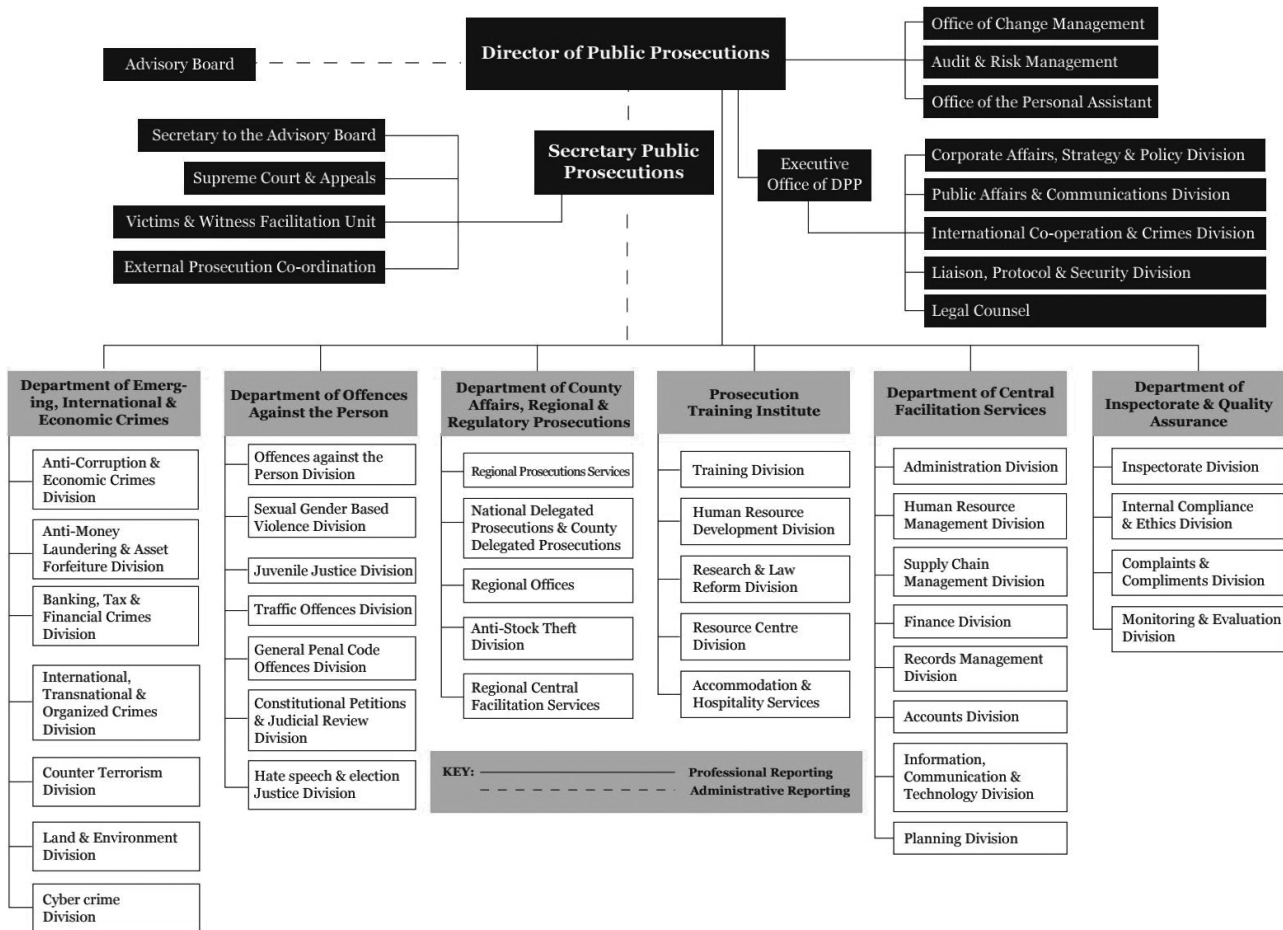
permission, other than court martial matters;

- Discontinue a criminal proceeding at any stage before judgment is entered;
- Advise the State, Government Ministries, Departments and State Corporations on all matters relating to the administration of criminal justice in the country;
- Direct and supervise criminal and anti-corruption investigations;
- Handle matters relating to Mutual Legal Assistance and Extradition;
- Appointing, training and gazetting public prosecutors;
- Facilitate victims of crime and witnesses during prosecution; and
- Contributing, developing and implementing policy, procedure and law reform.

