

# The Influential

A Bulletin of the Global Centre for Policy and Strategy

**Promoting Kenyas' Strategic  
Interests on the Domestic  
and International Stances**



- The transnational mobility of Al-Shabaab
- Kenya-USA Free Trade Agreement negotiations
- Covid-19 and Kenya's economic recovery
- Effective anti-corruption strategies in Kenya
- Strengthening the role of Proceeds of Crime and Anti-money Laundering Act



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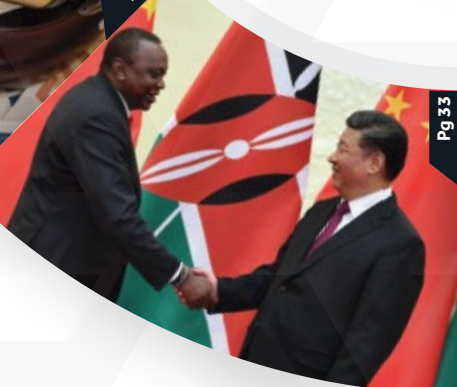
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**THE GLOBAL CENTRE FOR POLICY AND STRATEGY**  
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## ABOUT US

**The Global Centre for Policy and Strategy (GLOCEPS)** is a non-profit organisation based in Nairobi, Kenya. The Centre was founded in 2020 and has an overarching vision of being a leading global centre of excellence in action research, policy influence and strategy formulation. As a pioneer institution of excellence, GLOCEPS provides a strategic link between experience and inter-disciplinary research on one end and policy formulation and action on the other.

In pursuit of this vision, GLOCEPS achieves research excellence through partnerships with like-minded organisations, experts and practitioners. The Centre prides itself in its diversity of expertise that combines seasoned public policy experts and researchers with veteran practitioners and experienced academicians. In doing so, we remain open to new ideas and innovation.

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The Global Centre for Policy and Strategy  
(GLOCEPS)  
Off Kiambu Road, Nairobi Kenya  
P.O. Box 27023-00100,  
Nairobi.  
Telephone: 0112401331  
Mobile: +254 700 279635  
Email: [info@gloceps.org](mailto:info@gloceps.org)  
Web: <https://www.gloceps.org>



## WELCOME NOTE

The Global Centre for Policy and Strategy (GLOCEPS) is pleased to welcome you to read our **3<sup>rd</sup> Issue** of **The Influential Bulletin**. In this issue, we focus on issues that impact Kenya's strategic interests at domestic and transnational levels. The articles in this publication are authored by our research team in the core pillars of Defence and Security; Diplomacy and Foreign Policy; Strategic Interests and Transnational Crimes; Public Policy, Ethics and Governance; and Development. The papers in this Bulletin are products of inter-disciplinary research with relevance to policy formulation and strategic interventions.

The articles in this collection cover a broad array of topics, including economic recovery in the context of Covid-19 pandemic, varied internal and external security threats, and public governance gaps. The papers underscore the need for proactive governance interventions with implications on national and regional security interests.

Special thanks to colleagues and research partners that have contributed immensely in this publication journey. We would like to acknowledge the input of the GLOCEPS Board of Directors and administrative team for their leadership, planning and support functions; the research team for their detailed examination of their subject areas; and the editorial team for peer reviewing and finalizing the Bulletin.

Enjoy the read.

**BRIG (RTD) C M KANG'ETHE, EBS**  
**EXECUTIVE DIRECTOR**

## EDITOR'S NOTE

Welcome to the **3<sup>rd</sup> Issue** of **The Influential Bulletin**. This is part of our July-October periodical and it contains papers anchored on safeguarding Kenya's strategic interests in the context of changing regional and global dynamics.

Each paper examines key issues on internal and regional security, transnational organized crime, diplomacy, development and governance. Holistically, they provide practical policy scenarios relevant to enhance Kenya's strategic interests. The focus is on the debates on strengthening the Proceeds of Crime and Anti-Money Laundering Act in the investigation and prosecution of financial crimes; curtailing the transnational mobility of the Al-Shabaab in Eastern Africa; An assessment of the effectiveness of existing anti-corruption strategies; Kenya's economic recovery prioritization in the context of Covid-19 pandemic and the need to advance Kenya's strategic interests in the ongoing Kenya-US Free Trade Agreement Negotiations. Each of the papers offers recommendations on how to address the issues raised.

We hope you will find the ideas contained in this issue thought-provoking and insightful. We thank you for your readership and look forward to receiving your feedback or comments on this issue. Feel free to reach us on email at [info@gloceps.org](mailto:info@gloceps.org)

Kind regards,

**DR K O ASEMBO, OGW, HSC**  
**EDITOR-IN-CHIEF**





## INTRODUCTION

This publication contains papers anchored on safeguarding Kenya's strategic interests in the context of changing regional and global dynamics. The five research papers engage in academic and policy conversations themed around countering financial crimes; pre-empting the transnational mobility of the Al-Shabaab; strengthening anticorruption efforts; rejuvenation of Kenya's economy in the context of the Covid 19 pandemic; and advancing Kenya's strategic interests in ongoing Kenya-United States Free Trade Area Agreement (KUSFTA) negotiations. Each paper offers practical policy recommendations.

The first paper by Dr John Mwangi argues that the effectiveness of counter-terrorism interventions in Kenya in pre-empting transnational mobility of the Al-Shabaab is yet to be fully realised. It suggests the closing of terrorist mobility opportunities as a matter of priority. At the domestic level, it recommends strengthening of border security and countering the illicit travel infrastructure. Beyond the frontiers, it proposes international and regional cooperation, knowledge generation on terrorist mobility and countering the terrorists' funding innovations.

The second paper by Janet Kiguru suggests that Kenya's position in the Kenya-United States Free Trade Area Agreement (KUSFTA) negotiations is bound to be affected by internal and external socio-political dynamics. These include the structure of Kenya's negotiating team, the political developments in the two countries, stakeholder participation, the China-US trade war and regional politics. While some of these factors strengthen Kenya's position, others amplify her limitations and threaten her influence. The country's ability to navigate these factors will determine her strategic leverage on the US, a more robust and distinctly advantaged state.

The third paper by Michael Owuor observes that the rejuvenation of Kenya's economy is anchored on alleviating the Covid-19 pandemic-induced social and economic effects. The paper argues that prioritization of the accelerated vaccination policy is fundamental to swift economic recovery. It affords a better tradeoff by insulating the nation from disruptive nature of the pandemic. Equally, it ameliorates the effects of the pandemic containment measures on businesses and households. With the promise of a normalized operating environment, the government's capacity to provide social and economic stimulus packages would be enhanced albeit with the constraints of an encumbering debt distress, widespread unemployment instigated by the pandemic and predominance of public sector procurement fraud. Discussions on these issues anchor insights and policy recommendations for economic recovery amidst the COVID-19 pandemic.

The fourth paper by Stephen Nduvi argues that policy challenges continue to undermine Kenya's resolve and efficiency in curbing corruption. This creates an urgent need to strengthen anti-corruption efforts in order to forestall the continued economic degradation occasioned by widespread graft. Key recommendations include easing the burden of proof on the prosecutor in providing evidence for corruption cases, and intensifying efforts in countering conflict of interest by public officers. There is also need to deepen stakeholder collaboration and multi-agency efforts to strengthen public and private institutions' adoption of anti-corruption policies.

The final paper by Ida Gathoni explores the successes and challenges of the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009 (POCAMLA) in the investigation and prosecution of financial crimes in Kenya. It argues



that the law has been successful in enhancing international cooperation and multi-lateral engagements in countering money laundering, enforcement of compliance in financial crimes reporting and strengthening Kenya's counter-terrorism regime. Nevertheless, the country remains a primary concern internationally in respect to money laundering and financial crimes. This necessitates revisiting the discourse of investigation and prosecution of financial crimes in order to address key risk issues such as inclusion

of lawyers as reporting entities, lenient penalties, shortage of capacity in enforcement institutions, rapid evolution of digital finance environment, legal bottlenecks, and the potential jeopardy of due process in prosecution under POCAMLA. Key recommendations include enforcement of stiffer penalties, increasing budgetary allocations for investigative and prosecutorial agencies and the establishment of a specialized research centre to keep up with the rapid evolution of financial crimes.

## EDITORIAL TEAM

### Editor-in-Chief

Dr K O Asembo

### Editors

Dr John Mwangi  
Janet Kiguru  
Michael Owuor

### Graphics Designer

Lydia Aoko





# ACRONYMS

<b>ADF</b>	Allied Defence Forces
<b>AfCFTA</b>	African Continental Free Trade Area
<b>AGOA</b>	Africa Growth and Opportunity Act
<b>AML</b>	Anti-Money Laundering
<b>ARA</b>	Assets Recovery Agency
<b>BPS</b>	Budgetary Policy Statement
<b>CAR</b>	Central African Republic
<b>CBK</b>	Central Bank of Kenya
<b>CCTV</b>	Closed Circuit Television
<b>COMESA</b>	Common Market for Eastern and Southern Africa
<b>Covid-19</b>	Corona virus 2019
<b>DCI</b>	Directorate of Criminal Investigation
<b>DRC</b>	Democratic Republic of Congo
<b>EAC</b>	East African Community
<b>EACC</b>	Ethics and Anti-Corruption Commission
<b>EPA</b>	Economic Partnership Agreement
<b>FDI</b>	Foreign Direct Investment
<b>FRC</b>	Financial Reporting Centre
<b>FTFs</b>	Foreign Terrorist Fighters
<b>GDP</b>	Gross Domestic Product
<b>IEDs</b>	Improvised Explosive Devices
<b>IMF</b>	International Monetary Fund
<b>INTERPOL</b>	International Criminal Police Organization
<b>ISCAP</b>	Islamic State in Central Africa Province
<b>ISIS</b>	Islamic State in Syria and Iraq
<b>KEMSA</b>	Kenya Medical Supplies Authority
<b>KES</b>	Kenya Shilling
<b>KUSFTA</b>	Kenya-United States Free Trade Agreement
<b>MRAPS</b>	Mine resistant ambush protected vehicles
<b>MYC</b>	Muslim Youth Centre
<b>ODPP</b>	Office of the Director of Public Prosecutions
<b>POCAMLA</b>	Proceeds of Crime and Anti-money laundering Act No. 9 of 2009
<b>POEA</b>	Public Officer Ethics Act
<b>PPEs</b>	Personal Protective Equipment
<b>SEZ</b>	Special Economic Zone
<b>UN</b>	United Nations
<b>UNODC</b>	United Nations Office on Drugs and Crime
<b>US</b>	The United States of America
<b>VBIEDs</b>	Vehicle Borne Improvised Explosive Devices



# Countering the transnational mobility of the Al-Shabaab

**Dr. John Mwangi**

## Executive Summary

The effectiveness of counter-terrorism interventions in Kenya in pre-empting transnational mobility of the Al-Shabaab is yet to be fully realised. This paper suggests the closing of terrorist mobility opportunities as a matter of priority. Mobility is applied in this discussion to encompass movement of operatives and the related logistics that aid travel to execute terror attacks. It has facilitated the Al-Shabaab terror regime both transnationally and intra-nationally in launching terror attacks and supporting its strategic objectives. It is aided by legal and illegal travel infrastructure which include public and private modes of transport, weak border controls, failed states, corruption of state bureaucrats and criminal activities. At the domestic level, this paper recommends strengthening of border security and countering the illicit travel infrastructure. Beyond the frontiers, it proposes international and regional cooperation, knowledge generation on terrorist mobility and countering the terrorists' funding innovations.







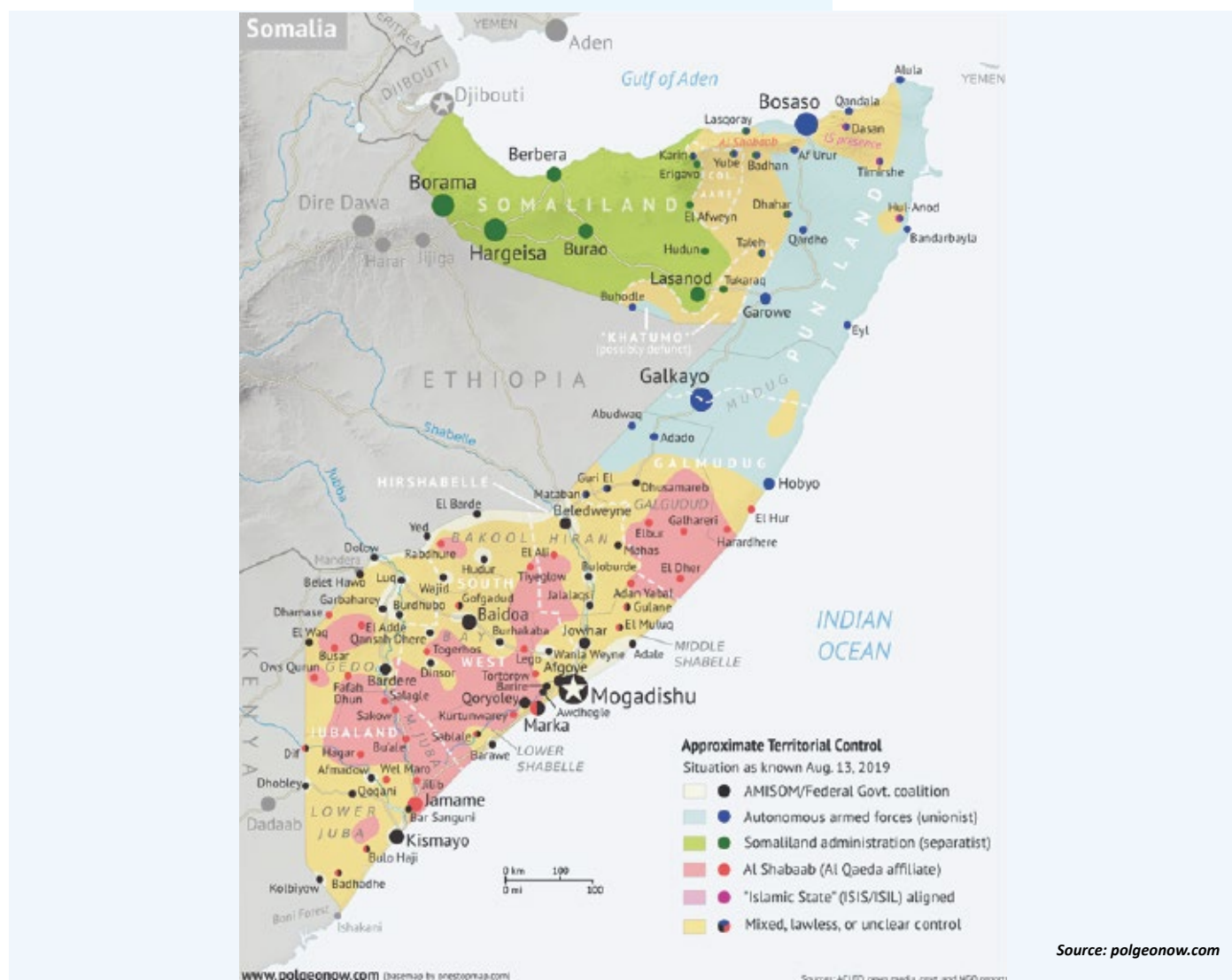
## Introduction

The transnational mobility of the Al-Shabaab pose security threats to Kenya, the East African region and globally. These threats are domiciled in terrorism, the core business of the Al-Shabaab. Terrorism is applied in this discussion to mean the projection of political violence to meet ideological goals by a non-state actor. These acts of extremism are meant to create harm, fear or force governments to submit to certain actions (Ganor, 2002;

POTA, 2012; D' Amato, 2018). The phenomenon of mobility remains a critical cog in the execution of terrorist incidences (9/11 Commission; Ginsburg, 2006).

The mobility of the Al-Shabaab is aided by several factors. They include transnational connections, exploitation of legal and illegal travel infrastructure, corruption, and the criminality-terrorism nexus. These have enabled the terror group to

project its transnational reach through such attacks as the Kampala bombings in Uganda in 2010, the Westgate in Nairobi, Kenya in September 2013, and the Dusit D2 in Nairobi in January 2019 (Asembo, 2020). The incidences relied on other facilitative factors such as weak border controls and localised logistics and in particular the exploitation of cross-border legal and illegal entry channels by the terror operatives.





## Background

The contemporary discourse of terrorism mobility in Kenya remains rooted in the activities of Al-Shabaab terror group, an Islamist terrorist organisation with roots in Somalia and which aspires to form an Islamic caliphate in The Horn of Africa (Cf. Mueller, 2016). It is affiliated to the Al-Qaeda global terrorist organisation. Its recruitment capacity has gone beyond its primary base in Somalia and attracted foreign terrorist fighters from the larger East African region and beyond. It is estimated that at least 25% of the group projected

membership of around 7,000 is Kenyan. As with other terrorist organisations, it has tapped the dynamics of globalisation to enable recruitment, fundraising, and movement of logistics to launch terror attacks (Cannon & Iyekekpole, 2018; Cannon & Pkalya, 2019).

The operatives rely on transnational mobility to plan and execute terrorist attacks. Preceding this pursuit is an initial socialisation path that requires mobilisation of a political ideology in order to motivate acts of violent extremism. The

resultant movement is enabled by both legal and illegal channels of cross-border mobility as the terror group capitalises on weak state governance. This occurs in a context where counter-terrorism interventions have mostly been reactive and rely on existing laws to try terror suspects (Mogire & Mkutu, 2011; Mwangi, 2017). This paper discusses the various manifestations of transnational mobility of Al-Shabaab terror operatives with focus on cross-border engagements between Kenya and Somalia.



Photo credit: State House Kenya

Kenya's President Uhuru Kenyatta visits troops participating in a multi-agency Field Training Exercise in Lamu, Kenya.

## Methodology

Qualitative data was collected through expert interviews with participants experienced in research, policy and counter-terrorism. Primary data was then triangulated with secondary data sourced from books, journals and grey literature.





## Key Findings

This section discusses key findings relevant to the discussion on transnational dynamics of the mobility of Al-Shabaab terror group.

### Transnational dynamics of Al- Shabaab mobility

Enablers	Activators
Transnational connections and transits	Diaspora, social media platforms
Weaknesses in transnational governance	State collapse, governance gaps
Exploitation of transnational travel infrastructure	Globalization, corruption
Transnational financing	Diaspora, financial donors
Transnational crimes in financing	Globalization, weak governance, contraband trade
The Kenya-Somalia irredentism factor	Pan-Somalism, 'marginalization' narratives
Security and operational challenges	Under-resourcing in security sector Varied doctrine and command structures Minimal cross border cooperation

Source: Expert Interviews 2021 and literature synthesis

### Exploitation of transnational connections and transits

The Al-Shabaab terror group relies on nodes and layers of connections and locomotion across borders as enablers of its transnational movement. Given its wide appeal to defend the religion of Islam, which it perceives to be under siege by primarily western world and allied states (Ingiriis, 2018; 2020). The Al-Shabaab has managed to recruit from the Somali population and its diaspora as well as The Horn of Africa, particularly, Kenya, Uganda and Tanzania. The group has also recruited Foreign Terrorist Fighters (FTFs) from

western countries such as the United States of America, Canada, Britain and Norway (cf. Josse et al, 2015). A number of FTFs have previous battle experiences with the now defunct Islamic State in Syria and Iraq (ISIS). It has equally maintained links with the Boko Haram terror group in Nigeria, having trained some of their operatives in Somalia.

While maintaining affiliation with the Al-Qaeda terror network since 2009, the group has transformed into a transnational actor. Its early affiliation with the

Al-Qaeda was strategic in enabling the outfit to transcend its Somali identity and achieve a global appeal. It has equally kept transnational ties with the Uganda and DRC-based Allied Defence forces (ADF) that has since 2020 rebranded itself as the Islamic State in Central Africa Province (ISCAP) even though there are contested linkages with other violent extremist groups (Candland et al, 2021). Some analysts portend that ADF linkages with the Al-Qaeda and the Al-Shabaab are part of 'terrorist framing' and is only appropriated to fit in the



context of the 'war on terror' (Titeca & Fahey, 2016). Its indoctrination and recruitment reach beyond East Africa (Kenya, Uganda and Tanzania) has been boosted in part by the internet and related social media platforms such as Facebook, Telegram, and WhatsApp. These applications have been useful for communication and operational planning prior to attacks.

The terror group has also maintained affiliation with the Ahlu Sunna Wal Jamaa, also known as, Ansar al-Sunna, an Islamist organization in the Cabo Delgado region of Northern Mozambique and an affiliate of ISCAP, which has drawn extremists from Kenya and Tanzania. Just like the Al-Shabaab, Ansar al-Sunna recruits were principally inspired by religious ideologues such as the late Sheikh Aboud Rogo, a Mombasa-based cleric.

This explains why majority of Kenyans that have joined the Mozambique-insurgency are from Kwale County. Their movements between Eastern Africa and Mozambique are supported by transnational networks built over time and the porosity of the Kenya-Tanzania borders. Al-Shabaab defectors have been claimed to cross over from Somalia through Kenya and thereafter exploit the 800km Tanzania-Mozambique porous border.

Over the years, Al-Shabaab's transnational mobility between Kenya and Somalia as from 2008 was facilitated by the Muslim Youth Centre (MYC). The MYC a Pumwani based youth organization was led by Sheikh Ahmed Iman Ali, a Kenyan senior member of the Al-Shabaab who is based in Somalia (Anderson & McKnight, 2014). The MYC in 2012 transformed into the Al-Hijra (Katumanga, 2017), an

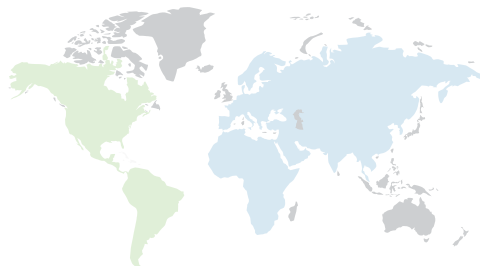
affiliate of the Al-Shabaab in Kenya and managed to create several branches in Mombasa and Garissa under the stewardship of the late Sheikh Aboud Rogo. Its recruitment agents are spread in Kenya's major towns such as Nairobi, Mombasa and Garissa. A recurrent theme for recruitment has been centered around social grievances (Speckhard & Shajkovci, 2019; Cannon & Pkalya, 2019; Chome, 2019). The operatives have relied on public and private means of transport to facilitate transit of MYC recruits between Kenya and Somalia. Key mobility routes to Somalia have included the Nairobi-Garissa-Dabaab; Nairobi-Garissa-Mandera; and the Mombasa-Lamu-Boni forest. The translocation bases across the Kenya-Somalia border are in Mandera and Lamu, which harbor hideouts for the operatives before they move to other parts of Kenya to mount attacks.



Photo credit: State House Kenya

Kenyan Defence Forces in a field training exercise in Lamu, Kenya





## Al-Shaabab mobility routes in Eastern Africa





Photo Credit: The Guardian

Kenyan soldiers on patrol in Somalia.

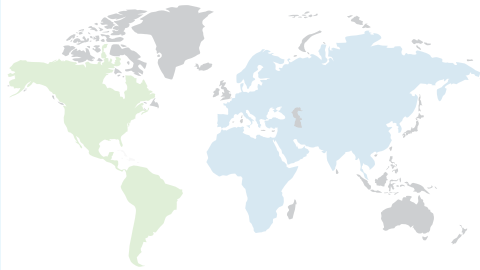
## Weaknesses in transnational governance mechanisms

The connection between weak governance and terrorism has been largely discussed in literature. The discourse of failed states has been prominent in contexts where key state functions are weak or absent or in a state of fragility (Newman, 2009; Simon & Tucker, 2007; Katumanga, 2017). The manifestations include absence of law and order and inadequate control of national borders which allows criminality to thrive. Somalia fits in the categorisation of failed states (Piazza, 2008). The absence of law and order in the country facilitates terrorist mobility in multiple ways includ-

ing local and cross border travels. While there is contestation in literature that terror operatives prefer to operate in relatively functioning states, 'failed states' like Somalia offer several vulnerabilities that aid terrorists' transnational mobility. The group has expanded its operational and organisational capabilities in Somalia with networks in the region including Kenya (Cannon & Pkalya, 2019).

The challenge of weak governance has continued to aid the transnational mobility of logistics particularly across the Kenya-Somalia border. The movement of logistics such as

Improvised Explosive Devices (IEDs) and Vehicle Borne Improvised Explosive Devices (VBIEDs) from Somalia to Kenya has equally benefitted from border porosity resulting from poor governance. Moreover, weaknesses in administration of north-eastern Kenya have provided opportunity for the assembly of IED constituent parts in the region, with technology imported from Somalia. This has emerged as a key aspect of terrorism mobility and an enabler of attacks planning and execution. IEDs in particular have since 2017 been widely mounted by the Al-Shabaab as a tactical strate-



gy to dominate certain routes in the region including Mandera-Wajir-Garissa and parts of Lamu county. This has made security operations unsustainable given targeted campaigns against police and military vehicles in these routes.

Weak border controls and which are compounded by poor bilateral relations between Kenya and Somalia enable operatives to cross border points to perpetrate terror attacks. The Al-Shabaab operatives originating from Somalia use several land routes which include Somalia-Lamu-Malindi-Mombasa; Somalia-Garissa-Mombasa; Somalia-Uganda-Busia-Nairobi; Somalia-Liboi-Garissa; Somalia-Mandera-Wajir-Isiolo-Nairobi

and Somalia Moyale-Nairobi. Governance lapses along these routes have enabled the terror operatives to exploit both public and private means of transport including motorcycles and donkey carts to evade detection. Terrorist operatives are generally careful about their means of mobility as a security precaution (Rossmo & Harries, 2011).

Al-Shabaab is projected to continue using drones and further exploits the weak governance gaps to engage in surveillance across the Kenya-Somalia border. This is serving as an additional aid to its movement. It joins a host of other insurgent groups in the DRC and Mozambique that are

relying on drones for surveillance and precision targeting (Allen, 2021).

The weaknesses in governance have contributed to poor community-state relations in the border counties, negatively impacting the needed public cooperation to counter the transnational mobility of the Al-Shabaab. Despite increased counter-terrorism efforts, the operatives have established hideouts among locals particularly in Mandera, Wajir, Garissa and Lamu. This has been manifested in the recruitment of terror operatives among the residents in these counties and the increased cross-border attacks in the North Eastern and Coast regions.



