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# TOWARDS A HARMONISED ANTI-MONEY LAUNDERING APPROACH IN THE EAST AFRICAN COMMUNITY

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## Abstract

Article 5 of the Treaty for the Establishment of the East African Community (EAC) sets out four main stages of integration, namely, a customs union, a common market, a monetary union, and ultimately a political federation. Implementation of each of the stages of integration blurs national boundaries, paving way for free movement of persons, goods, services, and capital leading to increased trade and economic development. However, without proper structure to monitor cross border movements, the integration creates an avenue for criminals to move proceeds of crime freely within the region. For instance, several reports by the Sentry revealed that significant proceeds of crimes from South Sudan are laundered and invested in Kenya and Uganda. Despite these revelations, the EAC Partner States are yet to take joint measures to combat money laundering (ML). Further, the existing national anti-money laundering (AML) laws are divergent and characterised by enforcement deficits. Against this background, this paper makes a case for the need to jointly combat ML and its predicate offences among the Partner States and at the EAC level. Further, it audits the AML statutes of EAC Partner State, highlighting the discrepancies in the criminalisation of ML and the sanctions regime. The paper calls for the adoption of a more harmonised and proactive AML response within the EAC.

**Key words:** Anti-money Laundering, Predicate Crimes, Criminal Sanctions, Administrative Sanctions, Harmonisation, Corruption

## 1.   Introduction

Regional economic integration fosters economic cooperation and spurs socio-economic development among participating countries. To reap these positive gains that come with regional economic integration, Kenya, Uganda, and Tanzania established the East African Community (EAC).[1] The number of Partner States has grown over time to include Rwanda, Burundi, and South Sudan. The core goals of the EAC include the establishment of a customs union, a common market, a monetary union, and ultimately a political federation.[2] So far, EAC has significantly implemented its Customs Union Protocol,[3] and it is on course to implement the Common Market Protocol[4] and the Monetary Union Protocol.[5] The political federation, which is the ultimate stage of integration, is yet to be rolled out. However, preparatory works are underway. For example, in 2017, the EAC heads of state adopted a political confederation as a transitional model for the EAC's political federation.[6] The sustained efforts to realise these integration goals saw the EAC ranked number one in the 2019 Africa Regional Integration Index Report.[7] The increased integration efforts presents opportunities for economic development for each Partner State and also for the block as a whole. To achieve holistic economic growth, the EAC needs to foreground measures to prevent criminals from abusing opportunities presented by integration to perpetrate crimes such as money laundering (ML).

Money laundering is the process by which proceeds of crime are disguised to look legitimate and then integrated into the financial system. The laundered proceeds are derived from crimes such as corruption, fraud, and robbery that

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[1]   Treaty for the Establishment of the East African Community (signed on 30 November 1999, entered into force on 7 July 2000) (Hereinafter EAC Treaty).

[2]   EAC Treaty, art 5.

[3]   Protocol on the Establishment of the EAC Customs Union (adopted 2 March 2004). The Customs Union Protocol became fully fledged in 2010 however it is yet to be fully implemented. See Dicta Asiimwe, 'National interests delay Customs Union, even as technology kicks in' *The EastAfrican (Nairobi, 9 October 2018)* <https://www.theeastafrican.co.ke/business/National-interests-delay-Customs-Union/2560-4797928-489yg1z/index.html> accessed 15 March 2020.

[4]   Protocol on the Establishment of the EAC Common Market (adopted on 20 November 2009).

[5]   Protocol on the Establishment of the EAC Monetary Union (Adopted on 30 November 2013).

[6]   EAC, 'Political Federation' <https://www.eac.int/political-federation> accessed 14 April 2020.

[7]   African Union, Development Bank Group, United Economic Commission for Africa, Africa Regional Integration Index Report 2019 available at <https://www.uneca.org/sites/default/files/PublicationFiles/arii-report2019-fin-r39-21may20.pdf> accessd 15 April 2020.

are referred to as predicate crimes.[8] In the context of regional integration, criminals take advantage of porous borders that come with increased integration to move proceeds of crime from one jurisdiction to another in a bid to disguise the source, thereby frustrating efforts to trace and recover the criminal proceeds. For instance, within the EAC, several reports by The Sentry have revealed how South Sudanese politically exposed persons (high ranking officials in government and military) have looted the much-needed resources from South Sudan and invested them in real estate in Kampala, Uganda and Nairobi, Kenya.[9] These process is facilitated by banks in Uganda and Kenya that have subsidiaries in South Sudan who receive looted funds from the politically exposed persons without conducting enhanced due diligence to identify the source of the funds.[10] In 2016, the Kenya Commercial Bank, through its South Sudan subsidiary, was implicated for facilitating the transfer of embezzled funds by high ranking members of the South Sudanese government.[11] Apart from purchasing properties and investing, some of the high-ranking officials of South Sudan responsible for spates of violence freely reside in Kenya and Uganda. Despite these shocking revelations, authorities in Kenya and Uganda are yet to sanction entities involved or freeze assets that were procured by laundered proceeds. Further, at the Community level, there are no decisive measures that have been so far taken to condemn these practices or to conduct further investigations.

Apart from the cases of South Sudan, predicate crimes such as corruption are high among the partner states. The 2019 Transparency International's Corruption Perception Index ranking shows that apart from Rwanda, that has a score of 53, other Partner States score dismally with South Sudan rank-

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[8]     African Development Bank, *Bank Group Strategy for the Prevention of Money Laundering and Terrorist Financing in Africa, (May 2007)* 2 <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Bank_Group_Strategy_for_the_Prevention_Of_Money_Laundering_and_Terrorist_Financing_In_Africa.pdf> accessed 15 January 2020.

[9]     The Sentry, *Making a Killing, South Sudanese Military Leaders Wealth, Explained, The Sentry (May 2020)* < https://cdn.thesentry.org/wp-content/uploads/2020/05/MakingAKilling_TheSentry_May2020.pdf> 30 Many 2020(Hereinafter The Sentry Report 2020); The Sentry, *War Crimes Shouldn't Pay Stopping the looting and destruction in South Sudan The Sentry (September 2016)* 5-7 <https://cdn.thesentry.org/wp-content/uploads/2016/09/Sentry_WCSP_Finalx.pdf> 15 February 2020.(Hereinafter The Sentry 2016).

[10]    FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, (2012-2019), FATF, Paris, France. Recommendation 12. (Hereinafter FATF Recommendations).

[11]    The Sentry Report (2016), 6, 7,41,44.

ing second most corrupt nation.[12] Partner States also have prevalent predicate crimes, such as drug trafficking, where the ports of Mombasa and Dar es Salaam act as entry points or transit points.[13] Cross-border smuggling of goods, trading in counterfeit goods, illegal logging among others are some of the crimes generating proceeds of crime. Some of the enablers of these crimes include the predominant informal and cash-based nature of the EAC's economy,[14] enforcement deficit and inadequate resources that have seen less investment in combating ML and related crimes. So far, enforcement of AML measures with the EAC appears to be a sole responsibility of each Partner State. If such practices are left to continue undeterred, they threaten to water down the socio-economic gains of integration since integration in itself will indeed turn out to be a great enabler of transnational acquisitive crimes.

Confining the anti-money laundering (AML) measures to the domestic level in a liberalised market has a number of challenges. First, Partner States lack consensus in the AML policy framework at the community level since the responsibility rests in an individual Partner State. Therefore, criminal proceeds from the Partner States such as South Sudan can be reinvested freely in the Partner States like Uganda and Kenya.[15] Second, Partner States have varying definitions of ML without measures in place to harmonise the definitions. As a result, there is a lack of uniformity in identifying predicate crimes for ML. This impedes coordinated cross-border enforcement of AML laws, especially when a predicate crime in one country is not criminalised in another country. Third, Partners States have discrepancies in the sanction regime for money laundering offences. Therefore, criminals can forum shop and access the EAC market through the Partner States with weak sanctions and enforcement deficits.

Against this background, this paper discusses the spectre of ML within the East Africa community, calling for joint and concerted efforts among the

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[12] In the 2019 Transparency International Corruption Perception Index, Tanzanian, Uganda, Kenya, Burundi, and South Sudan scored 37, 28, 28, 19 and 12 respectively in a scale of 0-100, where 100 is least corrupt country. See Transparency International, Corruption Perceptions Index 2019 <https://www.transparency.org/cpi2019> accessed 15 March 2020.

[13] Liat Shetret et al, *Tracking Progress: Anti-Money Laundering and Countering the Financing of Terrorism in East Africa and the Greater Horn of Africa (Global Center on Cooperative Security 2015)* <https://www.globalcenter.org/wp-content/uploads/2015/03/Tracking-Progress-low-res.pdf> *accesed 15 March 2020.*

[14] Ibid.

[15] The Sentry Report (2016) and (2020) (n 9).

Partner States to combat ML. To this end, the subsequent discussion is divided into four parts. The first part makes a case for the need to combat ML at the Community level. The second part gives a general overview of the legal framework and regulatory framework of AML applicable to the EAC Partner States. The third part analyses the policy and legal response to ML adopted by each Partner State highlighting discrepancies in definitions and sanctions for ML offences and calling for harmonisation of the AML laws. Finally, the fourth part gives a general conclusion and specific recommendations.

