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Chapter 7

Revisiting Kenya's Proceeds of Crime and Anti-Money Laundering Act 9 of 2009 (Revised 2019): an opportunity for extraterritorial jurisdiction

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Abstract

Various steps have been taken in both East and Southern Africa to combat the vice of money laundering. Notable steps are evident in Kenya as the business hub for East Africa. The era of globalisation has without a doubt led to various advantages such as transnational modernisation, marketing of predominant consumerist values. While this has to a great extent destabilised customs and tradition, crime has continued to inform this process of destabilisation. This is against the backdrop that globalisation subsequently ushers in new and favourable contexts for crime through the 'compression of time and the annihilation of space'. Some States have provided for extraterritorial jurisdiction of anti-money laundering offences as a holistic step towards mitigation of the vice. In the context of Kenya's Anti-money laundering law and using a desktop research approach, this contribution evaluates the argument that extraterritorial jurisdiction provides a tool for mitigating the commission of a crime and the effects thereof. First, the author uses a literature review to make a case for extraterritorial jurisdiction and the pros and cons it presents. Secondly, a twofold engagement of the findings is done; an evaluation of the use of extraterritorial jurisdiction in some laws in Kenya and the position of the Proceeds of Crime and Anti-Money Laundering Act 9 of 2009 (Revised 2019). Thirdly, a conclusion followed by recommendations on the way forward is done.

Keywords: Anti-money laundering, Proceeds of Crime and Anti-Money Laundering Act 9 of 2009 (Revised 2019), extraterritorial jurisdiction

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Revisiting Kenya's Proceeds of Crime and Anti-Money Laundering Act 9 of 2009 (Revised 2019): an opportunity for extraterritorial jurisdiction

By

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Introduction

The issue of extraterritorial jurisdiction is not new to Kenya as some laws provide for it. For instance, the Prohibition of Female Genital Mutilation Act provides the Kenyan courts with jurisdiction to handle offences committed outside the Republic (NCLR, 2012). Courts have also been dynamic to allow for the application of the extraterritorial jurisdiction of universal offences such as piracy under Kenya's penal laws (Muhamud, 2009; Mugarura, 2011). Other countries that allow for extraterritorial jurisdiction of some offences include South Africa under its Prevention of Organised Crime Act (Nanima, 2019). There is evidence of the application of extraterritorial jurisdiction within and beyond Kenya. It is argued that extraterritorial jurisdiction may mitigate the commission of, and the effects of an offence. This requires that a case for extraterritorial jurisdiction is presented in the context of the existing literature. Findings on the use of extraterritorial jurisdiction in some laws and a critique of selected sections of the Proceeds of Crime and Anti-Money Laundering Act 9 of 2009 (Revised 2019) follows. A conclusion and recommendations on the way forward follow.

Statement of the Problem

Kenya is a signatory to various international treaties and instruments on anti-money laundering in the Republic (Kenyalaw, 2021). A critical aspect that needs interrogation is the position of extraterritorial jurisdiction in dealing with money laundering. The limited application of extraterritorial jurisdiction in the law has greatly affected the desired implementation of the Proceeds of Crime and Anti-Money Laundering Act 9 of 2009 (as revised in 2019) (hereinafter PoCAMLA).

On the contrary, it is argued that extraterritorial jurisdiction may be instructive in mitigating the commission of a crime and the effects thereof. It is prudent to obtain insights on the extent of the application of the law in terms of money laundering. If this study is not done, this will be a missed opportunity at evaluating the extent to which extraterritorial jurisdiction may be used to deal with money laundering. This chapter questions the need for extraterritorial jurisdiction through existing literature and evaluates findings under selected normative and jurisprudential positions. A conclusion and recommendations on the way forward follow.

Review of Related Literature

This review looks at the principle of legality, money laundering and whether it can be prosecuted as a universal offence, and principles of extraterritorial jurisdiction. The guiding principle in criminal cases is that prohibited conduct needs to be identified and a punishment prescribed for it. This is based on the principles of *nullum crimen sine lege* and *nulla poena sine lege* (Horder, 2016). It is true that where the law fails to prescribe the prohibited conduct, it becomes a challenge to punish those who commit it (Horder, 2016). A discussion of this concept is beyond the scope of this chapter. As indicated earlier, emphasis has to be placed on the engagement of the stages of money laundering under the PoCAMLA.

