

CHAPTER 3

THE CONTROL OF MONEY LAUNDERING AND TERRORIST FUNDING IN KENYA

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Introduction

The control of money laundering in Kenya requires action at two levels. At the first level, measures are required to detect, punish and control economic crime, which generates the money that then needs to be laundered. An earlier study identified the principal sources of proceeds of crime, which include corruption, drug trafficking and violent crime. Measures to control offences related to these activities will have a direct and beneficial impact on the control of money laundering in Kenya. The first part of this study is, therefore, devoted to a review of the arrangements in place for the control of criminal activity whose motive is financial gain.

At the second level, measures are needed to address the problem of money laundering directly, as an independent and logical result of economic crime. An evaluation of the institutional and legislative arrangements necessary to achieve the desired controls is needed. The second part of this study attempts to review existing institutional and legal controls on money laundering with a view to suggesting reforms where deficiencies are detected.

The control of money laundering is the subject of increased interest as a result of the events in the United States (US) on 11 September 2001. It is recognised that terrorism would be checked by controlling terrorists' financial capacity to organise. This requires detecting the movement of money that would be used in assembling the accessories of terrorism. Money laundering control is, therefore, important for the purpose of controlling terrorism. In response to the threat of terrorism, the United Nations (UN) Security Council passed Resolution 1373 (hereafter the Resolution) on 28 September 2001, which imposes a number of obligations on member states with regards to combating terrorism. This study will review the adequacy of Kenya's compliance with the Resolution.

Apart from the attacks in the US, Kenya has had two serious terrorist attacks of its own: on 9 August 1998 and again in December 2002. These attacks have raised a home-grown concern over terrorism, which is independent of the concern brought about by the more famous attacks in the US. This study will, therefore, review existing institutional and legislative controls against terrorism and give a comment on their adequacy.

Part I: The control of corruption

Kenya is perceived as one of the most corrupt countries in the world.¹ Corruption accounts for the largest amounts of illegally earned wealth in the country, ahead of the illegal trade in narcotics and other forms of organised crime. For example, it is claimed that the sum of Ksh600 billion held in foreign accounts by ten of Kenya's political elite is all the proceeds of corruption.²

Historically, institutions to fight corruption in Kenya have been weak, enjoying little official support. Until 2003, when it was repealed, the sole legal basis for fighting corruption was the Prevention of Corruption Act. Enacted in 1956, the Act made it an offence for a public official to accept a bribe or other inducement as consideration for the performance of official duties. Until 1991, however, there was little attempt to enforce the Act. Then, in 1991, the Act was amended to provide stiffer sentences for corruption. Again, there was still no attempt to enforce the Act. In 1993 the government set up an anti-corruption unit within the police force only for this to be disbanded two years later, following a mysterious fire which destroyed its headquarters. Then in 1997, the government, in fulfillment of donor conditionalities, amended the Prevention of Corruption Act to establish the Kenya Anti-Corruption Authority (KACA) as an independent anti-corruption authority. Its first director was appointed the same year, and when, the following year, the authority sought to prosecute a number of ranking public officials from the Kenya Revenue Authority for the non-collection of Ksh230 million in taxes, its director was dismissed by the President.

Public opinion at the time was that attempts to prosecute the public officials had interfered with vested political interests, which prevailed against KACA through the tribunal process.³

When KACA sought to prosecute other corruption cases under a new director the High Court intervened, declaring that the authority's statutory power to conduct prosecutions was unconstitutional.⁴

In the intervening period the High Court delivered another decision, in December 2001,⁵ discharging a cabinet minister from prosecution for corruption on the grounds that there had been undue delay in commencing the prosecution. In arriving at the decision, the High Court interpreted a provision of the Constitution of Kenya requiring that criminal prosecutions, once started, should be concluded quickly, as also requiring that where there had been a long intervening period before a person was charged, irrespective of when the offence was discovered, such a prosecution would be unconstitutional.

The two decisions, rendered a year apart, are considered to be part of a tendentious misinterpretation of the Constitution to build a body of jurisprudence that is hostile to the fight against corruption. The Judiciary has, thus, displayed its dislike for the enforcement of anti-corruption legislation, some of which it has selectively struck down as unconstitutional.

The new anti-corruption arrangements

Following declarations by the judiciary that existing anti-corruption legislation was unconstitutional, the National Assembly, after several unsuccessful attempts, finally enacted two pieces of legislation that represent a fresh basis for the fight against corruption. These are the Anti-Corruption and Economic Crimes Act, 2003⁶ and the Public Officer Ethics Act, 2003.⁷ As these two statutes are of significant relevance to the control of money laundering, their provisions will be discussed at some length.

The Anti-Corruption and Economic Crimes Act came into force only in May 2003. The Act establishes the Kenya Anti-Corruption Commission⁸ (hereafter the Commission) as an independent body in charge of the fight against corruption. The Commission's director is appointed by the President on the advice of an advisory committee and with the approval of the National Assembly.⁹

The Act requires the appointment of special magistrates, conferred with exclusive jurisdiction to try offences under its provisions.¹⁰ They have the power to pardon any person on condition of their making a full and true disclosure of the whole circumstances within their knowledge relating to an offence under the Act.¹¹

The Commission is empowered to carry out many functions of which two are of relevance to this discussion. Firstly, the Commission has power to investigate

conduct constituting corruption or economic crime and to assist other law enforcement agencies to do so.¹² Secondly, the Commission has power to investigate the extent of liability by public officials for loss or damage to public property and to institute civil proceedings for the recovery of such property. The Commission may institute recovery proceedings even if the property is outside Kenya.¹³

The Commission may, by notice, require persons reasonably suspected of corruption or economic crimes to furnish, within a reasonable time, a statement enumerating the suspected person's property and when and how it was acquired. It is an offence punishable by a fine or imprisonment to fail to respond to a notice issued by the Commission or to provide false or misleading information in a declaration. The Commission may, in addition, require associates of a suspected person to provide similar information about the suspected person's property.¹⁴ The Commission is empowered to require the production of records held by third parties if they relate to the property of a suspected person and to take and keep copies of such records. Records, for clarity, include bank accounts and other accounts. The Commission may also require a person in whose possession is property that is the subject of its investigation, to produce such property for its inspection.¹⁵

It is an offence to knowingly deal with property acquired through corruption. Dealing with such property is defined as including holding, receiving, concealing, using or entering into any transaction in relation to such property.¹⁶ Where a person corruptly derived a quantifiable benefit or the public made a loss as a result of dealing by any person with property acquired through corruption, the Act provides that, in addition to the fine of Ksh100,000 or imprisonment for up to ten years, the offender shall be liable to a mandatory fine equivalent to twice the value of the quantifiable benefit or the loss to the public.¹⁷

The Commission may commence civil proceedings against a public official or a former public official, if, after investigation, it finds that he has unexplained assets about which, after he has been afforded reasonable opportunity to explain their source, he is unable to provide an adequate explanation.¹⁸ Where such proceedings are brought, the court may order the person to pay compensation equal to the unexplained assets to the government.¹⁹ For the purpose of such proceedings, assets include those held in trust for the person and assets given away by the person as gifts or loans without compensation. For purposes of evidence, unexplained assets may be taken as corroboration that a person corruptly received a benefit.