## 2.  Why should the Partner States Combat Money Laundering at the Community Level?

The overarching reason for combating ML is to eliminate crime by ensuring that no person benefits from the proceeds of crime. Other reasons include safeguarding the integrity of financial institutions and increasing revenue collection to foster economic growth and development, as discussed below.

### 2.1  To Eliminate Crime

Stessens observes that the ultimate goal of the entire AML discourse is to reduce crime by making it difficult for criminals to spend proceeds of crime freely.[16] The inability to freely spend proceeds of crime will be a disincentive to criminals within and outside the EAC. The statistics on the scales and prevalence of predicate crimes within the EAC are not readily available partly because of the clandestine nature of criminal activities.[17] Nevertheless, there is evidence that ML takes place in the EAC unabated. For example, the Sentry Report of 2019 revealed how South Sudanese officials plunder the country and purchase properties in leafy suburbs in Kenya and Uganda.[18] The Institute of Economic Affairs also documents illicit financial flows in South Sudan, showing that Kenya and Uganda provide transit routes through which resources leave the landlocked country destined to other countries for investment of the illicit

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[16]  Guy Stessens, *Money Laundering: A New International Law Enforcement Model (New York: Cambridge University Press 2008) 420.*

[17]  African Union High Level Panel Report, *Illicit Financial Flows from Africa Illicit Financial Flows (2015)* <https://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf > *accessed 15 January 2020.*

[18]  The Sentry (2016) (n 9) 5-7.

finances.[19] Besides, the prevalence of predicate crimes such as corruption,[20] cybercrime, trade invoice manipulation,[21] smuggling, illegal trade in drugs and counterfeit goods, wildlife trafficking, trade in illegal timber and charcoal, and piracy make EAC Partner States susceptible to ML.[22] Apart from acquisitive crimes, the threat of terrorism is high in the region, and ML typologies are likely to be used to finance terrorist groups such as Al Shabaab.[23] Therefore, with increased cross-border movement of persons, goods, and capital, there is a need to adopt responsive AML measures at the EAC level and the national level to cut all avenues that are exploited to further acquisitive crimes such as ML and terrorist financing. This will help reduce far reaching economic effect such as distortion of commodity prices in the economy.[24]

## 2.2 To Protect the Integrity of the Financial System

The viability of banks and other financial institutions within the EAC is a matter of concern since bank failures scare investors and negatively impacts on the economy. The move towards having a common currency, a vital component of the Monetary Union Protocol, makes it a priority for the EAC to ensure prudent management and stability of banks and financial institutions in the Partner States. In the past, banks in EAC have been involved in ML. In Kenya, in 2019, the Central Bank fined five banks for failing to report suspicious ML transactions related to the first and second National Youth Service corruption scandals in which public funds were embezzled.[25] The Bank of

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[19] Institute of Economic Affairs, '*Why Reduction of Illicit Financial Flows that Fuels South Sudan's War Economy is in Kenya and Uganda's Interest' November 2018, page 8* < http://www.ieakenya. or.ke/publications/bulletins/2//> 15 April 2020.

[20] Tanzanian, Uganda, Kenya, Burundi, and South Sudan scored dismally in the 2019 transparency international corruption perception index. In a scale of 0-100, where 100 is least corrupt, the Partner States scored 37, 28, 28, 19 and 12 respectively. See Transparency International, *Corruption Perceptions Index 2019* <https://www.transparency.org/cpi2019> accessed 15 March 2020.

[21] Global Financial Integrity (2019).

[22] United Nations Office on Drugs and Crime (UNODC), *Transnational Organized Crime in Eastern Africa: A Threat Assessment (*2013, UNODC); Shetret *et al* (n 13).

[23] Ibid.

[24] For example, the Institute of Economic Affairs indicates that the cost of real estate in Nairobi and Kampala skyrocketed since most of the funds looted from South Sudan are invested in this sector. Ibid (n 19).

[25] NYS scam: Banks fined Sh721m warned against insurance claims, Business Daily (Nairobi, 5 March 2020) <https://www.businessdailyafrica.com/news/NYS-scam-Banks-fined-Sh721m-warned-against-insurance-claims/539546-5478920-a277r0z/index.html> accessed 15 March 2020; NYS scam: Banks fined Sh721m warned against insurance claims, Business Daily (Nairobi, 5 March 2020) <https://www.businessdailyafrica.com/news/NYS-scam-Banks-fined-Sh721m-warned-against-insurance-claims/539546-5478920-a277r0z/index.html> accessed 15 March 2020.

Tanzania and the Bank of Uganda have similarly penalised banks for failure to report suspicious transactions.[26] Where commensurate sanctions are issued, they dissuade banks from facilitating ML by soiling the reputation of banks and reducing the profitability of banks, more so in cases of small banks.[27] Consequently, this may result in runs, and potential depositors may avoid banks that facilitate ML.[28]

Furthermore, there have been cases of banks collapsing while others, the regulator has been forced to liquidate them. In Kenya, the collapse of banks such as Charterhouse Bank, Imperial Bank, and Dubai Bank was linked to bank fraud and ML.[29] In 2017, the Central Bank of Tanzania placed FBME Bank under liquidation after the US Treasury's Financial Crimes Enforcement Network (FinCen) declared it a primary ML concern.[30] These cases of bank failures negatively impact a Partner State's economy and the EAC's economy more so where it is a big bank with depositors drawn from the entire EAC region. As more banks open shop within the EAC market, it is necessary for the adoption of concerted measures at the EAC level to supervise the implementation of sound AML measures as well as prudential supervision.

To achieve effective supervision, there is a need to harmonise AML measures within the EAC to prevent fraudulent financial institutions from conducting forum shopping and accessing the EAC market through countries with

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[26] 'Tanzania fines five banks for lax anti-money laundering controls' *The EastAfrican (Nairobi, 15 January 2020)* <https://www.theeastafrican.co.ke/business/Tanzania-fines-five-banks-for-lax-anti-money-laundering-controls/2560-5285154-kyisct/index.html> accessed 15 January 2020; Sulaiman Kakaire, 'Why Uganda can't beat money laundering yet' *The Observer (Kampala, 8 November 2017)* <https://observer.ug/news/headlines/55842-why-uganda-can-t-beat-money-laundering-yet.html> accessed 15 January 2020.

[27] Gregory Gilchrist, '*The Special Problem with Banks and Crime' [2014] 85* University of Colorado Law Review *1, 31.*

[28] Ibid 32; Patrick Alushula, 'We picked painful lessons from NYS scam, admits Family Bank' Standard Digital (Nairobi, 28 February 2017) <https://www.standardmedia.co.ke/business/article/2001230933/we-picked-painful-lessons-from-nys-scam-admits-family-bank> accessed 15 March 2020.

[29] Bankelele, 'Lessons from other bank collapses around the world' *Daily Nation* (Nairobi, November 1 2018) <https://www.nation.co.ke/oped/blogs/dot9/bankelele/2274454-4832544-15jfu0y/index.html> accessed 15 January 2020.

[30] 'BoT finally annuls FBME's banking license' *The Citizen,* (Dar es Salaam, 8 May 2017) <https://www.thecitizen.co.tz/news/BoT-finally-annuls-FBME-s-banking-license/1840340-3918080-axrpfk/index.html> accessed 6 January 2020; *Fbme Bank Ltd., et al. v. Steven Mnuchin (in his official capacity as Secretary of the Treasury) et al* Case No. 15-cv-01270 (CRC), United States District Court for the District of Columbia <www.courthousenews.com/wp-content/uploads/2017/04/FBME.pdf> accessed 15 January 2020.

weak regulations and enforcement deficits. Besides the internal threats to the economy, failure to combat ML will see Partner States listed by the Financial Action Task Force FATF as high-risk jurisdictions, thereby excluding their financial institutions from the international financial system. Where several Partner States are listed, this will affect the overall rating of the EAC as a sustainable and preferred investment hub. In light of the foregoing, the Partner States should prioritise sound prudential and AML supervision of financial institutions such as banks, insurance companies, forex bureaus, among other entities that are vulnerable targets for money launderers.

### 2.3 To Increase Revenue Collection

Effective AML measures will lead to an increase in revenue collection. Some countries, such as Australia, consider an increase in tax collection as the primary goal of its AML measures.[31] Among the EAC Partner States, the imminent threat to terrorism and being blacklisted by the FATF appears to have been key factors in formulating AML measures.[32] Therefore, the push to implement the AML status seems not to be a top priority at the national level.