C. ODPP’s Organizational Structure

ODPP’s organizational structure is divided into six main departments headed by Deputy Directors of Public Prosecution (DDPPs) who are responsible for overseeing the thematic areas under the Office’s mandate. The Departments are further divided into thematic divisions and units to further enhance service delivery to members of the public. The table below shows the Office’s structure.²⁰

Table 1: ODPP’s Organizational Structure



There are two departments responsible in relation to this research paper which are the Department of Emerging, International & Economic Crimes (EI & EC) and the Department of Offences Against Persons (OAP) with the specific divisions as indicated in Table 1 above.

D. Strategies Adopted by the ODPP in Combating Transnational Organized Crime

The Office’s thematic departments and divisions are manned by specialized prosecution counsel with skills and knowledge to prosecute various offences. Other than this, the Office has also adopted the following

²⁰ ODPP’s Organisational Structure as published in the ODPP Annual Report 2020/2021.

strategies:

1. Prosecution Guided Focus on Investigations

In recognition of various talents and skills of both investigators and prosecutors, the Office has adopted this strategy where prosecutors guide investigators before a criminal charge is instituted. The investigating officer avails their file for periodic review by the prosecutor to ensure that all evidence is covered and that all procedures such as chain of custody are also well documented. This has been instrumental in ensuring that criminal charges brought in court are successfully prosecuted and not withdrawn or dismissed on technicalities.

2. Teamwork and Prosecution Teams

The Office has set up prosecution teams led by senior prosecution counsel to guide the team while undertaking prosecution. Under this, prosecutors are assigned a specific role such as researchers, legal drafting and presentation of witnesses in court. This is particularly with regard to complex cases involving numerous pieces of evidence and many witnesses.

3. Conducting Advocacy and Trainings

The ODPP is also involved in sensitizing criminal justice actors such as members of the judiciary, investigative agencies, prisons, probation and even the members of the public at large on various strategies developed by the office in the fight against transnational organized crime, and in particular terrorism.

The sensitizations are done through joint trainings with the criminal justice actors or can take the form of community outreach initiatives where members of the public attend and can ask questions in an interactive session. Joint trainings have led to enhanced inter-agency cooperation more so as the officers share experiences and challenges with the colleagues in the other agencies.

The Office also conducts social media sensitizations through the ODPP's YouTube,²¹ Facebook²² and Twitter Accounts,²³ where it publishes various programmes, booklets or online interactions with various topics covered for the public's consumption. The Office through its various officers also attend the national television shows and radio shows, including the dialect ones to sensitize members of the public on its mandate and the various offences as prosecuted in the country.

All these programmes and trainings have been instrumental in making the public aware of the effects of organized crime, particularly on the effects of terrorism and radicalization of the youth, thus making the community take steps to prevent the youth from joining crime and also how to spot the ones already influenced and address the same. This has led to enhanced social cohesion and cooperation with the community where the sensitizations are conducted.

4. Establishment of a Specialized Court to Handle Terrorism and Organized Crime in Nairobi

The Judiciary through support of its partners and in consultation with other agencies like the ODPP spearheaded the establishment of *Kahawa Law Courts* on 1 April 2020.²⁴ The decision to establish the specialized court was brought about by the increase of organized crime, particularly terrorism cases occurring in the country.

The officers, both magistrates and prosecutors working in this court are well trained in handling organized criminal offences. The courts are also well secured for safety of all personnel working there.

Prior to the establishment of the court, there was a high risk in moving terror suspects in high security trials from custody to Milimani Courts within the Nairobi Central Business District. This Court has therefore facilitated the efficiency of disposal of serious crime offences as well as the ease of the transportation of high-profile suspects. High profile is due to the magnitude of the offence committed (in terms of casualties and/or fatalities and level of damage occasioned).

²¹ <https://www.youtube.com/@officeofthedirectorofpubli276>

²² <https://web.facebook.com/ODPPKenya>

²³ https://twitter.com/ODPP_KE/

²⁴ The Court is established vide Gazette Notice Number 374 of 16 January 2020.

IV. CASE STUDIES

This part examines four court cases that have provided lessons to actors in transnational organized crime, particularly countering violent extremism and terrorism and Online Child Sexual Exploitation and Abuse (OSCEA).

A. Edda Wakesho

Edda Wakesho had been hired as a house help (nanny) to look after a minor in the minor's home where she defiled the minor she was taking care of as well as filmed the minor while engaging in the act. She was arrested and later charged with the offence of defilement as well as filming the act. The minor was 4 years old at the time.

Senior Resident Magistrate Florence Macharia handed Edda Wakesho a life sentence for defiling the minor and an additional ten years for filming the act and posting it online between June and October 2021. Wakesho, in her defence, said she committed the crime after being promised good money by a Facebook user whom she said introduced her to a page where people post explicit images and videos.