Money laundering is a process of placement, layering and integration (Hamman, 2015). A detailed discussion of the various definitions and a latch on the most compelling is not done here as the real question oscillates around the application of extraterritorial jurisdiction in dealing with the vice. Going forward, investigators often lookout for these three concepts to follow the proceeds of crime. More often, the lack of an offence that lists these three steps as the ingredients of an offence creates a challenge to successful prosecution. As will be shown, this position is saved (in part) by the provision of the offence of money laundering in the PoCAMLA.

The principle of universality obliges every State to bring to trial persons who are accused of certain crimes (Mugarura, 2011). It is argued that the principle of universality enables States to safeguard their interests as well as the interests of others (Cassesse, 2003). This speaks to the need for co-existence among States (Nanima, 2019). It is reiterated that there are two forms of universal jurisdiction; first, conditional universal jurisdiction where only States where the accused is in custody may prosecute him or her (Cassesse, 2003). Secondly, absolute universal jurisdiction allows a State to prosecute persons accused of international crimes regardless of their nationality, place of commission of a crime, and nationality of the victim (Hovell, 2018). This process is based on the four Geneva Conventions on International Crimes and the Convention against Torture 1984 (Hovell, 2018). However, there is little indication that money laundering is a universal offence. Unlike other offences such as piracy, human trafficking or slave trade, apartheid, genocide and other crimes against humanity, money laundering has, to the best of the author's perception not yet achieved the traction to be identified as a crime of universal application (Rose, 2019).

In practice, national jurisdictions wield geographical jurisdiction over areas that are within their territory. The national courts' application of their power is within the bounds of jurisdiction. It is instructive to retract these steps to unpack the concept of jurisdiction. This is granulated in instances where the hierarchy of courts have geographical jurisdiction. For instance, in South Africa, each of the 9 provinces has at least 1 High Court, and their geographical jurisdiction does not extend beyond the bounds of the province (Constitution, 1996). Within the provinces are regional Magistrates Courts that are geographically limited to given areas within the province. The Supreme Court of Appeal and the Constitutional Court have inherent geographical jurisdiction over the entire republic of South Africa. A similar position is evident in Uganda and Kenya where Magistrate Courts have geographical jurisdiction to a given area, while the High Courts have geographical jurisdiction to given regions in terms of their locations as High Court Circuits.

Jurisdiction may be prescriptive, adjudicative or enforcement in nature (Colangelo, 2014). Prescriptive or legislative jurisdiction relates to the ability of States to prescribe laws for actors and conduct abroad, while enforcement jurisdiction speaks to the ability of States to ensure that their laws complied with (Zerk, 2010). Adjudicative jurisdiction is known as the engagement of courts on matters that have been brought before them within a geographical or and exterritorial perspective (Zerk, 2010). To this end, adjudicative jurisdiction is informed by the extent to which a given law provides for the resolution of matters that arises from within the context of a State but beyond its borders.

The general principle is that no State may exercise its power in any form in the territory of another State unless there is a rule making that possible; and secondly, States have a wide discretion to exercise jurisdiction within their territory in instances where there are acts or omissions that have been committed outside their borders (Lotus, 1927; Nanima, 2019). In respect to the first principle, the then Permanent Court of International Justice stated:

> Now the first and foremost restriction imposed by international law upon a State is that –failing the existence of a permissive rule to the contrary –it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention (Lotus, 1927, para 45).

As such, there has to be a permissive rule that allows a State to exercise its jurisdiction over an act that occurs in another State. It follows that the presumption that underscores the permissive rule is to the end that what is not prohibited under international law is permitted (Hertogen, 2015). This position has evolved to indicate that the basis of permissiveness on a State's discretion to consent to an act of extraterritorial jurisdiction in the exercise of its sovereignty be linked to its interdependence (Nanima, 2019). As such, independent States co-exist with each other (Colangelo, 2014). This co-existence assists in the balancing of rights and interests between States in the sphere of international law (Nanima, 2019).