Since economic integration aims at increasing trade, trade-based money laundering is an area of concern. Trade-based money laundering is part of the international trade fraud that aims at the transfer of value between jurisdictions and avoiding tax obligations.[33] In the case of trade-based money laundering, apart from avoiding tax obligations, there is an additional motivation to conceal the origin of illegally obtained capital to create an impression that it emanated from an ostensibly legitimate business transaction.[34] The strategies used include over-invoicing or under-invoicing, falsely, or inaccurately describing goods or services, among others. The scales of losses are shocking. For example, Kenya is believed to have lost as much as US$1.51 billion between 2002 and 2011 to trade misinvoicing[35] while in Uganda the Global Financial Integrity estimates that from 2006 to 2015, the potential loss for

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[31]   Stessen (n 16) 194.
[32]   Shetret *et al (n 13) while analysing the AML/CFT measure in the Horn of Africa notes the FATF monitoring process saw Kenya, Uganda and Tanzania adopt AML measures to comply with the all legislative standards as outlined by the FATF.*
[33]   Samuel McSkimming, 'Trade Based-Money Laundering: Responding to an emerging threat' [2010] 15 No. 1 Deakin *Law Review 37, 42.*
[34]   Ibid.
[35]   African Union HLP Report (n 17).

misinvoicing was approximately US$4.9 billion for over and under invoicing of imports and US$1.7 billion for over and under-invoicing of exports.36 Therefore, the EAC's Partner States AML initiatives should not narrowly focus on formal compliance with the FATF standards that mainly focus on banks and financial institutions. The AML response should be tailored to complement tax collection measures in the cross-border movement of goods and services to aid integration as the ultimate EAC agenda.

## 3 Overview of the International and Regional AML Legal and Institutional Framework Applicable to the EAC Partner States

### 3.1 Overview of the International Legal Framework

Most criminals do not want to declare that they earn from proceeds of crime publicly. They adopt ML strategies to disguise their sources to appear legitimate. Therefore, countries waging war against acquisitive crimes also implement AML measures to make it difficult for criminals to utilise the proceeds of crime. At the international level, the United Nations (UN) first addressed ML by adopting the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (the Vienna Convention).37 As the name suggests, this Convention narrowly focused on combating laundering of proceeds resulting from drug trafficking offences. The most significant global effort was the adoption of the UN Convention against Transnational Organized Crime and the Protocols thereto, 2000 (Palermo Convention).38 Unlike the Vienna Convention, the Palermo Convention extended the scope of predicate offences beyond drug trafficking offences. The offences set out in article 6 of the Palermo Convention remain the key focus of the global AML

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36 Global Financial Intergrity, 'A Scoping Study of Illicit Financial Flows Impacting Uganda' October 16, 2018 < https://gfintegrity.org/report/a-scoping-study-of-illicit-financial-flows-impacting-uganda/#:~:text=Trade%20misinvoicing%20is%20the%20most,estimated%20using%20 publicly%20available%20data.&text=The%20figure%20for%20possible%20outflows,trade%20 (2006%2D2015).> accessed 15 April 2020.

37 Kenya, Uganda, Tanzania, Burundi and Rwanda are signatories to treaty < https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6> accessed 15 January 2020.

38 Kenya, Tanzania, Uganda Burundi and Rwanda are signatories to the treaty <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII 12&chapter=18&clang=_en > accessed 15 January 2019.

initiatives. In essence, article 6 calls on all states parties to enact laws which criminalises the intentional:

> [C]onversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

> The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;[39]

The Palermo Convention also enjoins each state party to establish a Financial Intelligence Unit (FIU) to serve as 'a national centre for the collection, analysis, and dissemination of information regarding potential money laundering.'[40] In line with the Palermo Convention, Kenya, Uganda, and Tanzania have established financial intelligence units (FIUs).[41] Rwanda passed its law establishing its FIU, the Financial Intelligence Center, in January 2020.42 At the time of writing, it could not be ascertained whether the centre had already been set up. South Sudan and Burundi are yet to establish FIUs. Furthermore, South Sudan is the only member of the EAC that has not ratified the Vienna Convention and the Palermo Convention owing to its age and the prevailing political situation.

In addition to the two conventions mentioned above, there are other international and regional conventions aimed at combating ML and predicate crimes. These include the UN Convention against Corruption of 2003,[43] the International Convention for Suppression of Financing of Terrorism of 1999, and the African Union Convention on Preventing and Combating Corrup-

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[39]   The Palermo Convention Art 6(1)(a).

[40]   The Palermo Convention 2000, art 7 (1) (b).

[41]   Financial Reporting Centre established under s 21 of the Kenya's Proceeds of Crime and Anti-Money Laundering Act 2009 (KPCAML Act 2009); Financial Intelligence Authority established under s 18 of the Uganda's Anti-Money Laundering Act 2013, (UAML Act 2013); Financial Intelligence Unit established under s 4 of the Tanzania's Anti-Money Laundering Act 2006. (TAML Act 2006).

[42]   Law n° 74/2019 of 29/01/2020.

[43]   Kenya Uganda and Tanzania adopted this Convention on 9 December 2003, 9 September 2004 and 25 May 2005 respectively.

tion.[44] These, among other conventions, calls upon state parties to criminalise the predicate crimes at the national level and coordinate with other countries in preventing and combating crimes. Since some of these economic crimes are committed by senior government officials who may not be tried in national courts, the African Union has made a significant effort to criminalise ML in the Malabo Protocol.[45] The Protocol further seeks to give the African Court of Justice and Human and Peoples' Rights jurisdiction over crimes such as ML and corruption. Though this is a laudable initiative, the Protocol is yet to come to force,[46] and also it has some shortcomings. First, it provides for blanket immunity for heads of state or government and other senior state officials while in office,[47] and second, it criminalises ML resulting from corruption-related offences only. These loopholes are likely to limit its effectiveness in combating ML once it enters into force.

## 3.2 Overview of the International Institutional Framework

At the international level, the main body tasked with combating ML is the Financial Action Task Force (FATF). The FATF was established by the Group of Seven (G7) countries at their annual economic summit in Paris, France, in 1989.[48] The FATF combats ML and terrorism financing by formulating recommendations that reflect international best practices. Presently, the Forty FATF Recommendations of 2012, as revised in 2019, are the guiding principles in combating ML.

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[44] Adoted on 01 July 2003 entered into force on 5 August 2006. EAC Partner States except South Sudan have ratified this Convention see <https://au.int/sites/default/files/treaties/36387-treaty-0049_-_african_charter_on_the_values_and_principles_of_decentralisation_local_governance_and_local_development_e.pdf> accessed 15 March 2020.

[45] Protocol on the Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) Article 28 I Bis.

[46] Maram Mahdi, '*Africa's international crimes court is still a pipe dream*' Institute for Security Studies 15 OCTOBER 2019 <HTTPS://ISSAFRICA.ORG/ISS-TODAY/AFRICAS-INTERNATIONAL-CRIMES-COURT-IS-STILL-A-PIPE-DREAM?UTM_SOURCE=BENCHMARKEMAIL&UTM_CAMPAIGN=ISS_TODAY&UTM_MEDIUM=EMAIL> 15 FEBRUARY 2020.

[47] Malabo Protocol Article 46 A Bis; Amnesty International, 'Malabo Protocol:Legal And Institutional Implications of the Merged and Expanded African Court' 2017 <https://www.amnesty.org/download/Documents/AFR0161372017ENGLISH.PDF> accessed 15 April 2020.

[48] For details see *http://www.fatf-gafi.org/about/ (accessed 15 March 2020).*

Although the FATF lacks powers to enforce sanctions, its Forty Recommendations are authoritative nationally and internationally.49 To ensure compliance with its recommendations, the FATF reviews AML measures adopted in different jurisdictions[50] and lists the high-risk jurisdictions and those with significant AML deficiencies (grey list). A negative listing by the FATF harms a country's economy since banks and other financial institutions may be barred from accessing the global financial system. Furthermore, there is increased scrutiny on any transaction to or from a high-risk country, making it difficult to access the international financial system. The threat of being listed as a high-risk jurisdiction has prompted most states to comply with the FATF recommendations.[51]

FATF has 37 members, with South Africa being the only country from the African continent.[52] To ensure global participation in the FATF process, the FATF co-opted nine FATF-Style Regional Bodies (FSRBs) as associate members. One such body is the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), whose membership compose of countries from Eastern and Southern Africa. The FATF and FSRBs monitor compliance with the FATF Recommendation at the national level by conducting a mutual evaluation of AML measures among member countries. Kenya, Uganda, Tanzania, and Rwanda are members of ESAAMLG and have benefitted from the mutual evaluation reviews.[53] South Sudan and Burundi are yet to join ESAAMLG. As such, there is limited information on a comprehensive overview of their AML measures.

