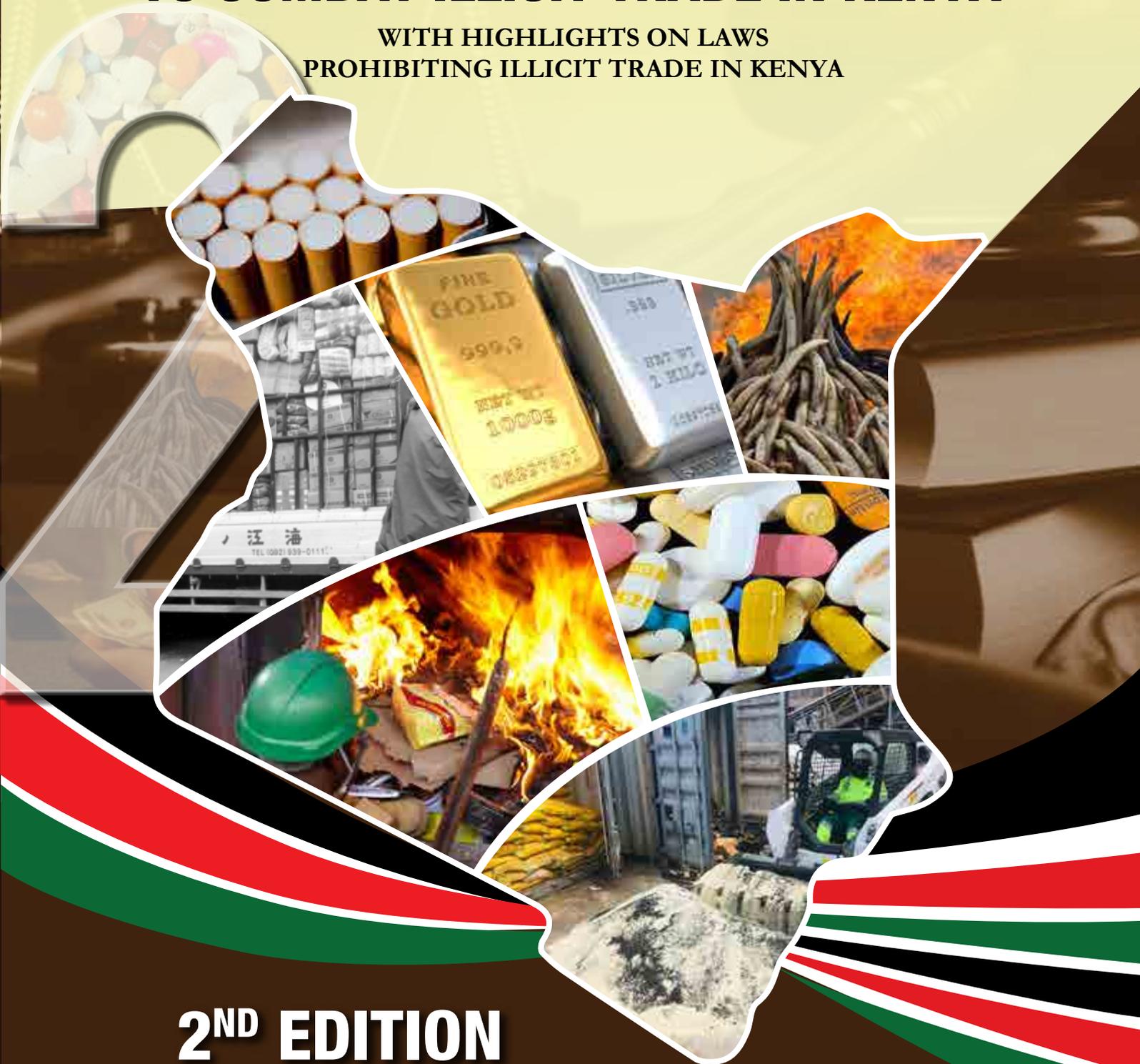


REPUBLIC OF KENYA



ENFORCEMENT MANUAL TO COMBAT ILLICIT TRADE IN KENYA

WITH HIGHLIGHTS ON LAWS
PROHIBITING ILLICIT TRADE IN KENYA



2ND EDITION



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CHAPTER ONE

DEFINITION OF ILLICIT TRADE AND WHAT IT ENTAILS

There is no single definition for illicit trade because it encompasses a wide range of activities which are still growing.

The Ministry of Industry, Trade and Cooperatives of Kenya has the following definition for illicit trade:¹ Generally, it may be defined as any form of trade that infringes the rules, laws, regulations, licenses, taxation systems, and all procedures that countries use to organize trade, protect citizens, raise standards of living and enforce codes of ethics. The concept extends to money, goods or value gained from illegal or otherwise unethical activity; and includes all actions or conduct intended to facilitate such activities.

Illicit trade includes but is not limited to:

- a) Smuggling
- b) Counterfeiting, Piracy and illicit manufacturing of goods
- c) Transit Fraud/ Dumping
- d) Trade in Prohibited and Restricted Goods or Products
- e) Illicit cash flows
- f) Human and wildlife Trafficking
- g) Trade in small arms and light weapons
- h) Illegal logging and illicit trade of charcoal

COMMODITIES MOSTLY AFFECTED BY ILLICIT TRADE

The Ministry of Trade of Kenya states that goods which are most prone to counterfeiting are electronics, motor-vehicle spare parts, stationeries, food and beverages, LPG, movies and music DVD's, and petroleum products, Luxury Goods and Fashion Apparels, Phones and Computer Accessories among others. ³⁵

In its last two (2) reports on illicit trade,³⁶ the WCO focused on illicit trade in the following categories:

- a) Drugs
- b) Medical goods subject to intellectual property rights
- c) Non-medical goods subject to intellectual property rights
- d) Cultural objects

- e) Flora and fauna

COMMON MODES OF COUNTERFEITING PRODUCTS

The Anti-Counterfeit Act of Kenya defines counterfeiting as taking the following actions without the authority of the owner of intellectual property right subsisting in Kenya or outside Kenya in respect of protected goods:

- a) the manufacture, production, packaging, re-packaging, labelling or making, whether in Kenya, of any goods whereby those protected goods are imitated in such manner and to such a degree that those other goods are identical or substantially similar copies of the protected goods;
- b) the manufacture, production or making, whether in Kenya, the subject matter of that intellectual property, or a colourable imitation thereof so that the other goods are calculated to be confused with or to be taken as being the protected goods of the said owner or any goods manufactured, produced or made under his licence;
- c) the manufacturing, producing or making of copies, in Kenya, in violation of an author's rights or related rights;
- d) in relation to medicine, the deliberate and fraudulent mislabelling of medicine with respect to identity or source, whether or not such products have correct ingredients, wrong ingredients, have sufficient active ingredients or have fake packaging.³⁹

The ACA has identified various methods through which counterfeit products are made including; labelling, packaging, adulterations, direct imports, transit goods, and even locally manufactured counterfeit goods.

These come in different forms as listed below.

- i. Printing of fake labels that occur mostly with alcoholic beverages, soft drinks and juices and mineral water where genuine packaging materials are used to depict the original cover while the content of the product is fake, although in some cases bearing similar content of the genuine product.
- ii. Direct import goods are those coming into the country already counterfeited from their sources of origin either in neighbouring countries or overseas. Here, packaging and labelling are mostly used to cheat the unsuspecting consumer.
- iii. Adulteration of products is mostly found in cosmetics and beauty products, cooking oil, pens, rice, and branded stationery.
- iv. Transit goods to neighboring countries play a vital role in counterfeits' proliferation in the domestic market. Counterfeits find their way to the market through different points at the borders while in transit

v. Locally manufactured goods: Cases have been reported and police raids undertaken to apprehend unlawful production of goods which resemble legally manufactured goods by registered companies in various parts of the country.

vi. Counterfeiters can be subcontractors of the original producers and may illegally use original production equipment, models and infrastructure. In such a case, counterfeit goods may share the very same quality of the original ones (e.g. when subcontractors overproduce in order to sell part of the production on their own)

IMPACT OF ILLICIT TRADE

1. Impact on the Economy and Business

Illicit trade leads to a depressed economy because of the loss of revenue in the form of taxes and loss of value for manufacturers whose goods are subject to illicit trade. It also leads to job losses. The revenues which are lost through illicit trade could be used to improve public services, especially in developing countries. In turn, the revenues from illicit trade are used to finance other illegal activities such as terrorism which also impacts economies negatively. In sum, illicit trade undermines the achievement of the economic goals for poverty reduction, decent jobs and economic growth.

