

**Security Council**

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Letter dated 4 March 2004 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council

I write with reference to my letter of 18 September 2003 (S/2003/908). The Counter-Terrorism Committee has received the attached third report from Kenya submitted pursuant to paragraph 6 of resolution 1373 (2001) (see annex). I would be grateful if you could arrange for the present letter and its annex to be circulated as a document of the Security Council.

(Signed) Inocencio F. Arias
Chairman

Security Council Committee established pursuant to
resolution 1373 (2001) concerning counter-terrorism



Annex

Note verbale dated 2 March 2004 from the Permanent Mission of the Republic of Kenya to the United Nations addressed to the Chairman of the Counter-Terrorism Committee

The Permanent Mission of the Republic of Kenya to the United Nations presents its compliments to the Chairman of the Committee and, in reference to the latter's letter dated 31 October 2003, has the honour to forward herewith Kenya's third report on measures taken to implement resolution 1373 (2001) (see enclosure).

Enclosure

**THIRD REPORT OF THE REPUBLIC OF KENYA
SUBMITTED TO THE UNITED NATIONS
COUNTER-TERRORISM COMMITTEE
(CTC)**

**THIRD REPORT OF THE REPUBLIC OF KENYA SUBMITTED TO
THE UNITED NATIONS COUNTER TERRORISM COMMITTEE
(CTC)
ESTABLISHED PURSUANT TO PARAGRAPH 6 OF SECURITY
COUNCIL RESOLUTION 1373 (2001)**

Introduction

Kenya submitted its first report and second supplementary report to Counter Terrorism Committee (CTC) in July 2002 and March 2003 respectively. Arising out of the second report, CTC posed further question and elicited further comments from the Government of Kenya with regard to the implementation of Resolution 1373(2001). Set out below are the responses from the Government of Kenya to the issues requested by CTC:

Are the measures taken by Kenya to combat terrorism compliant with all its obligations under international law (Has it adopted measures to combat terrorism in accordance with international human rights, refugee, and humanitarian law?)

All legislative and administrative measures taken must not be contrary or *ultra vires* to the provisions of the Constitution of Kenya, which at Chapter V provides for the protection of fundamental rights and freedoms of the individual. These rights and freedoms include right to life, personal liberty, protection from slavery and forced labour, protection from inhuman treatment, protection from deprivation of property, protection from arbitrary search or entry, freedom of conscience, expression, assembly and association, freedom of movement, protection from discrimination on the grounds of race, political opinion, religion, colour, creed or sex.

The Constitution of Kenya embodies the principles contained in various international human rights covenants, which Kenya is also a party to. So far there has been no Constitutional challenges against any measures taken.

1.2 Is there any law, which criminalizes the willful provision or collection, by any means, directly or indirectly, of funds by Kenyans or in the territory with the intention that the funds should be used or in the knowledge that they are to be used, in order to carry out terrorist acts? Give an outline of provisions.

There is no law, which directly criminalizes the willful provision, or collection of funds to carry out terrorist acts. However such an offence is punishable under the offences related to conspiracy to commit a felony under the various provisions of the Penal Code Chapter 63 of the Laws of Kenya.

Section 220 of the Penal Code provides that any person who attempts or with intent to unlawfully cause the death of another does any act, or omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life, is guilty of a felony and is liable to imprisonment for life.

Section 224 of the Penal Code also provides that any person who conspires with any other person to kill any person, whether that person is in Kenya or elsewhere, is guilty of a felony and is liable to imprisonment for fourteen years. Under section 234 in addition to corporal punishment the same punishment is provided for any person who unlawfully causes grievous harm.

Section 235 of the Penal Code further provides that any person who unlawfully, and with intent to do any harm to another, puts any explosive substance in any place whatever, is guilty of a felony and is liable to imprisonment for fourteen years.

The substantive provision criminalizing the willful provision or collection of funds by Kenyans or in the territory with the intention to be used carry out terrorist acts is provided in Section 14 of the Suppression of Terrorism Bill, 2003 as follows:-

Any person who-

- (a) invites another to provide or make available money or other property; and

- (b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism,
 - (c) receives money or other property and intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism,
 - (d) provides or makes available money or other property and knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism,
- shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding ten years or to a fine, or both.