From the investigations conducted by the Anti Human Trafficking Child Protection Unit (AHTCPU) of the DCI however, found Wakesho to be part of a racket that uses house help to expose children in the abusive acts. The video which was played in court was sent to the minor's mother who was threatened to send money or have the video shared online.

B. Republic versus Ibrein Issack Robow²⁵

The Criminal Court at Milimani in Nairobi convicted and sentenced the accused person, Ibrein Issack Robov, to life imprisonment for the commission of a terrorist act, kidnapping and hostage taking, among others. The accused person was the driver of the motor vehicle ferrying two Cuban doctors, Assel Herrera Correa and Landy Rodriguez Hernanded. The two doctors were part of a 100-member Cuban medical team brought to Kenya in 2019 under an agreement between the two countries. The two had been abducted on 12 April 2019 in Mandera, North Eastern part of Kenya for ransom. The accused person was found to have conspired with terrorists in committing the said offences which led to the death of one Administration Police Constable (APC) Mutundo Katambo. The APC had been assigned security duty to the Cuban doctors at the time of the incident.

C. Thomas Scheller

Thomas Scheller, a 71-year-old German male was charged with the offence of Child Pornography, Defilement and Child trafficking in 2020. At the time of his arrest, the court was informed that he was arrested for sodomizing four teenagers aged between 10 and 13 years old in Kenya. Scheller, a retired engineer, committed these offences in Kisumu and Nairobi counties. The court heard that Scheller, who is in the country illegally, was said to be a habitual paedophile who targets young boys.

The prosecution team told the court that Scheller had a pending case at Ukunda Police Station in Kwale County, Coast Province, before he fled to Kisumu, Nyanza Province, where he lured young boys to his rented apartment in Nyalenda and exposed them to pornography before defiling them. Scheller had been on the police radar since he was linked to a German-based child abuser, to whom he allegedly sent pornographic materials video-taped in Kwale County and its environs. During his arrest, the accused was in the company of a boy suspected to have been a victim of child trafficking and defilement. His case is pending before court.

D. Salim Mohamed Rashid

In 2016, Salim Mohamed Rashid left Kenya for Turkey allegedly to join a Turkish university for undergraduate studies. In the same year, he was deported by Turkish authorities back to Kenya after he was arrested while trying to cross over to Syria. Salim was later acquitted for lack of sufficient evidence (e.g. lack of cooperation from Turkish authorities – MLA).

On 4 December 2020, Salim went missing. His family reported that their son was missing. This was

²⁵ Milimani criminal case no. 813 of 2019.

followed by protests by the family and civil society. A habeus corpus application was filed and security agencies were blamed for his disappearance.

Sometime in the year 2021 a video went viral showing Salim slaughtering a person who appeared like a Democratic Republic of Congo (DRC) security officer. On 29 January 2022, Salim was arrested in DRC by DRC forces.

In 2017 Salim narrowly escaped a police raid in Kwale area from a house where explosive making materials were recovered. A few days later he was intercepted at the Moi International Airport, Mombasa Kenya while attempting to travel to Sudan. He was charged with terrorism offences before Mombasa Law Courts. On 28 August 2019, Salim was granted a Kshs. 3 million bond despite the prosecution's objection to the same. He was thereafter ordered to deposit his passport to the court. At least eight witnesses had testified in the case as of the time of his disappearance in October 2020. His arrest in DRC is the last his family heard of him and the matter is still pending before court.

V. CHALLENGES ENCOUNTERED IN PROSECUTION OF TRANSNATIONAL ORGANIZED CRIME AND RECOMMENDATIONS

A. Challenges Encountered in Prosecution of Transnational Organized Crime

Despite the good laws and well-set structures to combat transnational organized crime, the fight against these crimes still continues sometimes to the detriment of the country. Therefore, the challenges encountered in the prosecution of these offences include, inter alia, the following:

1. Kenya's Porous Borders

Access to Kenya's coastal area as well as its porous borders makes it easy for transborder crimes such as drug trafficking, terrorism and illegal wildlife trafficking to thrive. Unchecked illegal immigration and lack of proper manning of the border points make room for terrorism and other crimes to thrive. An example being the Garissa University terror attack assailants were reported to have escaped to a neighbouring country.

2. Bureaucracy and Red Tape in Investigation Agencies

Most of the top leadership of the agencies in the country are rigid in their thought processes insisting on formal rules and standards in their operations. This may be detrimental, especially in instances where quick action is needed such as in detaining flight risk suspects engaged in trans-border criminal activities. Quick thinking and adoption of technology in government process is key in combating these crimes, especially those touching on suspicious online criminal activities.