2. Impacts on Public health and safety

Illicit trade leads to the proliferation of goods which have not been subjected to safety standards thus risking the health and safety of consumers of illicit goods. In the UNCTAD report referred to above, the following types of illicit trade have an impact on health and safety:

- a) Illicit trade in foods threatens the health of consumers as they may consume toxic ingredients, disease-containing pathogens or contaminants;
- b) Illicit trade in agrochemicals and pesticides jeopardises farmer health and safety and leads to production of illegitimate crops which further exacerbate health problems;
- c) Illicit trade in alcohol and tobacco leads to health risks for consumers and in some cases, it leads to death;
- d) Illicit trade in counterfeit and pirated goods puts consumers of such goods at risk because manufacturers do not abide by quality and safety requirements like legitimate manufacturers;
- e) Illicit trade in substandard, unlicensed and falsified medicines leads to health complications because not only are consumers not healed from their illnesses, but also those illicit medicines may lead to other health complications;

- f) Illicit trade in gemstones and precious stones leads to health and safety risks for miners because they do not use protective gear;
- g) Disposal of raw materials used to manufacture illicit goods will in most cases be unsafe thus causing health risks to the people who may encounter such waste; and
- h) Trafficking in persons leads to health and safety risks for the persons being trafficked because in most cases, they will be held in deplorable conditions and they may even be subjected to sexual exploitation.

3. Impact on National Security

As a whole, the proceeds from illicit trade are often used to fund other illegal activities such as terrorism which threaten national and world security. The FATF in its 2012 report on illicit tobacco trade identified a number of instances where people who had been involved in the illegal tobacco business were using those proceeds to finance terrorist groups such as Al-Qaeda.

From the research carried out by bodies such as the WCO, OECD, UNCTAD among other bodies, the following are some of the other effects of illicit trade on security:

- a) Illicit trade in weapons has led to weapons being in the hands of criminals and rebel groups thus leading to national security problems.
- b) Illicit trade in goods meant for a legitimate supply chain leads to the use of those goods for negative purposes such as manufacturing arms and weapons.
- c) Human trafficking and smuggling leads to the phenomenon of undocumented immigrants who may pose a security threat to a country.

4. Impact of illicit trade on Wildlife

The illicit trade in wildlife is estimated to be worth between US\$ 70 million to US\$ 213 million annually⁵⁰.

As per the UNCTAD report referred to above, the following are the effects of illicit trade on wildlife:

- a) Illicit trade in wildlife and wildlife products has led to the extinction and near-extinction of various species of flora and fauna; and
- b) Illicit trade in forestry products endangers the habitats of wildlife which has led to the extinction of species of flora and fauna.

CHAPTER TWO

LEGAL REGIME

The legal regime regulating illicit trade is found in both international conventions and national statutes. The Constitution of Kenya in Article 2 provides that the international conventions and treaties ratified by Kenya, as well as the general rules of international law form part of the law of Kenya.

This Chapter therefore discusses both international and regional instruments that deal with the various forms of illicit trade as well as related offences such as terrorism. The Chapter also discusses the national laws and policies that govern the different forms of illicit trade and related offences. Lastly, the Chapter discusses the various international institutions tasked with combating illicit trade.

INTERNATIONAL INSTRUMENTS GOVERNING TRADE IN ILLICIT GOODS

The international community has made steps towards regulating trade in illicit goods through conventions and treaties tackling different aspects of illicit trade. Some of the international instruments that govern the various forms of illicit trade are set out below.

INTERNATIONAL INSTRUMENTS REGULATING INTELLECTUAL PROPERTY INFRINGEMENTS

1. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)
2. Anti-Counterfeiting Trade Agreement
3. Patent Cooperation Treaty (19 June 1970):
4. WIPO Copyright Treaty (20 December 1996):
5. Patent Law Treaty (01 June 2000):
6. Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (14 April 1891):
7. Berne Convention for the Protection of Literary and Artistic Works (24 July 1971):

INTERNATIONAL INSTRUMENTS RELATING TO TRANSNATIONAL ORGANISED CRIME

1. United Nations Convention against Transnational Organized Crime Purpose and Scope

INTERNATIONAL INSTRUMENTS RELATING TO TRAFFICKING IN PERSONS

1. UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, also known as “Palermo Protocol”
2. Convention on the Rights of the Child (CRC)⁷¹ the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography
3. The Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption
4. The Convention on the Elimination of All Forms of Discrimination against Women,

5. The African Charter on Human and Peoples' Rights (1981) and its Protocol on Women's Rights (2002)
6. The African Charter on the Rights and Welfare of the Child (1990)

INTERNATIONAL INSTRUMENTS REGULATING ILLICIT TRADE IN MANUFACTURED PRODUCTS

1. Framework Convention on Tobacco Control, 2003 (WHO FCTC) and Protocol to Eliminate Illicit Trade in Tobacco Products, 2012 (WHO Protocol)

INTERNATIONAL INSTRUMENTS RELATING TO ILLICIT TRADE IN NATURAL RESOURCES

1. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) 1973

INTERNATIONAL INSTRUMENTS RELATING TO ILLICIT TRAFFICKING IN DRUGS

1. Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol; The Convention on Psychotropic Substances of 1971 and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988

INTERNATIONAL INSTRUMENTS RELATING TO ILLICIT MANUFACTURING OF AND TRAFFICKING IN FIREARMS

1. Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, 2001 (Firearms Protocol)

INTERNATIONAL INSTRUMENTS AGAINST TERRORISM

1. International Convention for the Suppression of the Financing of Terrorism, 1999

OTHER INTERNATIONAL INSTRUMENTS

1. International Convention against the Taking of Hostages
2. International Convention for the Suppression of Acts of Nuclear Terrorism

BILATERAL, REGIONAL AND INTERNATIONAL INSTRUMENTS RELATING TO EXTRADITION

Introduction

It is important to note that in Kenya, the extradition process is governed by the Extradition (Contiguous and Foreign Countries) Act, Cap 76 and the Extradition (Commonwealth Countries) Act, Cap 77. The Extradition (Commonwealth Countries) Act, Cap 77 applies to any commonwealth country that the DPP has designated for the purpose of the Act. No separate Agreement with the country is required.

On the contrary, an application for extradition under the Extradition (Contiguous and Foreign Countries) Act, cannot succeed unless the requesting state has entered into an

Agreement with Kenya.⁸⁹ Where there is no bilateral Agreement with a requesting state or, in the case of Commonwealth Countries, where the country has not been designated, extradition may still occur on the basis that the offence is an extraditable offence under an International Convention, Treaty or Agreement. The International Treaty or Agreement must be ratified by Kenya.

BILATERAL AGREEMENTS

1. Extradition Treaty between United States of America and Kenya

REGIONAL AGREEMENTS

1. Organization of African Unity Convention on the Prevention and Combating of Terrorism
2. African Union Convention on Preventing and Combating Corruption

INTERNATIONAL INSTITUTIONAL INTERVENTION TO COMBAT ILLICIT TRADE

1. World Custom Organization (WCO)
2. The International Criminal Police Organization (Interpol)
3. The Organization Economic Cooperation And Development (OECD)

NATIONAL STATUTORY PROVISIONS CRIMINALISING ILLICIT TRADE

1. Agricultural Produce (Export) Act, Cap 319
2. Anti-Counterfeit Act, No. 3 of 2008
3. Anti-Counterfeit Regulations, 2010
4. Anti-Doping Act, No 5 of 2016
5. Alcoholic Drinks Control Act, No. 4 of 2010
6. Anti-Corruption and Economic Crimes Act, No. 3 of 2003
7. Bribery Act, No. 47 of 2016
8. Competition Act, No. 12 of 2010
9. Consumer Protection Act No. 46 of 2012
10. Copyright Act No 12 of 2001 & Copyright (Amendment) Act No. 20 of 2019
11. Customs and Excise Act, Cap 472
12. East African Community Customs Management Act, 2004 & East African Community Customs Management (Amendment) Act, 2009
13. Fisheries Management and Development Act, No. 35 of 2016
14. The Fertilizers and Animal Foodstuffs Act, Cap 345
15. Fertilizers and Animal Foodstuffs (Amendment) Act, No. 20 of 2015
16. Forest Conservation and Management Act, 2016
17. Firearms Act, Cap 114
18. Health Act, No. 21 of 2017
19. Industrial Property Act, 2001
20. Kenya Trade Remedies Act, No. 32 of 2017

21. Merchant Shipping Act, No. 4 of 2009
22. Narcotic Drugs and Psychotropic Substances (Control) Act, No. 4 of 1994
23. Narcotic Drugs and Psychotropic Substances (Control) Restraint and Forfeiture) Regulations, 1997
24. Narcotic Drugs and Psychotropic Substances (Control) (Seizure, Analysis and Disposal) Regulations, 2006
25. Pharmacy and Poisons Act, Cap 244
26. Health Laws Amendment Act, No. 5 of 2019
27. Prevention of Organized Crimes Act, No. 6 of 2010
28. Prevention of Terrorism Act, No. 30 of 2012
29. Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009
30. Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 of 2016
31. Wildlife Conservation and Management Act, No. 47 of 2013

CHAPTER THREE

CRIMINAL PROCEEDINGS

Criminal cases are ordinarily initiated by a complaint being lodged. In most instances, however, the criminal process is initiated when a law enforcement agent observes the commission of a cognizable offence, and makes an arrest hot on the heels of the commission of the said offence.