While the permissive law may be used to indicate the application of extraterritorial jurisdiction, there are other aspects such as the universality of the offence in question where the domestic law is silent on its use (Miller, 2009). The question that arises is whether anti-money laundering is a universal crime. The answer is no, from the onset because various crimes may be identified in anti-money laundering, and there is an emphasis on the elements of money laundering for purposes of investigation (Castella, 2018). While an investigator looks for the three elements of placement, layering and integration concerning various transactions, the prosecutor focuses on the elements of the crime, not the process of commission of the crime (Castella, 2018). Furthermore, money laundering may be evident in various criminal activities, like white-collar crimes, environmental crimes, drug trafficking, corruption and financing terrorism (Young & Woodiwiss, 2021). It may occur in various ways such as placing cash in the financial system, moving money already in that system (domestically and internationally) and using various alternatives to the financial system like value cards, bitcoins and other virtual currencies (Erasmus & Bowden, 2020).

Without prejudice to the foregoing, it is instructive to contextualize this by looking at the process of money laundering. The object of money laundering is to ensure that proceeds from the underlying criminal activity are spent and its fruits are enjoyed (Kumar, 2012). Money laundering involves manipulating legally or illegally acquired wealth to obscure its existence, origin, or ownership to avoid law enforcement (Shams, 2004). According to Mugarura (2011), it is a deliberate, complicated, and sophisticated process where proceeds of crime are camouflaged, disguised or made to appear as earned legitimately. First and foremost, money laundering takes place in three stages, thus placement, layering and integration (Hamman, 2015). The placement is used to devise means of situating funds into the financial system through various methods such as the deposit accounts of shell corporations, or transformation into bills of exchange (Irwin, Choo & Lui, 2012). Layering is the creation of a false paper trail through countless monetary transactions aimed at hiding behind complex financial structures to hide its origins (Saeed, Mubarik & Zulfiqar, 2021). The extraterritorial aspect of this stage is the use of transactions across borders jurisdictions. Finally, integration forms the restoration of the funds to their legitimate 'looking' source (Tang & Ai, 2013).

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To this end, there is a need to question where the process of identifying the existence of money laundering inculcates the use of extraterritorial jurisdiction, especially where one of the three aspects take place outside the geographical jurisdiction of Kenya.

Discussion of Findings

The use of extraterritorial jurisdiction in the adjudication of matters is not new to Kenya's judicial dispensation.

The Prohibition of

> '28. Extra-territorial jurisdiction
> (1) A person who, while being a citizen of, or permanently residing in, Kenya, commits an act outside Kenya which act would constitute an offence under section 19 had it been committed in Kenya, is guilty of such an offence under this Act.
> (2) A person may not be convicted of an offence contemplated in subsection (1) if such a person has been acquitted or convicted in the country where that offence was committed.' (National Council for Law Reporting, 2012)

In addition to the above, Kenyan Courts have handed down a decision that indicates that crimes of universal jurisdiction, though criminalized in the context of domestic law, may be adjudicated under their universal nature (Bellish, 2012). This position was adopted by the Court in an appeal on cases of piracy under domestic law (Muhamud, 2009).

The mention of the word jurisdiction in the PoCAMLA does not refer to anything close to extraterritorial jurisdiction. It is mentioned four times and contextualized. First, it used in the definition section to refer to a court of competent jurisdiction (NCLR, 2019, sec 2). Secondly, it accords a court of competent jurisdiction to hand down penalties in the form of fines (NCLR, 2019, Sec 24B). Thirdly, after searching, the police may procure an affidavit before a court of competent jurisdiction (NCLR, 2019, Sec 107(1)(b). The final instance of jurisdiction is in section 117, which allows for a request for the detention of an individual for purposes of transfer of a person to or from Kenya. This in its self is not indicative of the adjudicative extraterritorial jurisdiction on the part of the court (NCLR, 2019). The relevant section provides

> (2) Where the person who is the subject of a request under section 111(c) is in custody in the other country by virtue of a sentence or order of a court or tribunal exercising criminal jurisdiction, the effect of a request under section 115(c) shall be to authorize the detention in custody of the person in transit to and from Kenya, and while in Kenya at such places as the Attorney-General may specify (NCLR, 2019, section 117(2).