The Commission may apply to court, *ex parte*, for the preservation of property pending litigation.²⁰

The Public Officer Ethics Act also came into force in May 2003. The Act establishes a code of conduct and ethics to which all senior public officials must subscribe.²¹ The code prohibits public officials from engaging in improper enrichment and from accepting any personal benefit in the performance of public duty and requires officials to declare personal interests if these conflict with official duty.²²

The Act requires that every public officer to whom it applies shall annually submit a declaration of the income, assets and liabilities of himself, his spouse and dependent children under the age of 18.²³ By August 2003 public officials are expected to submit the initial declarations under the Act.

Declarations received from public officials are to be held in confidence and should not be disclosed to the public. Information contained in the register of declarations may only be disclosed to law enforcement agents or for purposes of judicial proceedings.²⁴

A competent authority may investigate, whether on its own initiative or after a complaint, if a public official has contravened the code of conduct and ethics. After investigation the authority may take disciplinary action or refer the matter to another authority for its action.²⁵

A comment on the anti-corruption legislation

The attacks by the judiciary against the prosecution powers that were vested in the original KACA have convinced the authorities to segregate this power, leaving the new Commission only with the role of investigating corruption cases and initiating civil recoveries. Prosecution will now be conducted by the office of the Attorney-General, which also prosecutes all the other crimes. The argument behind conferring the KACA with prosecution authority was that the office of the Attorney-General had exercised its power to prosecute offences of corruption in an unaccountable manner, leaving deserving cases not prosecuted. For better or worse, therefore, investigation and prosecution have been segregated, the former being conferred on the Commission and the latter on the Attorney-General. As a check on his exercise of this power, the Attorney-General is required to make annual reports to the National Assembly explaining his decisions on the cases referred to him for prosecution.²⁶

The poor record of the judiciary in enforcing the previous anti-corruption legislation has led to the creation of special magistrates' courts with exclusive jurisdiction to try offences under the Act. Presumably only persons with the highest integrity will be appointed as magistrates under the Act. However, the right of appeal, which would have to be exercised in the existing judiciary, provides a potential threat to the enforcement of the legislation.

If enforced, the provisions in the Act concerning unexplained assets will contribute to the fight against money laundering. Unexplained lifestyles, which are a product of economic crime, are directly targeted by the provisions. The power to seize assets and to confiscate proceeds of economic crime will, if enforced, also strengthen the fight against money laundering by promoting a culture that questions the sources of all property and wealth. The strategies for enforcing the anti-corruption legislation, including the freezing of assets and the power to compel third-party disclosures and confiscation, are all part of typical anti-money laundering procedures. The introduction of these measures into legislation will, therefore, add to the existing body of legislative measures that empower public authorities to question sources of wealth and to confiscate wealth whose acquisition was the result of crime. Anti-money laundering measures will easily fit into, and will be reinforced by, the existing laws which target the proceeds of corruption.

The Public Officer Ethics Act provisions requiring the declaration of assets and liabilities will provide law enforcement with invaluable financial intelligence, which is of crucial importance from the point of view of money-laundering control. Further, if properly enforced the provisions will act as a deterrent against economic crime since a framework now exists that questions the sources of wealth.

The importance of the provisions in the Acts in the fight against money laundering must, however, not be overstated. Ultimately, as history has shown, good legislation is easily defeated by political indifference and even hostility. Moreover, a number of weaknesses exist in this latest legislation, including the following:

- The Public Officer Ethics Act requirements that exclude the public from access to information contained in the register of declarations severely undermine the purposes of the legislation. Without public involvement it is unlikely that the legislation will be enforced with the requisite robustness.
- There should have been a requirement that all family members of a public official, not just dependents, should declare their assets and liabilities.

- Declarations are to be made on a prescribed form, which is not structured to extract the greatest possible amount of information from public officials.
- There are no provisions under the Act to obligate the authorities responsible for receiving the declarations to make adequate administrative arrangements for processing the information declared. It is likely, therefore, that enforcement of the legislation will be hampered by administrative inadequacies.
- There is no requirement or provision for the training of public officials who will be responsible for the enforcement of the legislation.

However, unlike in the past the new Kenyan government, which came into power at the beginning of 2003, has made strong statements against corruption and has promised that the fight against it will be a top priority. Political support in the fight against corruption, which has previously been doubtful, is now promised in abundance.

The control of narcotics and psychotropic substances

Kenya is an important country in the trafficking of narcotic drugs and psychotropic substances. Its geographical location makes the country an important mid-way point between Asia, the source of a large amount of narcotic drugs, and Europe and North America, which are the main markets. Kenya is, therefore, an important trans-shipment point where narcotics are repackaged for onward trafficking to Europe and North America.

Estimates indicate that the trade in narcotics represents millions of US dollars every year.²⁷ Studies have continually linked trade in narcotics with elements in the Kenyan state, making this an important political problem.

Arrangements for the control of drug trafficking are based on the Narcotic Drugs and Psychotropic Substances Act, enacted in 1994.²⁸ The Act prohibits the possession of and trafficking in narcotic drugs and psychotropic substances and the cultivation of certain plants. It provides stiff sentences for offences in relation to these prohibitions.²⁹ For example, a person who is found in possession of any narcotic drug or psychotropic substance is liable to imprisonment for 20 years if the drug or substance is for his own use and, in every other case, an additional fine of not less than Ksh1 million or three times the value of the prohibited substance, whichever is greater.