Complaints are ordinarily lodged by a report being made at a police station, or through an agency imbued with powers of arrest for a specialized area of crime, whereupon the said complaint is recorded in the OB. The record reflects who the complainant is and what the complaint entails. The decision to file a case depends on the information in the OB. The officers will commence investigations that may include taking statements from the complainant and witnesses, scene visit and if necessary, take photographs of the scene, and collect any evidentiary materials. They may also consider interrogating any suspect and where none is identified, conduct investigations to establish those culpable. Depending on the evidence in their hands, if an offence is disclosed, the officers will proceed to arrest and indict the suspects. In most offences, arrests can be made without a warrant.

1. **Offences**

Offences generally fall into two main categories: cognizable and non-cognizable. As a general rule, cognizable offences may result in an arrest without a warrant. All non-cognizable offences require a warrant of arrest to be issued prior to effecting arrest. These offences must be preceded by investigation and identification of those to be arrested.

2. **Elements of a Crime: Mens Rea and Actus Reus¹⁰⁰**

The elements of crime constitute the ingredients that must be present in order for a person to be found guilty of a crime. This is generally covered in the maxim *actus reus non facit reum nisi men sit rea*. Loosely translated, an act of itself does not constitute a crime unless it is accompanied by a guilty intent.

3. **Guide to Investigating Illicit Trade Offences**

The procedure of investigating illicit trade offences is given by a combination of relevant Acts of Parliament such as, the Penal Code, Criminal Procedure Code (Section 89), Evidence Act Cap 80, National Police Service Act, 2011, the Anti-Counterfeit Act 2008, the Standards Act, ACECA of 2003 and the National Police Service Standing orders. In accordance with the CPC, the general procedure is:

- a. A complaint received at the relevant enforcement agency shall be recorded in the OB/ complaint register and brought to the attention of the officer in-charge (OSC) of the police station or in-charge of the investigations at the relevant agency.
- b. Depending on the nature of the complaint, the OCS/ officer in-charge of the investigations at the relevant agency will identify the investigator(s) who will visit the premises/scenes of crime. The investigator(s) will gather as much information from the scene of crime as possible, draw sketch plans of the scene, interview witnesses, record statements and arrest the suspects where possible. For cases which involve expert's handling, they will be informed without delay in order to visit the scene.
- c. The OCS/ officer in-charge of the investigations at the relevant agency will inform relevant agencies such as KWS, ACA, KEBS and KFS to reinforce, join or take over the investigations.
- d. The investigator may also inform the office of the DPP depending on the complexity of the case. More serious cases will be handed over to the DCI.
- e. It will be the duty of the investigator to record statements of witnesses gathering all the necessary information and take charge of any exhibits in the case. Exhibits which require analysis will be properly packed, labelled and submitted to the relevant departments for analysis without delay. Perishable exhibits should be photographed and produced in court during the plea and the prosecutor shall address the court on the manner of disposal of such exhibits. Any other exhibits will be marked and kept in the exhibit store at the police station/designated illicit goods depots pending production in court as the case may be.
- f. The investigator will open a case file in the matter inclusive of all facts about the case and inform the relevant authorities as the case may be.
- g. Upon completion of the investigations, the case file will be forwarded to the DCI/relevant authorities for onward transmission to the DPP for advice and/or sanction to prosecute the accused persons.
- h. Once the case file is returned with the sanction/advice, the OCS/ officer in-charge of the investigations at the relevant agency will draft the charges and take the accused persons to court for the plea. The prosecutor will then be furnished with information regarding bail and status of investigation.
- i. For a fair trial, all documents, exhibits, statements to be relied on by the prosecution shall be furnished to the defence. The identities of the witnesses may be protected. This is critical for the safety of whistle blowers and witnesses in cases involving organized crimes.
- j. The prosecutor must promptly inform the OCS/ officer in-charge of the investigations at the relevant agency of hearing dates of case(s) for witnesses to be bonded in time and pre-trials held with the investigator(s) and witnesses.

k. It will be the duty of the investigator(s) to produce exhibits in court, ensure safe custody of the same and witness attendance during the hearing of the case.

NOTE: All offences on illicit trade should be treated as felonies because of the gravity of the offence and as a deterrent to the vice. As such, the investigator(s) shall take finger prints of the accused person(s) all the time.

4. Disposal of unclaimed/ abandoned property

a) In case of any property that is unclaimed, the investigator will take charge of the property and put it in safe custody at the designated illicit trade depot.

b) He will cause a proclamation of the goods to be posted at the courts notice board for a period not exceeding 6 months.

c) At the expiry of 6 months without any claimant, the investigator will seek for orders of disposal from the court.

d) If the unclaimed goods are disposed of by way of auction, the proceeds will be deposited in the consolidated fund.

5. Arrests

This involves the physical apprehension of a suspect, confining him or her in custody or restraining the person's movement. The process of arrest is governed by the Constitution (Article 49), Criminal Procedure Code (Section 21-42) and National Police Service Act (Section 24). Some of the agencies have powers of arrest. The public can also conduct an arrest.

7. Exhibits

Exhibits management and handling is a key component of the criminal justice system especially in illicit trade cases, which by their very nature are determined largely by production of exhibits. The investigator, prosecutor and the court must take necessary measures to ensure the proper collection, preservation, presentation of exhibits in court and their destruction or disposal upon the conclusion of the case. Investigating officers should develop an inventory of all the items recovered. The inventory must be signed by the persons recovering the items, the persons found with the items, their lawyers if available. Investigating officers must take photographs of the scene and items recovered if any. The photographs must also be produced to court. Accepting, maintaining, returning, and disposing of exhibits vests in the court and it has to determine where the exhibits will be stored and make a determination of their disposal upon the conclusion of the trial.

7. Receiving, Handling, and Transfer of Exhibits in Criminal Cases

All exhibits must be entered into an inventory of all the items produced. All exhibits that have been introduced in any criminal action or proceeding are retained by the executive officer of the court, who shall establish a procedure to account for the exhibits properly until the final determination of the case and determination by the trial court on what should be done to the exhibits.

Though exhibits are under the direct administration of executive officers of the Court, judicial officers have the overall responsibility over the exhibits and they have to ensure that they exercise actual control over the preservation and destruction of exhibits. Failure to exercise such control, may pose an actual risk of exhibits finding their way back into the market or circulation amongst members of the public.

Courts should also develop their own local processes that address the custodial responsibilities for managing exhibits that are dangerous or contain biohazard materials. The court can in this regard seek assistance from specialized agencies of the state e.g. the NEMA in the handling of hazardous exhibits. Courts may make arrangements with prosecuting agencies or local law enforcement agencies to secure such exhibits in their own secure strong rooms, as an alternative to having court staff handle these dangerous items.

Exhibits may at times be bulky and the agencies may not have sufficient storage facilities to keep the exhibits pending trial or as the matter is heard. In such instances the court should consider sealing the exhibits at the point of recovery (e.g. in the warehouse/storage facility) where the illicit goods were recovered. The court has to ensure that the place is sealed with the court seal and sufficient security measures are put in place to avoid tampering with the exhibits. The court also has to constantly monitor and check on the condition of the exhibits to determine that there has not been any tampering.

The court officer must also lay down clear procedure for the handling of the exhibits in court during the trial. The court officer should ensure that custody of exhibits is under his/her control at all times.

9. *Destruction of Exhibits*

At the conclusion of the trial, the trial court will make an order on the agency to destroy the goods. The court has to directly supervise the destruction of the exhibits and a report to that effect made. Before destruction of exhibits, the court must ascertain that they are indeed the actual exhibits produced in court.

Where the exhibits to be destroyed are hazardous or toxic materials, the court may seek assistance of specialized agencies or institutions to assist in determining the mode of destruction and the destruction of the exhibits. The court will still be required to supervise such destruction even if being undertaken by the specialized agencies.

10. *Instituting Criminal Prosecutions*

A prosecutor is defined as a public prosecutor or a person permitted by the court to conduct a prosecution under Section 88 of the CPC. The DPP is the principal prosecutor of offences under the Constitution. Article 157 (12) of the Constitution however provides that Parliament may through an Act grant prosecutorial powers to other agencies. The DPP can also donate prosecutorial powers to other agencies. In making the decision to prosecute, the Public Prosecutor must first be satisfied that there is sufficient evidence (the evidential test).

If there is sufficient evidence, the Public Prosecutor must next determine whether a prosecution would be in the public interest (the public interest test).

The evidential test requires the Public Prosecutor to be satisfied that there is sufficient evidence i.e. evidence that would provide a realistic prospect of conviction against each suspect on each charge. The Public Prosecutor must therefore assess the available evidence and decide whether an objective, impartial and reasonable court would more likely than not convict the accused of the charge or charges alleged on the basis of the available and admissible evidence.