3. Lack of Cooperation and Coordination among Agencies

Many agencies ranging from the investigative agencies, law enforcement agencies, prosecution services and the judiciary operate in silos or under the guise of "independence in their operations". This hinders collaboration efforts in combating crime which when well tapped can bring a lot of good. This is because each of these agencies are equipped differently and all have a common goal of combating crime both locally and internationally. Without proper cooperation, collaboration and coordination, it is unlikely that the war against transnational organized crime can be won.

4. Advances in Technology

Advances in technology have given rise to new frontiers of doing trade such as virtual currencies (bitcoins and crypto currencies). The increase in the use of unregulated virtual currencies has led to increased financing of organized crimes such as terrorism and piracy. Further, terrorists are, for example, now utilizing new undetected technologies and developing sophisticated networks making cyberterrorism a real threat.

Similarly, the advance in technology means that prosecution has to rely on digital evidence to prove such cases. Such evidence is easy to modify, remove or hide and in some cases without leaving tracks that might identify the criminals and their intent, e.g. by encryption, evidence stored on Google Drive or Drop Box become non-compatible with the gadgets being utilized for forensic analysis.

5. Interference with Witnesses

Most of the offenders in these offences are persons/entities with the means to bribe their way through the judicial process (in investigation, prosecution or even the judiciary), thus delaying the trial process thereby frustrating the witnesses or some, in a worst case scenario, may end up intimidating the witnesses, resulting in acquittals in cases that would have had strong convictions.

6. Sabotage among Agencies

We have instances where some agencies frustrate the other by not providing what is needed for successful prosecution, an example being if investigative agencies fail to provide well investigated files, despite several reminders by the prosecution.

7. Conversion of Intelligence to Evidence

Most of the information obtained touching on these cases is in the form of intelligence which is inadmissible in court. This information needs to be corroborated for purposes of converting it to evidence which in cases of witness threatening and intimidation may not be possible, leading to the collapse of very strong cases.

8. Other Challenges

- Lack of a centralized data/ information management system of cases touching on transnational organized crime
- Mistrust between the community and law enforcement agencies
- Limited capacity in human resources and equipment/ technology for forensic analysis of these offences
- Inadequate translators especially in serious transborder offences such as terrorism, piracy and human trafficking. There are very few certified interpreters willing to come to court for the purpose of providing interpretation services. Without a thorough and accurate interpretation of the facts and evidence in a trial process, a lot can be lost in translation leading to a miscarriage of justice.

B. Recommendations and Way Forward

In recognition that each state agency and criminal justice actor has a role to play, whether nationally, regionally or internationally in combating these crimes, I recommend the following:

1. Increased Cooperation, Collaboration and Coordination on All Fronts

Collaboration between the different arms of government, the private sector and the international community will go a long way in strengthening the surveillance of these offences and will thus also become a prevention and detection measure as well as aid recovery procedures of any assets derived from these offences.

Increased cooperation and coordination may be achieved through:

- Negotiating and signing of bilateral treaties for extradition and MLA
- Ratifying relevant universal instruments
- Nationally entering into MOUs for investigation and prosecution of these offences

2. Increased Capacity-Building of Investigative Agencies to Handle These Crimes

Investigations are the core process for successful prosecution. It is not possible to gain a conviction on a file that has not met the evidentiary threshold. In this regard, it is important to empower the investigators by increasing the number of:

- Specialized trainings for investigators, which should include the basics and evolution of transnational organized crimes; and
- Joint trainings for all criminal justice actors

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These trainings will empower the officers with requisite skills to detect and identify questionable transactions and activities.

3. Conduct Public Sensitization by All Criminal Justice Actors

It is important for all the actors in the justice sector to take part in public sensitization on the magnitude of these offences and the need to combat them. This way the public understands that the whole law enforcement agency is keen on combating these offences, and they also need to be roped in.

4. Create a Database for Information

The government of Kenya through the relevant agencies and ministries should create a database or repository for sharing of data and information on transnational organized crime. This database can include information on key offenders and previous conviction records, if any that will help in the objection of bond and bail terms in case of reoffending. This information can also be used to track the money trail of key suspects in relation to various offences.

5. Adopt a Naming and Shaming Strategy

This is a mode of social punishment as it has been noted that public shame and ridicule are powerful tools that a State can use to reign in organizations or institutions engaging in illicit activities such as fraud and money-laundering. The blacklisting of such institutions, corporations or individuals denies them contracts and investment opportunities.

6. Other Relevant Strategies

Other strategies that can be adopted include:

- Policy measures to strengthen institutions to enhance the rule of law
- Research to identify the strengths and weaknesses of existing methods being used to combat the crime
- Amnesty to offenders so as to give them a second chance to start life with a clean slate as well as amnesty to institutions/organizations as an incentive for investors and offenders to provide correct tax disclosures and proper bank records/statements.