Any land on which a prohibited plant is cultivated is to be forfeited to the state,³⁰ as are machinery, equipment, implements, pipes, utensils or other articles and conveyances (aircraft, vehicles and vessels) used for the commission of any offence under the Act.³¹

The Attorney-General is empowered to apply to the High Court for an order restraining the property of any person who has committed an offence under the Act. The transfer of any property after the Attorney-General's application is void. The Court may direct the respondent to submit, within a reasonable time, a statement of his assets and liabilities and failure to do so is itself an offence. The Court is empowered to make any interim orders that would secure the ends of justice. The forfeiture of property is, however, subject to the claims and interests of innocent third parties against such property.³²

The Act empowers the government to enter into any arrangement with the government of any other country for the recovery and handing over of possessions to the government of Kenya of any property in respect of which an order of forfeiture has been made and which is in that country, and for tracing and preserving any property in that country owned or under the control of any person who has, or is suspected to have, committed an offence under the Act.³³

The government of Kenya may similarly enter into any arrangements, on a reciprocal basis, with the government of any other country in respect of 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 any commission of an offence against a corresponding law of that country.³⁴

The Act then makes provisions against the laundering of the proceeds of drug trafficking.³⁵ It is an offence for any person to conceal or disguise any property which, in whole or in part, directly or indirectly, represents his proceeds from drug trafficking. It is also an offence if any person converts or transfers any property or revenue from Kenya which is the proceeds of drug trafficking for purposes of avoiding prosecution. Further offences relate to the acquisition of such property for no or inadequate consideration.

These offences are to be punished by imprisonment for up to 14 years, and such punishment is in addition to, and does not derogate from, any other punishment for related offences already provided in the Act.

A comment on the Act

The Narcotic Drugs and Psychotropic Substances Act met with instant resistance upon implementation in 1994. The principal criticism was that it was enacted without any form of public consultation, which served to alienate the public once implementation started. The judiciary initially interpreted the Act as prescribing minimum sentences for the possession of 'soft' drugs, a fairly common problem in Kenya that receives widespread judicial leniency. The courts, therefore, interpreted the legislation as taking away their discretion on sentencing and requiring them to deal with inappropriate harshness with offenders convicted for 'soft' drug offences.³⁶

A workshop convened to review the Guidelines for Kenyan Drug Control Master Plan held in 1999 summarised experiences in implementing the Act as follows:

- Large numbers of suspects released on bail while awaiting trial, abscond. As a result, an amendment was included in the Constitution taking away the right to bail for drug-related offences, as a specific derogation from the right to bail which is constitutionally guaranteed.
- Poor investigation of cases leads to a large number of acquittals.
- Corruption, a pervasive problem in the judiciary, is especially noticeable in relation to drug-related cases, in which the stakes are typically high.
- Relatively low understanding of drug-related jurisprudence by the judiciary and the private legal profession leads to poor enforcement of the Act.³⁷

To oversee the enforcement of the Act, the government has established the Interministerial Drug Co-ordinating Committee (IDCM), an informal committee bringing together law enforcement personnel from various government departments. The IDCM is responsible for:

1. the development and implementation of a national plan of action for drug control;
2. implementation of provisions of the Single Convention on Narcotic Drugs, 1961, the Convention on Psychotropic Substances, 1971 and United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988;
3. updating and implementing drug control laws and regulations;

4. enforcing drug control, precursors and drug-related money laundering laws, without prejudice to the operational role of the Central Drug Enforcement and Anti-Money Laundering Services;
5. monitoring drug abuse and public information for the youth, for families, educators and the general public, and by supporting other initiatives in the files of information and prevention;
6. establishing a viable data collection and analysis system on drug abuse and drug trafficking at the national level;
7. ensuring the development of treatment and rehabilitation programmes for drug addicts;
8. undertaking research on drug addiction;
9. ensuring the training of personnel in charge of measures dealing with drug abuse and drug trafficking, money laundering and precursors;
10. promoting and ensuring the promotion of international co-operation in combating drug abuse and drug trafficking; and
11. ensuring co-ordination and support of activities of non-governmental organisations and associations participating in drug abuse control.³⁸

Commenting on the IDCM the workshop remarked that its establishment had 'noble' intentions. However, it noted that being only a committee the IDCM "has got no statutory existence, no executive authority, no budgetary allocation and no visible public presence". It was therefore recommended that a master plan on drug control in Kenya should establish a working secretariat on a short-term basis and "put in place arrangements for research to compile indicative data as to the drug abuse situation in Kenya" on a medium-term basis. It was also recommended that in the long term, "drug control in Kenya should have a visible and committed political leadership".³⁹

Notwithstanding the problems noted above, the Narcotics Act has been enforced relatively successfully against offenders who possess or use the drugs prohibited under the Act. Enforcement in relation to the confiscation of the proceeds or instrumentalities of drug trafficking has, however, been largely absent. During the nearly ten years in which the Act has been in force, not a single case for confiscation of the proceeds of drugs has been presented. Even where charges have been brought for growing a prohibited plant, these have not been accompanied by an application for the forfeiture of the land on which such a plant was grown, as provided for in the Act. Only one case has ever been presented in an attempt to enforce the anti-money laundering provisions

of the Act. The Crucial Properties Case, as it was called, is discussed later in this chapter.

Part II: The control of money laundering

Anti-money laundering legislation in Kenya has developed on a piecemeal basis. Before 1994 there was no legislation against money laundering. During that year the Narcotic Drugs and Psychotropic Substances Act was enacted, which made it an offence to launder the proceeds of drugs. It thus covered only the proceeds of drug trafficking, excluding money earned from other criminal activities. The Anti-Corruption and Economic Crimes Act was only enacted in 2003, extending anti-money laundering legislation to the proceeds of corruption and economic crime.

It needs to be stated that these statutes merely create offences in relation to the laundering of proceeds of the criminal activities that they set out to control, that is corruption, economic crimes and drug trafficking. The statutes neither intend nor attempt to set up institutions to detect and punish money laundering, which may occur notwithstanding their provisions. What therefore remain to be explored are the arrangements, if any, that have been put in place to detect and deter money laundering. These will be considered next.

The financial sector

The Central Bank of Kenya

The existing anti-money laundering arrangements exist as part of the regulatory framework in the financial sector. The Central Bank of Kenya (CBK), which is key in the regulatory arrangements, is not surprisingly given a central role in detecting and reporting money laundering. The CBK is required by the Central Bank of Kenya Act to formulate and implement monetary policy aimed at achieving and maintaining stability in the general levels of prices. The CBK is empowered, among other things, to formulate and implement foreign exchange policy, to hold and manage foreign exchange and to act as banker and advisor to, and as fiscal agent of, the government of Kenya.⁴⁰

The Act empowers the CBK to issue directions for the maintenance of a stable and efficient banking and financial system. In exercise of these powers, the CBK has made the Regulation on Money Laundering, which is the most deliberate attempt under Kenyan law to address the money-laundering problem at present.⁴¹

The Regulation on Money Laundering

The Regulation applies to banks, financial institutions and mortgage companies licensed under the Banking Act.⁴²

It is the intention of the Regulation to provide guidance regarding the prevention, detection and control of money laundering activities. It clarifies that it is the responsibility of the board of directors and management of an institution to establish appropriate policies and procedures and to train staff to ensure adequate identification of customers and their sources of funds. Such policies, it says, should ensure the effective prevention, detection and control of money laundering activities.⁴³