In deciding whether the available evidence is sufficient, the Public Prosecutor must consider whether the available evidence is admissible (in the sense that it can be used in court) and whether it is reliable. Further, the evidential test requires the Public Prosecutor to have a firm grasp of the substantive law relating to the offence committed. Reliable evidence is evidence that a court is likely to find credible.

A Public Prosecutor has a duty not to ignore evidence merely because he or she is not sure that it is usable or that it is reliable. The prosecutor's job is to see that all the relevant facts, including those favorable to an accused, are placed before the court and to present those facts in an ethical, fair, dispassionate, firm and clear manner. Prosecutors must refrain from all actions which could lead to the conviction of innocent persons. The Prosecution should be able to avail all witnesses necessary to establish the truth even if their evidence is inconsistent and under certain circumstances the court, on its volition, has a duty to call witnesses whose evidence appears essential to the just decision of the case. This test gets its constitutional backing from Article 50(2) (j) where every accused person has the right to a fair trial which includes the right to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. The prosecutor does not go into court only to lead in evidence of the facts contained in his file. His job is more exacting than that. He has to lead the evidence, judge its veracity and effect on the court, form an opinion concerning what facts seem to be common cause and what facts are in dispute and be prepared to argue the merits of his case, either on a point of law or on the facts. He must take a sustained and intelligent interest in all the evidence given. We recommend that any parties who conduct prosecution of illicit trade cases be regularly trained on the provisions of the laws applicable to the prosecution of illicit trade and their

constituent responsibilities. This is especially useful in cases where amendments of laws are undertaken from time to time.

11. Proof of A Case Beyond Any Reasonable Doubt

The prosecution in a criminal trial has the obligation to tender evidence and prove its case beyond any reasonable doubt so that during the trial the prosecution will bring all their witnesses and exhibits to prove its case against the accused and the court will determine whether there is a case to answer. Evidence adduced by the prosecution should be such that it can convict the accused.

12. Public Interest

The role of the prosecutor is that of an agent of justice. As an advocate in court, he represents the public, including the complainant who is the victim of some crime of which the public is interested in knowing the truth through fair prosecution in court.

The Public Interest Test in prosecution of criminal cases is concerned with the goals of criminal law, which include reducing crime (for example through punishing guilty offenders with a view to deterring potential offenders), reforming and rehabilitating offenders, reparation, and protecting the public. In some cases, for example, it may be necessary to prosecute an offender so as to deter potential offenders from committing a crime that the society considers notorious. However, there are cases in which rehabilitation would be considered to be an appropriate response to an offence. In such cases, it may be appropriate to divert the matter from court, without the need to prosecute and procure a conviction. The Public Interest Test deals with governmental decision-making processes, with a view to ensuring that they facilitate the fair administration of justice.

13. Charges and Information

Section 89 – Criminal Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without a warrant.

A person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction.

A complaint may be made orally or in writing, but, if made orally, shall be reduced to writing by the magistrate, and, in either case, shall be signed by the complainant and the magistrate. For a suspect to be brought formally before the court there must be a formal complaint.

When somebody makes a report that an offence has been committed the police must look at all the statements from the witnesses and the complainants and then consult the respective statutes to see which offence is revealed by those facts and which Section of the law it offends.

Once the police have determined what offence has been committed then certain rules will follow; firstly every offence that is committed must be charged separately, this is the rule that gives rise to joinder of counts, gives rise to joinder of persons. Counts constitute every individual offence that has been committed in a single transaction. Depending on the number of offences that have been identified one uses a format such as Count 1, Count 2 etc.

The charge will have a statement of offence which will be the statement that will tell what the offence is e.g. theft contrary to Section 279(b) of the Penal Code. One has to be careful not to join charges. Where the facts indicate that two persons were arrested and brought together to the police station, it is possible that the reports are different for both persons, the facts of what offences they have committed might be very different. One should never have counts that are totally unrelated, there must be a nexus. When one is jointly charging persons, they should be charged in a single charge sheet. Where there is a link between any offences or persons then one has a joinder of counts or joinder of parties. In circumstances where one person has committed two different offences at different times and locations, one must have different charge sheets as the offences are unrelated.

14. Bail and Bond

Bail and Bond in the Police Station

At the Police Station, a suspect may be released on cash bail, with or without sureties, or personal (free) bond or recognizance. The Police Service Standing Orders¹⁰⁷ require the officer in charge of a police station to release any person arrested on a minor charge on the security of cash bail, as a general rule, unless the officer has good grounds for believing that the arrested person will not answer his bail terms. In case a person who has been released on bail fails to appear in court, the officer in charge of the police station should apply to the magistrate for a warrant of arrest. At this point, the magistrate may either order the cash bail to be forfeited (if it is demonstrated that there are sufficient grounds that justify an order for forfeiture), or retained on court deposit until such time as the accused person appears. Where the accused person violates bail or bond terms, the police should cancel the bail or bond, re-arrest him or her, bring him or her to the police station, and take him or her to court.

Bail and Bond in the court

Once an accused person has taken plea, the court will normally determine if the accused person should be admitted to bail or bond before the trial commences. Bail takes the form of a cash amount determined by the court being paid directly in court to secure the release of the accused person as he/she awaits trial. The amount is referred to as cash bail.

The court may also take into account other considerations and determine that the circumstances of the case require that it imposes a sum of money as bail to be guaranteed by a surety or sureties who will deposit security in court to secure the release of the accused person pending his/ her trial. This is referred to as bond.

Forfeiture

Section 130 and Section 131 of the CPC set out the procedure for forfeiture where an accused absconds/ jumps bail. A warrant of arrest is issued against the accused and summons to the surety. If the accused comes to court he should give reasons as to why forfeiture should not take place if the court is persuaded the warrant may be lifted. Where the accused is not arrested and continues with non-attendance the surety will be required to show cause why forfeiture should not be ordered against them. The surety will be given time to look for the accused and it is only where he fails to do so that the forfeiture will ensue.

If penalty is not paid then an order can issue for attachment against property. Where it is not possible to attach property, the court can make an order for imprisonment for a term not exceeding 6 months. The court may also enforce only part payment of the surety.

If a surety fails to take reasonable precautions in the discharge of his/her duty he/she is liable to be ordered to pay the penalty of the bond.

15. Plea Bargaining

Plea bargaining is a legal concept provided for in Section 137(A) to 137 (O) of CPC. After an accused has been charged or any time before judgement, the prosecutor and the accused may negotiate and enter into an agreement for reduction of a charge to a lesser offence, for a withdrawal of the charge, for a stay of other charges or for a promise not to proceed with possible charges.

16. Diversion

The Constitution encourages a restorative rather than a retributive approach to criminal justice. It thus recognizes other outcomes in the criminal justice system apart from imprisonment. Diversion is a means of resolving criminal cases without resort to full judicial proceedings. Diversion allows for the quick disposal of criminal matters, in appropriate cases, while providing benefits for the victim and the public. The conditions of diversion seek to address the harm caused by the crimes committed, by promoting restorative justice. Diversion can take the form of a simple caution or warning, an apology to the victim, payment for damage done, or it may involve referral to a structured diversion programme, restorative justice process or similar scheme.

17. The Trial Process

The criminal trial process commences when the prosecution presents criminal information in the form of a charge before the relevant court. The charge is read out to the accused person and he answers by either pleading guilty or not guilty. If the accused person pleads guilty, the court must record the admission as nearly as possible in the words of the accused before entering a plea of guilty. This is to ensure that the plea is unequivocal and that it cannot be interpreted in any other way except as an admission of guilt. The duty of the court is heightened where the accused is not represented by an advocate. Such plea must be specific and not a general assertion of guilt. Where the accused is charged on more than one count, the plea must be entered for each count. The court then proceeds to hear his/her mitigation and pass a sentence. In such a case, the accused is convicted on his/her own plea of guilty. Where an accused person pleads not guilty, the case proceeds to full trial in which case the prosecution will lead evidence to prove the guilt of the accused person.

18. *In Camera Trial*

The sensitive nature of prosecuting suspects on trade in illicit goods offences may at times militate against a public trial. A prosecutor must be sensitive to this fact and where in appropriate cases the safety of witnesses may be compromised; the prosecutor may apply for a trial to be conducted in camera.

19. *Presence of Accused Persons*

The accused person must be present at the commencement of his trial. He/she must also be present in court at all times during the proceedings. The court may issue summons to ensure attendance by the accused person.¹¹⁷ The trial may however proceed in the absence of the accused person if his/ her conduct makes it impossible for the trial to proceed, in accordance with Article 50(2) (f) of the constitution. However, the discretion to proceed in the absence of the accused person must be exercised with caution especially where the court concludes that the accused has absconded.

20. *Presence of Complainant*

Section 202 of the CPC requires the complainant to be present at the commencement of the trial. Failure to attend by the complainant may lead to an acquittal of the accused persons. The decision to acquit must be exercised judicially. It must be exercised where the court has determined that the complaint's absence is deliberate or repeated.