A look at the offences in the Act

The lack of a clear position on extraterritorial jurisdiction requires that one evaluates the wording of the Act to identify its possible application in the PoCAMLA. This silence on the express exercise of extraterritorial jurisdiction under the PoCAMLA calls for a closer evaluation.

The term offence means

> '**…** an offence against a provision of any law in Kenya, or an offence against a provision of any law in a foreign state for conduct which, if it occurred in Kenya, would constitute an offence against a provision of any law in Kenya' (NCLR, 2019, sec 1).

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From this reading where specified conduct beyond the bounds of Kenya would constitute an offence in Kenya, the PoCAMLA requires that such conduct is recognized as an offence. However, it falls short of ensuring that recognition extends to adjudicative extraterritorial jurisdiction. A look at the offences under the Act may come in handy.

The PoCAMLA provides for 12 general offences. These include 1) money laundering, 2) acquisition, possession or use of proceeds of crime, 3) failure to report suspicion regarding proceeds of crime and 4) financial promotion of an offence (NCLR, 2019). Other offences include 5) tipping off, 6) misrepresentation, 7) malicious reporting, 8) failure to comply with the provisions of the Act, and 9) conveyance of monetary instruments to or from Kenya (NCLR, 2019). In addition, other offences include10) misuse of information, 11) failure to comply with an order of the court and 12) hindering a person in the performance of functions under this Act (NCLR, 2019). A look at these 12 offences reveals specific facts about their possible engagement.

Out of the 12 offences, only one offence indicates a possible application of extraterritorial jurisdiction. As regards the offence of money laundering, the subject is a person with actual or reasonable knowledge that property forms part of the proceeds of crime (NCLR, 2019). This subject is linked to the offence where (s)he either enters into a transaction in connection with that property or performs an act that effectively conceals the source of the movement of the property, enables or assists the person in the commission of an offence or removes or diminishes the property due to the commission of an offence (NCLR, 2019). Specific regard is to the second effect of the offence in section 3(b)(ii) that states

> 'A person who knows or who ought reasonably to have known that property is or forms part of the proceeds of crime and—
>
> (a) ….
>
> (b) performs any other act in connection with such property, whether it is performed independently or with any other person, whose effect is to—
>
> (i) …
>
> (ii) enable or assist any person who has committed or commits an offence, whether in Kenya or elsewhere to avoid prosecution; or
>
> (iii) …'. (NCLR, 2019, sec 3(b)(ii)

While the offence does not directly provide that the court has extraterritorial jurisdiction to adjudicate this offence where the subject has assisted a person to launder money within or outside Kenya, the ingredient of the offence of assisting may occur beyond the bounds of Kenya's borders. It should be noted that an attempt to challenge the constitutionality of this offence in section 3 was not successful (Kiprono, 2019). To this end, a few principles are evident from this provision.

The concept of assisting in this part of the provision is not tagged to a particular stage of money laundering, be it placement, layering and integration (Hamman, 2015). As such, this offence adds value to the prosecution of money laundering by linking the ingredients of the offence to the stages. The lack of specific emphasis on a particular stage of money laundering

has to be interpreted to mean that the assistance may be to any of the three stages. The question is whether a person who is not assisting in the commission of the offence may be charged under this section. Kenyan Courts have stated that section 3 of the PoCAMLA is for the prosecution of those who launder on behalf of others, with the intent to help the State to catch up with persons who in the course of their business or otherwise facilitate money laundering by or on behalf of others and especially the originators of the crime (Onyango, 2017). It is argued that in addition to the subjective application of section 3, a look at section 3(ii)(b) indicates that it is only the assistance hereunder that provides an iota of extraterritorial jurisdiction. It would appear that the only possible use of extraterritorial jurisdiction is limited to section 3(ii)(b). A few shortcomings arise as a result of this position.

First, one has to ensure that the subject has to be charged with money laundering in addition to other offences if the conduct of placement, layering and integration are to be dealt with. A reading of the section indicates that it is a person 'who knows or who ought reasonably to have known that property is or forms part of the proceeds of crime' (NCLR, 2019, sec 3). Rule of statutory interpretation call for the normal meaning of words if they are clear on the face of it. As indicated in *Ex parte Patrick Ogola Onyango & others* [below], the court found no fault with the literal interpretation of the section (Onyango, 2016).