The Regulation requires boards of directors to ensure that management obtains proper identification of customers wishing to open accounts or to make transactions, whether directly or through proxy, to obtain and maintain adequate records regarding the sources of funds and details of transactions in order to establish identification of unusual or suspicious transactions and to reconstruct individual transactions, and to submit to the CBK a report of any suspicious transactions or activities which may indicate money laundering or other attempts to conceal the true identity of customers or ownership of assets.⁴⁴

The Regulation then prescribes the minimum information acceptable for determining the true identity of customers wishing to open accounts or make transactions. In the case of personal accounts identification should include nationality and date of birth as evidenced by photographic identification, a national passport or national identity document, the address of current residence verified by a referee, verified employment or sources of income, written confirmation from the customer's previous bank, if applicable and, where there is to be more than one account holder, a statement from each that he has personally known the other for at least 12 months.⁴⁵

To open corporate accounts, certified copies of registration certificates are required as well as certified copies of board resolutions to open the account and an identification of the principal persons in charge of the corporation, together with audited financial statements for at least the previous year.⁴⁶

The Regulation then describes suspicious activities and transactions by giving examples of such transactions and requires an institution which becomes aware of a suspicious activity or transaction to report it to the CBK immediately. The reporting institution is required to maintain confidentiality in respect of the suspicious transaction and to report such a transaction only to the CBK.⁴⁷

Suspicious activity or transaction reports are to be made on a form provided by the Regulation. The form requires the identification of the institution providing the report, personal details about the person (or entity) against whom the report is made and a statement of the relationship between the institution and the person (or entity). The statement should state whether the relationship is that of accountant, agent, appraiser, attorney, borrower, broker, depositor, etc.

Then the suspicious activity or transaction must be identified, including dates, amounts of money involved and the basis of the suspicion, e.g., large cash deposits or large deposit from abroad.

A statement is required identifying the witnesses to the suspicious transaction and the person who prepared the report.⁴⁸

Comment on the Regulation

The CBK Regulation is a simplistic attempt to make provision for the control of money laundering through the financial system. Its feeble attempts cannot surely be expected to have any success.

The first glaring problem is that the Regulation only applies to commercial banks, financial institutions and mortgage companies. All of these are defined and licensed under the Banking Act. However, these are not the only institutions in the financial system. Building societies, savings and credit societies, foreign exchange bureaux, micro finance institutions and money remitters all play an important role in the financial system and present justifiable concern from a money laundering point of view. However, these are left out of the scope of the Regulation.

The form prescribed for making suspicious transactions reports appears to contemplate a larger scope than that allowed by the Regulation. Whereas the Regulation concentrates on the relationship between a banker and its customer, the form requires reports to be made of all types of suspicious transactions, even those involving persons who are not customers of the bank. For example, suspicious transaction reports may be made of accountants, attorneys, agents, employees, shareholders, etc. None of these is covered by the Regulation itself. It is therefore unclear how a bank could ever be competent to make a report on them if they are not customers.

The Regulation merely requires the boards of directors of the institutions to which it applies to “establish appropriate policies and procedures” to ensure

the identification of customers and the sources of their funds. The Regulation does not prescribe or describe those policies and, therefore, leaves it to individual institutions to determine, surely in a subjective manner, what is suitable for them.

There are no sanctions in the Regulation for failure to comply with the requirements of the Regulation. In the circumstances, it is wholly unclear how breaches are to be punished or corrected. Further, the Regulation does not reserve to the CBK, as it should have reasonably done, the right to inspect the institutions to which the Regulation applies for purposes of ascertaining the level of compliance with the Regulation.

The Regulation does not contemplate, and therefore fails to make provision for, the possibility that money that is already in the financial system could have questionable sources and may, therefore, need to be subjected to the due diligence that the Regulation prescribes for money that has not entered the system. For example, the Regulation does not require institutions to ensure that other institutions whose money they may handle have carried out similar anti-money laundering checks on money that the regulated institutions may receive.

It is wholly unclear and there is no provision for what is to happen to suspicious transaction reports which the CBK may receive under this Regulation. The Regulation imposes no duties on the CBK and makes no provision whatsoever regarding its handling of any reports that it may receive from the regulated institutions.

This Regulation, which is only part of subsidiary legislation, suffers from a low profile and poor publicity. Outside the financial institutions to which it applies there is little awareness of its existence and requirements. The assumption on the part of the CBK, it seems, has been that its work is discharged merely by enacting the Regulation. The CBK has therefore not found it necessary to engage in any noticeable advocacy to improve awareness of, and therefore compliance with, the Regulation. Concern by the CBK over money laundering has, at best, been perfunctory.

The Regulation requires banks to ensure that sufficient training is accorded to staff to enable them to identify and report on suspicions transactions. The form of training, however, is not identified with any precision. It is therefore left to each institution to make its own training arrangements without the benefit of a benchmark of what may be considered adequate. The assumption, clearly, is

that the CBK has the competence to handle suspicious transaction reports which it may receive under the Regulation. This, as the Crucial Properties Case (reported below) shows, is not necessarily a safe assumption.

The Crucial Properties Case⁴⁹

In January 2001 Charter House Bank reported to the CBK, as required by law, the receipt of US\$25 million into the account of a company called Crucial Properties. Following this notification, the fraud investigation unit (hereafter the unit) of CBK applied for a magistrate's order freezing the account of Crucial Properties and for warrants of search to enable the unit to investigate the account. The unit stated in its application that it believed the money to be proceeds of a theft.

After the account was frozen the head of the unit wrote to Charter House Bank asking to be furnished with all the information relating to transactions that had taken place through the account. Charter House Bank, however, declined the request, claiming it had no legal obligation to co-operate with the unit. The bank further asserted that it was bound by the requirement to keep its customers' affairs confidential.

The unit continued with its investigation, notwithstanding this setback. The investigation established that Crucial Properties had been incorporated in Kenya in May 1998 with two directors. In December 2000 the company opened a foreign currency account at Charter House Bank and then passed a resolution to introduce Humphrey Kariuki as an additional director. Kariuki was to be the star player in the court cases that followed the report of money's receipt by Charter House Bank. Soon after Kariuki became a director, the money was remitted into the account.

Questioned about the source of the money, Kariuki claimed that it was transferred from Jersey "for property development and trading within Africa".

The unit, however, asserted that the source of the money was not Jersey, as claimed, but Liechtenstein, in Europe. The unit also asserted that Kariuki had failed to provide a proper explanation as to the source of the money which, the unit now said, was the proceeds of drug trafficking.