Photo Credit: allAfrica.com

Ethiopia Arrests 25 Al-Shabaab Suspects in Terror Sweep, June 2014





Photo Credit: aljazeera.com

*Kenya Court finds Mohamed Ahmed Abdi and Hussein Hassan Mustafa guilty in the deadly Westgate mall attack.*

The role of transnational corruption across the Kenya-Somalia border remains key in the discussion of weaknesses in governance. Somalia remains the second-most corrupt country in the world after South Sudan, according to World Corruption Perceptions Index 2020. Kenya is at position 124 out of 179 ranked countries. Hence, terror operatives find it easy to manipulate a section of corrupt state officials to aid their transnational movements (Petrich 2019; Papale, 2020; Katumanga, 2017). Those manning border points or those in government departments such

as immigration have been manipulated to allow easy acquisition of legal travel documents such as passports. Kenya's State Department for Registration of Persons has been in the spotlight for issuing illegal aliens from Somalia with national identification documents.

The corrupt state bureaucracy has seen government officers being compromised to allow operatives to cross with their weapons and related logistics such as IEDs and VBIEDs across the borders. For example, USD 200 is claimed to be an

acceptable bribe by Al-Shabaab to cross over to Kenya (Cannon & Pkalya, 2019). This has made interception of such operatives difficult as they travel on 'genuine' documents such as national identity cards and passports. Possession of these valid documents always prevent undue scrutiny at border crossing points. A key contributor to transnational corruption is low morale among security officers working in the frontiers. The poor working conditions often create opportunity for corrupt dealings between the terror operatives and state officials.



## Exploitation of transnational travel infrastructure

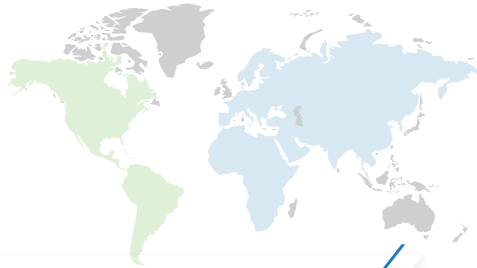
Terror operatives depend on both legal and illegal travel infrastructures to move to targeted spaces for attacks planning and execution. The operatives use licit travel documents such as passports and identity cards to board planes, and cross borders to execute their attacks (cf. Rudner, 2008). They have also perfected the virtual space, which enables impersonation, and related exploitation of credit card fraud to aid their mobility. Holders of 'powerful' passports such as citizens of the US, and Norway are able to travel with ease to over 100 countries visa free.

These passports have been exploited for travel to launch terror attacks. Yet, visa applications have in many instances filtered out some terror operatives destined for international travels.

Terror operatives also exploit the illegal travel infrastructure to counter states' surveillance. This infrastructure aids their movement through the production of fake travel documents such as passports, visas, work or residence permits. Corrupt immigration officers and travel agents in Kenya have offered supportive roles in this respect

(Cf. Cannon & Pkalya, 2019). The production of illegal travel documents is supported by cartels that also facilitate transnational crimes such as human and arms trafficking (UNODC/CTCOE, 2021). At the operational level, access to travel documents has enabled movement to different locations for training, surveillance, reconnaissance, and tactical planning. The continued rush by Somalia nationals to acquire Kenyan identification and travel documents both legally and illegally to facilitate movement across Kenya and Somalia is noteworthy.





## Transnational financing

The Al-Shabaab has maintained an effective transnational financial system that has sustained its activities despite the counter-insurgency efforts. While the terror group's monetary strength is derived from its trade in charcoal, sugar, and other smuggling businesses in southern Somalia (Cannon & Pkalya, 2019), other sources of funding include the remittances from the estimated 14% of Somali people who are living in the diaspora (NTFRA, 2018). This is estimated at about USD 1.2 billion per year. There is also the international aid flow of USD 834 million, foreign direct investment of USD 102 million and export trade of USD 516 million every year to the Federal Government of Somalia. While

these funds are meant for the welfare of the Somali people, they have, a number of times, extended support to the Al-Shabaab. There are also large-scale donations from overseas in form of goods which are usually sent by Jihadist donors to businessmen linked to the terror group. These are sold and the proceeds are handed over to the Al-Shabaab. There is a growing threat that some business fronts in South Sudan could be supporting Al-Shabaab in Somalia. These businesses include real estate, oil companies operating mainly in Jubaland with proceeds being used as additional financing source.

The groups' financial liquidity

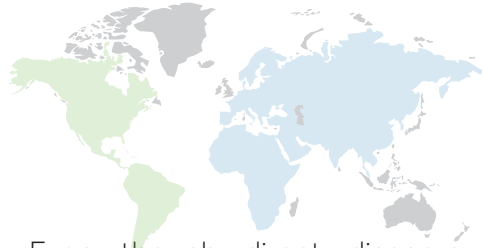
has continued to rest on the generosity of individual donors, its foreign backers (Ingiriis, 2018), and its Al-Qaeda connection. In 2013, the US Treasury issued an alert on Qatari-based Umayr Al-Nu'aymi for channeling USD 250,000 to Al-Shabaab. The group has previously received financial assistance from Eritrea, though it is estimated that such assistance has drastically reduced during heavy scrutiny by the United Nations.

Since 9/11, the global community has been cooperating to curtail terrorist financing orchestrated through formal financial systems. Irrespective of the heightened awareness, the Al-Shabaab still uses formal



Photo Credit: techmoran.com





money platforms such as M-PESA to move money for its logistics functions. This is enabled by its support from the Somali diaspora and individual sympathisers. The exploitation of transnational financing networks is suspected to have contributed to the Dusit D2 Hotel attack in Nairobi, Kenya, in January 2019. One of the suspects linked to the attacks, Hassan Abdi Nur, is believed to have received KES 9 million from South Africa through 52 M-PESA accounts he registered between October to December 2018. Prior to the attack, the suspect unusually withdrew USD 300,000 at Diamond Trust Bank in Eastleigh, Nairobi, which was later wired to Jillib, Somalia, the headquarters of Al-Shabaab.

Even though direct diaspora remittances to the Al-Shabaab have drastically reduced due to its proscription as a terrorist group by the US, stopping diaspora support to the group has not been easy. This has been due to the absence of a structured banking system in Somalia which is in direct connection to the global financial community. Hence, most of the remittances have reached the Al-Shabaab through the hawala network, which makes payments to the recipients directly on a trusted platform. In this form of transaction, a dealer in Somalia will call and agree with a dealer in another country to make payments to the client without sending the actual cash. The

opaqueness of this system has made it very difficult to control and regulate by the international financial security community. Even when the hawala routes are disrupted, cash of up to USD 10,000 has normally been sent directly to Al-Shabaab using personal couriers, with the possibility of larger amounts being smuggled transnationally.

Projections could be made that Al-Shabaab in the future could exploit virtual currencies such as Bitcoin to fundraise. The group could seek to learn from other groups such as ISIS that have been supported through virtual currencies (European Union, 2018).

## Funding Terror: Sugar from Kismayu

### Al-Shabaab-linked sugar smugglers still in business after attack

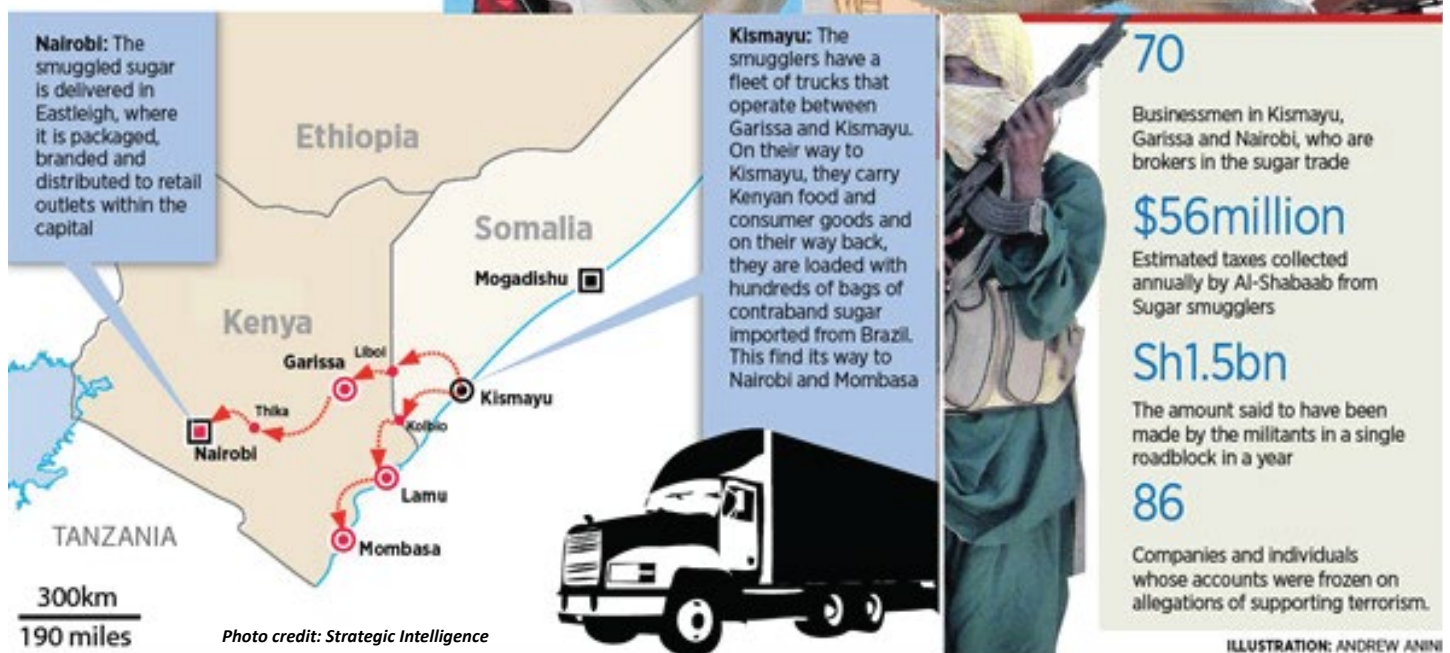




Photo Credit: @KRACorporate

Kenya Revenue Authority officials intercept contraband goods from Somalia in Wajir County , June 2020

## Role of transnational crimes in financing

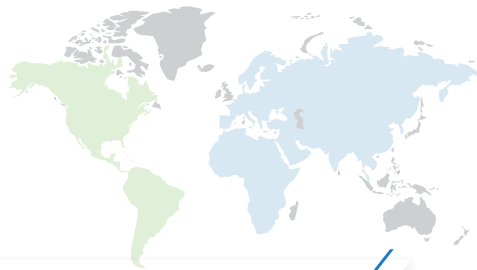
Terror operatives require financial resources to support their logistic functions of planning and execution of terror attacks (Rudner, 2008; Aydinli, 2006). They are able to exploit the crime-terror nexus to enhance their logistical operations and particularly in weak states (Hübschle, 2011). Terrorist organisations such as the Al-Shabaab have extensive land and maritime smuggling links that keep the movement financially afloat. They are involved in the smuggling of contraband products such as sugar, textiles, and charcoal across borders. The contraband trade was particularly lucrative prior to Kenya's military engagement in Somalia through the Operation Linda Nchi campaign in 2011 through its

use of Kismayu port. At the height of piracy in the mid-2000s (2007-2009) on the Indian Ocean, the group received a percentage of piracy ransoms. In the recent past, the Al-Shabaab has also ventured into smuggling wildlife trophies including ivory. The group has maintained ties with poachers spread across Kenya, the DRC, and the Central African Republic (CAR). This has in turn enabled connections with Asian markets (Levy & Yusuf, 2019; Petrich, 2019; Toole, 2020).

The terror group has exploited the disruptions of the heroin smuggling routes as a result of the ongoing Syrian civil war. It has activated connections with the Middle East and now supplies heroin to criminal

networks in Kenya, Nigeria, and South Sudan (Levy& Yusuf, 2019). By quickly adapting to new revenue streams, the group can easily manage its logistics such as travel, and the activation of decentralised terror cells for attacks. The Amniyat, the intelligence wing of the Al-Shabaab, has been critical to its organisational effectiveness that has seen its 'tax base' expand. As the group innovates on its 'taxation base', the notable shift is its progressive transformation into a criminal enterprise rather than a religious ideology. It continues to exploit weak governance mechanisms to engage in illicit business activities to ensure its financial sustainability (Levy& Yusuf, 2019; Petrich, 2019).





## The Kenya-Somalia irredentism factor

The Kenyan Somali and 'Somalia Somalis' are only separated by colonial boundaries and conquest but share identity, clan and religious affiliations including historical aspirations for pan-Somalism (Chau, 2010). This context of belonging and common ancestry by way of clan affiliations across the borders means that it is difficult to differentiate the

two. Cross-border marriages are the norm in border towns such as Bulahawa, Mandera, Fino, Liboi and Elwak. The immediate implication of this on transnational mobility is that movement can be seamless across the Kenya-Somalia border. The cross-border affiliation means that the Al-Shabaab operatives of Somali descent find safe hideouts, recruiting enviro-

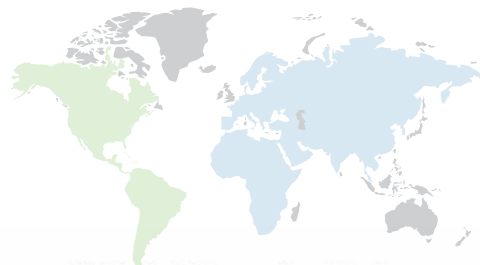
ments, training grounds and easily move logistics without undue scrutiny in Kenya. When tied with the gender dynamics, women in particular have been an emerging conduit for the movement of logistics as they attract less suspicion from security agencies (Idris, 2020, Ndung'u & Salifu, 2017).



Photo credit: State House Kenya

*Kenya's President Uhuru Kenyatta visits the multi-agency team undertaking a joint operations trainings in Boni Forest, Lamu, Kenya.*





Al-Shabaab Operations by Type

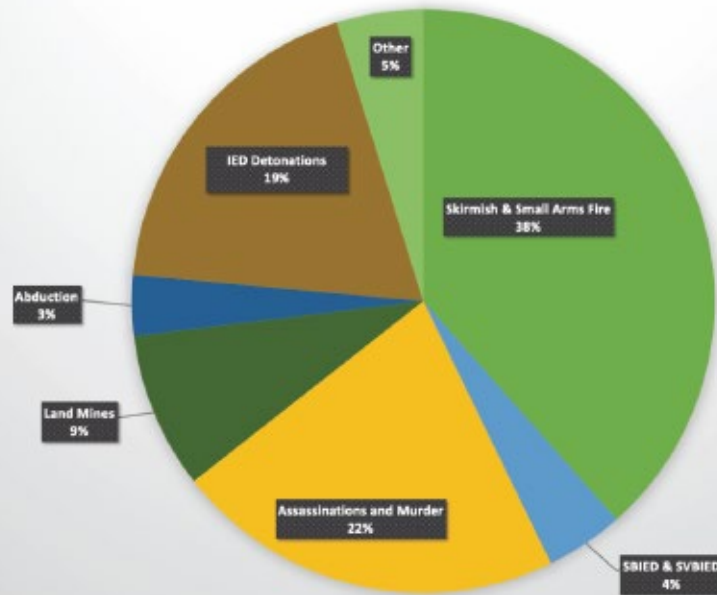


Photo credit: [intelligencefusion.co.uk](https://www.intelligencefusion.co.uk)

## Security and operational challenges

Several internal challenges have impacted the operational effectiveness of countering Al-Shabaab mobility. One key operational challenge is related to the quality of equipment in use by security agencies. Previously procured operational equipment such as Mine Resistant Ambush Protected vehicles (MRAPS) have been a disappointment since they have been previously destroyed by IEDs and landmines in Lamu and North Eastern regions, which Al-Shabaab continues to mount against Kenya's security officials. The IEDs have proven a major challenge as counter-terrorism efforts by Kenya's security agencies against the Al-Shabaab continue.

The terror group continues to innovate the development

of IEDs and VBIEDs (Petrich, 2019). This operational challenge is likely to be mitigated with the planned procurement of 118 new armoured military vehicles in 2022 (Ngugi, 2021).

The other challenge is related to the continued use of tented-land cruisers for routine police patrols especially in North Eastern and Coast regions. This has always exposed officers to IED attacks leading to many casualties. The modification of the patrol vehicles, especially those in terror-prone regions from tented pickups to open-back-to-back patrol vehicles has the ability to enhance quick-response in cases of attack. The patrol vehicles and related defects in bullet proof hardware in turn affect security officers' morale. Procuring of

secure and combat-friendly equipment would boost the morale and effectiveness of security officers.

Another key area requiring intervention is the strengthening of operational competencies to accommodate additional skills such as motor-bike patrols which officers can deploy depending on the situation. The motorbike as a patrol equipment has the capacity to evade IEDs and exhibit maneuverability in jungles such as Boni forest. It had been effectively used in countering the Liberation Tigers of Tamil Eelam separatists in the Srilankan civil war of 1983-2009. This will equip officers with a new layer of counter-terrorism skills which they can deploy at will. Furthermore, the thickness and denseness of Boni forest cou-



entering the Liberation Tigers of Tamil Eelam separatists in the Sri Lankan civil war of 1983-2009. This will equip officers with a new layer of counter-terrorism skills which they can deploy at will. Furthermore, the thickness and denseness of Boni forest coupled with low quality equipment has made it difficult to locate Al-Shabaab hideouts.

The construction of Kenya-Somalia border wall remains a practical option (cf. Katumanga, 2017), to secure the border from Al-Shabaab transnational mobility. While the initial plan was to construct a 708km border wall with Somalia, the project stalled with only 10 kms completed in 2019 after parliament raised a query on the cost of construction (BBC,

2019; Praxides, 2021). Yet it remains consistent with other practices in other parts of the world such as India-Bangladesh, Israel-Palestine, US- Mexico and South Africa- Zimbabwe. A tight border fence would likely have pre-empted the abduction of Cuban doctors in Mandera in April 2019. Construction work has recently commenced in the Lamu region amidst a series of Al-Shabaab IEDs attacks particularly targeting the private contractors engaged in the wall project. The initiative, when complete with observation posts and CCTV cameras, would be a game-changer in countering Al-Shabaab transnational mobility.

At the doctrinal level, the evolving multi-agency approach

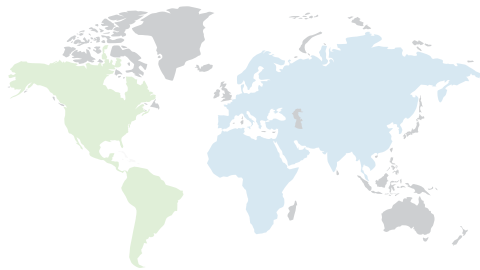
as a broad counter-terrorism strategy requires increased synergy for enhanced operational effectiveness. While the approach is novel in Kenya's counter-terrorism operations, its working is impacted negatively by different training doctrines, standard operating procedures, and command and control structures across contributing government agencies (Kamau, 2021). The effectiveness of the multi-agency approach is in harmonising training and command across the different agencies, including standard operating procedures. Improved terms of service including harmonising salaries and benefits across the evolving multi-agency approach could optimise its working and boost the morale of security officials.



National Police Service receives armoured personnel carriers, Feb 2, 2016

Photo credit: Nation.co.ke





*Kenya's President Uhuru Kenyatta at a multi-agency joint operations training exercise in Lamu, Kenya.*

## Conclusion

The nature of Al-Shabaab's transnational mobility is multifarious and constitutes exploitation of networks, routes, travel infrastructure, weak governance, finances, criminality, and operational challenges. This calls for counter-terrorism strategies to focus on regular mapping of the changing patterns. The terrorists will continue to rely on a decentralised operational network aided by a weak state apparatus to facilitate their mobility into and out of the country.





## Recommendations

The policy recommendations are organised in a matrix format and details the immediate, short-term and long term interventions required to counter the transnational dynamics of Al-Shabaab. The enablers are discussed in the matrix as the key factors that aid the transnational mobility of the Al-Shabaab while the activators are debated in the context of contextual factors that similarly aids this mobility.

Enablers	Activators	Immediate	Mid-term	Long-term
<b>Transnational connections</b>	Diaspora, social media platforms	Enhanced cooperation with global actors such as Interpol and UNODC through the Counter-Terrorism Centre of Excellence.	Regional and international cooperation at the AU and UN levels.	Regular analysis of Al-Shabaab mobility trends to generate knowledge and preventive interventions.
<b>Weaknesses in transnational governance</b>	State collapse, governance gaps	The Ministry of Foreign Affairs should improve bilateral cooperation on security matters between Kenya and Somalia.	The Ministry of Interior should intensify regular engagement and cooperation with entities such as the INTERPOL and the UNODC for information sharing and strategic interventions.	State stabilization efforts through cooperation with external agencies such as the European Union, unilateral actors, and through agencies such as IGAD and the African Union.  KDF to enhance border security along Kenya-Somalia border.
<b>Exploitation of transnational travel infrastructure</b>	Globalization, corruption	Strict enforcement of anti-corruption laws and regulations in the public sector.	The Ministry of Interior to enhance cooperation with entities such as INTERPOL.	Regular mapping of trends and patterns on exploitation of travel infrastructure at the domestic, regional and global levels.



## Recommendations

Enablers	Activators	Immediate	Mid-term	Long-term
<b>Transnational financing</b>	Diaspora, financial donors	Enforcement of existing laws such as POCAMLA and 'disrupting' loopholes in the informal financial systems such as Hawala system to counter terrorism financing.	Cooperation with global financial intelligence units to counter terrorism financing.	Global cooperation with multiple entities such as INTERPOL to counter terrorism financing.  Cooperation with financial sector players.
<b>Transnational crimes</b>	Globalisation, weak governance, contraband trade	The Ministry of Interior should prioritise border communities' cooperation through enhancing existing structures of community policing and Nyumba Kumi.	Enforcement of existing laws such as POCAMLA.	Global cooperation with entities such as INTERPOL, UNODC regional security chiefs meetings.
<b>The Kenya-Somalia irredentism factor</b>	Pan-Somalism, 'Marginalization' narratives	Development of cross border multi-agency committees for security and strategic interests' cooperation.	Citizenship education to be led and innovated by Kenya's Ministry of Education.	Progressive national and county governments development allocations in the north-eastern region to counter irredentist concerns. Addressing progressive marginalisation would change the narratives around belonging and identity in the north-eastern region.



## Recommendations

Enablers	Activators	Immediate	Mid-term	Long-term
<b>Security and operational challenges</b>	Resources morale Cross-border incursions	<p>The Ministry of Interior should progressively upgrade the existing security equipment used in patrolling Kenya-Somalia border such as Armored Personnel Carriers (APCs), Ambush Protected Vehicles (MRAP) and open back-to-back patrol vehicles. This would help counter-attacks from small fires and improvised explosive devices in the region.</p>	<p>The Ministry of Interior to establish a special counter-terrorism patrol team experienced in motor-bike combat skills to complement the motor-vehicle patrol team, especially in terror prone regions.</p> <p>Strengthening a multi-agency cooperation for CT effectiveness. This would include harmonizing differences in remuneration, training, equipment, doctrine and operational culture.</p>	<p>The Ministry of Defence and Ministry of Interior should engage in continuous multiagency capacity building of the National Police Service, the KDF, NIS and Intelligence Services on the changing dynamics of counter-terrorism.</p> <p>National Counter-Terrorism Centre (NCTC) to take lead in reviewing the National Countering Violent Extremism Strategy. This would have the impact of harmonizing CT operations.</p>

**Transnational dynamics of Al-Shabaab mobility**  
*Source: Expert interviews 2021 and literature synthesis*



## References

- Allen, K. (2021). Drones in the hands of insurgents: how Africa can prepare. <https://issafrica.org/iss-today/drones-in-the-hands-of-insurgents-how-africa-can-prepare> (accessed 26 July 2021).
- Anderson, D.M. & McKnight, J. (2014). Kenya at War: Al-Shabaab and its Enemies in Eastern Africa. *African Affairs*, 111(454), 1-27.
- Asembo, K. O. (2020). Conceptualising Mobility Factor in Violent Extremism: Constructing the Wheels of Terror. Nairobi: Unpublished (on file).
- Aydinli, E. (2006). From Finances to Transnational Mobility: Searching for the Global Jihadists' Achilles Heel. *Terrorism and Political Violence*, 18(2), 301-313.
- BBC News (2019). Scandal over Kenya's border fence that cost \$35m for just 10km. Available at <https://www.bbc.com/news/world-africa-47574463> (accessed 28 July 2021).
- Candland, T. et al. (2021). The Islamic State in Congo. Available at [https://web.archive.org/web/20210321232150id\\_/https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/The%20Islamic%20State%20in%20Congo%20English.pdf](https://web.archive.org/web/20210321232150id_/https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/The%20Islamic%20State%20in%20Congo%20English.pdf) (accessed 27 July 2021).
- Cannon, B., & Iyekepolo, W. (2018). Explaining Transborder Terrorist Attacks: The Cases of Boko Haram and Al-Shabaab. *African Security*, 11(4), 370-396.
- Cannon, B., & Pkalya, D. (2019). Why al-Shabaab Attacks Kenya: Questioning the Narrative Paradigm. *Terrorism and Political Violence*, 31(4), 836-852.
- Chau, D. (2010). At the Crossroads of Cultures? A Historic and Strategic Examination of Kenya-Somalia Relations. *Journal of the Middle East and Africa*, 1(1), 67-83.
- Chome, N. (2019). From Islamic Reform to Muslim Activism: The Evolution of an Islamist Ideology in Kenya. *African Affairs*, 118(472), 531-552.
- D'Amato, S. (2017). Terrorists going transnational: rethinking the role of states in the case of AQIM and Boko Haram. *Critical Studies on Terrorism*, 11(1), 151-172.
- European Union (2018). Virtual Currencies and terrorist financing: assessing the risks and evaluating responses available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604970/IPOL\\_STU\(2018\)604970\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604970/IPOL_STU(2018)604970_EN.pdf) (accessed 26 July 2021).
- Ganor, B. (2002). Defining Terrorism: Is One Man's Terrorist another Man's Freedom Fighter? *Police Practice and Research*, 3(4), 287-304.
- Ginsburg, S. (2006). Countering Terrorist Mobility: Shaping an Operational Strategy. Migration Policy Institute.
- Hübschle, A. (2011). From Theory to Practice: Exploring the Organised Crime-Terror Nexus in Sub-Saharan Africa. *Perspectives on Terrorism*, 5(3/4), 81-95.
- Idris, I. (2020). Gender and countering violent extremism (CVE) in the Kenya Mozambique region. GSDRC, University of Birmingham. Available at [https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15753/892%20\\_Gender\\_and\\_CVE\\_in\\_the\\_Kenya\\_Mozambique\\_Region.pdf](https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15753/892%20_Gender_and_CVE_in_the_Kenya_Mozambique_Region.pdf) (accessed 28 July 2021).
- Ingiriis, M. (2018). The Invention of Al-Shabaab in Somalia: Emulating the Anti-Colonial the Dervish Movement. *African Affairs*, 117(467), 217-237.
- Ingiriis, M. (2020). The anthropology of Al-Shabaab: the salient factors for the insurgency movement's recruitment project. *Small Wars & Insurgencies*, 31(2), 359-380.
- Joose, P., Sandra M. Bucerius, and Sara K. Thompson (2015). Narratives and Counter narratives: Somali-Canadians on Recruitment as Foreign Fighters to Al-Shabaab. *British Journal of Criminology*, 55, 811-832.
- Kamau, J. (2021). Is counter-terrorism counterproductive? A case study of Kenya's response to terrorism, 1998-2020. *South African Journal of International Affairs*, 28(2), 203-231.
- Katumanga, M. (2017). The Political Economy of Insurge-terrorism and "Covart" in Kenya and Juba Borderlands. *The African Review: A Journal of African Politics, Development and International Affairs*, 44(2), 136-171.
- Levy, I., & Yusuf, A. (2019). How Do Terrorist Organisations Make Money? Terrorist Funding and Innovation in the Case of al-Shabaab. *Studies in Conflict & Terrorism*, DOI 10.1080/1057610X.2019.1628622
- Mogire, E., & Mkutu, K. (2011). Counter-terrorism in Kenya. *Journal of Contemporary African Studies*, 29(4), 473-491.