What executive machinery is in place for preventing and suppressing the financing of terrorist acts?

Currently there is an Anti Terrorist Police Unit located in the Office of the President overseeing the prevention and suppressing the financing of terrorist acts. The Unit composed of intelligence personnel dealing with various aspects of financial forensics required to trace proceeds channeled for terrorist activities. This Unit is a stopgap measure awaiting the enactment of the Anti-Money Laundering Bill, which shall transform the Unit into the equivalent of Financial Intelligence Unit.

The Kenya Bankers Association has come up with policy guidelines of "know your customer (KYC)" and "know your transactions (KYT)" requiring all member banks to report any suspicious financial transactions awaiting the enactment of the anti money laundering bill.

The Central Bank of Kenya has also re-organized its capacity to closely monitor and supervise the operations of commercial banks and forex bureaus.

What progresses have been made towards enactment of the Suppression of Terrorism Bill and Anti Money Laundering Bill?

The Suppression of Terrorism Bill has been published and matured for debate in the National Assembly. The publication of the Bill elicited various comments from different stakeholders. But due to the tight calendar of the National Assembly and the need to build

consensus among various stakeholders the Bill may lapse and will need to be published again before submission for debate in the National Assembly.

The Anti Money Laundering Bill is at the drafting stage.

1.3 Does the obligation to report suspicious financial transactions extend to other intermediaries e.g. lawyers, accountants and notaries when engaged in brokering activities?

The duty to report not only suspicious financial transaction but preparation to commit crime generally lies with every person in Kenya.

Under Section 393 of the Penal Code every person who, knowing that a person designs to commit or is committing a felony, fails to use all reasonable means to prevent the commission or completion thereof is guilty of a misdemeanor. Section 393 of the Penal Code provides that a person who receives or assist another who is, to his knowledge, guilty of an offence and liable to imprisonment of 3 years being accessory after the fact.

Professional Ethics governing the practice of various professions in Kenya require that members of that profession to report to the competent authorities where they suspect that any illegal act are about to be committed.

The substantive duty to report suspicious financial transactions by other intermediaries engaged in brokering activities will be covered under the Anti Money Laundering Bill.

1.4 Is there any law in Kenya which provides for the freezing of funds regardless of their origin which are:

- **Held in the names of persons and entities identified in lists, such as those approved for the purposes of**

- **Security Council Resolution 1267 (1999), as being linked to terrorist activities;**
- **Suspected of being linked to terrorism, but which have not yet been used for the commission of a terrorist act.**

Under Section 36 of the Narcotic Drugs and Psychotropic Substances (Control) Act, No. 4 of 1994 any person who commits a specified offence under the Act, all the property owned by such a person on the date of the commission of that offence or acquired by him after that date shall be forfeited to the Government.

Under the Act the regulations have been made to freeze the accounts suspected to contain proceeds of drug trafficking or related offences awaiting the determination by the courts.

Outline Section 180 of the Evidence Act and the relevant provisions of the Criminal Procedure Code as well as information on whether Kenya can freeze assets suspected of being linked to terrorism at the request of another State.

Section 180 of the Evidence Act Chapter 80 of the Laws of Kenya provides that where it is proved on oath to a judge or magistrate that in fact, or according to reasonable suspicion, the inspection of any banker's book is necessary or desirable for the purpose of any investigation into commission of an offence, the judge or magistrate may by warrant authorize a police officer or other person named therein to investigate the account of any specified person in any banker's book, and such warrant shall be sufficient authority for the production of any such banker's book as may be required for scrutiny by the officer or person named in the warrant, and such officer or person may take copies of any relevant entry or matter in such banker's book.

Any person who fails to produce any such banker's book to the police officer or any other person executing the warrant shall be guilty of an offence and liable to imprisonment for a term not exceeding one year or to a fine or both.

Under Section 47 of the Narcotic Drugs and Psychotropic Substances (Control) Act the Government of Kenya may enter into an

arrangement on a reciprocal basis with the Government of another country in respect of the recovery, and handing over of possession to the Government of that country of any property in Kenya which is confiscated by or forfeited to the Government of that country in consequence of the commission by any person of an offence against a corresponding law of that country or for tracing and preserving any property in Kenya owned by or under the control of any person who has or is suspected to have committed an offence against such corresponding law.