21. *Calling Witnesses*

The prosecution case starts by the prosecution calling the complainant and other primary witnesses first. All witnesses who are yet to testify must be outside the court room when a witness is testifying. The evidence of witnesses who sit through the testimony of another witness cannot be rejected but will be of a lesser evidentiary value to the prosecution case. Make sure witnesses who are yet to testify do not sit in court and listen to the testimony of another witness.

22. Language of the Court

Court proceedings are conducted in either English or Swahili. Where the prosecution has a witness, who cannot speak either of these languages, he may make an application to court to provide an interpreter if necessary. Prosecutions involving offences relating to trade in illicit goods at times may also involve foreign nationals who may not understand the language of the court. Measures should be taken to ensure that the court secures interpreters to be able to explain to the accused person the proceedings as they take place in court.

23. Examination In Chief

The burden of proof in criminal cases is on the prosecution who must prove their case beyond any reasonable doubt at the conclusion of the trial. Prosecution proves its case by calling relevant witnesses and adducing evidence in court. At times the burden of proof may shift to an accused person but it should be noted that the prosecution must lay some factual basis through its witnesses and exhibits before the burden shifts to the accused person. The primary purpose of examination in chief is to get testimony in support of the prosecution's version of events as they took place and that leads to the conviction of the accused person. One must avoid asking leading questions during examination in chief.

24. Cross Examination

Once the prosecution has examined a witness in chief, the accused person is given an opportunity to ask the witness questions in what is referred to as cross examination. Section 208 (3) CPC obliges the court to ask an accused person who is not represented whether he wishes to ask the witness any question. The court is required to record the answer given by the accused person. The accused person may ask leading questions to witnesses during cross examinations. The aim of cross examination is to raise doubt about the accuracy of the evidence given by the witness in examination in chief.

25. Re-Examination

Once the accused person has concluded cross examination, the prosecution is given an opportunity to ask any question in reexamination.

The purpose is to respond to any issue that was raised by the accused person in cross examination. New matters cannot be introduced at re-examination.

26. Prima Facie Case / Case to answer

At the conclusion of the prosecution's case, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence then it amounts to a prima facie case. In *Bhatt v Republic* 957 EA 332, the court defined a prima facie case as

one where a reasonable court directing its mind to the law and evidence would convict if no explanation were offered by the defence. Where the court is of the opinion that the prosecution has failed to establish a prima facie case; then a detailed reasoned ruling will be written, leading to an acquittal under Section 210 of the CPC. Once a ruling that a prima facie case has been entered, Section 211 of the CPC provides that the court shall again explain the substance of the charge to the accused. This is to prepare the accused person or to remind him of the charge. The accused person will then be put on his/her defence.

27. Defence Case

Once an accused person is put on his/her defence, the court shall inform him/her that he/she has a right to give evidence on oath from the witness box, in which case he/she shall be liable for cross examination. The accused may also elect to give an unsworn statement in which case he/she shall not be liable to cross-examination.

28. Sentencing

In Kenya, certain offences carry a mandatory death sentence upon conviction. In such a instance, the court does not have discretion as regards sentencing where the accused has been found guilty. These apply in capital offences. In other cases, courts exercise their discretion and impose sentences as guided by statutes. At times, statutes impose minimum sentences but leave it to the discretion of the court to determine the ultimate sentence to impose. There are no cases with rational sentencing; there is no codified sentencing mechanism. In cases of varying penalties for similar offences across legislations, the legislation upon which the prosecution relied to bring the charge forward would be the same one that would be referred to in order to determine the appropriate penalty to be meted.

29. Victim Impact Statements

Section 329 of the CPC makes it discretionary upon the court to determine whether or not to receive and adopt a victim impact statement, after conviction and before sentence. Where the primary victim has died as a direct result of the offence then the court may receive a statement from a family victim. The impact statement must be in writing and meet such other requirements as per the rules (rules are to be made by the Chief Justice).

30. Post-trial handling of exhibits

At the conclusion of the trial and conviction of the accused, the prosecutor should make an application to court for an order of how the exhibits are to be handled. It may be in the form of destruction of the goods, forfeiture of the goods to the State or any other ancillary order. The court should make an appropriate order and where possible supervise the implementation of its order or require a specified person or agency to report on the implementation of the order.

It is important to note that some of the exhibits in illicit trade trials may be harmful or hazardous in nature and such special care and assistance may be sought from specialized agencies or organizations to assist the court in destroying the exhibits.

It is also possible that the court may find an accused person not guilty of the charge but it is proved that the goods are illicit. In such cases, the court should not order a release of the goods to the person. If the goods are illicit though the accused person(s) are not guilty, the court should make an appropriate order on the handling of those exhibits post trial i.e. whether they should be destroyed or forfeited to the State as guided by Statute.

EXTRADITION PROCEEDINGS

Introduction

Extradition is the process through which an alleged criminal or a fugitive is surrendered by one state to another having jurisdiction over the crime charged.¹¹⁸ In Kenya, the extradition process is governed by the Extradition (Contiguous and Foreign Countries) Act, Cap 76 and the Extradition (Commonwealth Countries) Act, Cap 77. The request for the return of a person is made by the authorities of the requesting country through the Attorney-General, while the DPP is tasked with applying to court.

1. Factors that a Court must consider during Extradition

A Court conducting extradition proceedings must take in account the following factors:

- A. Whether the Offence is Extraditable
- B. Statutory Grounds for Refusing to Extradite
- C. Where there is an Extradition Treaty or Agreement between Kenya and the Requesting State
- D. Jurisdiction
- E. Bail
- F. Court's Duty

CHAPTER FOUR

INSTITUTIONS INVOLVED IN COMBATING ILLICIT TRADE

There are several Ministries, Departments, Authorities, Agencies and other institutions charged with combating illicit trade in Kenya as provided for in the Constitution and in various pieces of legislation.

The Constitution establishes various Offices and Commissions charged with combating illicit trade in Kenya. They include:

1. The Office of the Director of Public Prosecutions-exercises state powers of persecution.
2. Office of the Attorney-General-Primary government legal advisor and in-charge of drafting of legislation.
3. Ethics and Anti-Corruption Commission-conduct investigation especially regarding illicit cash flows.
4. Office of Inspector General of the National Police Service and National Police-conduct investigation of offences.
5. Courts-Hear and determine criminal proceedings.

COURTS TASKED WITH COMBATING ILLICIT TRADE IN KENYA

1. The High Court
2. Environment And Land Court
3. Magistrates' Courts

NEED FOR SPECIALISED COURTS THAT DEAL WITH MATTERS RELATING TO ILLICIT TRADE

Specialized courts are a feature of the judicial systems of many countries. The jurisdiction and function of such courts vary, sometimes widely, from one to another.¹³⁸ If the objective of Kenya's judicial system is to maintain high-quality and high-productivity generalist courts¹³⁹, an important consideration would be to transfer jurisdiction over matters dealing with illicit trade to specialized courts. Some of the matters dealing with illicit trade are often time-consuming, problematic, and complex.¹⁴⁰ This Manual therefore recommends the establishment of a specialized court with limited jurisdiction to hear and determine matters that touch on illicit trade.

ARGUMENTS IN FAVOUR OF SPECIALISED COURTS

There are several advantages to having specialized courts that only have the jurisdiction to hear particular and complex legal issues. They include:

1. Judicial System Efficiency

This system of specialized courts allow judges who preside over courts with unlimited jurisdiction to remain current on fewer areas of law. This is because the specialised fields of the law are assigned to specialized courts. The research efficiency of the judges in generalist courts is therefore increased.

2. Legal System Efficiency

Since generalist judges may be only marginally familiar with some complex areas of law, advocates usually have to go into great detail on that area during proceedings. They do this in order to educate the judge, and to ensure that they have access to as much information as possible that is favorable to their case. Advocates also do this in order to lay the groundwork for an appeal if the judge's decision fails to grasp the nature of the dispute and the elements of the law that compel its resolution. This is time consuming and costly for litigants.

On the other hand specialized court judges, usually do not need to be educated by the bar. This is because they are much more capable of reducing the scope of the legal framework to the vital issues on which resolution of the case depends. Since the litigants do not feel the need to establish a comprehensive record, the cost and delay are greatly reduced

3. Uniformity

Greater uniformity yields more consistent case law and, over time, less litigation. Less uniformity, which arises as a result of complex and narrowly focused jurisdiction being exercised by a number of generalized courts, leads to inefficiencies, increased forum-shopping problems, loss of confidence in the courts, and weaker jurisprudence.¹⁴⁵

4. Expertise

Judges that work in specialized courts have specific experience and therefore greater expertise. They are therefore more likely to produce higher-quality decisions with fewer rates of appeals. On the other hand, Generalist judges usually have a high caseload that consist of matters touching on various fields of the law. It is therefore challenging to remain sufficiently conversant and current with every area of law. This may lead to decisions that more prone to appeals

5. Improved Case Management

Since specialized courts tend to have similar cases, the procedural rules and requirements can be specifically designed to facilitate effective case management. Additionally, specialized judges are usually in a better position to effectively impose and monitor case management controls. Such controls include: setting and enforcing pretrial preparation deadlines; supervising disclosure of evidentiary materials and information, making

interlocutory rulings; requiring advocates to prepare case summaries and proposing pretrial/trial schedules; and advocating for settlement proceedings

6. Elimination of Conflicts and Forum Shopping

Specialized courts serve to reduce and even eliminate conflicts in the interpretation and application of the law in their field(s) of jurisdiction. This depends on how they are structured and how their decisions are appealed. It is common to find conflicts in law between generalist courts in different geographical regions of a country. Such conflicts promote forum shopping by litigants.