Morier-Genoud, E. (2020). The jihadi insurgency in Mozambique: origins, nature and beginning. *Journal of Eastern African Studies*, 14(3), 396-412.

Mueller, J. (2018). The Evolution of Political Violence: The Case of Somalia's Al-Shabaab. *Terrorism and Political Violence*, 30(1), 116-141.

Mwangi, O. (2017). Corruption, Human Rights Violation and Counterterrorism Policies in Kenya in S.N. Romaniuk et al. (eds.), *The Palgrave Handbook of Global Counterterrorism Policy*, DOI 10.1057/978-1-137-55769-8\_50.

Ndungu, I. & Salifu, U. 2017. *The Role of Women in Violent Extremism in Kenya*. Pretoria: Institute for Security Studies.

Newman, E. (2009). Failed States and International Order: Constructing a Post-Westphalian World. *Contemporary Security Policy*, 30(3), 421-443.

Ngugi, B. (2021). Kenya signs Sh9.8bn armoured cars deal with Turkish firm. <https://www.businessdailyafrica.com/b-d/economy/kenya-signs-sh9-8bn-armoured-cars-turkish-firm-3491782> (accessed August 4 2021).

Nkomo, S., & Buchanan-Clarke, S. (2020). Violent extremism in Africa Popular assessments from the 'Eastern Corridor' By Afrobarometer Policy Paper No. 65.

Petrich, K. (2019). Cows, Charcoal, and Cocaine: Al-Shabaab's Criminal Activities in the Horn of Africa. *Studies in Conflict & Terrorism*, DOI: 10.1080 /1057610X.2019 .1678873

Praxides, C. (2021). Lamu springs back to life as border wall assures security. Available at <https://www.the-star.co.ke/Bcounties/coast/2021-05-26-lamu-springs-back-to-life-as-border-wall-assures-security/> (accessed 28 July 2021).

Prevention of Terrorism Act, 2012, Kenya Gazette Supplement, Acts 2012. Nairobi: Government Printer, pp 1663-1709.

Rossmo, D., and Harries, K. (2011). The Geospatial Structure of Terrorist Cells. *Justice Quarterly*, 28(2), DOI: 10.1080/07418820903426197

Rudner, M. (2008). Misuse of Passports: Identity Fraud, the Propensity to Travel, and International Terrorism. *Studies in Conflict & Terrorism*, 31(2), 95-110.

Simons, A., & Tucker, D. (2007). The misleading problem of failed states: a 'socio-geography' of terrorism in the post-9/11 era. *Third World Quarterly*, 28(2), 387-401.

Speckhard, A., & Shajkovci, A. (2019). The Jihad in Kenya: Understanding Al-Shabaab Recruitment and Terrorist Activity inside Kenya—in Their Own Words. *African Security*, 12(1), 3-61.

The 2018 National Terrorist Financing Risk Assessment (NTFRA) available at [https://home.treasury.gov/system/-files/136/2018ntfra\\_12182018.pdf](https://home.treasury.gov/system/-files/136/2018ntfra_12182018.pdf) (accessed 26 July 2021).

The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (9/11 Report) (2004). <https://www.govinfo.gov/app/details/GPO-911REPORT> (accessed June 28 2021).

The United Nations Office on Drugs and Crime (UNODC) Regional Office for Eastern Africa (ROEA) and the EAPCCO Counter-Terrorism Centre of Excellence (CTCoE) (2021). *Countering the Financing of Terrorism in Eastern Africa*, Issue Paper 2. Available at <https://eapcco-ctcoe.org/ct-issue-papers/> (accessed August 11, 2021).

Titeca, K., & Fahey, D. (2016). The many faces of a rebel group: The Allied Democratic Forces in the Democratic Republic of Congo. *International Affairs*, 92(5), 1189-1206.

Toole, G. (2020). Research Note: Deception, Drugs, & Death: Interviews with Survivors of al-Shabaab's Youth Recruitment Traps in Kenya. *Studies in Conflict & Terrorism*, DOI: 10.1080/1057610X.2020.1862774



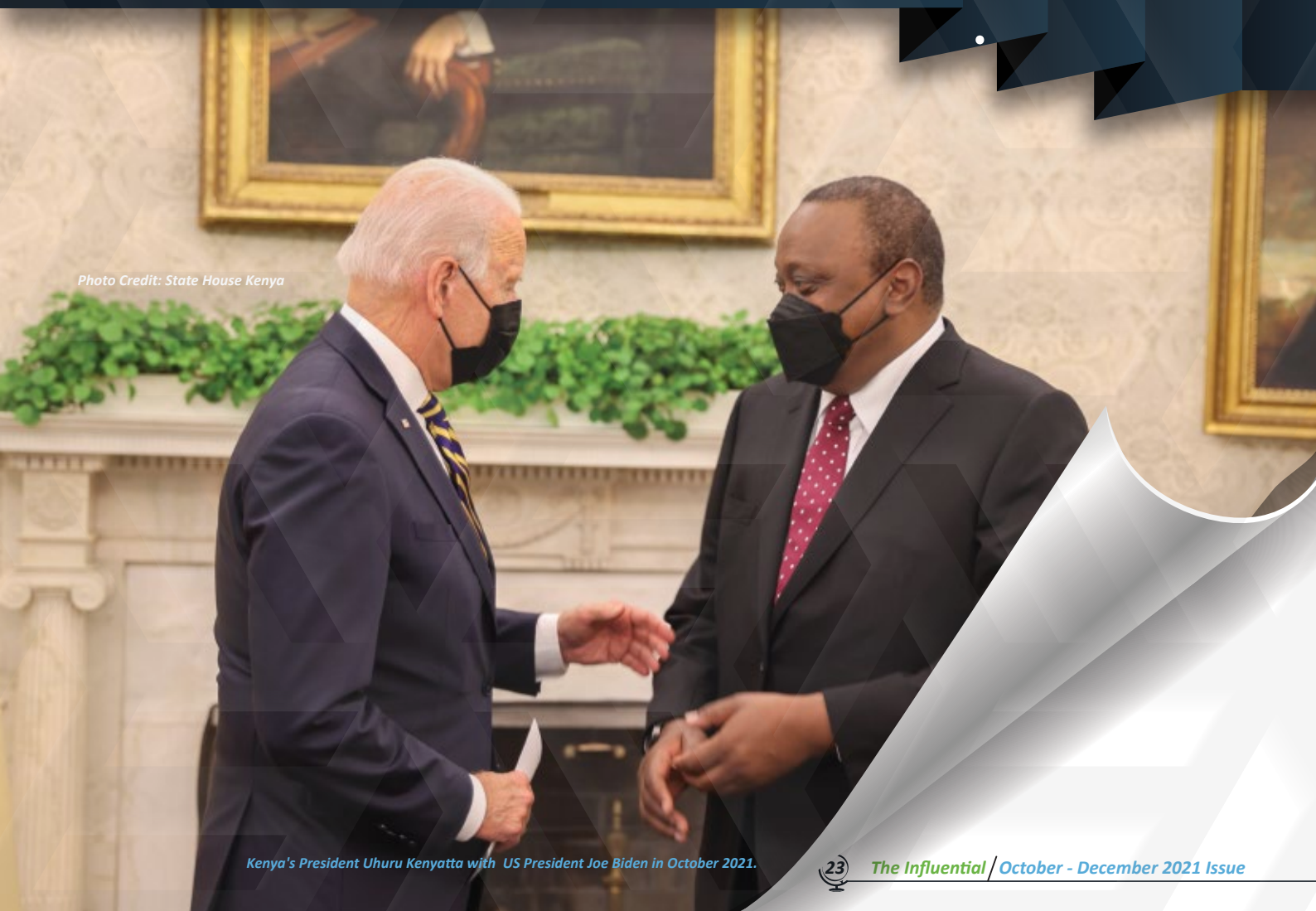
# Strategies for Kenya's leverage on the Kenya-United States of America Free Trade Agreement (KUSFTA) Negotiations

**Janet Kiguru**

## Executive Summary

Kenya's position in the Kenya-United States Free Trade Area Agreement (KUSFTA) negotiations is bound to be affected by internal and external socio-political dynamics. These include the structure of Kenya's negotiating team, the political developments in the two countries, stakeholder participation, the China-US trade war and regional politics. While some of these factors strengthen Kenya's position, others amplify her limitations and threaten her influence. The country's ability to navigate these factors will determine her strategic leverage on the US, a more robust and distinctly advantaged state. This paper recommends depoliticizing the negotiation process, formulating evidence-based negotiation objectives, inclusive stakeholder participation, instituting reforms in the business environment, leveraging Chinese infrastructure and building alliances with regional partners.

Photo Credit: State House Kenya







## Introduction

There are internal and external socio-political factors at play in the ongoing KUSFTA negotiations that are bound to affect Kenya's position and leverage. The internal dynamics include the capacity of Kenya's negotiating team, Kenya's 2022 elections, stakeholder involvement and the business environment.

The key external factors are regional politics, the US political dynamics and the US-China trade wars. While the first round of negotiations was concluded in August 2020, the negotiation process is expected to run for about two or three more years (Fibre2Fashion, 2020). This allows Kenya to tactfully craft

a fair agreement that protects her strategic interests and diplomatic standing in the regional and global spaces. Therefore, this paper analyses the factors that are critical to Kenya's leverage and explores the strategies she can employ to elevate her bargaining power in the KUSFTA negotiations.



Photo credit: US Embassy in Kenya

Kenya Cabinet Secretary (CS) for Interior Dr Fred Matiang'i, CS, Industrialization, Trade, and Enterprise Development Betty Maina, US ambassador Kyle McCarter and other government officials during the formal launch of the KUSFTA negotiations in July 2020.



## Background

Kenya and the US agreed to negotiate a bilateral free trade agreement in February 2020. The agreement seeks to ensure trade normalcy after Africa Growth and Opportunity Act (AGOA) expires in 2025 (Ministry of Industrialization, 2020). The pact is expected to promote trade, investment, technology transfer, and bilateral relations between Kenya and the US. KUSFTA is strategic since Kenya is a crucial ally of the US in security cooperation. Kenya has leveraged herself as an essential security partner, lagging in Vision 2030 and therefore needs a trade boost (Caporal, 2020;

Munyi, 2021; Ogutu, 2020; Weru, 2021). However, US negotiators have on several occasions customarily put aside the special bilateral relationships states share when negotiating free trade agreements (Balls et al., 2020). The country's key focus has been first to protect her national interests, and she is often unwilling to make any significant concessions or commitments that do not favour her (Crump, 2017; Cunningham, 2019). The need for Kenya to be more strategic is crucial given that the ongoing negotiations will be under President Joe Biden, who has

not shown eagerness to pursue KUSFTA. The Biden administration has allowed the mandate of the Trade Promotion Authority to expire, yet it would have enabled the fast-tracking of KUSFTA (Ngugi, 2021). Instead, the administration has signalled that it will review the negotiation objectives based on America's revised industrial, economic and climate change policies. These goals have favoured the Buy America, Build America agenda and focus on combating the influence of China globally.



Photo credit: Today News Africa

*Kenya's President Uhuru Kenyatta with US President Joe Biden during a meeting at the White House.*

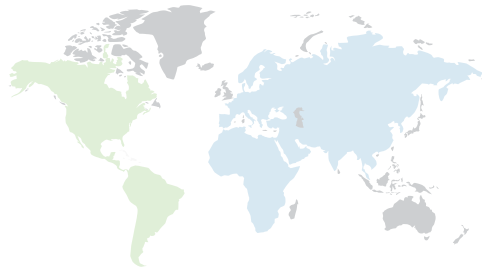
## Methodology

Qualitative data was gathered from foreign policy experts and practitioners using interview guides which provided in-depth discussion on the complexities of the KUSFTA negotiations. The experts were drawn from the Ministry of Trade, Industrialization and Enterprise Development, diaspora community, academics, and other stakeholders. The primary data was complemented by secondary data from documented sources. The data was analyzed thematically.

## Key Findings

The following internal and external factors remain significant in relation to Kenya's strategic leverage on the KUSFTA negotiations.





## Internal Factors

A number of internal political factors are bound to profoundly influence Kenya's ability to effectively negotiate KUSFTA and remain distractors to the leverage, if not addressed. They include the capacity of the negotiation team, domestic politics, the business environment and limited stakeholder participation.

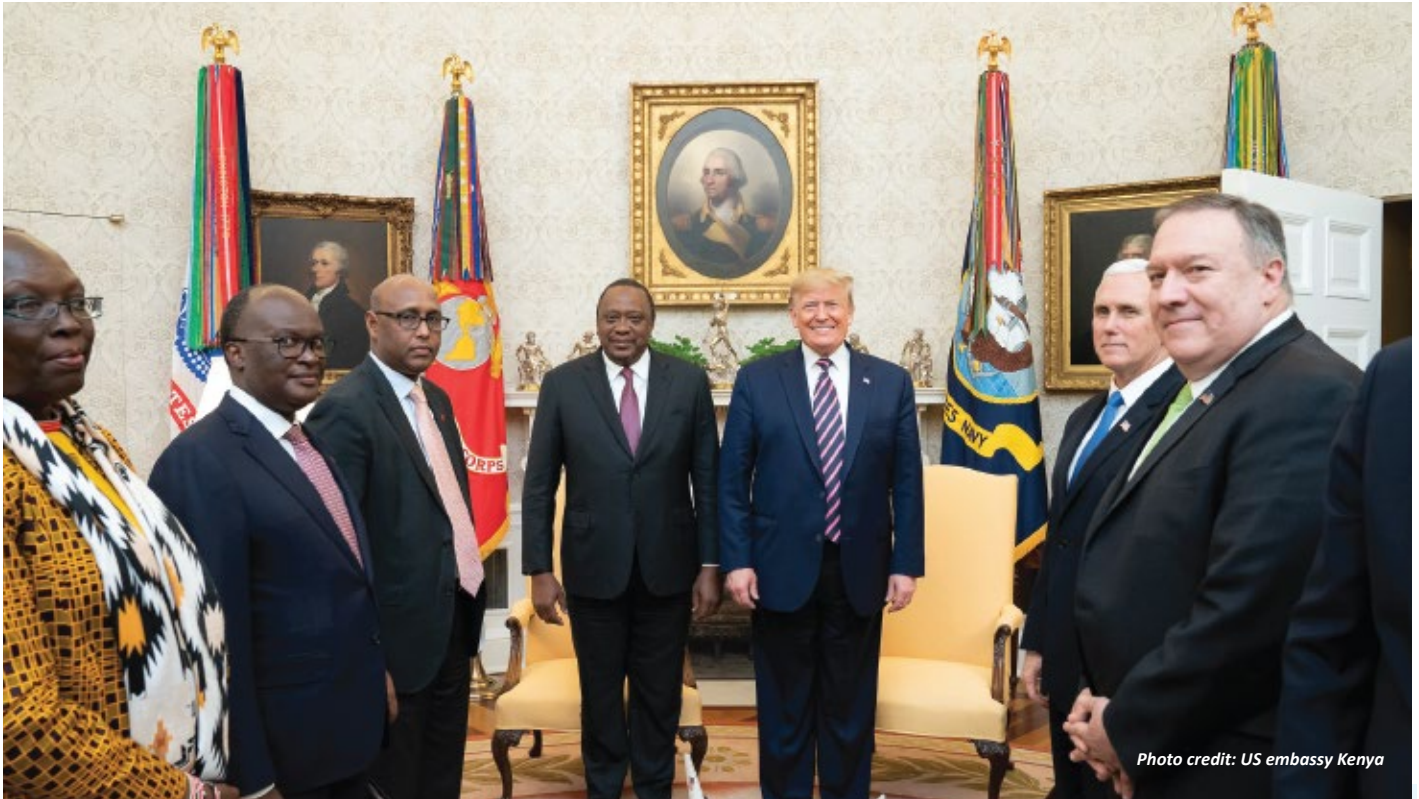


Photo credit: US embassy Kenya

US President Donald Trump, Vice President Mike Pence and Kenyan President Uhuru Kenyatta together with US and Kenyan government officials at the White House.

### The capacity of Kenya's negotiating team

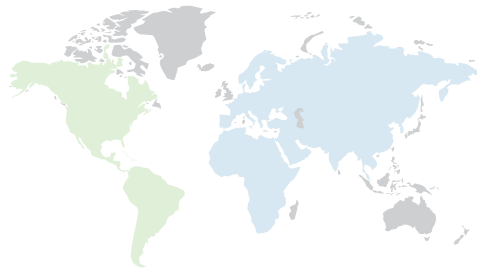
Kenya's negotiation team comprises 170 experts who are primarily bureaucrats, embedded within ministries and who may be lacking the requisite technical expertise on the US and free trade negotiations. Ideally, free trade agreement negotiations need to be led by a specialized non-ministerial committee that draws on the expertise of bureaucrats. While bureaucrats have previously relied on procedures and rules to make their decisions, their positions on KUSFTA could be amplified by incorporating

perspectives from economic analysts, scholars, and think tanks (Midamba, 2021). A consortium of local and global experts can re-orient Kenya's objectives to achieve Kenya's development blueprints, such as the Vision 2030 and the Big Four Agenda.

Kenya needs to learn more about the US so as to be in a favourable position during the negotiations. There appears to be a gap between US trade interests and Kenya's negotiation objectives.

For instance, as Kenya focuses on prioritizing 'Made in Kenya' product, these may only be competitive in the intra-Africa trade but not as exports to the US, whose market requires high-quality finished products (Midamba, 2021).

It is important to recognize that the government has hired an American public relations company, Rational 360, to make up for the technical expertise and networking deficiencies (Menya, 2021). The company will provide public relations support,



communications counsel, and technical support needed to help Kenya engage the US on KUSFTA. It comprises former US government officials such as Joe Lockhart, Melissa Green, Christine Koronides, Cassie Scher and Nick Garlow, who served in prominent positions in the Clinton and Obama governments. Their negotiation bias is likely to favour America's interests over Kenya's (Midamba, 2021). Customarily, Americans will always put American interests first, and therefore Kenya ought to rethink how she will use the company to win over Americans. Indeed, in the past years, parliament has questioned the worth of using US public relations firms as they

have been of little benefit to Kenya. Therefore, it is essential to complement the efforts of such firms with a consortium of homegrown and diaspora initiatives.

Similarly, the parliament departmental committee may experience challenges with regards to the proper technical capacity to consume, understand and drive the negotiations committee. Kenya's parliamentary committee on trade and industrialization comprises business administrators, lawyers, land economics and survey experts. Their US senate committee's counterparts on finance have senators with expertise in intellectual property rights, counterfeits

control, international affairs, international free trade, and agricultural policy. They have systems to report continuously on the interests of their electorates. Each senator hires a team of experts in various fields critical to their constituents. In the Kenya-United Kingdom Economic Partnership Agreement (EPA), the challenges which were primarily attributed to the parliamentary departmental committee's misunderstandings, lack of comprehension and proper technical knowledge on the terms of the agreement; caused delays in ratification (The East African, 2021; Weru, 2021).



Photo Credit: Parliament

The Kenyan Parliament



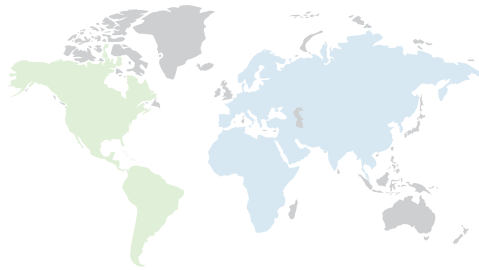


Photo Credit: The Star

President Uhuru Kenyatta, Deputy President William Ruto and Former Prime Minister Raila Odinga

## Kenya's domestic politics

The politicization of bilateral trade agreements and transition politics is bound to affect Kenya's capacity to negotiate effectively. Moreover, Kenya is heading into a turbulent political and economic atmosphere, with the 2022 elections taking centre stage. The polls and Covid-19 response will undoubtedly affect the resources and governments focus on the KUSFTA (Munyi, 2021; Weru, 2021).

As the negotiations remain key to the legacy of the current administration, the urgency to

truncate and accelerate KUSFTA to fit within the constitutional term of the current regime remains a key concern (Weru, 2021). The rush to seal the deal is likely to be disadvantageous to Kenya as it may derail the focus from pursuing specific beneficial outcomes of the agreement to delivering political mileage and regime legacy.

Further, there is a possibility that the 2022 elections may lead to new appointments in the critical ministries tasked with negotiating the KUSFTA. Often,

after elections, the Presidency merges, splits or reorganizes ministries. Elections are likely to result in the change of the chief negotiator and core team. This transitory politics will jeopardize Kenya's leverage and institutional memory that is key to these negotiations. More so, a new negotiator may thrust the negotiations into a new direction altogether. Ideally, the core negotiating team must be retained as much as possible for consistency and efficiency in serving the national interest.



Photo Credit: African Leadership Magazine Blog

## Stakeholder participation

The period before the negotiation resumes gives room for Kenya to partake in further stakeholder participation on KUSFTA. Kenya outlined her objectives then called upon some stakeholders to give their suggestions. Kenya used a bureaucratic strategy, and the input gathered remained somewhat restricted. On the contrary, the American team sought the stakeholders' views before drafting the objectives in an

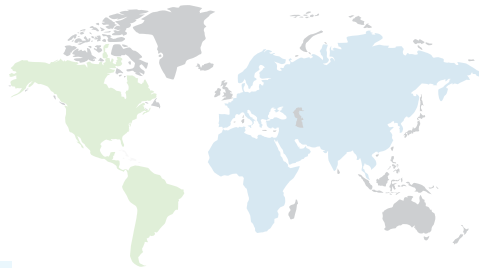
inclusive approach.

The Kenyan negotiations team is willing to get input and shift her goals even as the negotiations are underway. Before the Biden administration begins the negotiations, the Kenyan negotiation team has the advantage of consulting with and bringing onboard stakeholders who feel alienated. This includes think tanks that can provide adequate analysis and technical assis-

tance to the negotiation committees and parliamentary committees.

The involvement of civil society, public and private stakeholders harnesses domestic interests and balances them with external interests. Lack of stakeholder participation is likely to weaken a nation's leverage by overlooking key negotiation issues. Stakeholder alienation is expected to result in stalemates and even





legal, and implementation challenges long after the negotiations have been concluded. It is a concern that the negotiation team may not be aware that some Kenyans may not be supportive of KUSFTA and therefore there is a need for the ongoing deliberations to be brought down to a level that the majority of Kenyans can understand and participate (Midamba, 2021).

The East African Court of Justice case against Kenya was initiated by disgruntled Kenyans who wanted her warned or stopped from proceeding with the KUSFTA negotiations (East

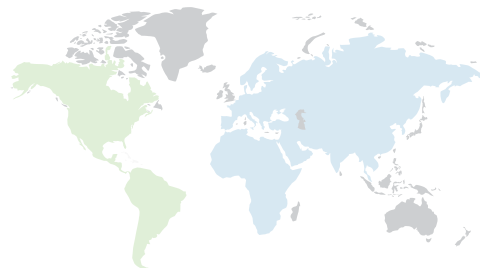
African Court of Justice, 2020; Weru, 2021). The lawsuit points to disgruntled stakeholders that were not incorporated and are using the court to sabotage the negotiation process or seek redress. Likewise, some Kenyans may not understand why KUSFTA is essential for the nation and are therefore being used by some external geopolitical actors as proxies to derail Kenya's ambitions. As this case is underway, it poses a threat that could derail KUSFTA or even Kenya's membership in the East African Community (EAC), a crucial trading bloc for Kenya.

Similarly, the Kenyan diplomatic

mission in the US has hosted virtual meetings on the KUSFTA, but experts portend that they are primarily procedural and rigid. These meetings have mainly been informative on KUSFTA and are yet to tap into the analytical expertise on negotiating and leveraging the US. The prominent and influential Kenyans in the US who possess a better understanding of the American markets and economy have avoided these virtual meetings (Midamba, 2021). Therefore, there is a need for proper synergy with the American diaspora capable of pushing Kenya's agenda informally.



Photo Credit: Brookings Institution



## The Kenyan business environment

Kenya's business environment is yet to attract American investors. The country's business landscape is marred with a number of challenges which include corruption, bureaucratic hurdles and systemic flaws. Yet, Kenya urgently needs to attract American Foreign Direct Investment (FDI) to balance America's trade volumes. More efforts are required outside the signing of KUSFTA to attract American investors. A number of American companies have left Kenya due to corruption, labour unions upheaval, energy costs, uncompetitive investment and working environment, political instability, customs and port bureaucracies (Midamba, 2021).

Kenya's extractive industry is a point of leverage to attract FDI targetting mineral extraction and processing. The country should be seeking to downplay the legacy of unfavourable trade deals that limited her to raw material exports and instead

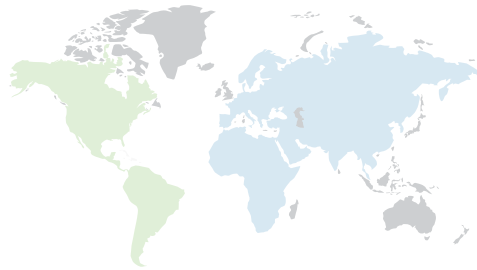
negotiate for capacity and investment to refine and process her raw materials. However, her leverage will diminish if she does not have seamless institutions and systems to leverage.