Does the Suppression of Terrorism Bill (STB) have provisions for the blocking of assets of terrorists and terrorist organizations and the seizing of such funds? If so give an outline of the provision.

Under Section 19 of the STB where the Attorney General has reasonable grounds to suspect that a person has committed, is committing or is about to commit an act of terrorism or is in possession of terrorist property, he may, for the purposes of the investigation of an offence apply to the High Court for an order:

- compelling the person to deliver up any document or record relevant to identifying, locating or quantifying any property and
- requiring a bank or any other financial institution, trustee, cash dealer or custodian to produce all information and deliver up all documents and records regarding any business transaction conducted by or on behalf of the person concerned.

Section 21 of the STB proposes that an authorized officer who has reasonable grounds to suspect that any cash which is being imported into or exported from Kenya, or is being brought to any place in Kenya for the purpose of being exported to any place in Kenya, is terrorist property, may seize the cash.

The authorized officer may seize all the cash under this section even if he reasonably suspects that a part only of the cash to be terrorist property especially where it is not reasonably practicable to seize that part of the cash that is suspected to be terrorist property. These powers can be exercised whether or not any court proceedings have been brought for an offence in connection with the cash concerned.

Section 22 of the STB proposes that the court by or before which a person is convicted of an offence under the Suppression of Terrorism Act may make a forfeiture order with regard to what the court considers was in the person's possession for purposes connected with the offence including any money or property.

There is no law to freeze funds suspected to emanate from a criminal activity save for narcotic drugs and psychotropic substances (control) act. Section 180 of the evidence act only gives powers to obtain warrants to investigate accounts. It does not address the issue of what action to take should the investigations into suspect accounts realize fraudulent deposits. Note also that section 22 of the STB proposes for the forfeiture of fraudulent funds "upon conviction". It is silent on the freezing the funds during investigations and hearing.

1.5 Has Kenya put in place a mechanism to register, audit and monitor the collection and use of funds and other resources by religious, charitable and other associations, with a view to ensuring that these are not diverted to purposes other than their stated purposes, in particular to the financing of terrorism? If not are there any steps intended to be taken?

The religious, charitable and other associations are registered under three regimes of law i.e. Non Governmental Organizations Coordinating Act (1990), Societies Act Chapter 108 and Companies Act Chapter 486 of the laws of Kenya.

Before registration of NGOs or Political party or any other society under the Non Governmental Organization Coordinating Act and the Societies Act, the applications for registration is forwarded to the National Security Intelligence Services (NSIS) for vetting to ascertain their objectives or linkages with any banned outfit and track records of its proposed officials. It is only after being given the go head by the NSIS will the Attorney General's Office register such an organization.

Under the Non Governmental Organizations Coordinating Act, there is a legal requirement for standard reporting and auditing of the Non Governmental Organization (NGOs). The reports are to be submitted to the NGO Council at the end of every financial year. Through this mechanism the collection and use of funds and other resources of

these organizations are monitored. The NGO code of conduct also provides the internal governance of the NGOs.

Under the Societies Act and Companies Act, organizations are required to file annual returns with the Registrar indicating the sources and use of funds.

Any organization that flouts the laws outlined above or from its stated objectives or is found to have links with any proscribed organization can be deregistered.

1.6 Is there any law in force, which regulates alternative money transfer agencies or services? If not, any steps contemplated?

The Micro Financing Institution Bill and the Anti Money Laundering Bill all of which are in the drafting stages are envisaged to regulate these informal financial institutions.

1.7 Does the Suppression of Terrorism Bill (STB) criminalize the recruitment of persons on Kenyan territory who seek to join terrorist groups, which operate inside its territory or abroad?

Yes, the STB criminalizes the recruitment of persons on Kenyan territory who seek to join terrorist groups.

Section 8 of the STB provides that a person shall be guilty of an offence if he incites another person to commit an act of terrorism wholly or partly outside Kenya if the act committed constitute an offence under the STB or any other law. It is immaterial whether or not the person incited is in Kenya at the time of the incitement.