To avoid the bureaucracy that comes with sharing information through national law enforcement agencies, the FIUs established the Egmont Group, a club of FIUs. The Egmont Group has principles and standards that FIUs must meet to qualify for membership. As a member of the Egmont Group, FIUs share information either proactively or upon request by member FIUs. The sharing process is convenient since it is fast, and the threshold for sharing

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49 UN Security Council Resolution 1617 (2005) para 7.
50 Peter Reuter and Edwin M. Truman, *Chasing Dirty Money: The fight against money laundering (Peterson Institute for International Economics 2004) 86.*
51 For example, Turkey in 1996, Kenya in 2012, Tanzania in 2012, and Uganda in 2016.
52 See FATF Membership *<https://www.fatf-gafi.org/about/membersandobservers/> accessed 11 February 2020.*
53 ESAAMLG, 'Mutual Evaluations and Follow Up Process' <https://www.esaamlg.org/index.php/Mutual_Evaluations_First> accessed 15 March 2020.

the information is lower than that required in mutual legal assistance treaties. Also, the Egmont Group has a database that contains essential analytical data to enable FIUs to analyse data and profile risks. At the time of writing, Tanzania's and Uganda's FIUs were the only members of the Egmont Group from the EAC.[54]

## 3.3 The East African Community Anti-Money Laundering Legal Framework

Apart from individual Partner State's efforts, at the EAC level, there are piecemeal and general efforts geared towards combating ML and other cross-border crimes. Article 85(k) of the EAC Treaty calls upon the Partner States to institute measures to prevent ML activities in the banking industry and capital markets. In the capital markets, the EAC Council of Ministers adopted the East African Community Directive on Anti-Money Laundering in the Securities Market.[55] This Directive calls for increased cooperation among the Partner States in combating ML and for the establishment of an effective AML framework in the securities market. This Directive is binding on Partner States and therefore requires full implementation. One of the main shortcomings of the Directive is that its enforcement has been left solely to the national authorities of Partner States, devoid of monitoring mechanisms at the EAC level.[56] As such, implementation depends on the political will of the respective Partner State. Surprisingly, at the EAC level, AML regulations for the banking sector are yet to be adopted, despite the sector being a major conduit for ML. This has seen the Partner States rely solely on varying regulations issued by the respective central banks. Therefore, to achieve a stable common currency, there is need to put in place stringent AML controls.

Further, Article 124(5) of the EAC Treaty calls upon the Partner States to enhance cooperation and mutual legal assistance in combating cross-border crimes. Specifically, the provision calls Partner States to:

  a) enhance the exchange of criminal intelligence and other security information; between the Partner States' central criminal intelligence information centres;

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[54] See https://egmontgroup.org/en/membership/list?field_region_value=east_southern_africa accessed 15 March 2020.

[55] EAC Directive 2014/14/EAC.

[56] Ibid arts 23 and 25.

b) enhance joint operations such as hot pursuit of criminals and joint patrols to promote border security;

c) establish common communication facilities for border security;

d) adopt the United Nations model law on mutual assistance on criminal matters;

e) conclude a Protocol on Combating Illicit Drug Trafficking;

f) enhance the exchange of visits by security authorities;

g) exchange training programmes for security personnel;

The above provisions can be applied generally to combat ML and its predicate crimes. Enhancing cooperation in criminal intelligence is essential, and in the context of combating ML, this can be done under the auspices of FIUs and other law enforcement agencies. The UN's model of mutual legal assistance is also a vital tool for AML discourse. The FIUs of Tanzania, Kenya, and Uganda have signed memoranda of understanding to coordinate in combating ML.[57] In line with article 124(5) (e) of the EAC Treaty, in 2001, the Partner States adopted the Protocol on Combating Illicit Drug Trafficking in the East African Region 2001[58] which shows the region's determination to cooperate in combating drug trafficking and related crimes that are critical sources of illicit proceeds. Also, Article 124(6) of the EAC Treaty calls for cooperation in combating terrorism. In implementing articles 124, the EAC Council of Ministers adopted the EAC Protocol on Peace and Security 2013 in which article 3(1)(i) singles out combating ML as one of the areas of cooperation among the Partner States. The Protocol also calls for cooperation among the Partner States in combating predicate crimes such as cybercrimes, motor vehicle theft, among others. Conspicuously missing is corruption that remains to be one of the prevalent predicate crimes in the region.

Finally, the Protocol on the Establishment of the East African Community Common Market also lists ML as one of the reasons for a Partner State to restrict the movement of capital in article 25(1)(b). This provision reaffirms the Partner States' commitment to stop the free flow of proceeds of crime within the EAC. However, the free movement of criminal proceeds from South Sudan to Uganda and Kenya shows that there are enforcement deficits in the

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[57] See Tanzania's FIU, 'MoUs signed with other FIUs and internal Stakeholders'<https://www.fiu. go.tz/MoUs.asp> accessed 15 March 2020.

[58] Entered into force on 13th January 2001.

region. Compounding this is the lack of structures to ensure cash declarations at border points to ensure criminals do not move money from one Partner State to another. Despite the loopholes of the existing AML measures at the Community, the lack of concerted efforts to implement them has dimmed the prospects of having a robust and responsive AML framework within the EAC.

## 4. Attendant challenges in Implementing Anti-Money Laundering Measures in the EAC

In this section, this paper discusses the AML statues of Kenya, Uganda, and Tanzania, focusing on the policy reasons for adoption of the AML measures, the definition of ML, and the sanctions that result from the commission of the crime, highlighting challenges that impede cross-border enforcement.

### 4.1 The Genesis of AML Statutes in EAC

### 4.1.1 The United Republic of Tanzania

Tanzania's Anti Money Laundering Act 2006[59] (TAML Act) was the pioneer AML statute in the region. This came after it had adopted anti-terrorism laws,[60] drug trafficking, and illicit trade. As per the ESAAMLG Mutual Evaluation Report of 2009, Tanzania was yet to operationalise its Financial Intelligence Unit, and the TAML Act was not applicable in Zanzibar.[61] Besides, predicate crimes such as murder, grievous bodily harm, and fraud were not part of its list of predicate crimes despite being prevalent in Tanzania.[62] These deficiencies saw the FATF list Tanzania as a country with strategic AML/CFT deficiencies from 2010 to 2014. Tanzania has since made progress in addressing most of the AML deficiencies, and at the time of writing, it no longer featured in the FATF's grey list. However, despite the improved formal compliance with the global AML measures, there is little evidence to show substantive enforcement of the AML laws given the prevalence of some of the predicate crimes such as corruption.[63]

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[59] See also the Anti-Money Laundering Regulations, 2007 (TZ).

[60] For example, the Prevention of Terrorism Act (TZ) 2002; The Proceeds of Crime Act 2006 (TZ)

[61] ESAAMLG, *Mutual Evaluation Report Anti-Money Laundering and Combating the Financing of Terrorism: United Republic of Tanzania (December 2009), (ESAAMLG MER Tanzania (2009) para 2.*

[62] Ibid.

[63] Shetret *et al (n 13) 61-62; Transparency Internationals Corruption Perceptions Index 2019.*

### 4.1.2 Kenya

Kenya adopted its principal AML statute, the Proceeds of Crime and Anti-Money Laundering Act (KPCAML Act) in 2009. The Act was preceded by the Central Bank of Kenya's Guideline on Proceeds of Crime and Money Laundering (Prevention) of 1999 and other statutes criminalising predicate crimes such as drug trafficking[64] and corruption.[65] The first attempt in 2007 and 2008 to enact the AML statute failed, and it was not until 2009 that Parliament passed the KPCAML Act. Its implementation stalled until the establishment of the Financial Reporting Centre in 2012. At this time, Kenya was listed on the FATF grey list,[66] and it had experienced an upsurge of terrorism incidences.[67] Kenya has since improved substantially in its AML response, and it is no longer subject to FATF monitoring.[68] Key initiatives include the operationalization of the Financial Reporting Centre, sanctioning and prosecution of banks that facilitate ML, reinvigorating the fight against corruption and the government's move to withdraw (demonetise) the older series Kenya Shillings 1,000 notes (approximately US$ 9.5) in a move to recover cash outside the financial system.[69] However, it is yet to achieve significant prosecutions of perpetrators of grand corruption,[70] and cybercrimes are on the rise.[71]

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[64] Narcotic Drugs and Psychotropic Substances (Control) Act 1994 (KY).

[65] Anti-Corruption and Economic Crimes Act 2003 (KY).

[66] FATF, *Improving Global AML/CFT Compliance: update on-going process - October 2010* <http://www.fatf-gafi.org/countries/di/greece/documents/improvingglobalamlcftcomplianceupdateon-goingprocess-october2010.html> 15 January 2020.

[67] United States Department of State, Country Reports on Terrorism 2012 - Kenya, 30 May 2013 < https://www.refworld.org/docid/51a86e8318.html> 15 April 2020.

[68] ESAAMLG, *First Round Mutual Evaluation - Post Evaluation Progress Report of Kenya on Anti-Money Laundering and Counter-Terrorist Financing Measures (2018)* <https://www.esaamlg.org/index.php/Mutual_Evaluations/readmore_me/416> accessed on 15 February 2015.

[69] Central Bank of Kenya, 'Conclusion of Demonetisation Exercise' Central Bank of Kenya Press Release 2 October 2019 < https://www.centralbank.go.ke/uploads/press_releases/735017284_Press%20Release%20-%20Conclusion%20of%20Demonetisation%20Exercise.pdf> 15 April 2020.