The county's fruitless struggles to clean up corruption at the Kenya Ports Authority, in government procurement processes and money laundering scandals are some of the factors that are likely to reduce her strength in negotiations. Similarly, She needs to streamline her national-level security risks, such as security lapses in airports and corruption, which are likely to hinder her prospects in negotiating with the US on making visa commitments as part of KUSFTA. So far, Kenya has also not negotiated to have visa privileges. Without a visa waiver program, the country will barely achieve any substantive progress as business owners will lack the mutual privilege to scout

for opportunities in the US.

Both countries are also having a face off over the global tax deal which caps the global minimum corporate tax rate at 15 per cent. Kenya has been reluctant to back the deal which is a key agenda of the Biden administration. The global tax deal conflicts with the recently passed Finance Bill 2020 which allows Kenya to enforce a digital services tax of 1.5% (Ngugi, 2021). This tax affects the sales made through digital platforms of American multinationals such as Google, Facebook and Amazon. The minimum global tax has earned the backing of 132 states including China and this is likely to be a key issue that will affect the resumption of the trade talks. It is likely that Kenya will eventually back the tax deal but this standoff offers an opportunity to leverage quicker resumption to the trade talks.





## External factors

Factors external to Kenya are equally bound to impact on Kenya's leverage in the Kenya-United States Free Trade Agreement negotiations. They include regional and global politics and the political dynamics within the US.



Photo credit: Quartz

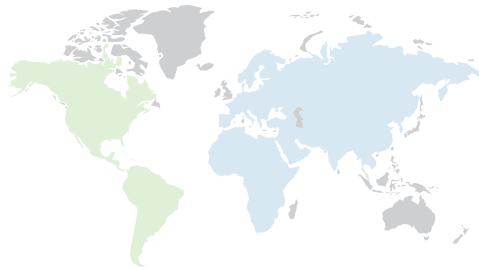
## Regional politics

Regional political dynamics are equally capable of impacting on KUSFTA negotiations. EAC states, Common Market for Eastern and Southern Africa (COMESA) and some African Continental Free Trade Area (AfCFTA) states have condemned Kenya's decision to pursue KUSFTA unilaterally (Caporal, 2020; Ogutu, 2020). They want the US to negotiate with Africa, to provide a prototype to replace AGOA. The AfCFTA region is Kenya's most critical trading partner, and therefore balancing the demands with the USFTA and AfCFTA will be crucial. Critics have portrayed Kenya as being at crossroads to win with one and lose all others. Thus, while

bilateral engagement with the US poses as a menace for Kenya's regional standing, it is also a strategic position. After AGOA expires in 2025, African states, more so, EAC states, will be in need of access to American markets. Kenya needs to exploit her economic, political, geographical and strategic advantage in the East and Central Africa region to ensure that their interests harmonize with those of Kenya. Thus, consistent leadership in the region can cement Kenya's position and downplay critics with proper follow up.

More so, the current US administration favours building alliances over bilateral agreements (Munyi, 2021). Thus,

given that Congress has already endorsed Kenya's trade agreement, it provides an avenue for Kenya to exploit partnerships with other regional partners. Alliances will allow Kenya to balance her relations with Great Powers and African partners. This will make her a regional leader as she can craft political settlements and reward her regional allies. Given that this is the first Sub-Saharan USFTA, the US may be willing to bring more countries into a Kenyan-led alliance (Midamba, 2021; Munyi, 2021). This is crucial to the US as she remains keen on having a more significant American presence to counter the Chinese takeover.



## The US-China trade war

It is becoming evident that Africa and particularly Kenya will be a battlefield for US-China trade wars (CNBC Africa, 2020). The 'war' is both an opportunity and a threat for Kenya since it hinges on her capability to balance her relations, considering her huge trade deficit with China. The world is moving to a tri-polar system, and Kenya has to align with the changing geopolitical powers. If Kenya signs with the US, she will be the target of China. There is a need for Kenya to downplay the risk as her current trade deficit with China is too high. The heavy two-way traffic with USFTA will compound matters for Kenyan businesses.

It is important that the country begins reconsidering imports from the US as China has been reluctant to open up her markets to Kenyan products.

However, the US-China trade war is an opportunity for Kenya to benefit from both powers. In the last decade, China has invested a lot in Kenya's infrastructure but the US is interested in exploiting this infrastructure to displace the Chinese from the Kenyan economy (Caporal, 2020). Previously, the US has focused on countering China's growing influence in Africa rather than developing an Africa-specific

policy. Thus, Kenya is in a strategic position to leverage her infrastructure to create geopolitical networks and political settlements that the US may be willing to exploit for more substantial inroads into the region. America has already shown interest in utilizing Chinese funded infrastructure to leverage US economic strengths in services and advanced manufacturing. Consequently, Kenya must maximize on America's fear of a Chinese takeover and China's urge to take over. As the cold war heats up, Kenya needs to evaluate her trade relations with China accordingly.

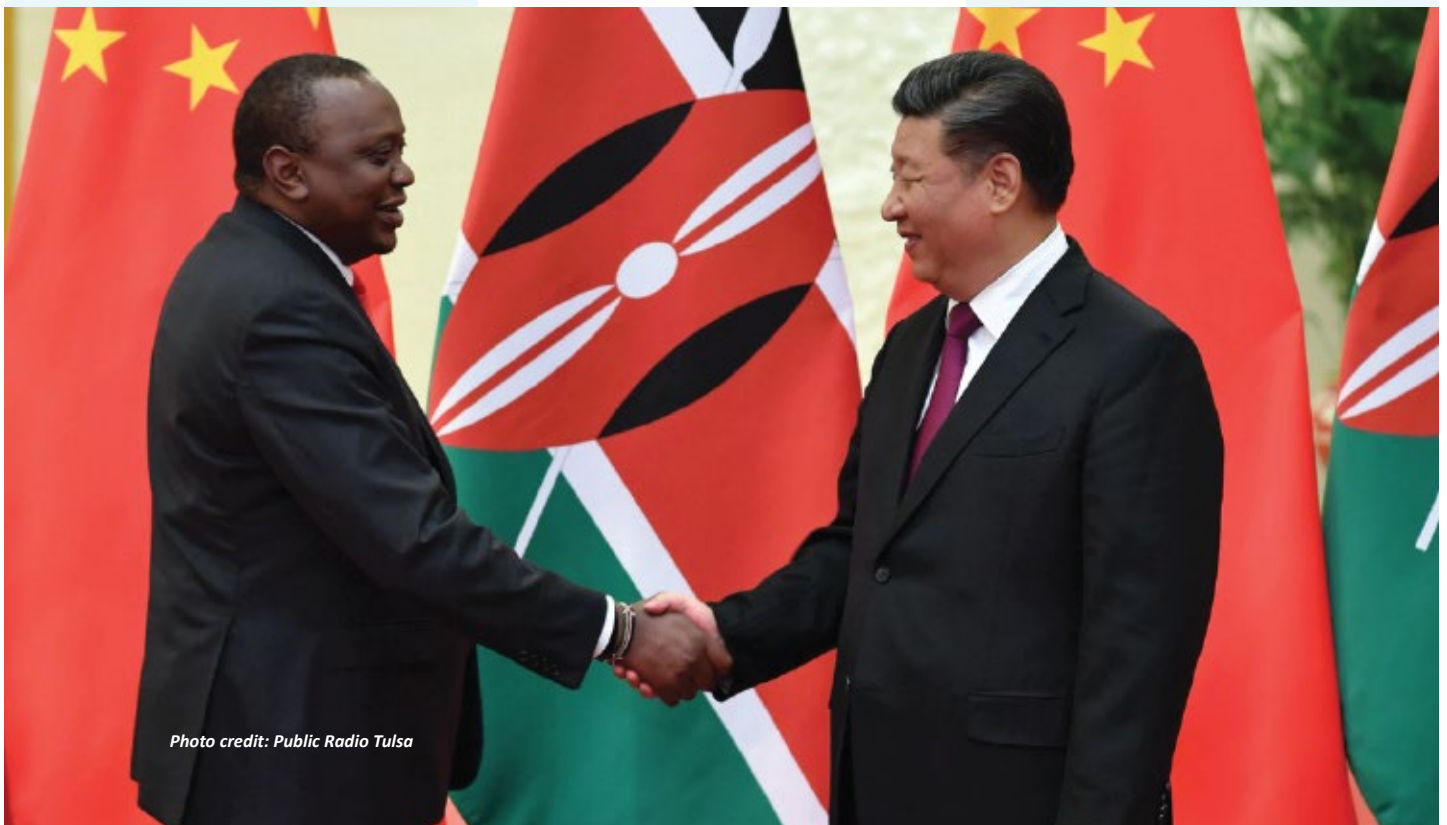
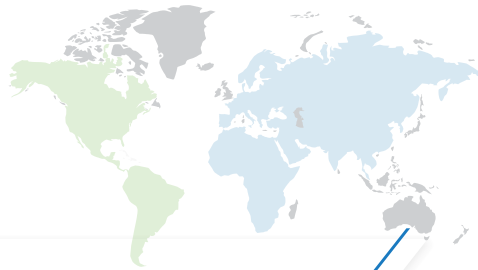


Photo credit: Public Radio Tulsa

Kenyan President Uhuru Kenyatta and Chinese President Xi Jinping in Beijing, China.





## US political landscape

The priorities of Democrats and Republicans on trade, defence and democracy determine how the US will conclude bilateral trade agreements. The current Senate has a 50-50 split, but the 'majority leader is a democrat. The American midterm elections slated for 2022 primaries may affect the composition of the Senate. The foreign policies of the Republican party focus on international trade and reducing the US trade deficit with other countries. They insist on reciprocal trade exchanges and have

been against one-way opening up of American markets (Munyi, 2021). This was evident in how the Trump administration initiated the US-China trade war, renegotiated the North American Free Trade Agreement (NAFTA), Japan–United States Free Trade Agreement (JUSFTA) and United States–Korea (South) Free Trade Agreement (KORUS). The US Senate expects a more powerful agreement than the United States–Mexico–Canada Agreement (USMCA). Republicans focus on ensuring America has

total domination.

Democrats focus on defence, security and democratization and are far more likely to prioritize promoting democracy, human rights and living standards in other nations, especially in Africa. As such, the current democrat majority may be keen on making demands on political reforms. However, they are likely to prioritize the renewal of AGOA, which may diminish the urgency of concluding KUSFTA (Munyi, 2021). Nonetheless, democrats draw a lot



Photo credit: Public Radio Tulsa

US President Barack Obama and Vice President Joe Biden in 2016.





of support from the African American community, and in fact, all members of the Congressional Black Caucus are currently from the Democratic Party. Race politics in America is presently heightened and is a very divisive issue. However, Kenya's leverage on the Demo-

cratic party is yet to be fully utilized. The party remains the biggest ally Kenya can forge in Washington. More so, the Obama-factor remains a point of influence in the Biden administration, and Kenya has the opportunity to take advantage of it before significant

changes occur (Midamba, 2021; Munyi, 2021). The democrats provide the most accessible avenue of winning the hearts and minds of Americans and Washington DC in lobbying for the resumption and fast-tracking of the negotiations.



*Photo credit: Secretary Antony Blinken*

*Kenya's Cabinet Secretary for Foreign Affairs Ambassador Raychelle Omamo and U.S. Secretary of State Antony Blinken in Washington, July 2021.*

## Conclusion

Kenya's leverage in the KUSFTA negotiations will be based on her ability to carefully leverage her strengths and strategically surpass her limitations. The capacities of the negotiation team, the urgency to complete the negotiations before the 2022 elections and dismal stakeholder participation remain the most substantial internal weaknesses and threats to favourable leverage on KUSFTA. The democrat-republican policies in US politics, the China-US trade wars and regional politics are possible threats, but they also provide strategic opportunities that Kenya can employ to influence a Kenyan-centric free trade agreement. Therefore, it is important that Kenya considers how to strategically leverage her strengths when KUSFTA negotiations resume.





## Recommendations

01

The Presidency should :

- a) Insulate the negotiation team from the vagaries of the elections and transitions by protecting their tenure and mandate within a specialized committee that is not rooted in any ministry.
- b) Institute an executive investment committee in the Office of the President to clean up the business environment and rid American investors of bureaucratic hurdles as Kenya seeks to attract massive Foreign Direct Investment.
- c) Ride on the Obama factor, and invite the former US President to Kenya for a visit to leverage his support as KUSFTA gets underway.
- d) Leverage the US interest on a global minimum tax rate to push the US to get back on the KUSFTA negotiations.

02

The Ministry of Industrialization, Trade and Enterprise Development, and parliament should seek stakeholders input, think tanks, and experts to analyse and provide technical expertise on American interests, needs, and markets.



Photo credit: State House Kenya

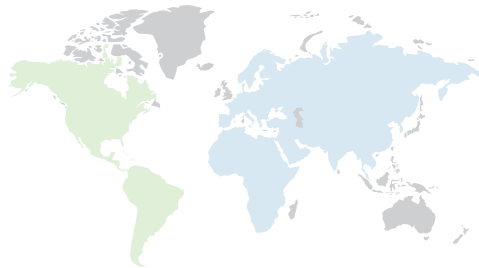
President Uhuru Kenyatta with visiting United States of America (US) Secretary of State Antony Blinken in November 2021, at State House Kenya.



Photo credit: tralac.com

- 03 ➤ The Ministry of Foreign Affairs and Ministry of Trade, Industrialization and Enterprise Development should negotiate for a political settlement with the EAC states who seek to benefit from KUSFTA in order to gain their support. Kenya should shed off the tag of being a 'reluctant hegemon' and take advantage of her current leadership position to get regional support for KUSFTA.
- 04 ➤ The negotiation team should leverage Chinese funded infrastructure such as ports and roads, geographical position, mining-based raw materials to advance her political influence and to attract American concessions.
- 05 ➤ The Ministry of Foreign Affairs and the negotiation team should seek the assistance of influential Kenyan business community in the US, Kenyan diasporas, working and living in the US to act as honorary consuls to informally provide analysis on American interests and leverage points, and attract FDI from their spheres of influence.
- 06 ➤ In the build-up to the next phase of the negotiations, Kenya should find ways of facilitating Kenyan businesses to access financing through institutions such as the Africa Export-Import Bank (AFREXIMBANK) and others to enable them easily export Kenyan products to the US.
- 07 ➤ Kenya should complement the role of Rational 360 Public Relations firm by creating a consortium of consultants and influential US lobby groups such as the Corporate Council for Africa and the Kenya-US Chamber of Commerce (AMCHAM), with whom they already have a strong working relationship.





## References

Balls, E., Weinberg, N., Redmond, J., & Borumand, S. (2020). Will prioritizing a UK-US Free Trade Agreement Make or Break Global Britain? (No. 136; M-RCBG Associate Working Paper Series |, Issue May).

Caporal, J. (2020). Going Solo: What Is the Significance of a U.S.-Kenya Free Trade Agreement? Center for Strategic and International Studies. <https://www.csis.org/analysis/going-solo-what-significance-us-kenya-free-trade-agreement>

CNBC Africa. (2020). Kenya-US free trade talks are under way: what Nairobi must get right from start. CNBC Africa. <https://agoo.info/news/article/15790-kenya-us-free-trade-talks-are-under-way-what-nairobi-must-get-right-from-start.html>

Crump, L. (2017). Cooperation and Closure in Bilateral Trade Negotiations (No. 17; Global Cooperation Research Papers).

Cunningham, R. O. (2019). Leverage Is Everything: Understanding the Trump Administration's Linkage between Trade Agreements and Unilateral Import Restrictions. Case Western Reserve Journal of International Law, 51(1).

East African Court of Justice. (2020). Kenya-FTA-Case -Reference-No.-5-of-2020. EACJ.

Fibre2Fashion. (2020). Kenya-US FTA talks 1st round likely to conclude by Aug 14. TRALAC. <https://agoo.info/news/article/15789-kenya-us-fta-talks-1st-round-likely-to-conclude-by-aug-14.html>

Menya, W. (2021). Kenya Hires U.S. Firm to Lobby Trade Deals With Washington. All Africa. <https://allafrica.com/stories/202104190037.html>

Midamba, N. (2021). Strategies for Kenya's Leverage on the Kenya-United States Free Trade Agreement (KUSFTA) Negotiations. (Paper Presentation) GLOCEPS Workshop on Promoting Kenya's Strategic Interests on Domestic and International Stances, Nairobi, Kenya

Ministry of Industrialization, T. E. and D. (2020). Proposed Kenya- United States of America Free Trade Agreement: Negotiations Principles, Objectives and Scope. Republic of Kenya.

Munyi, E. (2021). Kenya-US Free Trade Agreement: Strengthening Kenya's Trade Diplomacy in an Era of WTO Impasse. (Paper Presentation) GLOCEPS Workshop on Promoting Kenya's Strategic Interests on Domestic and International Stances, Nairobi, Kenya

Ngugi, B. (2021, July 21). Kenya withholds vote for US global tax deal. Business Daily, 1-4.

Ogut, M. (2020). Caught between Africa and the West: Kenya's proposed US free trade agreement. Africa Portal. <https://www.africaportal.org/features/caught-between-africa-and-the-west-kenyas-proposed-us-free-trade-agreement/>

The EastAfrican. (2021). Farmers sue to stop Kenya-UK trade deal. The East African. <https://www.theeastafrian.co.ke/tea/business/farmers-sue-to-stop-kenya-uk-trade-deal-3308326>

Weru, J. (2021). Presentation on the Status of the Kenya United States Free Trade Agreement: Organization and Strategy. (Paper Presentation) GLOCEPS Workshop on Promoting Kenya's Strategic Interests on Domestic and International Stances, Nairobi, Kenya



# Prioritization of Covid-19 pandemic policies to fast track Kenya's economic recovery

**Michael Owuor**

## Executive Summary



The rejuvenation of Kenya's economy is anchored on alleviating the pandemic induced social and economic effects. The paper argues that prioritization of the accelerated vaccination policy is fundamental to swift economic recovery. It affords a better tradeoff by insulating the nation from disruptive nature of the pandemic. Equally, it ameliorates the effects of the pandemic containment measures on businesses and households. With the promise of a normalized operating environment, the government's capacity to provide social and economic stimulus packages would be enhanced albeit with the constraints of an encumbering debt distress, widespread unemployment instigated by the pandemic and predominance of public sector procurement fraud. In this light, the return to socio-economic normalcy enables the Kenyan marketplace to be better positioned to take advantage of investment opportunities ranging from foreign direct investments by Kenyans in diaspora and bilateral ones through the ongoing free trade negotiations between Kenya and United States. Discussions on these issues anchor insights and policy recommendations for economic recovery amidst the Covid-19 pandemic.



Photo Credit: Voice of America





## Introduction

The Covid-19 pandemic poses enormous threats to national economies and health of populations. Lives and employments have been lost or adversely affected (NTP, 2021). The informal sector and small firms that provides employment to over 17.5 million adults and contributes 24% to GDP experienced a 45% decline in revenue. Further, 20% of businesses that were active in February 2020, closed by March 2021 (FDS Kenya, 2021). The Kenyan economy

lost over two million jobs during the second quarter of 2020 (KNBS, 2020a). Despite these steep social and economic costs on businesses, government and communities, policymakers were obligated to promulgate containment measures in order to preserve the health security of the nation. While the mutating nature of the virus is a fundamental concern to economic health and recovery, much of the resultant ill-effects have been due to factors that predate the

pandemic. In the Kenyan context, these exacerbating issues include debt distress, unemployment, and public sector fraud. Therefore, expediting a return to economic normalcy necessitates mitigating both the transmission of the virus and underlying economic factors. These are the foundation blocks for realizing stability in the local and global marketplaces that are innate for economic undertakings.



Photo credit: Citizen TV

President Donald Trump hosting President Uhuru Kenyatta and the Kenyan delegation at The White House in August 2018.



## Background



Photo credit: medium.com

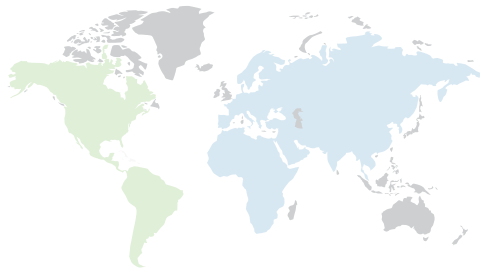
The Covid-19 pandemic's shakedown of the global economy has been monumental and far-reaching (Viscusi, 2021). The impact on investment, accumulation of human capital and global value chain is expected to postdate the pandemic (IFC, 2020; World Bank, 2020b). In the absence of targeted policy interventions, economic recovery in emerging and developing economies like Kenya are predicted to endure decade-long disruptions. Prudent and comprehensive policy efforts are therefore essential to spur robust, sustainable and equitable recovery. These social and economic policies should be geared at improving the health of populations while enhancing their employability.

Economic policy actions have to strengthen the health system to procure vaccines and accelerate inoculation. This is the preferred and cost-effective approach to obtaining herd immunity for the Kenyan population. Inoculation significantly reduces the socio-economic costs of the pandemic (Gupta & Baru, 2020). The alternative is to be apathetic and await herd immunity to occur naturally. Equally, these policies have to compliment initiatives that address economic concerns and promote economic investments and productivity. Legislative and policy frameworks on debt negotiations for lower interest rates and longer repayment periods and curbed borrowing are invaluable for balanced budgeting. Similar benefits are

realizable from mitigating public procurement fraud, encouraging efficiency and accountability.

In conclusion, forward-looking policies should be prioritized as attractive options for extended growth and development. They include investments in green projects and technologies as they are more equitable and adaptive to emerging environmental challenges; and long-term planning and action for transition from low-value manufacturing and agriculture (MoIT&ED, 2020; Nganga, 2020). While pursuing opportunities through free trade agreements, Kenya can leverage on these opportunities to attract investments that will enhance high value manufacturing and agriculture.





## Methodology

Data from this paper was collected from expert informants with knowledge and understanding on health public policy and political economy. The primary data was supplemented with secondary and the analysis of informed the documentation of key findings and recommendations.

## Key Findings

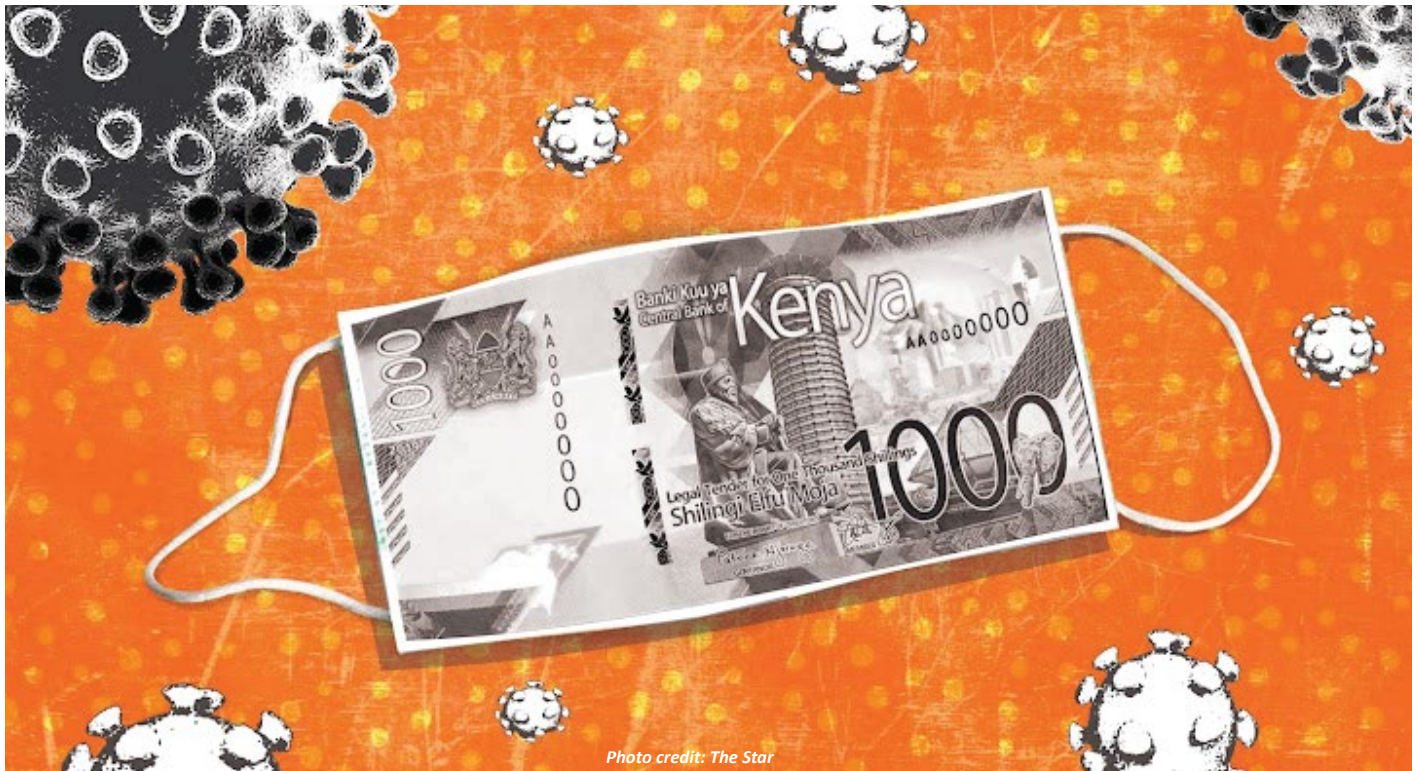


Photo credit: The Star

### Vaccination policy equates to economic policy

The cornerstone policy for a sustainable path to economic rejuvenation is one that secures an impregnable return to normalcy—an accelerated inoculation policy (Cem et al., 2021; Gagnon et al., 2021; Spiegel et al., 2021). Higher inoculation rates are anticipated to realize a faster return to economic normalcy due to containment of transmission rates, alleviation of strain on the health system and lifting of measures on cessation of movements. Economies cannot reopen safely or sustainably

when the pandemic is uncontrolled (The Economist, 2021; WHO, 2021). Policy interventions that eschew mass inoculation are ineffectual in the face of the mutating virus, inadequate welfare support, and infection spikes that occur every four months (Boettke & Powell, 2021; Penn Wharton, 2021). Super spreader activities are largely inevitable due to the Kenya's peculiar dynamics already engrained in the country's fabric. They include the reopening of learning institutions, large political gatherings

and aberration to prevention measures in public transportation sector.

The Kenyan economy is not resilient to incessant curfews and lockdowns. These are synonymous with measures taken globally. However, public policies that impose country-wide isolation and mobility restrictions impede on the productivity of workers. In turn, they pose an increasing threat on the health security of populations (Goldsztejn et al., 2020). Therefore, the govern-



ment's plan to vaccinate 30% of the population by 2023 is inadequate for the achievement of the required herd immunity and will inhibit economic recovery (World Bank, 2021b). Moreover, the beneficial economic tradeoff justifies the prioritization of inoculation policy. The procurement of the most expensive vaccine will cost an estimated \$700 million. This equates to 12.5% of tax revenue lost from April to December 2020 and 0.073% of Kenya's annual gross domestic product (GDP) (CBK, 2020; World Bank, 2021a). Spending on accelerated inoculation are likely to be exceeded by the resultant revenues from tax collections and lower welfare allocations to individuals and

businesses (Gagnon et al., 2021).