Crucial Properties then made an application in the High Court for the lifting of the magistrate's order freezing its account. That application

was never heard as the unit voluntarily caused the magistrate's order to be discharged and then applied to the High Court for an order to restrain the money under the Narcotics Drugs and Psychotropic Substances Act. The High Court initially granted this order.

The Narcotics Act provides that the High Court may make such an order to freeze money if it is suspected to be the proceeds of a specified offence. A specified offence is defined to include all the serious offences in relation to drugs trafficking under the Act, with a provision that the Attorney-General may add to the list of specified offences. Money laundering, although an offence under the Act, was not a specified offence at the time the money was received in Kenya. Since the unit claimed to be investigating the offence of money laundering, it sought a restraint of the money, only to then realise the legal deficiency. This it sought to cure through a belated notice in the *Gazette* declaring money laundering a specified offence, so that it could avail itself of the power to restrain the money through a court order.

The proceedings that followed degenerated into a farce. The Attorney-General's belated notice making money laundering a specified offence was declared a nullity by the High Court on the grounds that it amounted to a retrospective application of criminal law. The unit, it turned out, had assumed that Jersey, the claimed source of the money, was the same as New Jersey in the US, and therefore directed its investigation to the US.

The High Court grew impatient over the failure by the unit to substantiate its claim that the money had come from Liechtenstein and the further claim that it was the proceeds of drug trafficking. The judge, rather spectacularly, declared that money laundering was, after all, not an offence in Kenya due to the previous failure to declare it a specified offence. He concluded that, in any case, he had "no reason to believe that these highly reputed international banks can engage in money laundering", and ordered the money to be released to Crucial Properties.

With the money gone, the unit had no strong incentive to go on with the case and closed its investigation.

Other financial service providers

The following financial service providers are not covered by the Regulation but raise concern and merit consideration for money laundering control.

Foreign exchange bureaux

Commercial banks offer services as foreign exchange bureaux in Kenya. These services are regulated for purposes of money laundering since the CBK Regulation applies to all the services offered by commercial banks. Commercial banks are, however, not the only providers of services as foreign exchange dealers. Since 1995 there has been a policy of licensing independent foreign exchange dealers. The licensing and, presumably, the control of these independent bureaux is the responsibility of the CBK. According to the CBK, the licensing of forex bureaux was meant to make the foreign exchange market more competitive.⁵⁰

To regulate the non-bank forex bureaux, the CBK has issued the Forex Bureau Guidelines (the Guidelines) with which all such bureaux must comply. The guidelines prohibit any person from engaging in business as a foreign exchange bureau without a licence. They require bureaux to deposit US\$5,000 with the CBK as security for compliance with the Guidelines and to open and maintain, with a commercial bank, an account or accounts, designated 'Forex Bureau Foreign Currency Account'. A bureau is required to immediately pay into its account all foreign exchange remittances it receives.⁵¹

The Guidelines require bureaux to engage only in "spot transactions" and "not in transactions involving forward cover". Bureaux may buy and sell foreign exchange. They may also buy travellers' cheques, personal cheques and bank drafts but may not engage in the sale of these instruments without specific approval.⁵²

The role of forex bureaux in Kenya as channels through which money is laundered has been noted. One report claimed that Pakistani-run bureaux in Nairobi are linked to the laundering of money through the *hundi* system.⁵³ In 1999 a couple was arrested at the Jomo Kenyatta International Airport while attempting to smuggle Ksh50 million in foreign currency out of the country. The couple had been illegally running a foreign exchange business in Nairobi.⁵⁴ The connection between foreign exchange dealers and money laundering is made clear by this case.

Other than the formal foreign exchange dealers, a number of underground foreign exchange outlets exist in the big cities especially Nairobi, Mombasa and Kisumu. These arose during the time when exchange controls existed in Kenya and they managed to undercut formal sources of foreign exchange, because of their relatively low costs, including through tax evasion. Even after the liberalisation of foreign exchange, they have stubbornly remained in

business, although they have now lost their competitive advantage. However, they try to make up for this by opening for longer hours.

Clearly, these dealers also pose risks from a money laundering point of view. The volumes with which they deal are impossible to ascertain, given the informality of their business. Strictly speaking, these dealers operate illegally since a licence from the CBK is required to handle foreign exchange.⁵⁵

It is difficult to imagine that authorities are not aware of their existence, since they carry out their business relatively openly. It would be easy to curb this underground source of foreign exchange, if the authorities were interested in so doing.

A comment on the Guidelines

The Guidelines specifically require dealers to only engage in spot transactions. There is no requirement to keep records other than such as will enable the conduct of a proper audit of the accounts of a dealer. Such audits as may be conducted by the CBK are from the perspective of monitoring the movement of foreign exchange, rather than for controlling money laundering.

Although the Guidelines mention the need to ensure that such records leave a paper trail, there is no specific requirement to identify the persons with whom bureaux may deal. It is thus impossible, under existing arrangements, for dealers to be in a position to know their customers in the event of a need to do so.

Dealers are required to open and maintain bank accounts with commercial banks. This enables banks to receive money from persons whom neither they nor the dealers can identify. The possibilities of mischief are numerous. According to a bank manager in Nairobi, some commercial banks have been expressing concern over the banking, by their bureaux customers, of large sums of money whose sources cannot be explained. Such banks have, as result, been reluctant to keep bureaux as customers. Clearly, a strong case exists for bringing alternative foreign exchange dealers into some form of control against money laundering.

Money remitters

Informal money remitters of several varieties operate in Kenya. The increasing number of Kenyans living abroad is thought to have led to the increased use of informal methods to remit money back to Kenya. There is, however, no evidence as to the volumes of money remitted in this manner and it is necessary to

conduct further investigation before any formal intervention can, if necessary, be suggested.

After the banks, the postal system is the premier money transmitter in Kenya. A variety of services is offered for the transfer of money locally and also between Kenya, Uganda and Tanzania. Postbank, a state-owned commercial bank, in addition, offers such services internationally as an agent of Western Union, a US corporation involved in money transfers. In its turn, the Postbank uses the services of the postal system as a sub-agent of Western Union. Similar relationships for the transfer of money exist between other commercial banks and money remitters.⁵⁶

According to the United Nations Drugs Control Programme (UNDCP), “there has been an increasing resort to postal money orders for purposes of money laundering” in Nairobi. The UNDCP claims that criminal organisations are increasingly using postal orders to transfer huge incomes generated from illicit activities into foreign countries, very often those that apply bank secrecy.⁵⁷

The postal system is also used as a conduit for smuggling cash, which is sent as parcels or mail. To deal with this problem, there has been increased training for postal personnel and the use of modern equipment to detect cash being smuggled through the postal system.⁵⁸

The CBK regulates money transmitters who handle convertible foreign exchange. Its control is, therefore, from a foreign exchange perspective, consistent with the strong statutory emphasis as contained in its constitution. Where no convertible foreign exchange is involved, for example within East Africa, there is no regulatory mechanism. It follows that there is immediate need to put in place anti-money laundering procedures to govern money remitters.