Secondly, various challenges affect otherwise smooth prosecution under the PoCAMLA. Often, persons who commit these offences are outside the Republic, who is rarely prosecuted. This is informed by the extent of organized crime in money laundering. Consider a hypothetical where person A has funds that he needs to be cleaned. He goes ahead to enlist the service of person B who goes ahead to set up shell companies, set up various transactions that occur within and beyond the borders of Kenya. In the course of doing so, he goes ahead and enlists person C to help with the intricate details such as ensuring the shell companies are up and running, they can receive the funds and then go ahead to integrate the funds either back to the companies or bounds of person A or in areas where person A may still access the funds. This engagement shows placement, layering and integration. Under the PoCAMLA, person A would be a principal offender while person B and C would be charged for assisting A, regardless of whether the activities are beyond the jurisdiction of Kenya. The challenge arises if persons B and C are not assisting but rather are the principal offenders and are out of the jurisdiction. The concept of assisting then becomes a condition precedent to laying charges under the Act. In addition, if the prosecutor is not about to prove it for the trigger of section 3(b)(ii). Thirdly, if the offence of money laundering is not tagged to an offender outside the jurisdiction of Kenya, all the other offences cannot be prosecuted. As indicated earlier, this is due to the lack of adjudicative extraterritorial jurisdiction in the PoCAMLA.

Emerging Decisions

Thirdly, a look at recent decisions under section 3 of the PoCLAMA indicates a particular trend which deals with the contextual understanding of the offence of money laundering, other than extraterritorial jurisdiction. First, there is a questioning of the constitutionality of the offence as far as the concept of 'knowingly' which was based on the proof of concealment or disguise of any proceed of crime was vague, over-broad, otiose and over-reaching as it simply required the prosecutor to demonstrate that specific property was possessed, concealed, disguised or transferred as a proceed of any crime without proving how proceeds were produced (Kiprono, 2020, para 40). While this does not speak to extraterritorial jurisdiction it shows the Court's

approach to insisting that the use of the word 'knowingly' reiterates the concept of intent under the PoCAMLA (Kiprono, 2020, para 40).

In *Ex parte Patrick Ogola Onyango & others*, the court was tasked to establish whether a person can be charged with the offence of money laundering before a firm and final determination by a court of law that there exist proceeds of crime as the subject of the money laundering (Onyango, 2016). The Court held that the prosecution ought to prove that the accused entered into or became concerned in an engagement or arrangement; which he knew or ought to have known facilitated the acquisition, retention, use or control; Furthermore, that this engagement was for proceeds from the criminal property by or on behalf of another person the effect of which would conceal or disguise the source of the proceeds (Onyango, 2016, paras 149-150).

Most of the reported decisions speak to the forfeiture of property obtaining through money laundering and the use of the Anti-Corruption and Economic Crimes Act, the Bribery Act among others. A look up on Kenyalaw.org on extraterritorial jurisdiction returned the crucial result in *Muhamud's case*. In this case concerning piracy and the lack of extraterritorial jurisdiction under the Penal Code, the Court stated that where the offence is of a universal nature, every community (or jurisdiction) has the obligation by universal law of the rule of self-defence to inflict punishment upon a State. As such, under international customary law, crimes such as piracy, human trafficking or slave trade, apartheid, genocide and other crimes against humanity may be tried even where the acts are beyond the municipal jurisdiction of a State (Muhamud, 2009, paras 30-41).

It is clear from the foregoing that the application of extraterritoriality under section 2 of the PoCAMLA has not been tested. This notwithstanding, Kenya is in a critical position as a source, and transit of various activities that could lead to money laundering. This is exacerbated by various economic activities and various banks that make it hard to keep an eye on possible laundering in the greatest way possible. The establishment of the FATS under the Act is critical but support through adjudication is instructive to add voice to the mitigation of money laundering. To this end, the discussion of the need for extraterritorial jurisdiction need not be cowered from. This is because the universality of money laundering and the related crimes is questionable and cannot be relied on to ensuring prosecution; let alone limiting prosecution to individuals who assist.