Resolving such conflicts in law at appellate courts or second instance tribunals is costly and causes delays for litigants as well as to the judicial system. Therefore, establishing specialized courts with limited jurisdiction can reduce and eventually eliminate such conflicts and the forum shopping

7. Increased System Flexibility

Caseloads tend to vary over time in particular fields of the law. Tasking generalist courts with such fluctuating caseloads usually leads to untimely and unsystematic resolution of their ongoing caseload. Appointing additional new generalist judges may soften the impact of the workload increase, but what is to be done with the extra judges when the workload diminishes. Specialized courts can play a significant role in helping court systems to cope with such variations by handling those volatile areas. The number of judges in such courts can be adjusted to cope with the workload

8. Consistency of Administrative Agency Law

As various agencies perform their designated functions and exercise their authority, they inevitably generate disputes which then must be resolved, usually by some internal agency dispute resolution process. One of the primary functions of administrative agencies is to produce a consistent interpretation of the law that confers their jurisdiction. In the absence of independent dispute review forums, such reviews should be conducted by a single specialized forum rather than by a number of generalist regional courts

FACTORS TO CONSIDER WHEN ESTABLISHING SPECIALISED COURTS

1. Selection of the Specialized Subject Matter

The jurisdiction of a new specialized court should be selected carefully.¹⁵⁴ The legal field should be one in which generalist court judges, in processing their varied caseload, are unlikely to achieve sufficient expertise and efficiency.

2. Isolate the Jurisdiction

Wherever possible, the judges of a specialized court should have complete authority over the fields of law and subject matters placed within their jurisdiction. They should not share their jurisdiction with other courts via any kind of concurrent jurisdiction arrangement. If possible, the jurisdiction should be defined to constrain litigants from embedding the specialized legal issues in more broadly focused cases whose other issues fall within the jurisdiction of other courts.

3. Define the Jurisdiction to Promote Judicial Interest

If the jurisdiction of a specialized court is so narrowly drawn so that judges continually hear and determine the same legal issues and factual disputes, the process becomes mechanical. This usually leads to a diminished quality of judges and ultimately the status of the court.

The effects of repetitiveness, in terms of legal and factual issues, and repetitive advocacy from the same group of advocates may create vulnerabilities in the court system.

The court may therefore be in danger of being captured by its professional clientele. To protect against such risks, the jurisdiction of a specialized court might be broadened to include two or more distinct specialty areas of the law, as in the case of illicit trade

4. Consider the Need for a Specialized Court

A number of institutional considerations should be reviewed, when considering the creation of a specialized court. These factors include:

- i. Whether the jurisdiction can/should be given to an independent administrative agency/tribunal;¹⁶⁵
- ii. Whether generalist courts are able to handle the extra workload;¹⁶⁶
- iii. Whether the current judicial system is efficient in terms of speedy determination of such matters;
- iv. Whether the current judicial system is promoting the deterrence of such offences; and
- v. Whether the area of the law that defines the Court's jurisdiction is likely to continue to generate litigation for the court to handle for the foreseeable future.

Carefully structured statistical studies should be undertaken to determine what kind of workload the new court is likely to have before legislation creating it is drafted. Such courts need not always be permanent additions to an existing court system; as has been done on several occasions in the United States, specialized courts can be created for fixed periods of time by legislative action that includes sunset provisions. When the caseload reaches a low threshold, it may be more economical to transfer the specialized court's jurisdiction back to the generalist regional courts than to maintain a specialized court.

5. Creation of same status courts

Specialized court judges typically are viewed by the legal and judicial professions as lower in status and importance than generalist court judges. To improve the status of such courts, legislative bodies should establish same salary levels and benefits, and same constitutional status as the judges of the general courts for specialized judges.

6. Constrain the Tendency Toward Isolation

Some advocates of specialized courts suggest that one way of restricting this tendency toward isolation is to have judges hear cases in panels of three that are based on a rotation so that the composition of each panel changes with each new case, as is done in the Federal Republic of Germany. Another alternative is to have individual generalist court judges occasionally sit on these panels and, alternatively, to have individual specialized court judges sit on generalist court panels. Such exchanges could promote learning and information sharing in a manner that is beneficial to the adjudication process. and, in addition, is likely to be personally rewarding and invigorating for both categories of judges. Such exchanges should be considered only after the specialized court judges have achieved full competence and are considered fully qualified and competent in their respective specialties.

Additionally, another alternative is to broaden the jurisdiction to include more than one narrowly focused field of the law. A specialized court might have jurisdiction in two or three narrow but related fields of law. Such mixed jurisdiction, although specialized, provides for learning and, in addition, increases the level of challenge and interest to the judges.

7. Determine the Appropriate Organizational Hierarchy

Legislators should carefully consider whether to create specialized courts at the trial or the appellate level or both. Where adjudication of complex subject matter requires specialized expertise, such expertise should be located at the fact-finding or trial level. Specialized courts may well function best, in the overall scheme of things, at the first-instance level where:

- (i) judges with the required subject-matter expertise are capable of analyzing complex technical matters, and
- (ii) appeals are not automatic but must be based on allegations of serious error by the first-instance court.

To minimize the problems associated with capture and isolationism, review of the decisions of the specialized courts should fall within the jurisdiction of second instance or appellate generalist courts.

Alternatively, where the objective is to achieve a predictable body of stable and relatively uniform interpretation in a particular field of the law that is complex and technically difficult, specialization may be more appropriate at the appellate level.

Decisions issued by lower generalist courts that span the spectrum can be reversed and/or remanded to create greater coherence and consistency.

8. Make Access as Convenient as Possible to All Prospective Litigants

Creating a single specialized court to handle a particularly complex field of law may limit the access of some litigants. The specialized court should be located as centrally as possible to all major population centers

KEY AGENCIES TASKED WITH COMBATING ILLICT TRADE

Various pieces of legislation provide for various agencies that have been tasked with combating illicit trade.

1. Ministry of Industry Trade and Cooperatives, State Department for Trade
2. Kenya Industrial Property Institute (KIPI) (Industrial Property Act, 2001-Section 5)
3. Kenya Copyright Board (KECOBO) (Kenya Copyright Board- Section 3)
4. Anti-Counterfeit Authority (ACA) (Anti-Counterfeit Authority Act, No. 13 of 2008)
5. Kenya Bureau of Standards (KEBS) (Standards Act, Chapter 496)
6. Kenya Revenue Authority (Kenya Revenue Authority Act, No. 2 of 1995)
7. The Department of Weights and Measures (The Weights and Measures Act, Cap.513, and the Trade Descriptions Act, Cap. 505)
8. Kenya Plant Health Inspectorate Service (KEPHIS) (Kenya Plant Health Inspectorate Service Act No. 54 of 2012)
9. The Assets Recovery Agency (ARA) (Proceeds of Crime and Anti-Money Laundering Act)
10. Kenya Forest Service (KFS) (Forest Conservation and Management Act No. 34 of 2016)
11. Pharmacy and Poisons Board (Pharmacy and Poisons Act, Cap 244)
12. Kenya Wildlife Service (KWS) (Wildlife Conservation and Management Act, No. 47 of 2013)
13. Financial Reporting Centre (FRC) (The Proceeds of Crime and Anti-Money Laundering Act 2009) (The Prevention of Terrorism Act 2012)
14. National Environment Management Authority (NEMA) (Environmental Management and Co- Ordination Act No.8 of 1999 EMCA)

OTHER AGENCIES

1. Competition Authority of Kenya (Competition Act No.12 of 2010)
2. The National Authority for the Campaign Against Alcohol and Drug Abuse (NACADA) (NACADA Act No.14 of 2012)

3. Anti-Doping Agency of Kenya (Anti-Doping Act)
4. Kenya Citizens and Foreign Nationals Management Service (Kenya Citizens And Foreign Nationals Management Service Act, 2011)
5. Director in charge of citizenship and immigration
6. Kenya Maritime Authority (Kenya Maritime Authority Act; Merchant Shipping Act)
7. Firearms Licencing Board

OTHER STAKEHOLDERS RELEVANT TO THE ENFORCEMENT OF LEGISLATION RELATING TO ILLICIT TRADE

1. Kenya Association of Manufacturers
2. Kenya Private Sector Alliance
3. Kenya National Chamber of Commerce and Industry

NATIONAL ACTION PLAN TO COMBAT ILLICIT TRADE 2019-2022

The National Action Plan for Combating Illicit Trade, 2019-2022 (“the Action Plan”) which was launched in June 2019 aims at ensuring that agencies tasked with combating illicit trade have the required capacity and leverage their synergies with other partners and collaborators to realize meaningful impact in the war against illicit trade. The objectives of the Action Plan are to:

1. Reduce illicit trade in the Kenyan market by 20% p.a.
2. Strengthen the capacity of agencies to combat illicit trade.
3. Strengthen collaborations and partnerships.
4. Enhance public-private partnerships towards managing the vice.
5. Increase the level of awareness on illicit trade by 20% p.a.