Under Section 11 of the STB a person who invites support, arranges or manages or assist in arranging or managing a meeting to further the activities of a declared terrorist organization is guilty of an offence. A person who addresses such a meeting shall also be guilty of an offence if the purpose of such address is to encourage support for a declared terrorist organization or to further its activities.

Similarly under Section 4 of STB a person who provides or invites another to receive instruction or training in making or use of firearms or explosives and other weapons of mass destruction shall be committing an offence.

The aggregate of these provisions criminalize the recruitment of persons in Kenyan territory who seek to join terrorist groups.

Does the STB have a provision explicitly eliminating a “political motivation” exception to extradition for terrorist acts? State Provision.

Section 37 implies that extradition of an offender under the STB cannot be politically motivated. This Section provides that notwithstanding anything in the Extradition Acts, an offence, which caused or was intended or likely to cause death or serious bodily harm to any person, or serious damage to any property, shall for the purpose of extradition be deemed not to be an offence of a political character.

1.8 What mechanism enables Kenya’s investigative and Security agencies to share terrorist related information with other international security agencies?

- **List the names of countries to which Kenya provides early warning of anticipated terrorist activities through exchange of information.**

The sharing of terrorism related information with other international security agencies by Kenya is done administratively through bilateral and multilateral arrangements and also through Interpol and regional cooperation arrangements.

However under Section 33 of the STB it is proposed that the Commissioner of Police may, at the request of a competent authority of a foreign State, disclose to that authority any information in his possession relating to any person suspected of involvement in acts of terrorism.

Some of the Countries Kenya provides early warning of anticipated terrorist activities through exchange of information include France, Germany, Britain, USA, Israel, Uganda and Tanzania.

1.9 Do Kenya courts have the competence to deal with criminal acts of the following kind:

- **An act committed within Kenya by any person (whether that person is currently present in Kenya or not)**
- **An act committed outside Kenya by a person who is a citizen of or habitually resident in Kenya (whether that person is currently present in Kenya or not);**
- **An act committed outside Kenya by a foreign national who is currently in Kenya.**
- **What is the maximum sentence, which Kenya courts may impose for terrorist activities?**

The judiciary in Kenya is structured as follows;

- Magistrate's court (1 & 2),
- High Court and
- Court of Appeal at the apex of the judiciary.

Section 60 of the Constitution of Kenya provides that the High Court shall be the superior court of record, and shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by the Constitution or any other law.

Section 66 of the Criminal Procedure Code Chapter 75 of the Laws of Kenya provides that every court in Kenya has authority to cause to be brought before it any person who is within the local limits of its jurisdiction and is charged with an offence committed within Kenya, or which according to the law may be dealt with as if it had been committed within Kenya, and to deal with the accused person according to its jurisdiction.

Further Section 72 of the Criminal Procedure Code provides that the offence can be tried by the courts in whose jurisdiction the offence was committed or any consequences of the crime ensued.

Under the Criminal Procedure Code it is provided at Section 12 that any court may pass a lawful sentence combining any of the sentences, which it is authorized by law to pass. Kenya courts

depending on their authorized jurisdictions by law are competent to deal with all criminal acts committed in Kenya or abroad by a Kenyan citizen who is within the jurisdiction of Kenya.

Under Section 6 of the Penal Code Chapter 63 of the laws of Kenya, when an act which, if wholly done within Kenya, would be an offence, is done partly within and partly beyond the territory of Kenya, every person who within Kenya does or makes any part of such an act may be tried and punished in the same manner as if such act had been done wholly within the jurisdiction of Kenya.

Under the offence of conspiracy to commit a felony, Section 393 of the Penal Code provides that any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is liable if no other punishment is provided, to imprisonment for **seven years**.

The Penal Code of Kenya does not define terrorist activity. However any act that causes danger to life or property are prosecuted through various provisions of the Penal Code Chapter 63 as out lined above and Protection of Aircraft Chapter 68 of the Laws of Kenya.

Section 220 of the Penal Code provides that any person who attempts or with intent to unlawfully cause the death of another does any act, or omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life, is guilty of a felony and is liable to **imprisonment for life**.