The stagnation of Covid-19 vaccination is detrimental to economic rejuvenation. Most of the financial needs and support amidst the prevailing pandemic threat are recurrent (IMF, 2020b). Though germane in the short-term, they defer the debt distress problem that Kenya should be trimming. Already, the International Monetary Fund (IMF) has provided \$739 million to provide for additional spending on health and social protection (IMF, 2020a). An additional \$2.4 billion low interest financing has been pledged and partly remitted by the IMF towards budgetary

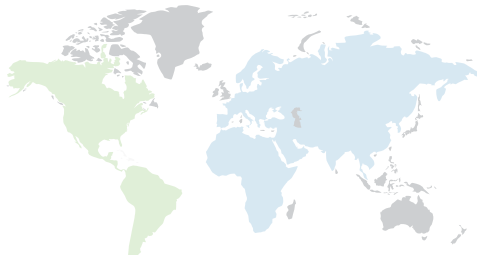
support for the year 2021/22 (IMF, 2021a).

With the government experiencing liquidity challenges in balancing the 2021/22 budget, policymakers will need to be ingenious in order to scale up inoculation. The budgetary allocation of KES 14.3 billion and alternative facility from the World Bank should be allocated to the acquisition of single dose vaccines such as Johnson and Johnson (NTP, 2021; World Bank, 2021c). Priced at \$10 per does, the financial outlay can secure over 20 million doses. This is more cost effective when compared to most double dose vaccines. For a similar financial commitment, the country can



Photo Credit: Voice of America





secure around 5 million pieces of double-dose vaccines. The estimated 20 million single dose vaccines are adequate for over 60% of the Kenyan population eligible for vaccination. This will enable the achievement of herd immunity as the country edges closer to the desired inoculation threshold of 60-70% of the population.

In addition, policymakers in the diplomatic circles should strengthen lobbying through the African Union for a greater share of the one billion euro vaccine donation pledged by major industrial nations (European Commission, 2021; Evenett, J Simon et al., 2021; OEDC, 2021; UNICEF, 2021; White House, 2021). These policy options

should be pursued concurrently with the existing undertaking through the Covid-19 Vaccine's Global Access (COVAX) facility. In conclusion, an accelerated inoculation policy is unequivocally a safer bet to improving the population health security and boosting the drive towards Kenya's economic rejuvenation (Gagnon et al., 2021).



Photo Credit: theconversation.com

## Addressing pandemic instigated unemployment

Typically, the Kenyan economy creates 900,000 employment opportunities in a calendar year. However, an 5.8% striking of the economy within the April-June 2021 quarter due to the pandemic and subsequent restriction, led to the loss of 1.8 million jobs (KAM, 2021; KNBS, 2020a; World Bank, 2020a). This represents a two-year job loss. The unemployment rate rose to a four-year high of 10.4% in June

2020 (World Bank, 2021b). The loss was not helped by a subsequent shrinkage of the economy by 1.2% in the subsequent quarter and a modest recovery of 1% in the last quarter of 2020. Overall, the 2020 economy is estimated to have grown by 0.6%, an indicator of its resilience amidst the pandemic (NTP, 2021). However, the recovery of jobs will be enduring due to the pandemic's

devastating effect on production and work centers. Though the economy witnessed recovery at the tail end of 2020 due to a resilient agricultural sector, this should be supported in the Economic Stimulus Recovery Strategy. The implementation of the planned Post-Covid Economic Recovery Strategy should support and advance initiatives in economic sectors that hold potential for growth (NTP, 2021).

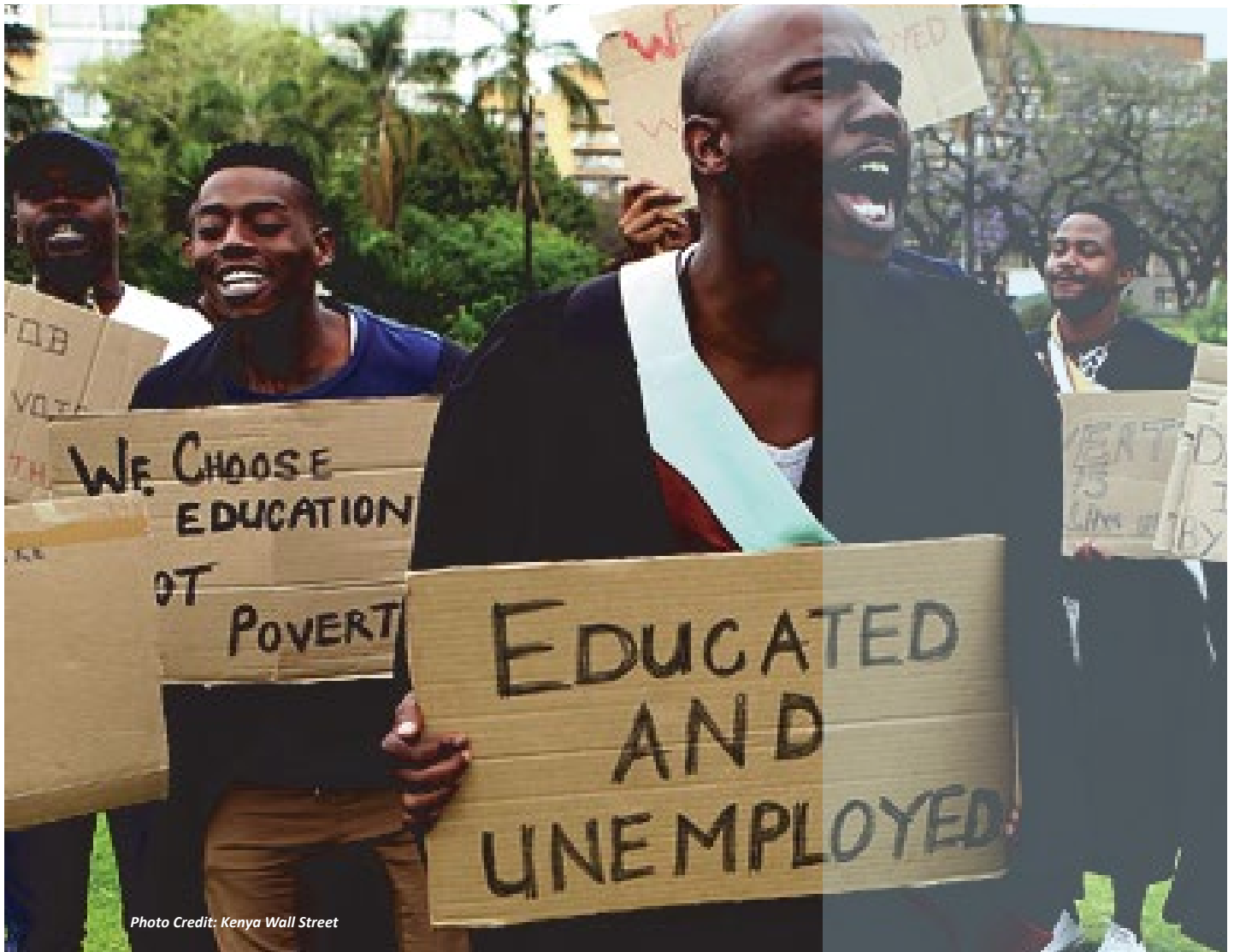


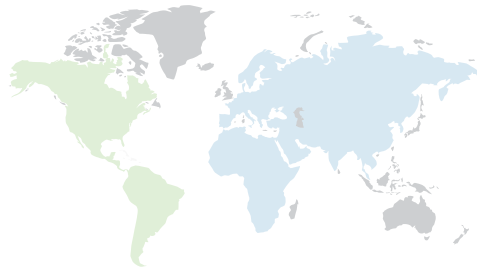
Photo Credit: Kenya Wall Street

In addition, accelerated vaccination promises the potential for recovery of lost jobs in the country's traditional sector and creation of additional permanent opportunities in the digital space. Increased vaccination will bring the country back to pre-pandemic job employment levels. This is the shared hope learnt from the United States where the Covid-19 program is improving hiring for old and new positions. The job report showed that an additional 916,000 and 266,000 jobs were created in March and April 2021

respectively. The biggest gainers were the construction sector (added 110,000 jobs), leisure and hospitality (280,000 jobs) and bar and restaurants (176,000 jobs) (Bureau of Labour Statistics, 2021). The US job numbers are projected to be higher once government benefits for furloughed workers ends. A breakdown of the new jobs bears striking similarities with Kenya's employment landscape. The most impacted industries are those that rely on contact interaction between actors. Mitigating the transmis-

sion of the virus in the sectors would improve commerce. An accelerated inoculation program is therefore a robust, speedy and cost effective way to mitigate the pandemic instigated unemployment. This policy action guarantees the return to a normal operating environment and removal of restrictions which is fundamental for the permanent recovery of two million job opportunities in the manufacturing, tourism and leisure sectors.





## Leveraging on the structure of Kenya's economy

While Kenya is classified as a lower-middle income country, her economic sectors are distinctively of low-value and low-productivity relative to the structure of the economy (World Bank, 2021b). With targeted policy actions and investments, potential for growth is vast. Such potential can engender job creation and enterprise development necessary for economic recovery. The analysis of Kenya's agricultural sector illustrates this argument. Though resilient in the face of the pandemic,

structural and productivity challenges abound (IEA Kenya, 2021; World Bank, 2021b). The sector contributes 34% of the country's annual GDP while employing a disproportionate 60% of the labor force (KNBS, 2020b). Due to the predominance of low value labor, the sector is indicative of the country's poverty status. Most of the people living below the poverty line are predominantly engaged in the agricultural sector (KNBS, 2020b). The low-value production approach

corresponds to the country's 2019 GDP per capita income of \$1,899, or \$158 monthly (NTP, 2021; World Bank, 2021a).

Likewise, the manufacturing sectors accounts for 7.5-9% of annual GDP, which is significantly lower than the government's target of 15% (KAM, 2021; KNBS, 2020b). The rest of Kenya's GDP contribution emanates from the service sector which includes the banking, finance, information technology and the



informal sector.

Prioritization of economic policies that encourage the organic transition of the drivers of key economic sectors from low to high value production should be encouraged. Based on the structure of the Kenyan economy, opportunities abound in strengthening the competitive advantages of key employment creators - the manufacturing and agricultural sectors. Value addition initiatives like the mechanization and mandated value addition of the agricultural products are key for high value productivity. Equally, policies should prioritize the transformation of the import substitution (Buy-Kenya, Build-Kenya) strategy towards export-led manufacturing. The country's manufacturing base provides the platform to expand the sector's GDP contribution to the

targeted levels. Increase in manufacturing output and product value are fundamental.

The evolution of the Vietnamese economy provides valuable lessons. Their export-orientation strategy underpins her gradual growth and integration with regional and world economies. Export processing zones, industrial zones and economic zones helped her attract local and foreign investors and improve her industrial development capacity (Eckardt et al., 2018; Thi et al., 2014). Relevant to Kenya's manufacturing puzzle, Vietnam restructured, consolidated and harmonized her policies to improve cost and quality competitiveness and encourage foreign investments. In this regard, Kenya needs an export-led approach anchored on long-term approach model spanning two to three decades.

This will enable the creation of competitive advantages, strategic learning and harmonious transition from agricultural to manufacturing based economy.

Nonetheless, the success of this approach requires that policymakers address structural challenges that injure the country's attraction as a premier investment destination. These include a punitive tax code, multiple taxation at national and county levels, and a convoluted regulatory environment (KAM, 2021). Policymakers should leverage on the structure of the Kenyan economy and promote existent and emerging opportunities in the ongoing free trade negotiations with the European Union and the United States.



Photo Credit: ODI





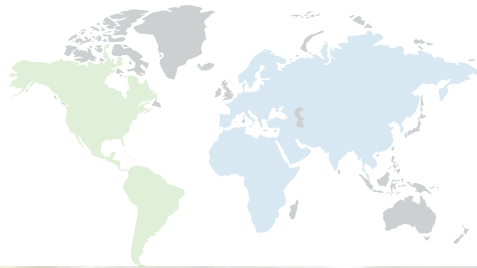


Photo Credit: Strathmore University

## Mitigating debt distress

The Covid-19 pandemic has exacerbated Kenya's debt distress. Economic disruptions at the global and national levels have continued unabated and at an unprecedented scale (IFC, 2020). This has coincided with the Kenya's continued budgetary deficits over the last eight years. Consequently, the country's debt portfolio has ballooned to 69% of GDP. This is above the 64% public-debt to GDP ratio threshold. This is unsustainable and would impact economic growth when maintained for over a decade (Caner et al., 2010; World Bank, 2021b). Equally, the country's average debt deficit of 7.8%

is more than twice the recommended 3% for economies of Kenya's scale and structure (IMF, 2021b; World Bank, 2021b).

While acquisition of debt is recommended to manage budgetary deficits and finance infrastructure development, it should be carefully planned and managed to avert debt distress. The net implication of debt distress is national financial strain. This compromises the government's ability to meet its budgetary obligations.

To resolve this problem, its genesis have to be addressed.

The country's situation is characterized by two causative factors-political and expenditure problems. The loan facilities by the IMF address these factors through supporting government reforms and financial needs (IMF, 2021b). These are ultimately aimed at resolving the debt deficit problem. Long-term fiscal consolidation and reduction of fiscal deficits have been proposed for implementation. Fiscal consolidation is geared towards more efficient and transparent spending and reduction of financial distress over the next three years through a balanced budget. As a policy priority, Kenya should



Photo credit: KIPPRA

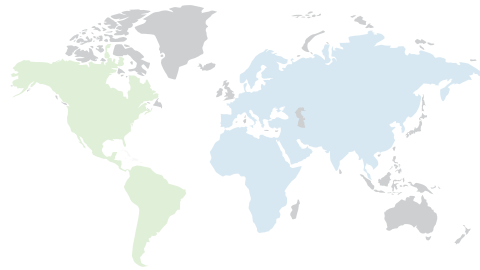
strive to bring her expenditure in tandem with the income. The spending rationalization plan captured in the 2021 Budgetary Policy Statement (BPS) involves a combination of revenue mobilization and spending rationalization (NTP, 2021). The plan is intended to reduce the fiscal deficit to below 4% of GDP by 2024/25. The BPS for 2021 needs to address the widening budgetary deficit. The 2021/22 daily estimates for revenue and expenditure are KES 5.4 billion and KES 8.1 billion respectively. The 2021/22 targeted revenue represents a marginal increase when compared to revenues of KES 4.8 billion and KES 5 billion in 2019/20 and 2020/21. Likewise,

the target expenditure has increased when compared with the 2019/20 and 2020/21 figures of KES 7 billion and KES 7.9 billion respectively. A daily deficit of KES 2.7 billion in a pandemic impacted period is untenable. This will increase pressure for additional tax revenue and dependence on foreign debt.

The debt distress especially with a significant proposition of national debt is denominated in foreign currency. This makes the country susceptible in the face of value loss of local currency. Alternative financing at cheaper rates and longer repayment periods than those

offered through commercial arrangements are most sustainable for debt rationalization (IEA Kenya, 2021). The ongoing infrastructural projects should be finalized through similar facilities. Moreover, policymakers should deliberately curb commitments for new infrastructural projects until the country's financial health improves. Again, accelerated inoculation is essential in this regard. The reduction of budgetary deficits and mitigation of debt distress are linked to revenue mobilization, economic growth and spending rationalization measures.





The government can, additionally, offload shares in profitable entities like Safaricom (KES 456 billion) and Kenya Commercial Bank (KES 10 billion). The state can also maintain a buy-back option that it can exercise in the future when the cash flows are in better health. The state should also divest from perennial loss making entities that constrain its resources. These policy actions are sustainable and predictable with the easing of the pandemic instigated shocks. The large daily deficits illustrate the urgency to curb excesses in public sector expenditure. Public

procurement in petroleum, travelling and communication expenditure are some areas for budgetary rationalization. Government audit reports estimate that government ministries, departments and agencies, outside the military and police pay for petroleum products worth four million kilometers every single day. On the other hand, the Stadium Management Board books of accounts spend a monthly average of USD 230 per employee.

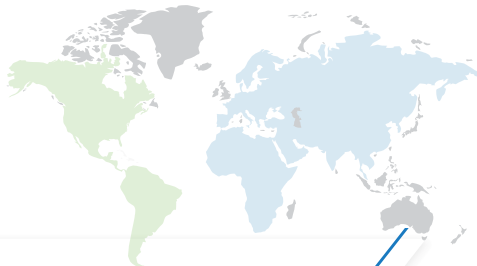
Solutions to these extravagant expenditures abound through

fiscal transparency of procurement information, publication of audited expenditures of ministries, departments and agencies, and review of current legal frameworks for asset declarations of senior government officials. Transparency of information of public procurement and information of beneficial owners of companies will aid curb the proliferation of conflict of interest and profligate graft. Indeed a thorough audit of government vote-heads provide opportunity for the realization of balanced budgeting.



Photo credit: State House

President Uhuru Kenyatta with the World Bank Vice President for Africa Hafez Ghanem.



## Encouraging foreign direct investment

The potential for economic rejuvenation and transition into a manufacturing hub rests on Kenya's ability to increase her low portfolio of Foreign Direct Investments (FDIs) (World Bank, 2021b). This would anchor the country's competitiveness in the global supply system which has transitioned from a singular to a multi-country manufacturing system. In addition to the domestic manufacturing base, countries are adopting a systematic approach to manufacturing while enhancing bilateral linkages in research and production. Manufacturers in the global marketplace prioritize offshoring and outsourcing their production and assembly units in order to improve supplies and cost resilience. Nations

are strategically positioning themselves in the global value chain and adapting their manufacturing-related policies in order to strengthen their competitive advantages (SME, 2020; UNIDO, 2013). Product components are manufactured in different countries and later shipped into singular locations where they are assembled into complete products. FDIs therefore afford countries entry into beneficial the global value chains platform.

As a result, Kenya's policy-makers need to appreciate that the global value chains have transitioned from singular locations to regional manufacturing. Therefore, for the country to realize her manufacturing blueprints, policy opportunities

for competitive manufacturing and technology sharing should be prioritized. Conversely, the immense potential of the manufacturing industry remains untapped. The sector's ability to drive the recovery of the national economy and technological advancement was witnessed in South East Asia region remains constrained by structural and regulatory challenges (UNIDO, 2013). The implication of this reality will be the re-evaluation and adaptation of the Buy-Kenya, Build-Kenya manufacturing mantra. It is inherently uncompetitive and ill-aligned to the global system manufacturing trends and Just-In-Time delivery practices.



Photo credit: People Daily

President Uhuru Kenyatta with International Monetary Fund (IMF) Director for African Department, Mr. Abebe Selassie



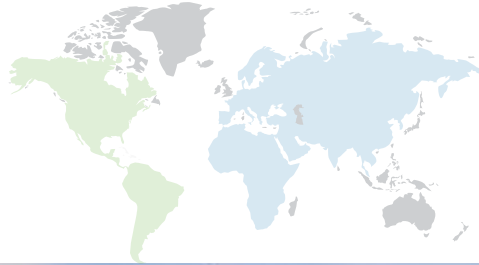


Photo credit: The Star

*President Uhuru Kenyatta at the commencement of Dongo Kundu Special Economic Zone in Mombasa county*

The ongoing free trade negotiations with the United States (KUSFTA) and the United Kingdom Economic Partnership Agreement (EPA) provide an opportune window to pursue and enhance FDIs. To this end, Kenya should strategically align and link FDIs sourcing plans with sub-sectors where competitive and cost advantages can accrue. Strategic manufacturing locations such as the Specialized Economic Zones (SEZs) in the coastal regions are most preferred. Similar to other facilities globally, SEZs are predominantly located in close

proximity to abundant port infrastructure (Eckardt et al., 2018; Thi et al., 2014). The cost of transporting raw materials inlands and then the finished products to the port only add to cost of production. Ultimately, they yield expensive and uncompetitive products in the global markets.

Consequently, the government should leverage on the inherent geographic opportunities availed at the SEZ at Dongo Kundu, Mombasa county. The industrial park in Mombasa will aid in recovery on the

region's and the national economies.

In the future, other SEZ projects can be pursued near the Lamu Port-South Sudan-Ethiopia-Transport Project. It is equally important that the FTAs and other agreements are mutually beneficial to both countries (KAM, 2021). She needs to negotiate for a part of the global value chain in which the FDIs will be utilized to drive the Kenya's export-led manufacturing and the country's economic growth.



## Tackling public sector procurement fraud

The challenge of corruption and its impact on economic growth are well documented. Widespread institutional and legislative reforms have been implemented to mitigate the vice. With regards to economic rejuvenation amidst the pandemic, policymakers need to address public sector procurement fraud which is directly linked to budgetary management and efficiency.

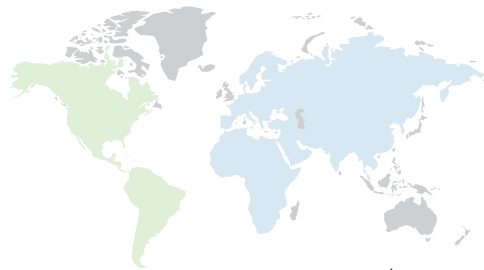
The government of Kenya controls the 30% portion of the annual national budget which is dedicated to the procurement of government goods and services (FDS Kenya, 2021; NTP, 2021; World Bank, 2021b). This typically translates to annual purchases of one trillion worth of goods. Instead of using this

purchasing power to drive down prices, purchases are predominantly made at the highest possible prices. As the single largest buyer in the economy, such decisions greatly contribute to dysfunctional markets, price distortions and inflation.

As a policy priority, the government has the power to utilize its purchasing power to promote market efficiency. Government efficiency infused through public procurement injects efficiency in the entire market. Key to this is the need to promote transparent public sourcing for products and services at the lowest cost and the highest attainable quality (Andersson et al., 2019; The Economist, 2012).

Policy options in this regards include tendering for procurement and payroll services from professional procurement firms. The prices in the procurement agreement should be capped at a fixed percentage of the prevailing market value. In instances where procurement firms charge exorbitant prices or pays wages to ghost workers, they should be legally obligated to compensate the government for resultant losses. This arrangement will allow government to concentrate on its core mandates thus improving public service delivery and financial discipline in the public sector.





## Conclusion

The cornerstone of Kenya's economic rejuvenation correlates to the acceleration of Covid-19 vaccination. In the midst of the pandemic, mass inoculation provides a stable platform to pursue other policy priorities for economic growth. Additionally, this policy provides the stage for the return to economic normalcy as it provides a guaranteed premise against the disruptive containment and restrictive approach. Policymakers should concurrently address public sector procurement fraud, pandemic instigated unemployment and debt distress while pursue FDI opportunities for the high value manufacturing and agricultural production.



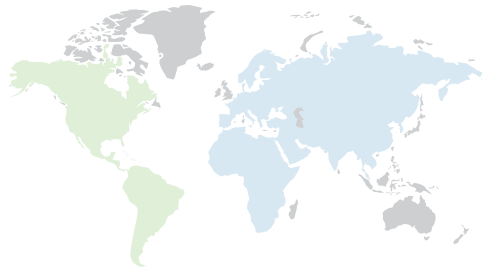
Photo credit: People Daily

US President Barack Obama and Vice President Joe Biden in 2016.

## Recommendations

The paper recommends the following policy priorities to be pursued for rejuvenation of the economy;

- 01 ➤ The Presidency in conjunction with the Kenyan Parliament to rigorously promote efficiency in the allocation and utilization of resources as the single largest buyer of goods and services. Efficiency in public finance management is a competitive advantage towards the rejuvenation of the Kenyan economy.
- 02 ➤ The National Treasury should adopt a hybrid approach to strengthen the capacity of health care system for the accelerated procurement and mass rollout of the Covid-19 vaccine.
- 03 ➤ The Kenya government should prioritize export-led trade in high value manufacturing and agricultural production.
- 04 ➤ The Kenyan government should prioritize the management of debt deficit to 3%. This can be undertaken through conducting forensic audit of public sector expenditure for balanced budgeting, outsourcing of government procurement and payroll management, offloading stakes in profitable entities with a share buy-back options and divesting from lossmaking state owned entities.



## References

Andersson, F., Jordahl, H., & Josephson, J. (2019). Outsourcing Public Services: Contractibility, Cost, and Quality. [www.iza.org](http://www.iza.org)

Boettke, P., & Powell, B. (2021). The political economy of the COVID-19 pandemic. *Southern Economic Journal*, 87(4), 1090–1106. <https://doi.org/10.1002/soej.12488>

Bureau of Labour Statistics. (2021). The Employment Situation- May 2021. [www.bls.gov/cps](http://www.bls.gov/cps)

Caner, M., Thomas, G., & Fritzi, K.-G. (2010). Finding the Tipping Point—When Sovereign Debt Turns Bad. <https://documents1.worldbank.org/curated/en/509771468337915456/pdf/WPS5391.pdf>

CBK. (2020). Annual Report and Financial Statements 2019/2020. [https://www.centralbank.go.ke/uploads/cbk\\_annual\\_reports/1456103982\\_ANNUAL\\_REPORT\\_2020\\_Posted\\_on\\_Website.pdf](https://www.centralbank.go.ke/uploads/cbk_annual_reports/1456103982_ANNUAL_REPORT_2020_Posted_on_Website.pdf)

Cem, Ç., Selva, D., ebner, K.-Ö., Sevcin, Y., & Yildirim, A. M. (2021). The Global Case for Global Vaccinations: An Epidemiological Model with International Production Networks (No. 28395). [https://www.nber.org/system/files/working\\_papers/w28395/w28395.pdf](https://www.nber.org/system/files/working_papers/w28395/w28395.pdf)

Eckardt, S., Mishra, D., & Tuan, V. D. (2018). Vietnam's manufacturing miracle: Lessons for developing countries. *Brookings*. <https://www.brookings.edu/blog/future-development/2018/04/17/vietnams-manufacturing-miracle-lessons-for-developing-countries/>

European Commission. (2021). €1 billion Team Europe initiative on manufacturing and access to vaccines, medicines and health technologies in Africa. [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_2594](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2594)

Evenett, J Simon, Bernard, H., Rocha, N., & Ruta, M. (2021). The Covid-19 Vaccine Production Club: Will Value Chains Temper Nationalism? <https://documents1.worldbank.org/curated/en/244291614991534306/pdf/The-Covid-19-Vaccine-Production-Club-Will-Value-Chains-Temper-Nationalism.pdf>

FDS Kenya. (2021). 2020 Annual Report- Financial Services Deepening Kenya.