[70] Wachira Maina, *State Capture: Inside Kenya's Inability to Fight Corruption, Africa Centre for Open Governance (AfriCOG) May 2019* < https://africog.org/wp-content/uploads/2019/05/STATE-CAPTURE.pdf> accessed 15 April 2020; Shetret *et al (n 13) 31-34.*

[71] Joshua Mutisya, 'Cybercrime losses surge above Sh20 billion' *Daily Nation (Nairobi, 18 March 2020)* <https://www.nation.co.ke/kenya/newsplex/cybercrime-losses-surge-above-sh20-billion-82972#:~:text=Common%20types%20of%20cybercrime%20in,online%20fraud%20scams%20and%20ransomware.&text=In%20Kenya%2C%20on%20average%2C%2096,either%20go%20unreported%20or%20unsolved> accessed 15 April 2020.*

### 4.1.3 Uganda

Uganda committed to implementing the FATF Compliant regime in 1999.[72] In 2004, Uganda presented the Proposed Anti-Money Laundering Bill 2004, in parliament. In 2007, ESAAMLG mutual evaluation report revealed that Uganda lacked an AML statute despite experiencing cases of terrorism mainly by the Lord's Resistance Army, public corruption, cross-border smuggling, drug trafficking, fraud, among others.[73] The Anti-Corruption Act 2009 and the Anti-Terrorism Act 2002 were some of the first AML/CFT status adopted by Uganda. In 2013, it enacted the Anti-Money Laundering Act 2013 (UAML Act), specifically addressing ML and terrorist financing and also establishing an FIU. However, despite persistent ML threats, Uganda has adopted a lackadaisical approach in implementing the UAML Act. At the time of writing, it featured in the FATF grey list for having strategic AML deficiencies.[74]

### 4.1.4 Rwanda

Rwanda does not face substantial ML and terrorist financing threats, however, it features prominently alongside Uganda in the list of countries whose elites have plundered resources from the Democratic Republic of the Congo.[75] It enacted its principal AML/CFT statute, Law No. 47/2008, of 09/09/2008, in 2008 crimininalising ML and terrorist financing.[76] The 2014 ESAAMLG's Mutual Evaluation Report, revealed several deficiencies in Rwanda's AML response.[77] However, Rwanda did not move with speed to address the deficiencies. In the 2018 Post Evaluation Progress Report, ESAAMLG expressed concern with the slow pace of implementation of AML measures.[78] In January

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[72] ESAAMLG, *Mutual Evaluation Report Anti Money Laundering and Combating the Financing of Terrorism: Republic of Uganda, (August 2007)* <https://esaamlg.org/reports/UGANDA_MER1.pdf> accessed 15 January 2020.

[73] Ibid.

[74] FATF, *Jurisdictions under Increased Monitoring – 21 February 2020,* <http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/increased-monitoring-february-2020.html> accessed 15 March 2020.

[75] The Sentry, 'Country Briefs: Democratic Republic of Congo' The Sentry July 2015 < https://thesentry.org/wp-content/uploads/2015/07/19103553/Country-Brief_DRC.pdf> 15 April 2020.

[76] ESAAMLG, *Mutual Evaluation Report Anti-Money Laundering and Combating the Financing of Terrorism: Rwanda, September 2014.*

[77] Ibid.

[78] ESAAMLG, 'First Round Mutual Evaluations -Postevaluation Progress Report of Rwanda: Covering the period August 2017 – July 2018' 2018 ESAAMLG < https://esaamlg.org/reports/Progress%20Report%20Rwanda-2018.pdf> accessed 15 April 2020.

2020, Rwanda passed a new law providing for the reconstitution of the financial intelligence unit.[79] At the time of writing, Rwanda had not established the Financial Intelligence Centre in accordance with the new law.[80] Going by the 2019 Transparency International's Corruption Perceptions Index score, Rwanda has commendably addressed corruption. However, there is a need to implement AML laws to avoid transnational ML threats more so those posed by regional economic integration.

### 4.1.5 South Sudan

In South Sudan, resource constraint and the prioritisation of security and humanitarian concerns have seen the country sideline implementation of AML measures.[81] The attempted coup d'état in 2013 and the ensuing cycles of violence stalled its attempts to implement AML measures despite having enacted the Anti-Money Laundering and Counter Terrorist Financing Act, 2012 (SSDAML Act). Political instability has seen senior government officials and their proxies embezzle funds and reinvest in countries like Kenya, Uganda and South Africa. This situation has seen the government referred to as a kleptocracy.[82] Also, a large foreign currency black market is a key enabler of corruption.[83] South Sudan has not yet established an FIU, and since it is not a member of ESAAMLG, it is yet to benefit from mutual evaluation. As such, the subsequent discussion will centre on the provisions of the SSDAML Act.

### 4.1.6 Burundi

Burundi, enacted Law No. 1/02 of 4 February 2008 Combating Money Laundering and Terrorist Financing (LBCFT) as its principal AML law. Subsequently, a Ministerial Order No. 540/791 of 25 May, 2010 provided for the creation of the National Financial Intelligence Unit (FIU).[84] In 2017, the United State Department of State indicated that Burundi was not a signifi-

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[79] Fred Nkusi, 'Why the Financial Intelligence Centre was set up' *The News Time (Kigali 16 March 2020)* <https://www.newtimes.co.rw/opinions/why-financial-intelligence-centre-was-set>accessed 15 April 2020.

[80] The writer contacted a lawfirm based in Rwanda on 24th June 2020 which indicated that the Centre had not been established.

[81] Shetret *et al (n 13) 43-48.*

[82] The Sentry (2016) 2.

[83] Shetret *et al (n 13) 43.*

[84] Implementation Review Group, *Review of implementation of the United Nations Convention against Corruption Executive summary: Burundi,* (CAC/COSP/IRG/2019/CRP.17.) 5 December 2019.

cant ML center, and it had not committed funds to implement AML measures beyond enacting the AML/CFT law. However, the report expressed concern about the soaring levels of public corruption.[85] Burundi is not a member of ESAAMLG and has not been subjected to a comprehensive mutual evaluation. Therefore, there is inadequate information about its AML measures. As a result, the subsequent discussion excludes Burundi since the researcher was not able to access its AML statute.

### 4.1.7 Remarks on the History and Policy behind AML statutes of the Partner States

The checkered history of the enactment of the AML statutes of the Partner States demonstrates a lack of political will to implement the AML laws. Despite the prevalence of predicate crimes in the region, it took the intervention of the ESAAMLG and the FATF for the Partner States to show commitment in formulating comprehensive AML statutes and institutions such as FIUs. For example, in Kenya, it took two years to pass the KPCAM Act 2009 and, afterward, a further three years to set up an FIU. In Uganda, it took almost a decade to pass its UAML Act 2013, and as of February 2020, it still had acute AML deficiencies while South Sudan is yet to set up its FIU despite enacting its AML statute in 2012. Equally, across the region, evidence of the successful conviction of ML suspects is scarce.[86]

The resulting danger of this history is that the Partner States' AML discourse is mainly foreign driven. Partner States measures are primarily aimed at window dressing glaring loopholes to avoid adverse publicity associated with featuring in the FATF's grey list. This explains why most of the measures undertaken by the Partner States aim at targeting financial institutions, yet the region has a predominantly cash-based economy with unique remittance systems such as hawala and mobile money transfers that require AML measures beyond the FATF framework.[87]

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[85]   United States Department of State, 'Countries/Jurisdictions of Primary Concern– Burundi' 2014 <https://2009-2017.state.gov/j/inl/rls/nrcrpt/2014/supplemental/227745.htm> accessed 14 April 2020.

[86]   Shetret *et al* (n 13).

[87]   Ibid.

Partner States should take advantage of the FATF's risk-based approach[88] to adopt and implement responsive AML measures. Under the risk-based approach, countries have a leeway to identify the high-risk targets by money launderers and consequently channel their resources to such areas as opposed to a general implementation of the FATF standards. This approach guarantees efficient utilisation of the inadequate resources, a challenge that faces most developing countries. Also, it enhances the effectiveness of the AML measures since they respond to threats facing a country. To implement a risk-based approach, the FATF recommends that every country should map out ML threats at the national level through conducting an extensive AML risk analysis.[89] Within the EAC, only Tanzania and Uganda had published their national risk assessment reports,[90] at the time of writing. The other Partner States had not published their national risk assessment reports, and therefore, this continues to hinder the effective implementation of the risk-based approach and AML measures. Generally, EAC Partner States' slow pace of implementation of AML measures is an indication of a lack of concerted political will to implement AML measures.

## 4.2 Defining and Criminalising Money Laundering in the Partner States

The definition of ML under article 6 of the Palermo Convention has continued to inform definitions across the globe. The point of departure comes when identifying predicate crimes to ML.[91] There are three approaches to identifying predicate offences, namely, the all crimes approach, penalty threshold approach, and listed/exclusive and restrive predicate crimes approach.[92] In the all-crimes approach, a predicate crime is any crime that generates proceeds.

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[88]  FATF Recommendation 1.

[89]  Ibid.