Section 224 of the Penal Code also provides that any person who conspires with any other person to kill any person, whether that person is in Kenya or elsewhere, is guilty of a felony and is liable to imprisonment for **fourteen years**. Under section 234 in addition to corporal punishment the same punishment is provided for any person who unlawfully causes grievous harm.

Section 235 of the Penal Code further provides that any person who unlawfully, and with intent to do any harm to another, puts any explosive substance in any place whatever, is guilty of a felony and is liable to imprisonment for **fourteen years**.

Section 393 of the Penal Code provides that any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is liable if no other punishment is provided, to imprisonment for **seven years**.

Under Section 3 of the Protection of Aircraft Act any person who, on board an aircraft in flight, whether in Kenya or elsewhere, unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of that aircraft shall be guilty of the offence of hijacking and liable to **imprisonment for life**.

1.10 What countries does Kenya have mutual legal assistance agreements with other than the USA?

The Extradition (Commonwealth Countries) Act Chapter 77 of the Laws of Kenya is an Act of Parliament making provision for surrender by Kenya to other Commonwealth countries on reciprocal basis persons accused or convicted of offences in those countries. Some of these Commonwealth Countries include Lesotho, Singapore, Malawi and Papua New Guinea.

In addition, the Extradition (Contiguous and Foreign Countries) Act Chapter 76 of the Laws of Kenya consolidate the law relating to the extradition of criminals and for matters relating therewith where Kenya has an agreement with another country. Some of the countries that have mutual assistance agreements with Kenya include Uganda, Tanzania, Rwanda, United Kingdom, Canada, and Mauritius.

1.11 Does Kenya have in train measures to strengthen border controls? If so, provide ways in which Kenya is working to strengthen them.

Kenya has embarked on computerization of immigration department and all points of entry and border posts. The security around the International airports has been strengthened to ensure safety of aircrafts.

With the support of its allies, Kenya has intensified surveillance along its coastal areas that borders the areas likely to be used by terrorist bent on entering the country. Despite budgetary constraints, Kenya continues to upgrade and modernize the necessary equipments used by the security forces guarding various points of entry on land and sea.

The security forces are constantly being trained to confront the emerging threats caused by terrorist.

1.12 Kenya indicated that it has ratified all 12 international instruments relating to terrorism. Is there any law or some sort of arrangement in place with a view to implementing the provisions of these 12 instruments in Kenya domestic law?

Kenya has put in place arrangement to domesticate the provisions of these 12 instruments.

The Suppression of Terrorism Bill (STB) was published on 30th April 2003 and matured for debate in the National Assembly.

The Anti Money Laundering Bill is at the drafting stage.

Even before the enactment of these intended new legislation, Kenya is capable of prosecuting the crimes envisaged in these instrument within the provisions of the Penal Code and other legislations as outlined above.

1.13 How would Kenya deal with a refugee who has committed a terrorist act but claims political motivation for such an act?

Once a refugee commits an act that endangers life or property, such an individual automatically loses his refugee status and shall be prosecuted in accordance with the relevant laws for such an offender. The defence of political motivation will not suffice. However in such event proper channels are followed in conjunction with the United Nations High Commission for Refugee officials with a view of lifting the refugee status to enable prosecution of the offender.

1.14 Does Kenya have any reports or questionnaires on implementation of international best practices, codes and standards which are relevant to the implementation of Resolution 1373? If so, provide copies thereof.

Kenya would like to benefit from any documented best practices, codes or standards, which are relevant to the implementation of resolution 1373 and for, combat terrorism in general. To this end Kenya looks to the international community to provide some of the best practices recorded within their jurisdictions and that may be replicated elsewhere.

Indicate any areas in which Kenya would require assistance or advice in order to implement the Resolution 1373, which requires States to have in place provisions specifically criminalizing the willful provision, and collection of funds within its territory with the intention of funding terrorist acts.

As Kenya puts in place various measures to meet the dangers posed by terrorism, the country will need considerable technical assistance in the areas of capacity building and equipment in order to effectively comply with the resolution 1373.

Kenya can also benefit from any documented best practices that have proved successful in combating threats posed by terrorism in other jurisdictions.

To this end Kenya look forward to the international community and its development partners to enhance its capabilities to combat the threats posed by terrorism.