Gagnon, J. E., Kamin, S., & Kearns, J. (2021). Policy Brief 21-11: Economic Costs and Benefits of Accelerated COVID-19 Vaccinations. [www.pii.com](http://www.pii.com)

Goldsztejn, U., Schwartzman, D., & Nehorai, A. (2020). Public policy and economic dynamics of COVID-19 spread: A mathematical modeling study. *PLoS ONE*, 15(12 December), e0244174. <https://doi.org/10.1371/journal.pone.0244174>

Gupta, I., & Baru, R. (2020). Economics & ethics of the COVID-19 vaccine: How prepared are we? In *Indian Journal of Medical Research* (Vol. 152, Issue 1, pp. 153–155). Wolters Kluwer Medknow Publications. [https://doi.org/10.4103/ijmr.IJMR\\_3581\\_20](https://doi.org/10.4103/ijmr.IJMR_3581_20)

IEA Kenya. (2021). The Citizen alternative Budget: 2021 Issue. IEA. <https://ieakenya.or.ke/publications/bulletins/the-citizen-alternative-budget-2020>

IFC. (2020). The economic policy response to the Covid-19 crisis. <https://www.ifc.org/wps/wcm/connect/f1a8b097-8cbf-4317-85ea-c28c1152560e/202004-Economic-policy-responses>

IMF. (2020a). IMF Executive Board Approves a US\$739 Million Disbursement to Kenya to Address the Impact of the COVID-19 Pandemic. <https://www.imf.org/en/News/Articles/2020/05/06/pr20208-kenya-imf-executive-board-approves-us-million-disbursement-address-impact-covid-19-pandemic>

IMF. (2020b). World Economic Outlook: A Long and Difficult Ascent. <https://www.imf.org/en/Publications/WEO/Issues/2020/09/30/world-economic-outlook-october-2020>

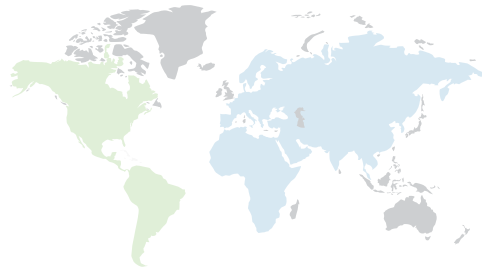
IMF. (2021a). IMF Executive Board Approves US\$2.34 Billion ECF and EFF Arrangements for Kenya. <https://www.imf.org/en/News/Articles/2021/04/02/pr2198-kenya-imf-executive-board-approves-us-billion-ecf-and-eff-arrangements>

IMF. (2021b). Requests for an Extended Arrangement Under the Extended Fund Facility and an Arrangement Under the Extended Credit Facility. <https://www.imf.org/-/media/Files/Publications/CR/2021/English/1KENEA2021002.ashx>

KAM. (2021). Manufacturing Priority Agenda 2021. <https://kam.co.ke/wp-content/uploads/2021/02/2021-Manufacturing-Priority-Agenda.pdf>

KNBS. (2020a). Quarterly Labour Force Report - Quarter2 2020. <https://www.knbs.or.ke/?wpdmpo=quarterly-labour-force-report-quarter-2-2020>





KNBS. (2020b). Statistical Abstract-2020. [https://www.knbs.or.ke/?page\\_id=3142](https://www.knbs.or.ke/?page_id=3142)

MoIT&ED. (2020). Proposed Kenya-United States of America Free Trade Agreements. <https://www.tralac.org/documents/resources/external-relations/us-agoa/3787-proposed-kenya-us-fta-agreement-negotiating-principles-objectives-and-scope-22-june-2020/file.html>

Nganga, T. K. (2020). Kenya-USA Free Trade Agreement-Comments. <http://wtochairs.org/sites/default/files/USA-KenyaFTA.pdf>

NTP. (2021). 2021 Budget Policy Statement. Republic of Kenya. [http://www.parliament.go.ke/sites/default/files/2021-02/2021 Budget Policy Statement from the National Treasury.-compressed\\_1.pdf](http://www.parliament.go.ke/sites/default/files/2021-02/2021%20Budget%20Policy%20Statement%20from%20the%20National%20Treasury.-compressed_1.pdf)

OECD. (2021). Coronavirus (COVID-19) vaccines for developing countries: An equal shot at recovery-OECD. [https://read.oecd-ilibrary.org/view/?ref=1060\\_1060300-enj5o5xwnj&title=Coronavirus-COVID-19-vaccines-for-developing-countries-An-equal-shot-at-recovery](https://read.oecd-ilibrary.org/view/?ref=1060_1060300-enj5o5xwnj&title=Coronavirus-COVID-19-vaccines-for-developing-countries-An-equal-shot-at-recovery)

Penn Wharton. (2021). Epidemiological and Economic Effects of the COVID-19 Vaccine in 2021. <https://budget-model.wharton.upenn.edu/issues/2021/3/1/>

SME. (2020). Trends in Global Manufacturing Implementing Industry 4.0 & Building the Digital Factory. <https://www.sme.org/globalassets/sme.org/media/white-papers-and-reports/2020-trends-in-global-manufacturing-study.pdf>

Spiegel, M., Tookes, H., Dabla-Norris, E., Khan, H., Lima, F., Sollaci, A., Production, V., Gros, C., Gros, D., Nunes, C., Carvalho, B. P., Pereira, J., Santos, D., Peralta, S., Tavares, J., Donnelly, R., & Patrinos, H. A. (2021). Covid Economics Vetted and Real-Time Papers. <https://cepr.org/content/-covid-economics-vetted-and-real-time-papers-0>

The Economist. (2012). Going private. <https://www.economist.com/britain/2012/03/17/going-private>

The Economist. (2021). Tracking covid-19 across the world. <https://www.economist.com/graphic-detail/tracking-coronavirus-across-the-world>

Thi, N., Anh, T., Duc, L. M., & Duc Chieu, T. (2014). The evolution of Vietnamese industry.

UNICEF. (2021). UNICEF welcomes G7 leaders' commitments to donate COVID vaccine doses, calls for

accelerated timetable. <https://www.unicef.org/eap/press-releases/unicef-welcomes-g7-leaders-commitments-donate-covid-vaccine-doses-calls-accelerated>

UNIDO. (2013). Emerging trends in global manufacturing industries. [https://www.unido.org/sites/default/files/2013-07/Emerging\\_Trends\\_UNIDO\\_2013\\_0.PDF](https://www.unido.org/sites/default/files/2013-07/Emerging_Trends_UNIDO_2013_0.PDF)

Viscusi, W. K. (2021). Economic lessons for COVID-19 pandemic policies. In *Southern Economic Journal* (Vol. 87, Issue 4, pp. 1064–1089). John Wiley and Sons Inc. <https://doi.org/10.1002/soej.12492>

White House. (2021). FACT SHEET: United States and G7+ Partners Will Provide More than 2 Billion Vaccines for the World. <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/13/fact-sheet-united-states-and-g7-partners-will-provide-more-than-2-billion-vaccines-for-the-world/>

WHO. (2021). COVID-19 vaccination financing and budgeting Q&A. <https://www.who.int/news/item/27-04-2021-covid-19-vaccination-financing-and-budgeting-q-a>

World Bank. (2020a). Kenya Economic Update: Navigating the Pandemic. <https://documents1.worldbank.org/curated/en/957121606226133134/pdf/Kenya-Economic-Update-Navigating-the-Pandemic.pdf>

World Bank. (2020b). Protecting People and Economies Integrated Policy Responses to COVID-19. <https://openknowledge.worldbank.org/bitstream/handle/10986/33770/Protecting-People-and-Economies-Integrated-Policy-Responses-to-COVID-19.pdf?sequence=7&isAllowed=y>

World Bank. (2021a). GDP per capita (current US\$) - Kenya | Data. <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=KE>

World Bank. (2021b). Macro Poverty Outlook Country-by-country Analysis and Projections for the Developing World Sub-Saharan Africa. [www.worldbank.org](http://www.worldbank.org)

World Bank. (2021c). Monitoring COVID-19 Impact on Households in Kenya. <https://www.worldbank.org/en/country/kenya/brief/monitoring-covid-19-impact-on-households-and-firms-in-kenya>



# Determinants of effective anti-corruption strategies in Kenya

Stephen Nduvi

## Executive Summary

This research paper explores definition of corruption, conflict of interest, institutional bureaucracy, policy implementation and evaluation, and the burden of proof as key determinants of the effectiveness of anti-corruption efforts in Kenya. It argues that policy challenges related to these factors continue to undermine Kenya's resolve and efficiency in curbing corruption. This creates an urgent need to strengthen anti-corruption efforts in order to forestall the continued economic degradation occasioned by widespread graft. Key recommendations include easing the burden of proof on the prosecutor in providing evidence for corruption cases, and intensifying efforts in countering conflict of interest by public officers. There is also need to deepen stakeholder collaboration and multi-agency efforts to strengthen public and private institutions' adoption of anti-corruption policies.







## Introduction

Corruption in public service in Kenya remains high despite concerted anti-corruption efforts by the government. Tangible outcomes are yet to be achieved as evidence availed by the Office of the Auditor General and Ethics and Anti-Corruption Commission (EACC) reveals persistence of graft, amidst

poor ethics and integrity practices in the public service (EACC, 2018). This is anchored on the continued availability of opportunity to engage in corrupt activities and the inability of existing frameworks to effectively deter and disrupt acts of corruption. The probability of a corrupt behavior being

exhibited tends to be higher when there is opportunity for abuse of power and where parties involved lack effective constraints, either normative (societal pressures, accepted rules, public opinion, external scrutiny) or legislative (enforced laws and regulations, including controls, audits, and sanctions) (Mungiu A., 2014).



Photo credit: EACC.go.ke



## Background

The corruption problem in Kenya is systemic and extends beyond public institutions to the larger society (Hope, 2012). The vice persists primarily due to vested interests of public officers and weaknesses of governance institutions in offering effective dissuasion. Consequently, it undermines the ability of the government to equitably allocate resources thus lowering living standards of citizens and exacerbating poverty levels (Kaufmann et al., 2011; Kaufmann and Siegelbaum, 1997; Kenyatta, 2014, p.1). Since independence, Kenya has

continued to implement various anti-corruption reforms in her efforts to tighten curbing of corruption. In 2019, the Sessional Paper No. 2 of 2018, created the National Ethics and Anti-Corruption Policy to provide a comprehensive legal and institutional framework for combatting corruption and promoting ethics and integrity. However, global data on eradicating corruption indicates that Kenya is yet to record impressive improvement worldwide. The country continues to rank below the global average of 43% with a score of

28% and equally beneath the sub-Saharan average corruption perception index of 32 % (Transparency International, 2020). Similarly, the World Justice Project Rule of Law Index 2020 ranks the country at position 102 among 126 least corrupt countries in the world and 18th in Africa (World Justice Project, 2020). It is estimated that the country loses up to one third of her national budget to corruption. This underscores the need to tighten anti-corruption efforts, particularly governance.



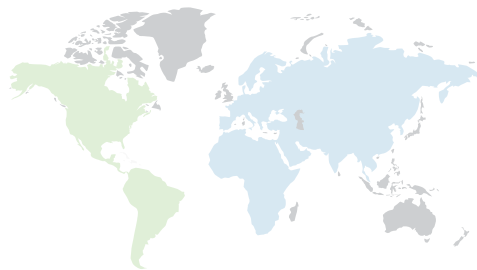
Photo credit: Standard.co.ke

*EACC Chief Executive Twalib Mbarak, Director of Public Prosecutions Noordin Haji and Directorate of Criminal Investigations George Kinoti addressing the press.*

## Methodology

The paper used both primary and secondary data to examine the determinants of effective anti-corruption campaigns in Kenya. Primary data was collected through interviews with key experts and practitioners. Secondary data was collected through a comprehensive desktop review of documented sources. The data was analyzed thematically as per the research questions.





## Key Findings

The following discussion examines key findings emanating from an analysis of the determinants of effective anti-corruption campaign in Kenya.



Photo Credit: CapitalFM

### Re-examining the definition of corruption

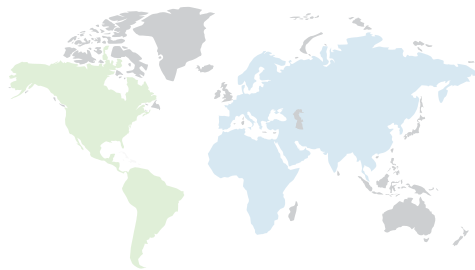
The Anti-corruption and Economic Crimes Act, and the Bribery Act, Laws of Kenya define corruption as abuse of office, bribery, fraud, misappropriation of public funds, breach of trust, and any offense involving dishonesty (The Constitution of Kenya, 2010). However, there are different perceptions of corruption as a vice by the general Kenyan public and this undermines the principle of collective effort in combating corruption (Marta et al. 2008, Nelken and Levi, 1996). Many Kenyan ethnic communities still

regard acts of bribery, fraud or dishonesty as heroism if the end result benefits the community.

For instance, a public officer capable of using their office powers to channel key government projects to their communities at the expense of others will always receive the greatest honor among their kinsmen for their daring corrupt deals. This worshipping of corruption at the popular level dents effort to curb graft since popular moral rules have the power to shape societal behavior. Moreover, the pres-

sure exerted on a public officer by their community's cultural norms and practices pushes public officers to engage in unethical deals to satisfy the expectations of the community because they are "one of their own".

In other cases, public servants with political interests often loot public resources and channel them to their communities to secure their current and future political ambitions. Common expressions, for instance, "*Osa Vinya Mukamba*" (don't be intimidated Mkamba)," among



the Kamba community, and *"shienyu ni shienyu"* (ours is ours) among the Luhya nation have legitimized unethical conduct by public officers' and celebrated acts of corruption at community level in the fight for community wellbeing (Kivoi, 2006). The failure of the definition of corruption to capture these popular realities by abnormarising cultural and popular norms often makes a mockery of the fight against graft in the country.

The African traditional culture is largely based on community sustenance, sharing and interconnectedness (Mkhize, 2008). The attitudes and practices have led to skewed appointments at

County Public Service Boards and this has greatly been condemned by various public ethics and anti-corruption bodies. Nepotism and irregular appointments of fellow kinsmen is seen as 'community tax' rather than corruption. This is because individuals feel they have a moral obligation to contribute to support those of their cultural roots in the community. For instance, in Mandera, Garissa, and Wajir Counties, resource sharing tends to favour the big clans as their numerical advantage helps to maintain a status of privilege (NCIC & Interpeace, 2017). Entrenchment of these habits at both national and county governments waters down

credibility in effective public service delivery.

Different Kenyan communities hold varied perceptions of what should be included or excluded in the definition of corruption. Among the Kikuyu, Luo, Kamba, and Luhya communities, for instance, gifts like livestock and agricultural products are seen as a sign of appreciation for a service rendered. They are interpreted as necessary facilitation to grease the wheels of public service delivery due to bottlenecks associated with public offices. Yet the law criminalizes these acts as corrupt dealings.



Photo credit: The Star



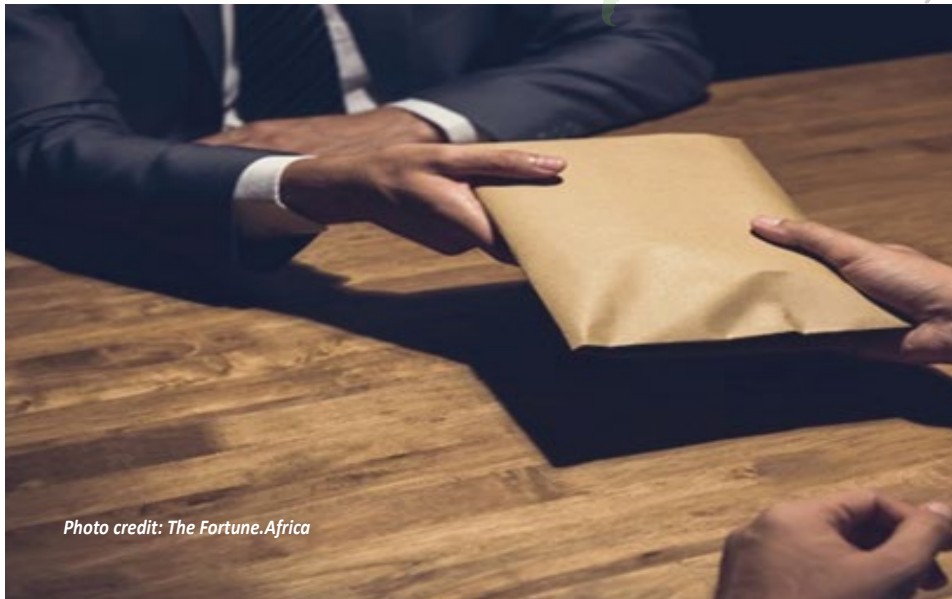


Photo credit: The Fortune.Africa

## Countering conflict of interest

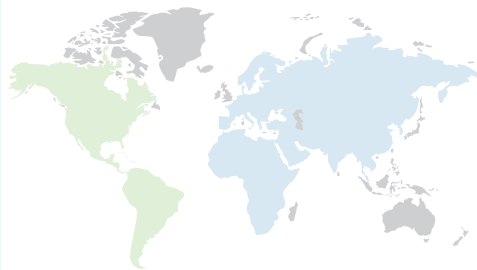
Conflict of interest by public officers exists in situations where an officers' actions or decisions made in their official capacity derives them personal benefits (Conflict of Interest Bill, 2019). Section 12 of Public Officer Ethics Act, 2003 (POEA) specifies the existence of conflict of interest in a situation where a public officer uses resources or information under his jurisdiction to achieve personal interests and goals (Public Officer Ethics Act, 2003). Reports by various oversight government agencies point out to an increasing trend in incidences of conflict of interest in public sector in Kenya despite the enactment and enforcement of several acts of parliament to address the issue.

Public sector jobs at both national and county governments have become most

lucrative spaces, as they offer opportunity for personal benefits (NCIC & Interpeace, 2017). Skewed appointments especially by the public service boards and flouting of procurement rules in awarding of public tenders so as to serve personal interests have become characteristic of public institutions. For instance, senior public officers at Kenya Medical Supplies Authority (KEMSA) were suspended for flouting procurement rules in purchase of personal protective equipment (PPEs) valued at Kes 7.8 billion (EACC, 2020). Consequently, development partners including the International Monetary Fund (IMF) and Global Fund continue to exert pressure on the Kenyan government to fast-track unravelling of the graft allegations at KEMSA. They have also demanded for strengthening of budgetary

transparency and accountability in the use of public resources. Where there are weak deterrence mechanisms, public officers may end up using government facilities to do their private work at the expense of public interest.

The absence of a strong moral conviction to fight corruption is further amplified by a weak criminal justice system (Kivoi, 2006). The judicial process in Kenya continues to offer graft holiday to perpetrators of conflict of interest who embezzle public funds while in line of official duties. The multi-billion KEMSA scandal remains unresolved despite President Uhuru's executive order to EACC to expedite investigation into the scandal. A number of County governors such as Okoth Obado (Migori), Moses Kasaine



Lenolkulal (Samburu), and former County governors such as Mike Sonko (Nairobi), and Ferdinand Waititu (Kiambu) remain under protracted investigation within the judicial due process procedures, despite being arrested and charged with crimes of conflict of interest (EACC, 2021; Kenya Law Review, 2019).

Similarly, the due process of the justice system has been unable to speedily resolve the ongoing cases of procurement of bogus electrical power transformers by the Kenya Power and Lighting Company; false medical claims paid by the National Hospital Insurance Fund; and the Arror and Kimwarer mega dam

scandals paid for by the National Treasury. The situation is compounded by disproportionate cash bails and multiple court injunctions which undermine rapid and timely administration of justice to safeguard public interest and punish the criminals.

The ability of a public institution to detect and control conflicts of interest determines the extent to which its staff will use their position of influence for personal gain (World Bank, 2004). Public officers with divided loyalties between private and public responsibilities lack adequate dedication to their public duties especially where deterrence measures are weak

due to inability to reconcile private and public interests. The POEA legislation, however, does not provide clear guidelines on impartiality and integrity practices to be upheld by public officers to avert conflict of interest (Public Officer Ethics Act, 2003). Yet, explicit and wide-ranging codes of conduct are the foundation for sustaining high ethical standards in public sector, since they provide for disciplinary sanctions against corrupt public officers who violate the rules (World Bank, 2004). Moreover, POEA fails to place emphasis on maintaining a register of conflicts of interest to enable evaluation of the levels of compliance by various commissions. The lack of stringent



Photo credit: Bad Rabbit



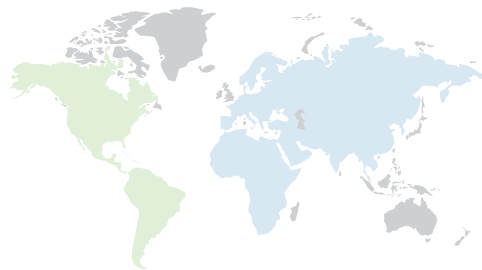


Photo Credit: VoA

A protest march against corruption in Nairobi, Kenya

dissuasion measures emboldens public officials' confidence in engaging in actions that typically breed conflict of interest. The implementation of conflict of interest deterrence measures remains crucial.

The Conflict of Interest Bill, 2019, which was touted to provide wider scope for the management and regulation of conflict of interest for public officials, continues to face implementation challenges (Ojienda, 2020). Whereas the bill focuses on conflict of interest, per se, it leaves out other aspects of ethics in public service such as the rule of law, integrity, and professional-

ism, yet they are at interplay in perpetuating the vice. More so, the enforcement and implementation of the bill is solely anchored on EACC while overlooking the role of the appointing authority for the public office involved and the role of multi-agency approach envisaged in the national anti-corruption policy. The bill fails to explicitly specify who will oversee EACC on matters of conflict of interest (Ojienda, 2020).

Other international jurisdictions, for instance, have put in place disciplinary sanctions as means to enforce codes of conduct. Philippines and Pakistan have

sanctions encompassing stern measures such as dismissal from office (World Bank, 2004). Additionally, other countries have embraced various sanctions such as disqualifying state officials from appointment to key posts, salary increments and promotions as measures of implementing the codes of conduct. Some deterrence measures on conflict of interest regulations include conditioning public officers who are shareholders to transfer their shares into trust governance upon appointment. There are also restrictions on professional activities of former public officials for a certain period of time.



Photo Credit: baselgovernance.org

Twalib Mbarak, EACC Chief Executive, meeting with officials in 2019

## Loosening bureaucratic rigidity

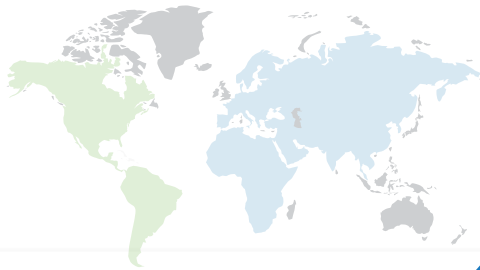
The national anti-corruption policy expects institutional level coordination and collaboration to ensure effective implementation of the policy so as to attain success against corruption (Sessional Paper No. 2 of 2018). However, the implementation of anti-corruption initiatives at institutional level is undermined by bureaucratic bottlenecks in mainstreaming national policy guidelines at local level in various institutions. Most public institutions lack ethics and integrity officers that can enforce integrity code. The role

remains a delegated responsibility which is not given much attention. This is as a result of poor attitudes of institution's leadership towards prioritizing anti-corruption efforts within their strategic plans and allocating it adequate budget. Moreover, different institutions have different structures and sizes and therefore not able to accommodate all structural proposals in a given anti-corruption policy guideline.

The various approaches such as executive direction to adhere to the strategy, creation

of resource based incentives, and sectoral peer leadership adopted to enhance effective implementation are undermined by pursuit of institutional independence (Sessional Paper No. 2 of 2018). This behavior tends to be self-centered. The rigidity of various institutions to cede their mandates to other institutions as proposed in the multi-agency framework may hamper co-ordination and collaboration among various law enforcement agencies in the fight against corruption.





## Anti-corruption policy implementation and evaluation

The fight against corruption continues to face implementation hurdles despite the establishment of the Multi-Agency Team (MAT) in November 2015. Activity report for 2019/20 shows that only four joint investigations have been carried by the MAT yet investigations and prosecution are interconnected activities (EACC, 2021). Feeble investigations normally lead to failure in prosecution. Although the ultimate goal of the framework was to enhance co-ordination and collaboration among various law enforcement agencies, institutional supremacy wars continue to undermine anti-corruption efforts (Sessional Paper No. 2 of 2018). The hostility impedes collective duty to combat corruption by denting effective communication and coordination among them-

selves and also with the public. They instead blame each other for laxity in execution of their mandates. This largely accounts for the dismal efforts in prosecution of corruption crimes. Minimal collaborations among various anti-graft bodies to collectively understand the potential risks in corruption prevention undermines corruption crusade.

Inadequate prioritization of monitoring and evaluation of anti-corruption strategies in both public and private institutions normally leads to poor assessment of progress and impact (World Bank, 2004). This is due to use of flawed indicators especially from institutions with weak data collection, processing and analysis capacities.

The anti-corruption enforcement agencies have been grimly undertaking institutional corruption risk assessment according to the EACC report of activities in the financial year 2019/2020. The Report for 2019/20 shows that EACC released nine reports on CRAs from only five counties. This portrays laxity in identifying and profiling institutional corruption risk areas and implementing the recommendations on how to seal the identified corruption loopholes. It further weakens the ability to incessantly determine the effectiveness of the systems, policies, procedures and practices put in place to combat corruption. Such situation complicates implementation process since no one is accountable and no corrective measures can be taken.



Photo credit: VoA

Public demonstrations in Nairobi, Kenya against poor hospital services.



Photo credit: [trafficketlasvegas.yolasite.com](https://www.trafficketlasvegas.com/yolasite.com)

## Lessening the burden of proof

The turn around for prosecution of corruption individuals is greatly affected by the burden of proof under the Evidence Act, Laws of Kenya. The current criminal justice system as provided for in the Act demands fair and equitable treatment of the suspects (Evidence Act, Laws of Kenya). Article 50 (2) (a) of the Constitution of Kenya (2010) equally provides for a suspect to be presumed innocent until proved guilty. Yet, suppressing and preventing economic crimes require an instantaneous justice process that does not allow the individu-

als to enjoy their proceeds of crime and use it to their advantage as they attend court cases.