[90]  Ministry of Finance and Planning, *National Money Laundering And Terrorist Financing Risk Assessment Report (December 2016)*< https://www.fiu.go.tz/TanzaniaNRA(Main)ReportDec2016.pdf> accessed 15th March 2020; Financial Inteligence Authority, *Money Laundering and Terrorist Financing National Risk Assessment Report, Uganda (March 2017)* <https://www.fia.go.ug/sites/default/files/2019-12/Money%20Laundering%20And%20Terrorist%20Financing%20National%20Risk%20Assessment%20Report_1.pdf> accessed 15 March 2020.

[91]  Brigitte Unger, '*Implementing Money Laundering' in Masciandro D et al (ed), Black Finance: The Economics of Crime (Edward Elger Publishing 2007) 103, 129*

[92]  Ibid, 129.

This is the approach adopted by Kenya, Uganda, and Rwanda.[93] Under the penalty threshold approach, predicate crimes are crimes that meet a statutory set threshold of punishment upon conviction.[94] Finally, under the listed predicate crime approach, only exclusively listed predicate crimes will result in ML.[95] Tanzania and South Sudan have adopted this approach.[96] Proceeds of crimes excluded from the listed predicate crimes will not result in ML. The FATF does not favour any of the three approaches as long as countries criminalise ML based on the Vienna Convention and Parlemo Convention and apply the crime of ML to all serious crimes.[97]

Tanzania adopted the listed predicate crimes approach to ML. Section 12 of the TAML Act 2006 establishes the offence of ML as follows:

> A person who-
> (a) engages, directly or indirectly, in a transaction that involves property that is a proceed of a predicate offence while he knows or ought to know or ought to have known that the property is the proceeds of a predicate offence;

The foregoing provision defines the objective elements of ML to include 'proceeds of a predicate offence' as a fundamental element of the crime. Section 3 of the TMAL Act goes further to list specific predicate crimes of ML. Therefore, if one commits an acquisitive crime not listed in the TAML Act's list of predicate crimes, he cannot be prosecuted for a ML offence. Tanzania has progressively updated its list of predicate crimes to include all predicate crimes listed by the FATF and also other crimes such as poaching that are prevalent within the EAC.[98] Conversely, South Sudan, which has adopted a similar approach, has left out serious crimes such as tax evasion, murder, and environmental crimes from its list of predicate crimes, despite the FATF recommending their inclusion.[99]

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[93] *KPCAML Act 2009, s 2; Organic Law Instituting the Penal Code N° 01/2012/OL of 02/05/2012 art 652(Rwanda).*

[94] *For example s 2 of Malawi's Money Laundering, Proceeds of Serious Crime Terrorist Financing Act 2006 defines serious crimes as 'any written law in Malawi, for which the maximum penalty is death or imprisonment for life or other deprivation of liberty for a period of not less than 12 months, and includes money laundering and terrorist financing'.*

[95] *TAML Act 2006, s 3.*

[96] South Sudan AML&CFT Act 2012, ss 5 and 14.

[97] FATF Recommendation 3.

[98] TAML Act 2009; and TAML Amemdment Act 2012, s 3(c).

[99] South Sudan AML&CFT Act 2012, ss 5; FATF

Kenya, Uganda, and Rwanda[100] adopted an all crimes approach to ML. Section 3 of the UAML Act 2013 and Section 3 of the KPCAML Act 2009 uses the word 'proceeds of crime' in defining ML. Crimes are defined to include all criminalised acts.[101] Equally in Rwanda, ML result from 'property derived from a felony or a misdemeanour.'[102] Therefore, in these countries, ML will result from proceeds derived from any crime. Article 1 of the EAC's Directive on AML in the Securities Market also uses the phrase 'proceeds of crime' which appears to be leaning towards an all crimes approach in defining ML. Despite the all crimes approach being broad and all-encompassing, its scope is limited when a country fails to criminalise some key predicate crimes.[103]

Apart from the variations in defining predicate crimes, in Tanzania, ML is not a stand-alone offence. Under section 12 of the TAML Act, to be held culpable for the offence of ML, one 'must know, ought to know or ought to have known that such property is the proceeds of a predicate offence.'[104] Going by that definition, in Tanzania, a predicate offence must first be established before one is prosecuted for ML. The same approach applies to South Sudan that has a list of predicate offences. In Rwanda, the prosecutor has to establish that the perpetrator 'knew' that the property was derived from a felony or a misdemeanour. Therefore, it will be difficult to satisfy the knowledge requirement without prior conviction.[105] In Uganda, under section 5 of the UAML Act, ML is a stand-alone crime. Money laundering is distinct from

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[100] For Rwanda see Articles 652 of the Penal Code 2012; Article 2 of the AML/CFT Law.

[101] Section 2 of the KPCAML Act defines proceeds of crime to mean: [A]ny property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and includes, on proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realized from such property from the time the offence was committed.
Further, an 'Offence' is defined under the KPCAML Act as follows:"an offence against a provision of any law in Kenya, or an offence against a provision of any law in a foreign state for conduct which, if it occurred in Kenya, would constitute an offence against a provision of any law in Kenya.'

[102] ESAAMLG, *MER Rwanda 2014* (n 76) para 94-96.

[103] For example, in Uganda, as of 2016, the illicit trafficking in narcotics and psychotropic substances was not criminalised and therefore, proceeds from such acts could not amount to ML. However, Uganda has since criminalised the offence. See ESAAMLG, *Anti-money laundering and counter-terrorist financing measures - Uganda, 2nd Follow Up Report and Technical Compliance Rerating (ESAAMLG, 2018) para 11.*

[104] TAML Act 2006, s 12; (ESAAMLG, *MER Tanzania 2009 (n 61) para 106.*

[105] The Penal Code 2012 S 652; ESAAMLG, *MER Rwanda 2014 (n 76) para 102.*

the predicate crime generating proceeds. Besides, one can be charged with ML without being convicted of the predicate offence.[106]

In Kenya, the KPCAML Act lacks an express provision declaring ML as a stand-alone offence. However, the High Court in *Republic v Director of Public Prosecutions & another Ex parte Patrick Ogola Onyango & 8 others*[107] held that:

> It would appear to me, therefore, and I so hold, that the prosecution need not prove, prior to any charges of money laundering, that there has existed a conviction or an affirmation of a predicate offence. The prosecution need not consequently show a determination by a court of law that there was theft or forgery or fraud that led to the acquisition of the proceeds or property the subject of the money laundering proceedings.

The criminal origins of the proceeds may be proved in the same way as any other elements of an offence can be proved. The offence of money laundering must be deemed as 'standalone' offence.[108]

Where ML is a stand-alone offence, and one does not need to obtain a conviction of a predicate crime before commencing criminal proceedings for ML, evidence that the proceeds resulted from a crime proceeds can be inferred from circumstantial evidence.[109] This approach is also more suitable for countries with an all crimes approach since they do not need to indicate a specific predicate offence precisely. As a result, ML statutes are enforced widely, and in the event of the death of the primary perpetrator of the underlying predicate crime before conviction, accomplices in ML can be prosecuted.[110]

### 4.3 Challenges and Options for Harmonisation

The varying approach in defining ML have adverse ramifications on the cross-border enforcement of AML measures within the EAC. First, countries with weak AML laws and enforcement deficits will be soft spots for money launderers and unscrupulous businesses aiming to access the EAC

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[106] UAML Act 2013 s 5(a) and (b).
[107] [2016] eKLR, para 150.
[108] Ibid para 150-51.
[109] Fiscal Information & Investigation Services of the Netherlands, '*Indirect Method of Proof Providing Evidence in stand-alone money laundering Investigations,' 15 April 2019 <https://www.amlc.eu/wp-content/uploads/2019/04/Money-Laundering-the-Indirect-Method-of-Proof-2019.pdf> accessed 15 March 2020.*
[110] Ibid.

market.[111] Second, where an underlying predicate crime is not criminalised in a Partner State, an extradition request may be declined for failure to meet the double(dual) criminality test.[112] Third, by not considering ML as a stand-alone offence, Tanzania and South Sudan are likely to face enforcement challenges, both domestically and within the region. Due to the backlogs facing most courts in the region, the integration of the proceeds of crime into the financial system will be complete before securing a conviction of predicate offence and thus complicating the tracing of proceeds. Finally, requests for extradition on account of a ML offence by Kenya, and Uganda where ML is a stand-alone offence may be declined on the ground that no conviction of a predicate crime has been achieved.

The varying approaches adopted in the definitions of ML has been a point of debate within the European Union (EU) in their move to adopt strict AML controls in the region.[113] Within the EU, the Anti-Money Laundering Directives continue to play a cardinal role in fostering harmonisation of laws. In the Third EU Anti-Money Laundering Directive (2005/60/EC), the EU incorporated the FATF Recommendations in its AML framework. This move saw member states criminalise all predicate crimes listed by the FATF.[114] Further, the directive expanded the scope of predicate crimes to include all offences that are punishable in Member States by detention for a maximum sentence of more than one year or a minimum sentence of more than six months for countries with minimum threshold offences. The EU harmonisation efforts were boosted by the adoption of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 2005.[115] The Convention provided for a list of predicate offences that were criminalised by all the European Countries hence helping the EU achieve a significant degree of convergence in defining predicate offences. However, there are cross-border enforcement challenges mostly with regard to countries that have an all crime approach to ML for crimes that

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[111] Joshua Kirschenbaum and Nicolas Véron, '*A better European Union architecture to fight money laundering*' (Policy Contribution Issue No. 19, October 2018) <https://www.bruegel.org/wp-content/uploads/2018/10/PC-19_2018-241018_.pdf> accessed 15 March 2020

[112] Double criminality means that countries will only prosecute ML if the offence is a predicate crime in both countries. See Unger (n 91).