To ensure the achievement of the Action Plan’s objective, each agency is required to develop and implement a resource mobilization strategy and the resources required must be included in the agency’s budgetary estimates.

CHAPTER FIVE

PRE-EXPORT VERIFICATION OF CONFORMITY

EFFECTIVENESS OF THE PRE-EXPORT VERIFICATION OF CONFORMITY (PVoC) TO STANDARDS PROGRAM

The PVoC Program is a conformity assessment program applied to products at the respective exporting countries, to ensure their compliance with the applicable Kenyan Technical Regulations and Mandatory Standards or approved specifications.¹⁷⁸ The purpose of the verification is to assure Kenyan consumers of the safety and quality of the imported goods they buy, and to protect Kenyan manufacturers from unfair competition from imports.

1. Objectives of the PVoC program

- i. To ensure quality of products, health and safety, and environmental protection for consumers.
- ii. To facilitate trade by ensuring that compliant goods are given expedited clearance at the port of entry.
- iii. To safeguard the country from unfair trade practices and dumping of substandard goods by ensuring that imported products comply with the same requirements to which locally manufactured goods are subjected.
- iv. To safeguard the country's national security.
- v. To prevent deceptive trade practices.
- vi. To enhance efficiency of clearance of imported goods at the ports of entry.

2. Modalities of the PVoC program

The KEBS is in charge of the conduct of the PVoC. To this end, KEBS has subdivided the world into nineteen (19) regions based on proximity and trade volumes. KEBS has also partnered with authorised PVoC agents in the nineteen regions to assist with the verification of all consignment destined for Kenya. All consignments destined for Kenya are required to undergo mandatory certification in the country of origin or supply prior to shipment into the country. The authorised agents have the powers of inspection, sampling, testing, sealing of full-load containers and issuance of Certificate of Conformity (COCs) / Certificate of Inspection (COIs) / Certificate of Roadworthiness for Motor Vehicles (CORs) or Non conformity Report (NCR) where relevant standards and regulatory requirements have not been met.

3. Routes for Certification

The PVoC program provides four (4) routes for obtaining certification dependent on the frequency of exporters' shipments to Kenya and the level of compliance shown in the initial application.

Route A

Under this Route, products to be shipped have to be tested and physically inspected by the PVoC agent to demonstrate conformity. All containerized cargo under this route must be sealed by the agent's seal and container numbers indicated in the CoC.

Route B

This route offers a fast track certification process through registration of products by the PVoC Agent. Products eligible for registration must have reasonable and consistent levels of quality (homogenous products).

Shipments of registered products are exempted from mandatory testing and certification may be based on physical inspection only. To ensure product conformity throughout the registration period of one (1) year, regular testing of registered product is conducted.

Frequent exporters of such homogenous products are advised to pursue this route. Some products, though homogenous in nature, are not eligible for certification under this route¹⁷⁹.

Route C

This route is open only to manufacturers who can demonstrate existence of a quality management system in their production/ manufacturing process. It involves auditing of the production processes and licensing of products manufactured thereof by authorized PVoC Agent. A license issued for the relevant products shall be valid for three (3) years. Licensed products shall be subject to random physical inspection by authorized PVoC Agent(s) prior to issuance of CoC and shipping. To ensure product conformity throughout the license period, regular testing of registered product is conducted.

Route D

This route is open only to registered importers of consolidated cargo. This is cargo containing a wide range of products generally in small quantities belonging to several consignees who have pooled or assembled together their parcels to form one consignment which may be declared as belonging to one importer at the port of destination. To be eligible, a consolidated cargo shall contain not less than three (3) different products/ brands.

Registered consolidators are required to apply for certification and submit the packing list and commercial invoice to PVOC agent at least forty-eight (48) hours before inspection. Upon inspection the PVOC agent shall issue a Certificate of Inspection (CoI). All containerized cargo under this route must be sealed by the contracted inspection agencies and seal numbers indicated in the CoC. High risk goods imported through this Route shall be subjected to testing at destination by KEBS at the importer's cost.

4. Challenges

Some of the challenges experienced under the PVoC programs include:

1. Lack of information on the relevant standards for the different imports and applicable exemptions by importers.
2. Lack of proper knowledge on applicable standards by the PVoC agents. This has on occasion resulted in the detection of substandard goods in the market.
3. High charges under the program. The fee charged is ad valorem which means it charged on the basis of the value of one's goods. This has been argued to promote importation of low-quality goods as these have a lower value hence lowering the cost. However, this is the system used by all countries managing such programs.
4. Lack of clear direction from KEBS on the PVoC program. For instance, although the manual provides for compulsory verification and inspection of goods at the exporting country, the Ministry of Trade recently re-introduced local CoC which has resulted in double inspection of goods and high costs for traders.

5. Way Forward

The above challenges have been faced by different governments and have even led to the suspension of the programs in some countries eg Uganda. However, through consultations and creation of awareness, the Uganda National Bureau of Standards (UNBS) was able to resume the program. Further, UNBS set up a sensitization program, wherein all stakeholders were informed about the program generally and the standards applicable as well as the authorized agent to undertake the inspection on behalf of UNBS. UNBS finally set up a toll free number for quick assistance in the event a trader had any urgent inquiry.

Borrowing from the practice in Uganda, to ensure that the PVoC program is effective in Kenya, KEBS and KRA should invest in creating awareness on the program, the standards and the authorized PVoC agents. The traders (importers) need to be fully sensitized about the program and should also have a means of reaching KEBS for inquiries. The traders should also be informed that the role of inspection by the authorized agents does not take away from the role of surveillance by KEBS. Therefore, when substandard goods are seized in the market, the traders may not simply rely on the CoC to escape liability. Additionally,

KEBS should be empowered with the relevant resources (including financial and human resources) to ensure that the objectives of the PVoC program are met.

It is also critical that any changes in relevant standards or exemptions are informed to the traders and also displayed in strategic locations such as the customs offices in the Zones of operation and the customs office at the ports of entry.

CHAPTER SIX

EMERGING ISSUES

This Chapter covers the issues that have in the recent past become influential in the fight against illicit trade. These issues shape the national strategies and agency cooperation in this fight.

ONLINE COUNTERFEITING

Online counterfeiting is the sale of counterfeit products through the internet

Combating online counterfeits

INTA recommends a number of best practices to combat online counterfeiting, which measures are aimed at different players in the online eco-system such as social media sites, search engines, logistics companies, trading platforms, payment service providers among others.

Search engines

- a) Their terms of service should expressly prohibit advertisements for counterfeit products.
- b) They should have the complaint processes to report advertisements for counterfeit products and they should respond in a timely manner to such reports.
- c) They should have a timely and effective process for trade mark owners to inform them of the illegal sale of counterfeit goods.
- d) To the extent that there are legal frameworks applicable to removal of content on search engines and the legal grounds implicate behavior used by counterfeiters, search engines should provide an efficient process for parties to submit removal requests.

Trading platforms

- a) They should enhance their procedures for identifying and taking action against repeat offenders.
- b) They should employ preventative measures such as filters and identity verifications to reduce the sale of counterfeits by anonymous parties.
- c) They should have an effective take down procedure to make sure that listings for counterfeit products are removed when reported and not reposted.
- d) They should correspond with trade mark owners upon request to learn about infringements to a particular trade mark.

Trade mark owners

- a) They should regularly create awareness about their trade marks to the public and how people can identify counterfeit products bearing their trade marks.
- b) They should regularly monitor online marketplaces and social media sites to identify which sites are selling counterfeit products.

CRYPTOCURRENCY PAYMENTS

The anonymity of and lack of regulation for cryptocurrency payments makes them an attractive option for people who are involved in illicit trade. According to research from the Faculty of Law of the University of Oxford, cryptocurrencies are used to finance illegal trade (drugs, hacks and thefts, illegal pornography, even murder-for-hire), potential to fund terrorism and money laundering.¹⁹⁷ It is estimated that about US\$76 billion of illegal activity per year involves Bitcoin (one of the most used cryptocurrencies), which amounts to almost half of Bitcoin transactions worldwide. In order to reduce or completely extinguish the use of cryptocurrency for illicit trade, it is imperative for governments and regulatory agencies to formulate regulations and policies that will tackle the aspects of cryptocurrency that make it lucrative for use in illicit trade.