The pace at which the cases are determined helps to prevent criminals from using the proceeds to facilitate commission of crimes in future or derailing the justice process through court injunctions. To ensure rapid and severe punishment for corruption offenders, the burden of proof should be of lower intensity as opposed to other criminal cases (Wodage, 2015). This could involve employing a 'lesser standard of

proof' other than proof beyond a reasonable doubt standard. In fact, this crime prevention model, should only demand a preponderant degree of proof or a 'clear and convincing degree of proof that a corruption offence has been committed or conflict of interest has actually occurred (Wodage, 2015). The alternative is to ease or reduce the burden of the prosecutor through legal procedures that involve some practice of reversal (easing) of burden of proof.

Delays in court process creates loopholes for interference with





with cases and frustrates the readiness of potential witnesses to give evidence. The adoption of a crime prevention model of criminal justice, remains effective in convicting and punishing offenders of economic crimes.

The due process model, on the other hand, remains lethargic as it demands a laborious procedure. The prosecutor has to prove beyond reasonable doubt that a suspect is guilty of the offences they are accused of,

some of which are blatant. This delays the trials process for most corruption cases as some of the evidence may take too long to gather thereby extending cases beyond the society's expectations.



*Photo credit: The Blue Diamond Gallery*

## Conclusion

Kenya's resolve and efficiency in curbing corruption is a function of her ability to deal with conflict of interest, institutional bureaucracy, definition of corruption, implementation of counter strategies, and the burden of proof. These factors underline the continued availability of opportunities to engage in corrupt activities and the inability of existing frameworks to detect and control the vice. There is therefore an urgent need to strengthen anti-corruption efforts in order to forestall the continued economic degradation occasioned by widespread graft.

## Recommendations

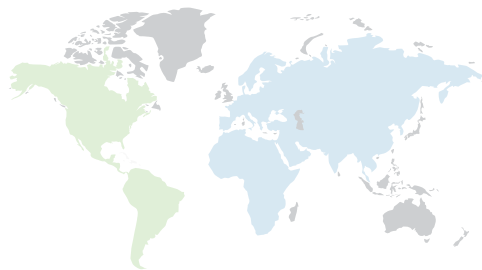
The following matrix offers various policy interventions for action.

Determinant	Immediate	Mid-term	Long-term
<b>Re-examining the definition of corruption</b>	EACC should intensify public awareness campaigns to sensitize the public on the popular and cultural norms that breed corruption in the public service.	The Parliament of Kenya should amend the definition of corruption under the Anti-corruption and Economic Crimes Act, and the Bribery Act, 2016 to harmonize cross-cutting corruption activities premised on popular and varied cultural dynamics of the Kenyan society.	Review school's curriculum materials to expand the existing definition and description of corruption to encompass popular and cultural practices that put pressure on public servants to pursue illicit enrichment for the sake of their communities.
<b>Countering conflict of interest</b>	<p>The Parliament should;</p> <ol style="list-style-type: none"> <li>Amend the Public Officers Ethics act, 2003 to impose explicit sanctions for violating the conflict of interest code without relying on decisions on disciplinary action by the Commission.</li> <li>The appointing authorities of various public officers should intensify oversight roles on conflict of interest by public officers under their jurisdiction to tighten scrutiny and prohibit public officials from engaging in conflict of interest activities.</li> </ol>	EACC should strengthen efforts in countering conflict of interest by public officers and appointing authorities through capacity building to encourage transparency rather than creating numerous restrictions or regulations on their activities.	Public and private institutions should re-engineer organizational culture change on upholding impartiality and integrity to enhance accountability of employees.



## Recommendations

Determinant	Immediate	Mid-term	Long-term
<b>Loosening bureaucratic rigidity</b>	<p>a) EACC should intensify stakeholder collaboration and multi-agency efforts in assessing the extent to which various institutions are adopting the anti-corruption policy guidelines at local level.</p> <p>b) EACC should institute quarterly national multi-agency conferences on the State of Corruption in Kenya to strengthen anti-corruption efforts.</p>	EACC should expand capacity building programs to enhance proficiency of various institutions in both public and private sector to mainstream anti-corruption policies at local level.	Establish anti-corruption departments in all public institutions to ensure compliance with the existing policies and implementation of counter-strategies.
<b>Anti-corruption policy implementation and evaluation</b>	The MAT should prioritize monitoring and evaluation of anti-corruption strategies in both public and private institutions in order to enhance assessment of progress and impact of anti-corruption strategies.	The MAT should enhance co-ordination and collaboration among various law enforcement agencies to forestall institutional supremacy wars that continue to undermine anti-corruption efforts in Kenya.	Both public and private institutions should prioritize anti-corruption efforts within their strategic plans and giving it adequate budgetary allocation.
<b>Lessening the burden of proof</b>	The Kenyan Parliament should amend the Evidence Act to lower the standard of proof in corruption cases from proof beyond reasonable doubt to convincing degree of proof. This will enhance prevention and the rate at which suspects are convicted and punished.	MAT should strengthen the relationship between the specialized anti-corruption courts and the specialized anti-corruption agencies such as the National Police Service, EACC and Office of the Director of Public Prosecution to enhance the effectiveness of the criminal justice system.	Strengthen the capacity of the EACC, the ODPP and anti-corruption courts in investigation, prosecution and processing of corruption cases.



## References

Mungiu, A. (2014), "Why control of corruption works – when it does", The Anti-Corruption Frontline.

Afrobarometer, (2019). The new Global Corruption Barometer (GCB)–Africa.[https://afrobarometer.org/sites/default-files/pressrelease/Ghana/ab\\_r7\\_pr3\\_ghanaians\\_see\\_increased\\_in\\_corruption\\_1.pdf](https://afrobarometer.org/sites/default-files/pressrelease/Ghana/ab_r7_pr3_ghanaians_see_increased_in_corruption_1.pdf). Accessed on 12.06.2021

Conflict of Interest Bill, (2019). <https://eacc.go.ke/default/document/draft-of-the-conflict-of-interest-bill-2019/>. Accessed on 12.06.2021

Director of Public Prosecution v Mbuvi Gidion Sonko; Ethics and Anti-Corruption Commission & 4 others (Interested Parties) [2021] eKLR. <http://kenyalaw.org/caselaw/cases/view/213453/>

Ethics and Anti-Corruption Commission, (2021). Report of Activities and Financial Statements for the Financial Year 2019/2020.<http://eacc.go.ke/default/wp-content/uploads/2021/05/Final-Annual-Report-2019-20-18th-MAY.pdf>. Accessed on 10.5.2021

Ethics and Anti-Corruption Commission, (2020). Inquiry into Allegations of Irregular Procurement and Fraudulent.<http://eacc.go.ke/default/wp-content/uploads/2021/05/Final-Annual-Report-2019-20-18th-MAY.pdf>. Accessed on 12.05.2021

Kaufmann, D. and Siegelbaum, P. (1997), "Privatisation and corruption in transition economies", Journal of International Affairs, Vol. 50, pp. 419–58.

Kaufmann, D., A. Kraay, and M. Mastruzzi. (2011). "The Worldwide Governance Indicators: Methodology and Analytical Issues." Hague Journal on the Rule of Law 3 (2): 220–46.

Kivoi, Douglas L. A. (2006). Meaning and Causes of Corruption with a Special Reference to Kenya: A Moral Perspective. Kenyatta University Library. <https://irlibrary.ku.ac.ke/handle/123456789/1939?show=full>. Accessed on 13.06.2021

Government of Kenya. (2014, March 18). Speech by his Excellency Hon. Uhuru Kenyatta, during the official launch of the Ethics and Anti-Corruption Commission Strategic Plan 2013–2018. Kenyatta International Conference Centre, Nairobi. <https://www.scribd.com/document/213069109/President-Uhuru-Kenyatta-s-Speech-During-the-Official-Launch-of-the-Ethics-and-Anti-corruption->

Commission-Strategic-Plan-2013-2018. Accessed on 5.05.2021

Marta, J., Heiss, C. & DeLugio, S. (2008), 'An explanatory comparison of ethical perceptions of Mexican and U.S. marketers', Journal of Business Ethics 82, 539555.

Kenya Law Review (2019).Moses Kasaine Lenolkulal v Director of Public Prosecutions. eKLR. <http://kenyalaw.org/caselaw/cases/view/178331/>

Nelken, D. & Levi, M. (1996). 'The corruption of politics and the politics of corruption: an overview', Journal of Law and Society 23, 117. <https://www.semanticscholar.org/paper/The-Corruption-of-Politics-and-the-Politics-of-An-Nelken-Levi/d391fb34b1110195ed48ee360c1167c92b41d814>. Accessed on 6.05.2021.

The National Cohesion and Integration Commission & Interpeace. (2017). Voices of the people: Challenges to peace in Mandera County. Nairobi: National Cohesion and Integration Commission (NCIC) and Interpeace. <https://www.interpeace.org/2017/07/voices-challenges-mandera-county/>. Accessed on 12.05.2021

Ojienda, T. (2020, January 23rd). An Analysis of the Conflict of Interest Bill, 2019. [https://www.proftomojiendaandassociates.com/download/an-analysis-of-the-conflict-of-interest-bill-2019\\_prof-tom-ojienda-sc\\_23rd-january-2020/](https://www.proftomojiendaandassociates.com/download/an-analysis-of-the-conflict-of-interest-bill-2019_prof-tom-ojienda-sc_23rd-january-2020/). Accessed on 15.06.2021

Mkhize, N. (2008). Ubuntu and Harmony: An African Approach to Morality and Ethics. In Persons in Community: African Ethics in a Global Culture. Edited by Ronald Nicolson. Scottsville: University of KwaZulu-Natal Press.

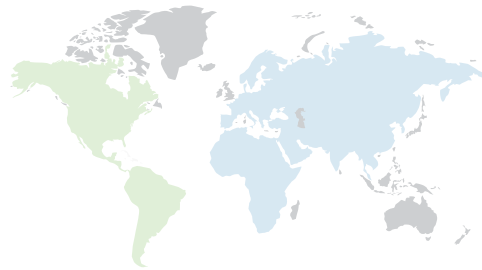
Sessional Paper No. 2 Of 2018.The National Ethics and Anti-Corruption Policy.

The Evidence (Out of Court Confessions) Rules, 2009. [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/EvidenceAct\\_Cap80.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/EvidenceAct_Cap80.pdf). Accessed on 15.05.2021

The Public Officer Ethics Act, 2003. <https://www.vihiga.go.ke/documents/Public%20Officer%20Ethics%20Act.pdf>. Accessed on 16.05.2021

Transparency International. (2020). Corruption Perceptions Index, 2020. <https://www.transparency.org/en/news/cpi-2020-sub-saharan-africa>. Accessed on 10.06.2021





Johnsøn, J., Hechler H., De Sousa, L., and Mathisen, H. (2011). How to monitor and evaluate anti-corruption agencies: Guidelines for agencies, donors, and evaluators. <https://www.cmi.no/publications/file/4171-how-to-monitor-and-evaluate-anti-corruption.pdf>. Accessed 06.06.2021

United Nations Convention Against Corruption (UNCAC), 2003. [https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf). Accessed on 16.06.2021.

World Bank. (2017). World Development Report: Governance and the Law. Washington, DC: World Bank.

World Bank. (2004). Challenging Corruption in Asia. Case

Studies and a Framework for Action. <https://documents1.worldbank.org/curated/en/791211468741662651/pdf/275800PAPER0Challenging0corruption.pdf>. Accessed on 12.06.2021

World Bank. (2019b). Worldwide Governance Indicators (WGI). <https://info.worldbank.org/governance/wgi/Home/Reports>. Accessed on 20.05.2021

World Justice Project. (2020). World Justice Project Rule of Law Index 2020. Washington, DC.

Wodage, W. Y. (2015). Burdens and Standards of Proof in Possession of Unexplained Property Prosecutions. *Mizan Law Review*, 8(1), 1–. doi:10.4314/mlrv8i1.1



# Strengthening the role of Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) in investigation and prosecution of financial crimes

**Ida Gathoni**

## Executive Summary

This paper explores the successes and challenges of the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009 (POCAMLA) in the investigation and prosecution of financial crimes in Kenya. It argues that the law has been successful in enhancing international cooperation and multi-lateral engagements in countering money laundering, enforcement of compliance in financial crimes reporting and strengthening Kenya's counter-terrorism regime. Nevertheless, the country remains a primary concern internationally in respect to money laundering and financial crimes. This necessitates revisiting the discourse of investigation and prosecution of financial crimes in order to address key risk issues such as inclusion of lawyers as reporting entities, lenient penalties, shortage of capacity in enforcement institutions, rapid evolution of digital finance environment, legal bottlenecks and the potential jeopardy of due process in prosecution under POCAMLA. Key recommendations include enforcement of stiffer penalties, increasing budgetary allocations for investigative and prosecutorial agencies and the establishment of a specialized research centre to keep up with the rapid evolution of financial crimes.



Photo credit: Wallsheaven





## Background

The investigation and prosecution of financial crimes in Kenya is premised on the Proceeds of Crime and Anti-Money Laundering Act, No.9 of 2009, hereafter, referred to as, POCAMLA. The law criminalises the offense of money laundering and provides guidelines on the tracing, seizure, freezing and confiscation of the proceeds of crime. It establishes the Financial Reporting Centre (FRC), the Assets Recovery Agency (ARA), and the Anti-Money Launder-

ing Advisory Board. These bodies, alongside the police and the prosecution, are charged with the responsibility of enforcing compliance with the law. The Act has undergone subsequent amendments and revisions as documented in Act No. 51 of 2012, Act No. 14 of 2015, Act No. 19 of 2015, Act No. 3 of 2017, L.N. 105/2017, Act No. 15 of 2017, Act No. 10 of 2018, Act No. 18 of 2018, Act No. 24 of 2019. Despite its existence, Kenya remains listed internationally for money

laundering.

Since its enactment, POCAMLA has been consistently used by the investigative and prosecution agencies in Kenya to restrain, preserve and seize proceeds of crime and money laundering. The Directorate of Criminal Investigation (DCI), the Ethics and Anti-Corruption Commission (EACC) and the Office of the Director of Public Prosecutions (ODPP) have on a number of occasions applied the law to pursue suspected



Photo Credit: gcc-compliance.com



# MONEY LAUNDERING



Photo credit: alten.com

cases of money laundering. The law has equally empowered financial institutions and designated non-financial businesses and professions to report suspicious transactions and activities in their systems. (ESAAMLG, 2019; United States Department of International Narcotics and Law Enforcement Affairs, 2021). The FRC, for instance, has entered into MOUs with the Central Bank of Kenya (CBK), Capital Markets Authority (CMA) and the Insurance Regulatory Authority (IRA) for

the regulation and supervision of the reporting entities to ensure they provide compliance reports annually (United Nations Office on Drugs and Crime, 2021). The ARA and ODPP have used POCAMLA to recover proceeds of crime through criminal and civil forfeiture proceedings.

The investigation and prosecution of financial and economic crimes in Kenya have increased following the legislation's enactment. Economic crimes prosecuted between 2018-

2019 grew by 16.7% (The Judiciary of Kenya, 2020). Evidence indicates that the financial crimes, particularly money laundering, continue to frustrate legitimate businesses, corrupt the financial system, and devalue government command over the economy and revenue generation. The crime remains a scourge due to increased international financial mobility and terror financing through an array of channels involving cyber-crimes. This is amplified by the great leap forward in techno-





*Photo Credit: Investopedia*

logical advancements such as artificial intelligence, block chain tech digitisation of economies and rapid globalisation that have significantly shaped the business environment in Kenya.

While POCAMLA remains a step in the right direction in relation to anti-money laundering initiatives over the past decade, the country, nonetheless, remains of concern to the United States in

relation to money laundering and financial crimes (International Narcotics and Law Enforcement Affairs, 2020). This necessitates revisiting the discourse of investigation and prosecution of financial crimes in order to address the risk issues as well as applicable strategies to attack the criminal financial activities and prevent, detect and punish illegal funds entering the system (Aluoka, 2021). While examining the successes and

challenges of POCAMLA, this study set out to explore the legal framework governing the management of financial crimes in Kenya, with a view towards strengthening its use in investigation and prosecution. The onus of this paper is therefore to analyse these issues and make policy recommendations towards strengthening Kenya's Anti-Money Laundering (AML) regime.



## Methodology

Qualitative data was gathered from practitioners using interview guides which provided in-depth discussion on the investigation and prosecution challenges under POCAMLA. Opinions of experts with varied and rich background in academia, law and financial crimes research form the depths of the discussions. The primary data was complemented by secondary data from documented sources. The data was analysed thematically.

## Key Findings

The following factors remain key in the discussion regarding the successes achieved so far and the constraints hindering effective prosecution of economic and financial crimes in Kenya.

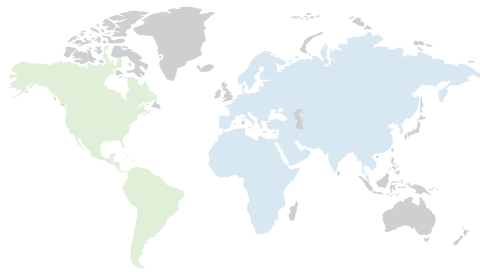
### a) Accomplishments of POCAMLA

The ongoing discussion explores the significant contributions POCAMLA has made towards the fight against financial crimes in Kenya. These include augmenting international cooperation and multi-lateral engagements in anti-money laundering (AML), enforcement of compliance in financial crimes reporting, and strengthening Kenya's counter-terrorism framework.



Photo Credit: trtworld.com





## Enhancing international cooperation and multi-lateral engagements in counter money laundering

The establishment of the Multi-Agency Team (MAT) in 2015 has enhanced interagency cooperation in the investigation and repossession of assets acquired through criminal activities. The National Police Service (NPS), EACC, ARA, Kenya Revenue Authority (KRA) and FRC are collaborating in tracing, identifying, freezing and recovery of proceeds of crime. The Act has equally continued to improve international cooperation in fighting money laundering, corruption and

terrorist financing. Investigative agencies have benefited from the provisions of Part XII of POCAMLA that provides for international assistance in investigations relating to financial crimes. They have been able to track, seize and repatriate assets stolen from Kenya and hidden in other countries such as the United Kingdom, Switzerland and Jersey Islands (Kirui, 2021).

In addition, the international collaborations have seen Kenyan

investigators and prosecutors benefit from technical multi-lateral assistance on how to best deal with complex cases of corruption and financial crimes. The Act is also an indication of Kenya's compliance with Financial Action Task Force (FATF) regulations as the country continues her quest to join the prestigious Egmont Group, an international organisation that facilitates cooperation between national financial intelligence units.



Photo Credit: [corporatecomplianceinsights.com](https://www.corporatecomplianceinsights.com)



Photo Credit: European Petrochemical Luncheon

## Enforcement of compliance in financial crimes reporting

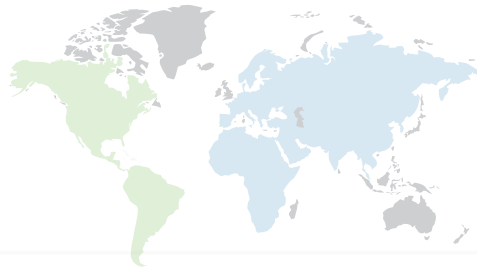
Financial institutions and designated non-financial businesses and professions are now under close supervision in relation to compliance with reporting requirements of POCAMLA. By the year 2017, the FRC had over 200 registered reporting institutions under its various regulatory bodies. This has facilitated the tracking and prosecution of non-compliant financial institutions (Likaka, 2021). For instance, the Central Bank of Kenya (CBK) fined five banks including Standard Chartered Bank, Equity, Kenya Commercial Bank (KCB), Cooperative Bank and the Diamond Trust Bank (DTB) a combined penalty of KES 392 million following their failure to report suspicious transactions

linked to the NYS II scandal (Muiruri, 2020). The banks had allowed transactions of over KES 3 billion linked to the scandal, without proper customer due diligence thereby validating large money transfers contrary to the CBK policy on transactions (Guguyu, 2020). In the year 2019/2020, ARA filed forfeiture proceedings of 23 motor vehicles and 13 parcels of developed land deemed to be proceeds of crime and money laundering (The Judiciary of Kenya, 2020). Similarly, the ODPP has operationalised the Proceeds of Crime Recovery Unit to facilitate the 'follow-the-money' strategy in pursuance of proceeds of crime (Office of the Director of Public Prosecutions, 2020).

Consequently, in 2020, the ODPP recovered KES 2 billion worth of proceeds of crime and related matters which was handed over to The National Treasury (Office of the Director of Public Prosecutions, 2020).

The EACC has equally managed significant disruptions in the movement of illicit finances. In the 2019/2020 financial year, the agency processed 36.9% of reports received on corruption, economic crimes and unethical conduct, which were relevant to its mandate (Ethics And Anti-Corruption Commission, 2020). This enabled the recovery of property worth over KES 11 billion from corrupt individuals.





## Strengthening Kenya's counter-terrorism regime

The enactment of POCAMLA has significantly strengthened Kenya's counter-terrorism policy regime. The law succeeded the development of The Prevention of Terrorism Act, 2012, that criminalised terrorism and its financing. This further gave way to the adoption of The Prevention of Terrorism Regulations, 2013, to implement the UN Security Council Resolutions 1267 and 1373. Moreover, to instrument the United Nations Security Council Resolutions on Suppression of Terrorism, the Counter Financing of Terrorism Inter-Ministerial Committee, was established to ensure Kenya is compliant with its

international obligations on combating terrorism financing (ESAAMLG, 2019). This is indicative of consistent reinforcement of Kenya's AML/CFT regime.

POCAMLA's provision for identifying, tracking, seizing and freezing suspected illicit finances have reduced the flow of finances to terrorist networks. Both money laundering and terrorist financing activities circumvent legalities of the financial sector. Terrorist funding and money laundering are both carried out through procedures that are relatively similar in that they aim to

avoid detection, conceal the sources of the money and, in the case of terrorism, conceal both the funding activity and the nature of the funded activity (IMF, n.d.). Indeed, the investigative agencies and the ODPP have applied such provisions and sued several individuals and financial institutions for their suspected engagement in terrorist financing. For instance, a branch manager at Diamond Trust Bank (DTB) is under prosecution for failing to report suspicious transactions which were later traced to the 2019 Dusit D2 terror attack in Nairobi. (Wechsler, 2019).



Photo Credit: dnaindia.com



## b) Challenges in investigation and prosecution under POCAMLA

The following discussion revisits the crucial risk issues in investigation and prosecution of financial crimes. These include lenient penalties, shortage of capacity, inadequate technological adaptation, stakeholder complicity in furthering financial crimes, legal bottlenecks and the potential jeopardy of the due process during prosecution.



Photo credit: The Star

Kenya's Director of Public Prosecutions, Noordin Haji (left) and Director, Directorate of Criminal Investigations, George Kinoti (right)

### Lenient penalties

Section 16(1) of the POCAMLA provides maximum penalties for those convicted of money laundering. These punishments appear affordable compared to amounts under investigation in the perpetrated crime. Whereas corporate bodies face penalties of up to KES 25 million or the amount of the value of the property introduced in the offence, whichever is less; other persons on the other hand, face jail terms of up to fourteen years or fines not exceeding KES 5 million or the equivalent value of the property involved in the offence whichever is higher or both. The

lack of minimum mandatory sentence is likely to encourage more cases of recidivism and increased offending among corporates and individuals as repercussions are not severe compared to the potential gains from the crime (Aluoka, 2021).

Even though there is evidence that financial institutions have been key enablers of money laundering schemes in Kenya, there exists a lukewarm approach to prosecution of money laundering offences involving financial institutions. The current trend of

substituting the offences with compassionate punishments is detrimental to the need for severe punishment to dissuade the criminal. This has been seen in the use of deferred prosecution agreements as a strategy to evade severe punishment. For instance, in the NYS scandal aforementioned, the ODPP chose to defer the prosecution of banks involved, substituting it with a fine of KES 385 million, while the banks allowed KES 3,578,000,000, to pass through their systems (Central Bank of Kenya, 2018; Ngugi, 2020). Proponents of punishment





argue that to its seriousness should be proportional to the harm done to society (Ihekwoaba et al., 1971). Likewise, prevention of financial crimes can only be effective if punish-

ment is prompt enough to prevent the offender from enjoying the proceeds. Even though criminal justice system provides for lesser sentences for cooperating suspects, too

lenient punishments are likely to reverse prevention efforts, encourage recidivism and embolden new offenders.



Photo Credit: KTO Law Firm



### Shortage of enforcement capacity

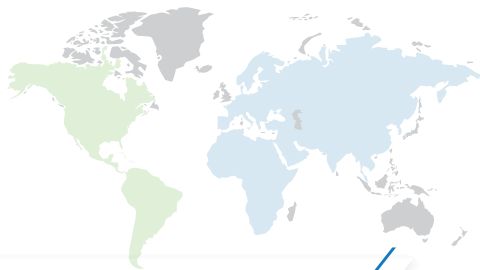
The investigative agencies and the ODPP do not have adequately trained personnel, funds and technological prowess to fully implement POCAMLA (Office of the Director of Public Prosecutions, 2020). Successful investigation of economic crimes requires vast engagement of forensic expertise. Despite a number of investigative officers being trained in this element, the inadequacy of manpower to cover the large volume of economic crimes occurring in Kenya remains a concern (Likaka, 2021). Being a relatively new law, there is still a deficiency a deficiency of successful cases that would

provide the required practical investigative and prosecutorial experience to complement the existing academic knowledge. There still exists inadequate capacity within financial institutions to carry out background checks on customers or verify their records (Kirui, 2021). Consequently, criminals continue to exploit such weaknesses to launder money.

In particular, investigative institutions such as the EACC and the DCI are yet to acquire and adopt modern intelligence and analytical technologies, ICT hardware and software equipment, to aid detecting, tracking, monitoring and reporting suspi-

cious new trends (Internal Affairs Unit, 2020; International Narcotics and Law Enforcement Affairs, 2020). In March 2021, the FRC launched the goAML application which provides a more secure platform where reporting entities can capture and submit reports to FRC. Once fully actualised, the platform stands to improve the interoperability of Kenya's multi-agency taskforce against money laundering. However, the intensive training and capacity building processes planned for investigative agencies are yet to take off due to logistical challenges.





## Rapid evolution of digital finance

The rapid evolution of technology, particularly the use of internet in the financial sector is a challenge to detection and prosecution of money laundering in Kenya. The speed of online money transfers happening within the digital space complicates the tracking of illicit transfers. The consistent migration of banking institutions to the online space, anonymous online payment services, transfers using mobile phones, and virtual currencies such as Bitcoin continue to complicate detection of illegal transfer of money (Beers, 2021). POCAM-LA does not recognise virtual currency as legal tender indicating that Anti-Money

Laundering (AML) requirements have not addressed digital asset risks (Cusack et al., 2020). Hence, there remains a gap in formulating a framework to address risks associated with digital assets. As Kenya moves towards the use of Bitcoin as a reserve currency (Okoth, 2021), the possibility of cryptocurrency becoming a legal tender in the country remains real. The situation is bound to increase financial risks.