The realisation that the postal system can be used for laundering money has caused the signing of a memorandum of understanding between the police and the postal authorities in Kenya for the control of this problem. Unfortunately, it was not possible to have access to the memorandum for purposes of this study.⁵⁹

What is clear, however, is that a lacuna exists in this area in terms of money laundering control. The memorandum, whatever its contents, is only an internal document between the two public authorities concerned and lacks the force of law and the ability of universal application. It only serves to emphasise the need to put in place a legislative framework to control money laundering through money remitters.

Building societies and micro-finance institutions

Building societies are formed in order to raise funds by subscription of members, from which to make advances to members secured through land.⁶⁰ Co-operative societies operate on the same principle, except that the security for advances is based on the shares held by the borrower and personal guarantees by other shareholders.

Building societies operate virtually like commercial banks except that they do not go to the clearing house. However, they have a range of financial instruments that, in practical terms, make them as good as banks. For example, they can raise money by issuing bonds and they open accounts for their customers and issue cheques.

At present there is no attempt at regulation of these institutions for purposes of money laundering⁶¹ and the scope of the CBK Regulation excludes them.

Micro-finance institutions are in an even worse position from the point of view of regulation. These are relatively new in Kenya and operate outside any form of regulation. In theory, micro-finance institutions are set up to provide credit to the lower end of the market, in which commercial banks are not interested. In practice, however, there is pressure to also advance credit to the higher end of the market, as no regulation exists against doing so. There is no form of control for micro-finance institutions, which are not subject to regulation by the CBK.

Anti-money laundering control is clearly needed in respect of these forgotten financial institutions as well.

Secrecy

Secrecy is an important issue in the anti-money laundering discourse. Secrecy provides a shield that money laundering schemes can exploit to avoid detection. The state of banking, corporate and lawyer/client secrecy in Kenya is relevant to the design of effective anti-money laundering procedures and is discussed next.

Corporate secrecy

Kenyan law allows for the creation of the corporation as a legal entity in order to provide business people with an opportunity to conduct their business with measured risks. The corporations that can be registered under Kenyan law

include companies (with or without limited liability), trusts, firms (which are unincorporated concerns which are allowed to use corporate names), and societies, etc.

It is a feature of Kenyan law to require the disclosure of the names and addresses of all persons responsible for the registration of a corporation. It is also a feature to provide for the establishment of public registers where such information is to be held and to allow public access to such information.

Corporate secrecy, a feature of many of the financial havens which are often associated with money laundering schemes, is shunned by Kenyan law which requires the disclosure of sufficient information to avoid anonymity.

Notwithstanding the law, it is possible to erect schemes that protect the identity of the true owners of a corporation by vesting its control in agents, including legal representatives. Such schemes ultimately rely on fear on the part of the agent, which would in all likelihood also prevent law enforcement from taking steps to identify the true owners.⁶²

The state of the public registries that hold and process information on corporations registered in Kenya is, however, a matter of very great concern. The relevant public records are held in a central registry in Nairobi, called the Companies Registry. The Companies Registry is poorly maintained, making it very difficult to register new corporations and to retrieve information on those that are already registered. There are also reports of incidents, induced by corruption, in which officials conceal information that should be available to the public. Notwithstanding the formal provisions of the law, there is a *de facto* state of secrecy created by the chaotic handling of information and petty corruption. In designing effective anti-money laundering procedures, it will be necessary to greatly improve the handling of information at the Companies Registry and to eliminate petty corruption, which can lead to quite serious lapses in accountability. Information technology would certainly need to be employed in the place of the existing manual systems.⁶³

Lawyer/client secrecy

Kenya, a common law jurisdiction, emphasises lawyer/client confidentiality and exempts lawyers from disclosing information held by them about their clients. Draft anti-corruption legislation published in 2001 proposed to limit lawyer/client confidentiality as a barrier to investigating corruption cases.⁶⁴ However, Kenya's powerful legal profession successfully campaigned against the inclusion of such a clause. Subsequent drafts of anti-corruption legislation

eliminated such proposals. The Anti-Corruption and Economic Crimes Act contains no limitations on lawyer/client confidentiality. The Narcotics Drugs and Psychotropic Substances Act also imposes a blanket cover for information held on a lawyer/client basis which, it provides, is exempt from law enforcement scrutiny.

It is suggested that the Kenyan approach to lawyer/client confidentiality is perhaps too dogmatic. Some form of disclosure obligations will have to be imposed on lawyers if an effective anti-money laundering system is to be established. The extension of anti-money laundering procedures to legal service providers will have to anticipate strong opposition from the legal profession, which has remained very conservative and which would, in all likelihood, view such measures as an unacceptable intrusion into the age-old privileges that the profession considers its right.

Bank secrecy

The Regulation on money laundering issued by the CBK prescribes the minimum amount of information that banks must obtain from persons who are allowed to hold accounts. The information to be disclosed has already been discussed above. If complied with, the Regulation is sufficient to ensure the proper identification of the customers of a bank.

However, questions arise in relation to trust accounts. Several businesses operate trust accounts and the money held in such accounts is easily masked from scrutiny of its true ownership. A lawyer who opens a trust account can probably successfully maintain a claim of client/lawyer confidentiality if law enforcement authorities raise questions about the beneficiaries of the account. Foreign exchange bureaux that are required to maintain client accounts would probably not be able to sustain such a claim, but would in any case be unlikely to know their customers since they are not obliged to do so. The true nature of secrecy at this point, therefore, is not of a banking nature but of a lawyer/client nature. The need to review this form of confidentiality has already been indicated.

Where a bank is compelled by anti-money laundering law to gather sufficient information to identify its customers, such information is not useful unless law enforcement authorities can have access to the information if needed. The barriers, if any, that banks can maintain against third parties (especially law enforcement authorities) with a legitimate interest in the identity of their customers, are of paramount importance in achieving accountability, which is what establishing the true identity of banks' customers is supposed to achieve. It has been argued that bank secrecy ultimately only serves to delay law

enforcement enquiries into a given financial transaction, rather than to defeat such enquiries altogether. Delay, however, can lead to significant harm as it can allow time to move money out of a bank and thus defeat the interests of law enforcement. The inquiry as to bank secrecy should therefore concern itself with whether, firstly, it is possible to have access to information held by banks and secondly, how easily this can be achieved.