[113] Unger (n 91); Kirschenbaum and Véron (n 111) Leonardo Borlini and Francesco Montanaro, 'The Evolution of the EU Law against Criminal Finance: The "Hardening" of FATF Standards within the EU' [2017] 48 *Georgetown Journal of International Law 1009*.

[114] See FATF Recommendations (2012-2019) p 112.

[115] C.E.T.S. No. 198 (entered into force May 1, 2008).

fall below the set threshold.[116] Also, other topics as to whether ML should be a stand-alone offence remain unresolved within the EU.[117]

Within the EAC, Partner States can adopt the EU approach of incorporating all crimes listed by the FATF and international conventions as predicate crimes. This should be complemented by a regional risk assessment to include other crimes such as poaching that do not feature expressly in the FATF list but generate significant criminal proceeds in the region. Since ML threatens the realisation of the Common Market Protocol and the Monetary Union Protocol, the EAC Partner States should be willing to go beyond the FATF standards in mapping out and criminalising regional AML threats.[118] After mapping out the prevalent crimes, the EAC should have a list of predicate crimes that each Partners State should criminalise within a set timeframe. Since ML threats are not static, the list should be updated periodically to reflect the contemporary AML typologies. Finally, in the long term, the Partners States, such as Tanzania and South Sudan should be encouraged to adopt an all crimes approach, which will enable them to prosecute ML as a stand-alone offence.[119]

## 4.4 Overview on the Sanctions in the Partner States' AML Legislations

The FATF recommendations require countries to adopt both criminal and administrative sanctions to ensure compliance with AML measures. AML supervisors' institutions such as FIUs and central banks to impose administrative sanctions for AML law breaches that do not amount to criminal offences. For example, where a financial institution fails to file a suspicious transaction report or to undertake customer due diligence procedures. Criminal sanctions imposed by courts where the conduct of a person amounts to a criminal offence in the AML statute. In most cases where the conduct amounts to a crime, both criminal and administrative sanctions are likely to be imposed since, in most cases, crimes result from flouting AML regulations and procedures.[120]

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[116] Unger (n 91) 130.

[117] Fiscal Information & Investigation Services of the Netherlands (n 109).

[118] The European Union AML framework is developed and in some aspects such as criminalisation of tax crimes, it did this before the FATF had included it as a predicate offence to ML. Also, the European Union monitors compliance of AML measures as opposed to leaving that duty to institutions such as the FATF that do not necessarily have the economic interests of the region at heart. See Kirschenbaum and Véron (n 111)

[119] Fiscal Information & Investigation Services of the Netherlands (n 109).

[120] See the High Court of Kenya decision in *Family Bank Limited & 2 others v Director of Public Prosecutions & 2 others* [2018] eKLR; See also TAML (Amendment) Act 2012, s 16(5).

### 4.4.1 Criminal Sanctions

a)    Criminal Sanctions of Natural Persons

In prescribing criminal sanctions for the offence of ML, Kenya and Uganda favour a maximum sentence while Tanzania, Rwanda, and South Sudan favour both minimum and maximum sentences. Money laundering committed by natural persons in Kenya attracts a maximum imprisonment term of fourteen years, or a fine not exceeding five million Kenyan shillings (approximately USD 50,000) or an amount equal to the value of the property involved in the offence, whichever is higher or both the fine and imprisonment.[121] In Uganda, ML attracts a maximum sentence of imprisonment of fifteen years or a fine not exceeding one hundred thousand currency points (approximately USD 534,668) or both.[122]

For minimum sentences, in Tanzania and Rwanda, in cases of a natural person, ML attracts a minimum sentence of five years while in South Sudan, it attracts a minimum sentence of seven years. The maximum sentence for Tanzania and South Sudan is ten years, while that of Rwanda is seven years. However, in the event of aggravating circumstances, the Rwandese Penal Code provides room for doubling the sentence. In Rwanda, in addition to the imprisonment, one has to pay a fine of two to five times the value of the amount of the laundered sums.[123] Tanzania provides for an alternative maximum penalty of five hundred million Tanzanian shillings (approximately USD 216,384) and a minimum fine of one hundred million Tanzanian shillings (approximately USD 43,277) while in South Sudan, an alternative to the jail term is a fine not exceeding twice the market value of the property that is the subject matter of the offence. [124]

b)    Criminals Sanctions for Legal Persons

Legal persons in Kenya attracts a fine not exceeding twenty-five million shillings (approximately USD 248,591), or the amount of the value of the property involved in the offence, whichever is the higher.[125] In contrast, in Uganda, it attracts a fine not exceeding two hundred thousand currency points

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[121]  KPCML Act s 16 (1)(a).
[122]  UAML Act s136 (1)(a).
[123]  Rwanda's Penal Code 2012 s 654.
[124]  South Sudan AML&CFT Act 2012 s 15 (1).
[125]  KPCML Act s 16 (1)(b).

(approximately USD 1,088,492).[126] In Tanzania, legal persons attract a maximum fine of one billion Tanzanian shillings (approximately USD 432,769) and a minimum penalty of five hundred million Tanzanian shillings (approximately USD216,384), or a fine equivalent to three times the market value of the property, whichever amount is greater.[127] In Rwanda, legal persons attract a fine equal to twice the fine applicable to individuals with an option to double in the event of aggravating circumstances.[128] In South Sudan, legal persons will be liable to a fine not exceeding three times the market value of the property that is the subject matter of the crime.[129]

### c) Challenges Arising from the Criminal Sanction Regime

A cursory glance at the sanctions prescribed by the Partner States AML laws reveals that if consistently applied, the sanctions are commensurate and have a deterrent effect. The first main challenge is the inadequate number of convictions that would enable a more comprehensive analysis to paint a clear picture of how the law is implemented. Given the prevalence of ML as demonstrated in this paper, enforcement deficit is one of the problems that affect the Partner States AML response. It is only through consistent enforcement of the existing AML laws in the Partner States that a meaningful conversation on cross-border enforcement can arise. The FATF Recommendation No 32 requires FIUs to keep statistics of convictions to provide room for the assessment of the entire AML regime. Therefore, Partner States should prosecute ML at the domestic level and those emanating from other countries, especially EAC partner states. This data should be available to allow room for comparison and assessment of the overall effectiveness of the AML measures.

Second, the variation in sentences stipulated in Partner States' AML statutes will negatively impact on the EAC's joint AML response. Criminal enterprises will undoubtedly consider sanctions in other Partner States to be more favourable. For example, Uganda does not mention the value of the property as a basis of imposing fines. Therefore, where a large sum of money beyond the fine is involved, the penalty may not be commensurate. In contrast, in Tanzania, Kenya, Rwanda, and South Sudan the value of the laundered prop-

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[126] UAML Act s 136 (1)(b).
[127] TAMLA s13(a) and (b).
[128] Rwanda's Penal Code 2012 s 656.
[129] South Sudan AML&CFT Act 2012, sec.15(2).

erty is considered when issuing fines. To circumvent challenges posed by the variation of sanctions, there is a need for the Partner States to approximate their criminal law sanctions for ML offences to ensure effective, proportionate and dissuasive criminal penalties within the EAC. Experiences from approximating extradition laws as provided for in article 4(2)(g) of the Protocol on Combating Illicit Drug Trafficking in the East African Region 2001 will be a good starting point. Also, Partner States can borrow from the EU that has been on steady progress approximating the criminal sanctions of Member States.[130]

### 4.4.2 Administrative Sanctions

The FATF Recommendation 23 provides calls upon countries to ensure that AML supervisors have adequate powers to monitor compliance with AML measures by financial institutions and other reporting entities and to impose adequate administrative sanctions in case of breach of AML measures. Kenya and Tanzania adopted a comprehensive list of regulators who monitor compliance with AML measures.[131] Also, regulators may impose administrative sanctions in cases of non-compliance with AML measures.[132] The Uganda's Financial Intelligence Authority and the Bank of Uganda have a mandate to supervise AML compliance and to impose administrative sanctions on non-compliant institutions.[133] This includes the power to request information and to conduct on-site inspections.[134] However, under section S. 21A(4) of the AML (Amendment) Act, supervisory authorities lack direct powers to impose sanctions since they can only ensure compliance by seeking an order of the court. As a result, this limits the powers of the supervisory authorities to impose monetary fines, among other administrative sanctions. On account of this shortcoming, the ESAAMLG rated Uganda to be partially compliant with the FATF recommendation No. 27.[135] Rwanda's AML laws also provide

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[130] Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law, art 5; Athina Giannakoula, 'Approximation of criminal penalties in the EU: Comparative review of the methods used and the provisions adopted – Future perspectives and proposals' *European Criminal Law Review 2015, pp. 133-160* < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3464687> 15 April 2020.