Even though mobile money platforms have greatly assisted in the crackdown of criminal networks, suspicious transnational dealings within the mobile money sector, in particular, have

been difficult to track and investigate due to inadequate enforcement in this sector. Criminal anonymity plays a significant role as criminals use false identification documents to open mobile payment accounts, which hinder law enforcement in identifying and making arrests (INTERPOL, 2020). This coupled with insufficient reporting, increases the risk of abuse (Sulieman & Salleh, 2020). Despite restrictions in maximum amounts per single transaction allowed by mobile money providers, there are no legal restrictions on operating a chain of transactions as per the set limits through multiple sim





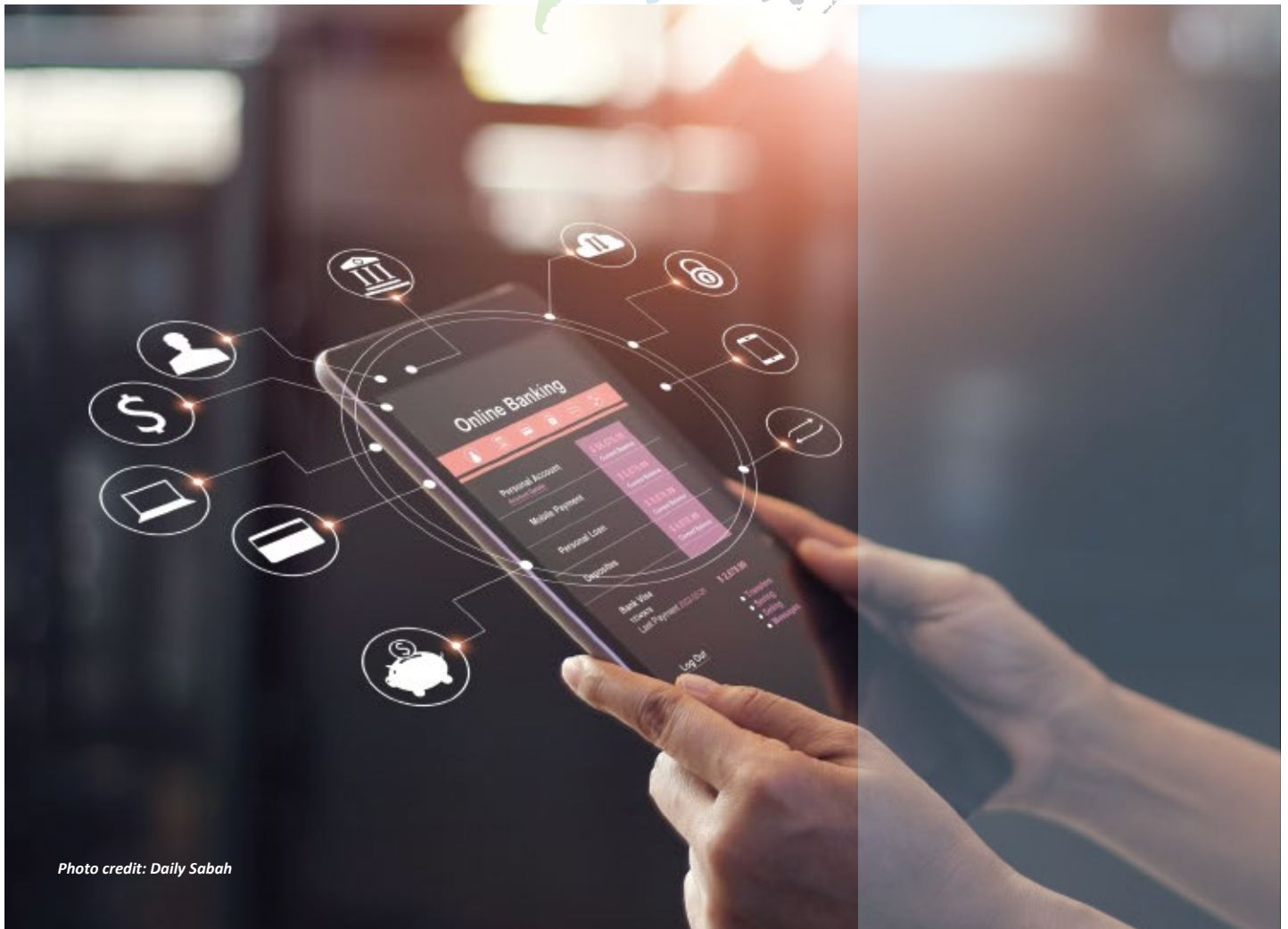


Photo credit: Daily Sabah

cards. Therefore, offenders have had opportunities to launder money severally without raising suspicion.

POCAMLA equally remains challenged by illicit flows of digital financial transactions across borders. Since 2011, Kenya has been losing an average of Ksh40 billion every year through illicit financial flows (Barasa, 2018). These amounts are supported by interoperability which progressively enables individuals to transfer money between accounts held with different mobile money operators, other financial system players such as banks, and across borders. For instance,

the availability of particular mobile money services in Afghanistan and India paired with the logistical prospects for sea shipments from Asia to Kenya, has contributed to increased prominence of the drug trade in East Africa (INTERPOL, 2020).

The use of proxy servers and anonymising software has made assimilation of illegal money almost impossible to detect, as money can be transferred or withdrawn, leaving little or no trace of an IP address (Tropina, 2016). Money can also be laundered through online auctions and sales. For example, gambling websites and

virtual gaming sites have been used to convert ill-gotten money into gaming currency, after which it is transferred back into real, usable and untraceable legitimate funds. This is indicative of the many forms of cybercrimes that may prove difficult for existing anti-money laundering laws (Investopedia, 2020). In its current state, POCAMLA is majorly designed to uncover dirty money as it passes through traditional financial institutions. This allows money launderers to keep changing their modus operandi in order to survive the traditional financial enforcement mechanisms (Aluoka, 2021).



## Legal bottlenecks

The non-inclusion of legal practitioners as designated non-financial business and professionals (DNFBPs) remains a key impediment in curbing financial crimes. The legal provisions that obstruct advocates from divulging information shared with their clients make it difficult for lawyers to report clients who are abetting or engaging in suspected financial transactions. As witnessed in the recent case of the United States of America v. Ramon Olorunwa Abbas, aka "Ray Hushpuppi," aka "Hush," aka "Malik," and others, Kenyan law firms seem to be the preferred destinations for international money laundering actors (West, 2021). Classification of lawyers as DNFBPs would oblige them to monitor and report suspected money laundering activities.

This would oblige lawyers continuously take their clients through AML risk assessment in order to screen backgrounds and sources of wealth, identify politically exposed persons and apply enhanced due diligence on their monetary activities (Gikonyo, 2019).

Despite the gravity of financial crimes, suspects take advantage of the bail and bond provisions in the Constitution of Kenya 2010 and the Criminal Procedure Code Cap 75, Laws of Kenya, to seek liberty and thereby interfere with the ongoing cases through bribery and intimidation having secured bail and bond. The lenient punishment money laundering attracts cannot allow the courts to deny the accused bail despite the amount involved.

Nonetheless, a Bill is currently before Parliament to add a new section 44A to POCAMLA. The Proceeds of Crime and Anti-Money Laundering (Amendment) Bill, 2021 seeks to address various issues, key among them the designation of legal practitioners as reporting institutions and mandating the FRC to intervene when it has reasonable grounds to suspect a transaction is suspicious. As a preventive and repressive action, this will provide prompt access to information on criminal assets, therefore putting a stop to criminal activities before they occur. This amendment would further enable the FRC to freeze transactions for up to five working days and allow other state agencies to investigate them under the Act (Mutua, 2021).



Photo credit: anticorruption-center.org





Photo credit: studyqa.com

### Potential jeopardy of due process in prosecution

POCAMLA casts a very wide net of persons who may be charged with money laundering other than crimes in the Penal Code, Cap 63, Laws of Kenya. This gives the prosecution absolute discretion that may be detrimental to the required balance between crime prevention and due process perspectives in pursuit of criminal justice. This is critical to securing public goodwill and cooperation during prosecution. Section 3, 4 and 7 of POCAMLA identify six different types of criminals who may be prosecuted for money laundering. These are (a) one who knows or should reasonably have known that property has been obtained from crime but proceeds to engage in a transaction regarding the same property; (b) a person who helps to conceal or disguise the nature,

source, location, movement or ownership of the property; (c) a person who deals with the property in a way that helps the offender avoid prosecution; (d) a person who takes away or diminishes any property acquired as a result of commission of an offence; (e) a person who acquires, uses, or possesses property that they know or ought to have reasonably known was acquired through a crime committed by another person and; (f) a person who promotes the offence of money laundering Section. There are no attempts made to demarcate the legal boundary between the offence of money laundering and that of handling stolen goods as in section 322 of the Penal Code. Both crimes involve handling proceeds of crime of any value.

The six different categories of criminals, particularly those in category (a) to (e) could either be charged with money laundering or handling stolen goods so long as they knowingly (or ought to reasonably have known) transport, transmit, transfer, receive, or even attempt to transfer or receive a monetary instrument or anything of value. While the definition favours the all-offence approach to prosecution and may make it difficult for a person suspected of the crime of money laundering to escape punishment, the law gives latitude for selective and prejudicial prosecution. This may jeopardise the crime prevention goal of criminal justice and take away public goodwill which is essential for gathering direct evidence to aid the prosecution



of financial crimes.

A case in point is the judicial review of *Republic v Director of Public Prosecutions & another Ex parte Patrick Ogola Onyango & eight others* [2016]. The suspects money laundering case claimed that the ODPP had not precisely established what crimes had generated the property in question. The court dismissed this position and appeared to be applying section 322 4(a) of the Penal Code that cushions the ODPP from being compelled to prove that the defendant knew or ought to have known the goods in question were stolen. Therefore, the Act is capable of promoting selective and prejudicial prosecution without recourse to due process. As it stands, the ODPP is at liberty to determine which cases to prosecute under

POCAMLA and which ones to designate under other statutes such as the Penal Code.

Moreover, without a fair notice on the value of the monetary instrument that is either punishable as money laundering or theft, the law risks being seen as void for vagueness (Aluoka, 2021). If the purpose of anti- money laundering law is to protect the Kenyan economy from devaluation and collapse, it makes little sense to state in law that dealing in proceeds of crime whose monetary value is as little as a coin amounts to money laundering and could lead to economic collapse. The law needs to be realistic enough to qualify and quantify the value of the proceeds of crime being punished and relate it to its potential consequence once introduced into the Kenyan

economy. This will allow other related crimes to be prosecuted under other existing laws. In comparison, United States (US) statute equivalent of POCAMLA presents a more purposeful and specific approach to detect and deter money laundering and the financing of terrorist activities. It puts an obligation on the prosecution to prove that the proceeds were derived from a "specified unlawful activity." These activities include over 200 types of U.S. crimes laid out in the US statutes and range from drug trafficking, terrorism, fraud to organized crime. In addition, the US law specifies as money laundering any financial transaction accruing from proceeds of crime whose value is greater than USD 10,000 (Cohen & Noonan, 2021).



Photo credit: Investopedia





### Lack of political goodwill in countering financial crimes

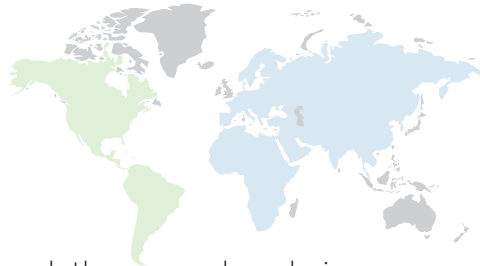
Money laundering, corruption and related crimes continue to fester due to lack of political goodwill in addressing them. The influential politicians involved have often appealed for public sympathy in their efforts to interfere with court cases. For instance, Migori Governor Zacharia Okoth Obado who faces fraud and embezzlement cases has been severely accused of attempted undue influence over the cases (Kiplagat, 2020, Mungahu, 2021). These influential individuals have often curtailed their prosecution or the seizure and confiscation of their ill-gotten funds or assets through their networks (Kirui, 2021). In particular, Chris Okemo and Samuel Gichuru, are

wanted for money laundering, corruption and racketeering charges in Jersey Islands. However, to date, Kenyan authorities are yet to open criminal proceedings against them despite their alleged embezzlement of billions of tax payers' money (Ngugi, 2021).

There have been concerns that some stakeholders such as lawyers and designated reporting institutions negligently or intentionally facilitate movement of illicit funds as was in the NYS scandal. Indeed, financial institutions including Standard Chartered Bank and Kenya Commercial Bank have been penalised in the past by regulatory authorities for abet-

ting money laundering and financing terrorism. Some investigators, prosecutors and court officials shield criminals after being compromised. These examples suggest that many incidents of money laundering and terrorist financing could be going on but disregarded (Kirui, 2021).

The existence of criminal networks within the system presents intensified complexities that aggravate the fight against money laundering in Kenya. These issues implore the country to trace its policy frameworks and strategies which make it more vulnerable to endemic money laundering and corruption.



## Conclusion

Kenya has substantially moved to curb the money laundering menace by establishing a legal environment through POCAMLA. The gains already made are significant. However, key shortcomings in relation to legal penalties, shortage of capacity in enforcement institutions, rapid evolution of digital finance environment, legal bottlenecks and potential jeopardy of due process in prosecution under POCAMLA are yet to be addressed. Effectiveness of POCAMLA therefore needs to address risk issues that impact on prevention, prosecution, detection and punishing of illegal funds entering the financial system. The law must at the same time address strategies to counter the criminal financial activities.



*Photo credit: angelsbailbonds.com*

## Recommendations



01

### Improving capacity for enforcement

- a) Kenya's Parliament should work towards increasing budgetary allocations for investigative agencies and the ODPP. This will enable them to hire additional staff, enhance the training of their staff to deal with financial crimes as well as acquire requisite investigative resources.
- b) The ODPP, DCI and FRC to enhance bilateral and multilateral engagements regionally and internationally to improve the capacity of staff on countering money laundering.
- c) The Office of the Attorney General should strengthen and expand the existing mutual legal agreements so as to assist in the tracing and seizing of funds and assets held in jurisdictions outside Kenya as well as enable the extradition of suspects to face trial in Kenya or other jurisdictions.
- d) The FRC to expedite full operability of the goAML platform as soon as possible.





02

## Legislative reforms

- e) Kenya's Parliament to review amendments to the Proceeds of Crime and Anti-Money Laundering (Amendment) Bill, 2021 to include amendments of sections 3,4 and 7 of POCAMLA specifying the value of monetary instruments that should be classified as proceeds of crime, while specifying the bracket of offences and their threshold in order to qualify for money laundering.
- f) Kenya's Parliament to review amendments to the Proceeds of Crime and Anti-Money Laundering (Amendment) Bill, 2021, to include the amendment of Section 2 of POCAMLA to not only include advocates as reporting agents, but also designate high-risk non-financial businesses and professions such as casinos, car bazaars and dealers in precious metals as reporting agencies.
- g) Kenya's Parliament to review amendments to the Proceeds of Crime and Anti-Money Laundering (Amendment) Bill, 2021, to extend the scope in the investigation and prosecution of money launderers using mobile money transfer platforms under POCAMLA.
- i) Kenya's Parliament to review the Proceeds of Crime and Anti-Money Laundering (Amendment) Bill, 2021 to stipulate stiffer penalties such as life imprisonment or fines not less than three times the amount laundered under POCAMLA.

03

## Evolving digital finance environment

- j) The FRC should establish a financial research and analysis centre to carry out continuous research and analysis of the evolving digital finance space and crimes.
- k) The FRC should petition the Central Bank of Kenya to revise guidelines on the receivership of international remittances through mobile phones in line with existing trend to curb financial crimes.
- l) The Communications Authority of Kenya should provide guidelines on acquisition of infinite number of sim cards by a single individual to curb possible money laundering schemes through multiple transactions.
- m) The Central Bank of Kenya should revise protocols for mobile transactions which would require customers to provide further details before proceeding with huge transactions of over USD 10,000. There should be two to three step verification process before one is allowed to make the transactions.
- n) The Central Bank of Kenya to review its approach towards cryptocurrency and embark on registration of players and agencies engaged in block chain technology trading. This will effectively curtail money laundering and terror-financing in the country's financial system.

04

## Winning political and public goodwill

- o) The FRC, EACC and the ODPP to intensify public campaigns on anti-money laundering and anti-corruption in order to attract the political and public goodwill needed in countering the vice.
- p) The FRC, EACC and the ODPP to intensify dialogue with the political class particularly the Parliament, the Presidency and the Council of Governors in relation to supporting legal reforms and anti-corruption and counter-money laundering agenda.



## References

Aluoka, O. (2021, March 29- April 1). Strengthening the Role of POCAMLA in Investigation and Prosecution of Financial Crimes (Paper Presentation) GLOCEPS Workshop on Promoting Kenya's Strategic Interests on Domestic and International Stances, Nairobi, Kenya

Beers, B. (2021, June 14). Internet Banks: Pros and Cons. Investopedia. <https://www.investopedia.com/articles/p-f/11/benefits-and-drawback-of-internet-banks.asp>

Central Bank of Kenya. (2018). Investigations of Banks Related to National Youth Service Transactions.

Cohen, J., & Noonan, L. (2021). Anti-Money Laundering 2021: A practical cross-border insight into anti-money laundering law. International Comparative Legal Guides.

Cusack, J., Runana, M., & M'Crystal, U. (2020). Financial Crime Threat Assessment Kenya.

Eastern and Southern Africa Anti-Money Laundering Group (2019). ESAAMLG at 20: looking back and looking ahead.

Ethics And Anti-Corruption Commission. (2020). Ethics And Anti-Corruption Commission Report Of Activities And Financial Statements For The Financial Year 2019/2020.

Gikonyo, C. (2019). The legal profession in Kenya and its anti-money laundering obligations or lack thereof. *Journal of Money Laundering Control*, 22(2), 247–256. <https://doi.org/10.1108/JMLC-01-2018-0010>

Guguyu, O. (2020, September 6). CBK bank fines grow 20 times on NYS scam - Business Daily. Business Daily. <https://www.businessdailyafrica.com/bd/economy/cbk-bank-fines-grow-20-times-on-nys-scam-2300540>

Ihekwoaba D., Onwudiwe, Odo, J., & Onyeozili, E. C. (1971). Deterrence Theory. *Encyclopedia of Prisons & Correctional Facilities* by Bosworth, M., 16(25), 233–237.

International Monetary Fund (n.d.). Anti-Money Laundering/Combating the Financing of Terrorism (AML/CFT)-Topics. IMF. Retrieved August 12, 2021, from <https://www.imf.org/external/np/leg/amlcft/eng/aml1.htm#aml-counter>

International Narcotics and Law Enforcement Affairs. (2020). United States Department of State Bureau of International Narcotics and Law Enforcement Affairs International Narcotics Control Strategy Report Volume II. II(March).

International Criminal Police Organization (2020). Mobile money and organized crime in Africa. June,1–52. <https://enactafrica.org/research/interpol-reports/mobile-money-and-organised-crime-in-africa>

Investopedia. (2020, October 13). What methods are used to launder money? <https://www.investopedia.com/ask/answers/022015/what-methods-are-used-launder-money.asp>

Kirui, G. (2021, March 29- April 1). Strengthening the Role of POCAMLA in Investigation and Prosecution of Financial Crimes (Paper Presentation) GLOCEPS Workshop on Promoting Kenya's Strategic Interests on Domestic and International Stances, Nairobi, Kenya

Likaka, L. (2021, March 29- April 1). Strengthening the Role of POCAMLA in Investigation and Prosecution of Financial Crimes (Paper Presentation) GLOCEPS Workshop on Promoting Kenya's Strategic Interests on Domestic and International Stances, Nairobi, Kenya

Muiruri, K. (2020, March 5). Five banks fined Ksh.385 million over NYS scandal - Citizentv.co.ke. Citizen Digital. <https://citizentv.co.ke/business/five-banks-fined-ksh-385-million-over-nys-scandal-325296/>

Mungahu, A. (2021). Court dismisses Obado application to reduce charges in fraud case - People Daily. People Daily . <https://www.pd.co.ke/news/court-dismisses-obado-application-to-reduce-charges-in-fraud-case-64536/>

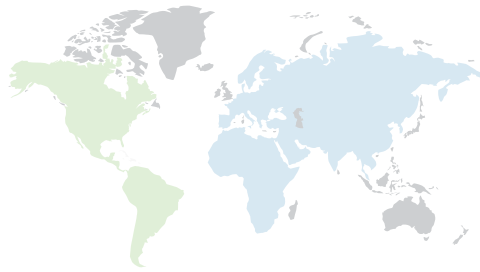
Ngugi, B. (2020, March 6). Equity, StanChart top list of NYS fraud fine - Business Daily. Business Daily. <https://www.businessdailyafrica.com/bd/corporate/companies/equity-stanchart-top-list-of-nys-fraud-fine-2282902>

Ngugi, B. (2021, January 7). Sh444m seized from Gichuru, Okemo to be used for Covid treatment-Business Daily. <https://www.businessdailyafrica.com/bd/economy/sh444m-seized-from-gichuru-okemo-covid-treatment-3249448>

Office of the Director of Public Prosecutions. (2020). Office of the Director of Public Prosecutions Annual Report Highlights 2017 - 2020. 3(3), 1–7. <https://www.odpp.go.ke/wp-content/uploads/2020/11/Annual-Report-Abridged-Version-Rvsd-7th-Nov.pdf>

Okoth, J. (2021, June 7). CBK in discussions over digital currencies project. <https://kenyanwallstreet.com/cbk-in-discussions-over-digital-currency/>





## References

Suliman, D. M., & Salleh, F. (2020). Anti-money laundering risk posed by mobile money services in Sub-Saharan Africa. *Journal of Critical Reviews*, 7(11), 568–571. <https://doi.org/10.31838/jcr.07.11.103>

The Judiciary of Kenya. (2020). *State of the Judiciary and the Administration of Justice Annual Report 2019/2020*.

Tiberius Barasa, M. (2018). *Synthesis of the Evidence Illicit Financial Flows in Kenya*: Pasgr, August.

Tropina, T. (2016). Do Digital Technologies Facilitate Illicit Financial Flows? *World Development Report*, 27.

United Nations Office on Drugs and Crime. (2021). *Country Review Report of The Republic of Kenya Review by Democratic Republic of the Congo and New Zealand of the implementation by Kenya of articles 5-14 and 51-59 of the*. 1–254.

United States Department of State Bureau of International Narcotics and Law Enforcement Affairs. (2021). *International Narcotics Control Strategy Report International Narcotics Control Strategy Report. II*(March).

Wechsler, M. (2019, January 30). *Mobile Money Transfers Suspected of Financing Dusit D2 Terror Attack* | DFS Observatory. Columbia Business School. <https://dfsobservatory.com/content/mobile-money-transfers-suspected-financing-dusit-d2-terror-attack>

West, K. (2021, July 31). *Kenyan Law Firm Okatch And Partners Advocates Named In The Sh1.1B Heist By Nigerian Scammer Hushpuppi* | Kenya Insights. Kenya Insights. <https://kenyainsights.com/kenyan-law-firm-okatch-and-partners-advocates-was-involved-in-the-sh1-1b-heist-by-nigerian-scammer-hushpuppi-us-court-told/>

# AUTHOR'S PROFILES

**Dr John Mwangi** is the Senior Research Fellow for Defence and Security. He holds a PhD in International Relations from the United States International University (USIU-A), Nairobi, Kenya. He is an alumni of Next Generation Social Sciences in Africa Fellowship a program of the Social Science Research Council (SSRC), New York. His research interests are in the areas of peace, security and development in The Horn of Africa. He has published on policing, refugees, counter-terrorism, and identity politics in The Horn of Africa. He is passionate about finding synergies and connections between academia and policy world. His recent publication is a 2020 book chapter titled: Continuities and discontinuities in radicalization trends: The case of Kenya in The Handbook of Collective Violence: Current Developments and Understanding in (eds.) Carol A. Ireland, Michael Lewis, Anthony Lopez, Jane L. Ireland. Routledge, ISBN-13: 978-0367186524.

**Ms Janet Kiguru** is the Research Fellow for Diplomacy and Foreign Policy Pillar. She has previous experience in research and teaching at the university level. Her particular areas of expertise include international development, regional integration, bilateral relations, multilateral relations, and diplomatic strategy. Janet is currently a PhD candidate at the United States International University-Africa. She holds a Master's degree in Development Studies and a Bachelor's degree in Sociology and Political Science from the University of Nairobi.

**Mr Michael Owuor** is the Research Fellow for Development Pillar. He has over ten years' experience in running multidisciplinary development programs and research with international public benefit organizations,

universities and government agencies for policy action. His research priorities include business strategies, economic development and political economy. He holds Bachelor's degree in Business Management; a Master of Business Administration and MSc in Health Systems Management.

**Mr Stephen Nyamu** is the Research Fellow for Public Policy, Ethics and Governance. He has previously worked with the Kenya Institute of Public Policy Research and Analysis (KIPPRA) in youth empowerment and drought mitigation research projects. He has contributed to various discussions papers, policy briefs and blogs including the Brookings Institute. His research interests include public policy, political economy, governance and ethics, youth, gender, development and regional integration. Stephen holds a Master's degree in Governance and Regional Integration from the Pan African University-Institute of Governance, Humanities and Social Sciences, Yaoundé-Cameroon. He has a BA degree in Economics and Finance (1st class honors) from Kenyatta University (Kenya). He is also a beneficiary of African Union Commission Full Masters Scholarships for young Africans and an alumni of KIPPRA Young Professionals Programme.

**Ms Ida Gathoni** is the Research Fellow for Strategic Interests and Transnational Crimes. She has been engaged in research undertakings related to cooperation and conflicts over natural resources in the arid and semi-arid lands. She holds a Master's degree in International Relations (Conflict Resolution and Development Studies) and a BA degree in International Business Administration (Finance) from the United States International University-Africa (USIU-A). She also holds a BA (hons) degree in Psychology from the University of Nairobi.





## The Global Centre for Policy and Strategy Team

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Executive Director

**Dr K O Asembo, OGW, HSC**

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Onesmus Kariuki  
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Executive Assistant  
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**Judith Peter**

Administrative Assistant

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Off Kiambu Road, Nairobi Kenya  
P.O. Box 27023-00100, Nairobi.  
Telephone: 011 2401331  
Mobile: +254 700 279635  
Email: [info@gloceps.org](mailto:info@gloceps.org)  
Web: <https://www.gloceps.org>

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