In Kenya there is no specific legislation on bank secrecy. In practice, however, banks maintain strict confidentiality about their customers' transactions. The High Court has held that it is actionable for a bank to release information on its customers to unauthorised third parties. Law enforcement can, however, access information held by banks using a simple procedure contained in the Criminal Procedure Code (hereafter the Code).⁶⁵

The Code empowers a magistrate to issue a written search warrant when it is proved that something that is connected to, or necessary for, an investigation into an offence, is suspected to be in any place, building, ship, vehicle, etc. The warrant may be issued to an authorised police officer who, with such a warrant, may enter such a place and conduct investigations into an offence. The officer may seize and take before the courts anything found in the place that is relevant to the offence under investigation.

In practice, this simple procedure is used by law enforcement to gain access to information held by banks. Where this is done, law enforcement agents approach magistrates and need not comply with any formal legal procedures to be issued with search warrants.

Thus in practice law enforcement agents are able to restrain transactions in given bank accounts without further procedural formalities on the basis of only a search warrant. This seems blatantly illegal, however, and would probably not be sustainable against sophisticated criminals who have access to good legal advice. In the Crucial Properties Case, discussed above, these simple procedures were used to freeze the money but subsequent to the restraint the bank refused to co-operate with investigators who sought information on the account. When lawyers entered the scene, the procedure used for restraining the money came under question, forcing law enforcement to make the ill-fated application under the Narcotics Act for a restraint order.

At a practical level existing bank secrecy procedures are tilted heavily in favour of law enforcement agents who can easily access bank records with minimum delay. What seems necessary is to make legal provision for the restraint of the

funds held in such accounts. Due process, however, seems necessary if such drastic powers are to be formalised.

The Intercon Services Case, whose facts are narrated below, demonstrates some of the dynamics involved in the enforcement of banking secrecy in Kenya.

The Intercon Services Case⁶⁶

One Friday in 1985, James Nderitu received a cheque for Ksh17 million from the Department of Customs and Excise. At the time this was a very large sum of money. Later on the same day the manager of the local branch of the Standard Chartered Bank visited Nderitu's restaurant, as he had often done, and after some discussion Nderitu disclosed his possession of the cheque which, it was agreed, Nderitu should deposit in the bank the following day.

This he did. The cheque was drawn in favour of Intercon Services, a company of which Nderitu was the managing director and the sole signatory to its account at the bank. Nderitu was also the managing director and sole signatory to the accounts of three other companies that had accounts with the bank, of which one was called Interstate Communications and a second was called Swiftair.

The following Monday, the bank manager telephoned Nderitu to inform him that his superiors had queried the cheque and needed to know the source of the money. The manager asked him for any documentary evidence he may have which could show the underlying transaction.

Nderitu took the payment voucher that had accompanied the cheque from the Department of Customs and Excise to the bank. On examination of the voucher, it turned out that there were minor discrepancies between the amount of money in figures and in words. Nderitu attributed this to a clerical error. It also turned out that the company to which the cheque should have been paid was Interstate and not Intercon, although both companies were owned by Nderitu, who explained that the cheque had been written in favour of the latter company at his request. The accounts for the four companies had been opened during the same month. Intercon's account had only been opened eight days previously and this very large deposit was its first transaction.

Even as the bank made these queries, it received the funds represented

by the cheque from the Kenya Commercial Bank, the bankers of the Department of Customs and Excise.

The Standard Bank manager paid the proceeds of the cheque into Intercon's account. Nderitu immediately transferred the funds to Swiftair's account, except for a small amount which he withdrew. He then instructed the bank to transfer the money to a different bank where Swiftair held an account. However, before this could be done, law enforcement intervened.

Meanwhile, the bank manager was proceeding with further inquiries into this transaction, which the bank considered most unusual. He telephoned the Department of Customs and Excise and spoke to one of the signatories to the cheque who confirmed that the payment to Nderitu was valid. Not satisfied, the manager called the second signatory who also confirmed the transaction. Still unsatisfied, he made a call to the fraud section of the CBK.

The CBK quickly moved in with the police, who froze all the accounts of the four companies, arrested Nderitu and charged him with the theft of the money that had been paid to him by the Department. Eventually Nderitu was convicted by a magistrate but, on appeal, the High Court set aside the conviction.

Subsequently, Nderitu sued the bank in 1988 for breach of customer confidentiality, taking the form of the various reports the bank manager had made to the public authorities, one of which had triggered his arrest and prosecution.

There was a very great delay in the trial of the suit, which was only heard in 2002. Nderitu claimed special damages of more than Ksh600 million which, he asserted, represented the loss of business resulting from the disruptions associated with his arrest.

At the trial, the parties consented to a determination of the question of liability and then, if necessary, the assessment of damages.

It emerged during the trial that Nderitu had had several other criminal cases brought against him around 1985 but was acquitted in all of them. The Department of Customs and Excise, the presumed complainant, was emphatic during the trial that the payment to Nderitu had been regular, although its head subsequently wrote that an offence had occurred which the Department found it difficult to prove. The

bank was prevented, at the trial, from proving that the money, which was paid to Nderitu as export compensation, was legally not payable, as none of his companies was involved in export business.

The judge held that:

- (i) the bank was entitled to make inquiries into the payment especially since it was unusually large, had been made into a new account and, further, since there were queries about the proper payee of the cheque (Intercon or Interstate);
- (ii) the fundamental question, however, was the extent to which a bank could be allowed to go to establish the truth. It is not the role of a banker to assume the role of an investigator of its customers' affairs or to turn itself into a policeman;
- (iii) the report to the CBK went far too far out of the bank's remit of reasonable inquiries and directly led to the suffering which Nderitu subsequently underwent. This report was a breach of the confidentiality that the bank owed Nderitu, as a customer.

The non-financial sector

The rudimentary anti-money laundering procedures existing in Kenya only target financial institutions. Non-financial institutions, it has been realised, are just as important in money laundering terms. For example, the European Union Directive on Money Laundering now requires anti-money laundering procedures to be extended to such institutions as antique dealers, auctioneers, casinos and other gambling businesses, dealers in property and high-value items and companies and trust providers.

A study on money laundering typologies in Kenya that preceded the current study, identified casinos and dealers in property and high value items as possible conduits through which money laundering may be occurring in Kenya. It is, therefore, necessary to examine whether any safeguards exist against the use of these as money laundering avenues.

Casinos

The regulation of casinos in Kenya is provided for under the Betting, Lotteries and Gaming Act. The Act does not define a casino and only defines gaming premises as "premises kept or used (whether on one occasion or more than

one) for gaming, and to which the public has or may have access for playing therein of a game of chance, whether the game of chance be unlawful or not”.