The possible option is where the country that seeks to try someone has ratified similar treaties with other countries that allow the prosecution of an accused who is not national of that domestic jurisdiction. For instance, in 2016, Equatorial Guinea accused France before the International Court of Justice (ICJ) that the latter violated the principles of sovereign equality and non-interference in the internal affairs of another state by prosecuting Obiang for corruption and money laundering. The facts are that one Obiang embezzled public funds in Equatorial Guinea, and laundered the criminal proceeds in France. The ICJ stated that State Parties to the Palermo Convention are obliged to introduce the Convention provisions into their domestic legislation. In light of the ratification of the same by both countries the offences under the Convention including corruption and money laundering, might be criminal in both Equatorial Guinea and France according to their domestic legislation (Portilla, 2020).

In this regard, where the only option is to use ratified Conventions, one may argue that a ratified Convention does not provide country A with the exclusive jurisdiction to prosecute an individual for money laundering and related crimes. The same Convention does not also exclude Country B from exercising its jurisdiction over the accused of similar offences. It would follow

that where Countries A and B have adopted legislation to criminalize money laundering, the principle of extraterritorial jurisdiction might operate against the offences outlined in the requisite Convention. This brings one back to the need to revisit the content of the domestic legislation that Kenya is using to fight money laundering.

In the interim, it is discernible from the above that is a limited application of extraterritorial jurisdiction under the PoCAMLA. This is evident in the lack of a provision on the application of extraterritorial jurisdiction to the Act. In addition, the indication of extraterritorial jurisdiction is limited to one offence of money laundering. This is exacerbated by the fact that extraterritorial jurisdiction is not applied to principal offenders but rather that person who assist the principal offenders in the commission of the offence. Kenya as a critical country in the region may be a source or transit country in the commission of offences that may be used to launder money. It is on this basis that conversation on the improvement of the PoCAMLA need not be shied from as this will inform critical legislative reviews in a grander scheme of things.

Conclusion and Recommendations

It is not in doubt that extraterritorial jurisdiction is instructive in mitigating the commission of a crime and the effects thereof across different States. The use of extraterritorial jurisdiction is instructive in ensuring that countries have a joint and concerted approach to engaging in money laundering and related offences. An amendment that first, provides for extraterritorial jurisdiction in PoCAMLA should be provided. Additional amendments that create the commission of the offence to be within Kenya or elsewhere (as indicated in section 3(b) (ii) should be done. This has to be subject to other aspects that need an empirical approach. To this end, it is proposed that an empirical study across the various courts is done to establish the extent of the use of the PoCAMLA on money laundering to obtain data on cases that may not be available online. This will accord real-time information to inform the need for amendments to the PoCAMLA. The judiciary should extend its dynamic approach in *Muhamud's* case to other offences under the PoCAMLA.

There is a limited application of extraterritorial jurisdiction under the PoCAMLA. This is evident in the lack of a provision on the application of extraterritorial jurisdiction to the Act. In addition, the indication of extraterritorial jurisdiction is limited to one offence of money laundering. This is exacerbated by the fact that extraterritorial jurisdiction is not applied to principal offenders but rather that person who assist the principal offenders in the commission of the offence. Kenya as a critical country in the region may be a source or transit country in the commission of offences that may be used to launder money. It is on this basis that conversation on the improvement of the PoCAMLA need not be shied from as this will inform critical legislative reviews in a grander scheme of things.

The proposed way forward is that Kenya should be able to prosecute individuals who commit offences that include or involve money laundering under the PoCLAMA. This should not be limited to only the offence of money laundering, or at its core to only persons who assist principal offenders in the commission of the offence. An approach that indicates how this extraterritorial jurisdiction should be engaged has to be qualified. It is argued that first; the individual to be prosecuted has to be in Kenya, with no request for extradition to another jurisdiction or whether the request for extradition does not violate any of the constitutional liberties under the Constitution 2010. Secondly, subject to amendments in the law, it is proposed that prosecution is informed by international and national rules on criminal law and liability.

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Thirdly, Kenya should be able to engage other States through mutual assistance and international cooperation to inform prosecution according to the law.

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