PROPOSED MERGER OF THE INTELLECTUAL PROPERTY AGENCIES

The suggestion to merge the state agencies in charge of the protection and enforcement of intellectual property rights (The Kenya Copyright Board, The Kenya Industrial Property Institute and the Anti- Counterfeit Authority) into one agency called the Kenya Intellectual Property Office (KIPO) originated from the Presidential Taskforce on Parliamentary Reforms.

The proposed merger is in line with best practices in other jurisdictions²⁰¹ and is necessitated by the fact that the agencies' functions are complementary and they should therefore be housed in one institution. Under the proposal, the merged agencies will become directorates under the new agency to be formed and the CEOs of the merged agencies will become heads of the directorates.

The Report by the Presidential Taskforce also recommended the enactment of an overarching law called the Government Owned Entities Bill to govern the agencies to be formed in line with the recommendations.²⁰³ The Bill was drafted in 2014²⁰⁴ but it has not yet been passed into law. According to the Bill Tracker on the Kenya Law website, the Bill has not yet been presented to Parliament for debate.

There has also been a suggestion to create an overarching intellectual property tribunal to merge the Industrial Property Tribunal, the Competent Authority under the Copyright Act and possibly the Seeds and Plants Tribunal. This suggestion originated from the Industrial Property Tribunal in response to an objection relating to the jurisdiction of the IPT. Before

the relevant legislation to effect the merger of agencies is passed, the agencies involved in the fight against illicit trade may collaborate in other ways such as the formation of multi-agency teams. The agencies should also pursue information sharing to enable them to be more effective in the fight against illicit trade.

TRAINING BY WCO

The WCO is an independent intergovernmental body whose mission is to enhance the effectiveness and efficiency of Customs administrations.²⁰⁸ Currently, the WCO represents 183 customs administrations across the world who collectively process approximately 98% of world trade.

One of the functions of the WCO is to offer training and capacity building services to its members. One of the tools that the WCO has developed is the Compliance and Enforcement Package (CEP) which contains WCO's approach in providing assistance to members in their compliance and enforcement activities for some of the high-risk areas such as drug trafficking, proliferation of weapons, counterfeiting of goods and piracy, among others. The WCO also runs an online academy where representatives from the trade community are able to access e-learning courses, webinars, books and news.

THE DESTRUCTION OF ILLICIT GOODS

Once illicit goods are seized by regulatory agencies, they may be used as evidence in legal proceedings after which they will most likely be destroyed; one of the goals of destruction of goods is to ensure that they are completely removed from all trade channels.²¹⁷ Some of the common methods for destruction of illicit goods are open air burning, shredding, crushing, burying in landfills.

JUDICIAL MECHANISMS IN THE FIGHT AGAINST ILLICIT TRADE

There are a number of gaps that exist in Kenya in relation to the judicial handling of illicit trade matters. The first is the lack of a specialized court or division of a court that handles both civil and criminal cases relating to illicit trade. It is prudent for Kenya to have a specialized court/court division in which judicial officers would be specially trained on the aspects of illicit trade so that they can make sound and practical decisions in those cases. A specialized court will also increase the speed at which illicit trade matters are heard; this is especially imperative since the delay of illicit trade cases leads to proliferation of illicit goods in the market which subsequently affects the health and safety of consumers.

Alternatively, the judiciary may train certain judicial officers in order to equip them to handle illicit trade matters within the existing court system.

The second is the shortage of specialized prosecutors who are trained on handling matters relating to illicit trade. As per the Constitution of Kenya, the prosecutorial power lies with

the ODPP and may be delegated to other parties vide an Act of Parliament. The ODPP should therefore train more officers who can handle illicit trade matters.

Thirdly, there are a number of gaps in the regulations which apply to handling of illicit trade cases. For example, there are no guidelines on the destruction of goods which have been the subject of illicit trade; therefore, courts do not follow up to ensure that the goods have been destroyed. There are also no guidelines on the forfeiture of movable property which has been used to carry out illicit trade. In some cases, such movable property may be owned by innocent parties who are not party to the illicit trade transactions. The Kenya Law Reform Commission may carry out a study on the procedural gaps in illicit trade law and recommend the areas that may be regulated upon.

CHAPTER SEVEN

INTERNATIONAL BEST PRACTICE IN THE FIGHT AGAINST ILLICIT TRADE- RECOMMENDATIONS

Illicit trade is a global problem that continues to grow leading to great risks to the society and the global economy. The national, regional and international regimes employed to prevent and mitigate the effects of illicit trade are diverse and intricate. Nonetheless, the criminal organizations behind illicit trade exploit the gaps and discrepancies between the policy and its enforcement. Further, the criminal organizations are constantly evolving in their tactics and using the latest technology to defeat the law.

The following practices have been implemented in various countries and have been of great assistance in combating illicit trade:

PROMOTING LEGITIMATE TRADE

The government is tasked with providing a conducive environment for the striving of legitimate trade. A conducive business environment for legitimate business will give incentive for the private-public partnership. Where legitimate businesses can thrive and have a competitive edge, they will be able to offer goods and services to the public at affordable prices which will eliminate the enticement of cheap prices offered by criminals. The government can ensure the thriving of legitimate business through the enactment of enabling laws and regulations and providing a conducive and competitive business environment.

ASSESSING THE MAGNITUDE OF ILLICIT TRADE

It is understandable that illicit trade in its nature is difficult to quantify since it is carried out in secret with the aim of avoiding detection. However, to effectively put mechanisms in place it is paramount for governments to have an estimate of the level of illicit trade within its own borders. Properly understanding the magnitude of the problem enables the proper allocation of resources and the direction of government policy.

To this end two methods have been popularly used in estimating the magnitude of illicit trade

a Residual Methods

Under this method, governments compare certain statistics in a bid to establish the trade gap filled by illicit trade.

b. Direct Measurement

This entails the carrying out of surveys to establish firsthand the magnitude of the illicit trade. This is similar to the Countrywide Baseline Survey on the size and impact of counterfeiting in Kenya carried out through the partnership of the ACA and TMEA.

Direct measurement may also be undertaken through expert groups such as manufacturers, law enforcement, industry representative amongst others.

POLITICAL GOODWILL AND SUPPORT

In the UK, there is a parliamentary group²²⁹ focused only on the combat of illicit trade within the UK. The group consists of parliamentarians from different parties and its main objective is to create awareness on the effect and impact of illicit trade and to come up with new ideas for tackling illicit trade. The group has been able to direct government policy toward the fight against illicit trade.

PUBLIC PRIVATE PARTNERSHIP

Representatives from both the public and private sector should be pulled together into a group whose focus should be preventing and reducing incidences of illicit trade through education (awareness creation) and intelligence sharing.

STRENGTHENING ENFORCEMENT

This includes empowering of key agencies by strengthening their legislative powers and providing an inter- agency information sharing and coordination platform which will ensure effective regulatory recourse.

EDUCATION AND AWARENESS CREATION

The focus of trainings should not only be limited to law enforcement but should also extend to manufacturers, importers and the general public

HARNESSING TECHNOLOGY

Although technology has been used to drive illicit trade, it can also be used to counter it. Technology has been used in the tobacco industry for tracking and tracing of genuine products which has played a role in reducing the magnitude of illicit trade. In South Africa, the introduction of LoRaWAN (long range wide area network) technology has made tracking of goods at various stages of the supply chain, particularly when it comes to the tracking of transported goods over long distances, affordable and easy²³². The technology has been deployed by traders in the tobacco industry to achieve an end-to-end supply chain audit trail designed to combat theft.

Satellite tracking has been used to tackle illicit fishing. The Pew Charitable Trusts has partnered with Satellite Applications Catapult to pioneer a system that enables government officials and other analysts to identify and monitor unlawful activities in global waters,

particularly illegal, unreported, and unregulated fishing, sometimes referred to as pirate fishing. This cutting-edge technology merges satellite tracking and imagery data with other sources of information, such as fishing vessel databases and oceanographic data, to help monitor seas across the globe.

Technology may be used in Kenya especially in tracking wildlife in our reserves to eliminate poaching. Further, KeNIC may be vital in the bringing down of websites selling illicit goods. KeNIC should be empowered especially as it relates pirated, fake or counterfeit goods sold online.

REGIONAL AND INTERNATIONAL CO-OPERATION

Illicit trade is a cross-border problem and thus governments should cooperate in tackling it. The establishment of an Anti -Illicit Trade Regulatory framework at a regional level for instance EAC will go a long way in eliminating illicit trade within the region²³⁴. Such a regulatory framework should include; inter alia: inter agency coordination mechanism, information sharing platforms, punitive measures for offenders, stronger enforcement measures and regional cooperation. Beyond the establishment of the regional framework, enforcement agencies such as customs official may set up an information sharing platform to easily capture criminals throughout the cross-border transaction.

Acceding to and nationalizing international treaties on the combat of illicit trade is also advisable so as to leverage on the techniques effected in other parts of the world.



ISBN 978-9966-1866-4-5



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