[131] See TAML Amendment Act 2012, s 3 (b).

[132] Section 23A (1) (d) of the TAML Act; section 24B and C; 36A of the KPCAML Act

[133] UAML (Amendment) Act 2017, s 21(1) (pa).

[134] Uganda's AML Regulations 2015, regs 53(2)(a) and (b); UAML (Amendment) Act 2017, s 21A (3).

[135] ESAAMLG, *Anti-money laundering and counter-terrorist financing measures - Uganda, 2nd Follow Up Report and Technical Compliance Rerating* (2018) paras 50-51.

for administrative sanctions,[136] while for South Sudan, the AML Act does not give its FIU power to impose administrative sanctions.

In Kenya and Tanzania, the regulators have, in the past, imposed sanctions for breaches of AML measures among banks.[137] However, the practice has not been reported consistently across the board to allow room for an objective comparison. Unlike criminal sanctions that are well stipulated, the administrative sanctions depend on the regulators' own persuasion provided it is within the range of fines prescribed by the criminal law sanctions. The absence of a guide on administrative sanction poses a significant problem. Regulators who issue low penalties for administrative breaches may encourage criminal enterprises to set shop in such Partner States. For example, in 2015, the Bank of Uganda imposed a penalty of approximately USD 6,371[138] to a bank for failing to implement an automated system to monitor and report suspicious transactions; defying the bank of Uganda's directive to freeze suspicious accounts; and failure to conduct a company search for a company's business accounts before establishing a bank-customer relationships. During the mutual evaluation, officials of ESAAMLG observed that the sanctions issued were disproportionate in light of the gravity of the breach.[139]

Another challenge within the EAC is the failure of regulators to impose AML sanctions where criminal proceeds originate from outside its jurisdiction. This is manifested by the failure of the central banks of Kenya and Uganda to sanction banks and officials following The Sentry Reports linking some of the Kenyan and Ugandan banks' involvement in ML in South Sudan. The rationale for this practice is that in-country regulations of South Sudan bound KCB Bank South Sudan, a subsidiary of Kenya's KCB Group PLC, and the Bank of South Sudan has the sole and primary duty to ensure its compliance

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[136] Rwanda Article 33 of Directive 01/FIU/2018.

[137] Ibid (n 25) and (n 26).

[138] Financial Intelligence Authority, *Money Laundering and Terrorist Financing National Risk Assessment Report, Uganda (March 2017)* <https://www.fia.go.ug/sites/default/files/2019-12/Money%20Laundering%20And%20Terrorist%20Financing%20National%20Risk%20Assessment%20Report_1.pdf> accessed 15 March 2020.

[139] Financial Intelligence Authority, Money Laundering and Terrorist Financing National Risk Assessment Report Uganda (March 2017) 97-98 <https://fia.go.ug/sites/default/files/2019-12/Money%20Laundering%20And%20Terrorist%20Financing%20National%20Risk%20Assessment%20Report_1.pdf> accessed 15 March 2020.

with AML laws. However, the Central Bank of Kenya has to provide the effective prudential supervision of the subsidiary.[140]

Bearing in mind the transnational risks that ML poses to the banking industry, the Basel Committee on Banking Supervision recommends that parent Banks should adopt AML/CFT measures to be complied with in all branches and subsidiaries in foreign jurisdictions.[141] Therefore, the KCB Group PLC should adopt AML/CFT measures to be applied consistently in its subsidiaries, notwithstanding the lax in the AML supervision in the host country. Such an initiative will foster wider compliance by the local banks in host countries in order to remain competitive. In Uganda, Mugarura notes that Barclays Bank influenced local banks to adopt procedures such as conducting customer due diligence to remain competitive.[142] Further, AML supervisors such as central banks and FIUs should also impose sanctions on parent banks whose subsidiaries fail to comply with the group's AML risk policies, especially for branches domiciled in EAC' Partner States.[143] This will ensure sound AML practice in countries like South Sudan AML measures and institutions.

Apart from imposing administrative sanctions, information on sanctions should be made public, especially where corporations are involved. Generally, deposit-taking financial institutions guard their reputation since adverse practices may lead to runs and a reduced market share.[144] In Kenya and Uganda, information of banks sanctioned by the AML supervisors is easily accessed in media reports, which is not the case in the other Partner States. Failure to share information on administrative sanctions is also an area of concern where the EU is yet to attain a consensus.[145] Going forward, Partner States should have a standardised way of sharing information regarding administrative sanctions, which should include the nature of the breach, the identity of the persons

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[140] Basel Committee on Banking Supervision, *Principles for the supervision of banks' foreign establishments (the "Concordat") (May 1983).*

[141] Basel Committee on Banking Supervision, *Guidelines Sound management of risks related to money laundering and financing of terrorism' June 2017 para 63-66.*

[142] Norman Mugarura, *The Global Anti-Money Laundering Regulatory Landscape in Less Developed Countries (Ashgate Publishing Company 2012).*

[143] Basel Committee on Banking Supervision (n 141) para 83-95.

[144] Gilchrist (n 27) 33.

[145] For example, in Denmark, Germany and Spain, sanctions are either anonymised or not published at all. See Kirschenbaum and Véron (n 111) 10.

responsible especially in cases of natural persons, and the penalty imposed.[146] This will not only serve a deterrence role, but also it will be necessary for assessing the effectiveness and propriety of administrative sanctions as well as mapping out prevalent ML typologies. Besides, other AML supervisors, such as the insurance regulators and the revenue collection authorities, should be at the fore in enforcing AML regulations since, within the EAC, other financial institutions, apart from banks, also aid ML transactions.

## 5.  Conclusion and Recommendations

In conclusion, this article has demonstrated that the threats posed by ML and its predicate crimes, if left unaddressed, will hinder the prospect of establishing a sustainable common market and a monetary union. Countries with weak AML laws and enforcement deficit may get an unfair economic advantage in the short-run since they may attract unscrupulous enterprises. In the long run, allowing criminals to move freely and invest proceeds of crime within the EAC threatens the region's economy, peace and security. Without consistent intervention to combat AML, ML threats will scare away prospective investors. Also, ML in banks and other financial institutions exposes the EAC's economy to the devastating effects of bank failure.[147] The fragmented efforts adopted by individual member states in compliance with the FATF standards and other international conventions are an indication that countries have acknowledged the threats posed by ML. However, there is a need to reinvigorate the enforcement measures as well as efforts to harmonise the AML statutes. In addition to the recommendations made in the foregoing discussion, the following are some of the recommendations that the Partner States should consider.

First, borrowing from the EU experience, the Partner States should be proactive in their AML response and not wait for the FATF and ESAAMLG to point out AML deficiencies. To this end, they should establish a supranational EAC body to lead the harmonisation and approximation process as well as

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[146] In the Union European, Article 60 of the Fourth European Union Anti-Money Laundering Directive (EU) 2015/849 makes it mandatory for AML supervisors to publish the name of the offending institution and the nature of breach; See Kirschenbaum and Véron (n 111).

[147] For example, the within the EAC, if a bank like the KCB Group fails, it will destabilise the economy of the region. In the USA, the 2008 financial crisis was as a result of the sudden failure of big investment banks such as American Group International (AIG); See Gilchrist (n 27) 33.

assessing the propriety of Partner State's AML measures. Further, the supra-national body should be tasked with supervision and enforcement of AML measures within the EAC once the county implements the Monetary Protocol.[148]

Second, the Partner States, especially South Sudan, Burundi, and Uganda, should take advantage of the risk-based to address AML deficiencies. Besides, South Sudan and Burundi should join the ESAAMLG to allow a comprehensive review of their AML measures.

Third, Kenya, Rwanda, South Sudan, and Burundi should finalise and publish AML risk analysis to provide a framework for implementation of a risk-based approach. Those yet to establish the FATF should set up these vital institutions and join the Egmont Group.

Fourth, Tanzania, South Sudan, and Rwanda should consider criminalising ML as a stand-alone offense to allow effective enforcement and international corporations. This should be done alongside harmonisation efforts to ensure convergence in defining ML and predicate offences.

Fifth, AML supervisors such as central banks and FIUs of Partner States with parent banks should ensure that subsidiaries in the other Partner States comply with AML regulations and measures applicable to the parent banks in line with the Basel Committee on Banking Supervision recommendations. Further, information on AML sanctions imposed should be made public to foster deterrence.

Finally, the hallmark of effective AML measures depends on the State Parties' concerted political will to enforce the AML measures indiscriminately. To this end, the Partner States should step up their efforts to prosecute ML and related predicate offences as well as confiscating proceeds of crime. Kenya and Uganda should lead the way by investigating further the information in The Sentry Reports.

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[148] At the moment, within the EU there are deliberations towards establishing a specialised body to monitor compliance with the AML regulations. See Kirschenbaum and Véron (n 111).