No person may carry on the business of gambling without a licence. The Act establishes a board to issue licences and to supervise gaming premises and empowers it to make regulations to protect persons playing in the premises against fraud.

Subsidiary legislation made under the Act requires the maintenance of records to show the total amount of money that a player puts down as stakes or pays by way of losses or exchanges for tokens used in playing the game.

Comment on casino legislation

Existing legislation on casinos has no concern with the possibility that they could be used as avenues of money laundering. Casinos in Kenya have traditionally had strong links with the political establishment, whose patronage they have found difficult to shake off. For example, a government directive was issued requiring all gambling in casinos to be conducted using foreign exchange. This was at a time when foreign exchange control existed in Kenya and access to such exchange itself required political connections. Casino owners without such connections were, naturally, disadvantaged by this policy which, it was thought, was introduced in order to give the political elite a chance to own casinos.

In 2000 legislation was introduced which exempted casinos from taxation. It is wholly unclear why such legislation could have been necessary. The legislation was only repealed in 2003.

According to the US Department of State International Narcotics Control Strategy Report of March 1996, the casino industry in Kenya is suspected to be an avenue through which narcotics-related money laundering occurs.

Other reports have also linked casinos to money laundering activities in Kenya. For example, Said Masoud Mohammed, a fugitive from Kenya law enforcement authorities in connection with drug-related crimes, was also a casino owner in Kenya.

At the moment, however, there are virtually no anti-money laundering controls against casinos, but, by the evidence, they are in great need.

Dealers in high-value property

As mentioned, a study on the typologies of money laundering in Kenya established that a number of dealers in high-value property are exposed to money laundering. The properties include real estate and motor vehicles. A report on the laundering proceeds of drugs, for example, claimed that organised crime syndicates are involved in the purchase of land in Mombasa and the development of holiday facilities, using the proceeds of crimes committed in Europe.

Informants interviewed for the earlier study said they believed that proceeds of drugs are, at least in part, invested in up-market developments and contribute to the continued investment in this sector. As a result, property on the coast, especially in Malindi, is fairly expensive notwithstanding a general business downturn in the same area.

Motor vehicle dealers are similarly highly exposed to money laundering. The earlier study established that they are especially vulnerable because, firstly, their trade involves an import/export element for which criminal money can be brought into the country in the form of motor vehicles, and, secondly, because motor vehicles in themselves are items of high value. Motor vehicle purchases are often conducted in cash, exposing financial institutions to the possibility of subsequent receipt of tainted money.

Estate agents and other real estate dealers clearly need to be subjected to anti-money laundering control. The same applies to other dealers in high-value items, of whom motor vehicle dealers are the most important.

Company and trust providers

People who provide advice on the establishment of businesses, including companies and trusts, are also exposed to money laundering. The example of the Karura Forest saga demonstrates the point: Karura Forest is a large natural forest on the outskirts of Nairobi which, as the only such forest in Nairobi, is of immense environmental importance. In 1998, it emerged that a large portion of the forest had been secretly alienated as private property in complete contravention of the Forests Act. Following a public outcry, it became necessary to establish the beneficiaries of this alienation.

A search at the Lands Office, where land transactions are registered, revealed that the forest had been allocated to 36 limited companies. A search of the companies register was necessary to establish who the directors of the companies were. It emerged that all the companies had been registered on the same day

by one law firm. However, the information on the directorships was unavailable in the registry because those behind the scandal had arranged for its concealment. Asked to provide information on the companies' directors, the law firm, naturally, claimed privilege and declined to give this information to the interested authorities.

Legal practitioners, accountants and certified public secretaries are the primary company and trust providers in Kenya. Legal practitioners enjoy lawyer/client privileges, which have already been discussed above. The others do not and would, in theory, be compelled to disclose information that comes to them to public authorities if it is relevant for law enforcement. However, none are presently obliged to report suspicious transactions from a money-laundering point of view. Also, none are the subject of any specific anti-money laundering obligations, for example, the duty to know their clients, the duty to maintain records of transactions to enable reconstruction where necessary, etc.

There can be little doubt that these service providers should be legitimate targets for anti-money laundering controls.

Part III: Terrorist activities

The United Nations Security Council Resolution 1373 (2001)

This Resolution is concerned with terrorism and terrorist acts. It is also concerned with the connection between international terrorism and transnational organised crime, illicit drugs and money laundering.

It calls for the prevention and suppression of the financing of terrorist acts and the criminalisation of the willful provision or collection, by any means, directly or indirectly, of funds with the intention that the funds are to be used for the funding of terrorist acts. It calls for the freezing of funds and financial assets of persons who commit or facilitate the commission of terrorist acts.

The Resolution requires states to co-operate to ensure that terrorism is prevented at all costs through the exchange of necessary information and preventing the financing, planning or facilitation of terrorist acts.

Kenya has taken steps to implement the decisions in the Resolution through domestic legislation. Money laundering in connection with corruption, economic crimes and drug trafficking is criminalised, as discussed above.

Further initiative is seen in the Suppression of Terrorism Bill, 2003, which is discussed below.

The Suppression of Terrorism Bill

The long title of the Bill declares it to be "an Act of Parliament to provide measures for the detection and prevention of terrorist activities; to amend the Extradition (commonwealth countries) Act and Extradition (contiguous and Foreign Countries) Act; and for related purposes". Terrorism is defined in clause 3 of the Bill to mean the use or threat of action where:

- (a) the action used or threatened:
 - (i) involves serious violence against a person;
 - (ii) involves serious damage to property;
 - (iii) endangers the life of any person other than the person committing the action;
 - (iv) creates a serious risk to the health or safety of the public or a section of the public; or
 - (v) is designed seriously to interfere with or seriously to disrupt an electronic system.
- (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public; and
- (c) the use or threat is made for the purpose of advancing a political, religious or ideological case;

Provided that the use or threat involves the use of:

- (i) firearms or explosives;
- (ii) chemical, biological, radiological or nuclear weapons; or
- (iii) weapons of mass destruction in any form, shall be deemed to constitute terrorism.

Clauses 4–8 of the Bill deal with terrorist offences and make a wide range of conduct illegal, including providing weapons and training, directing terrorist organisations, possessing articles for terrorist purposes and collecting information for terrorist purposes. The maximum sentence for these offences ranges from ten years in certain cases to life imprisonment in others.

Clause 9 empowers the Minister to declare that an organisation is concerned in terrorism by notice published in the *Gazette* and may revoke any notice previously published under this provision.

Any person who is a member of, or who supports or invites others to support, a declared terrorist organisation, is guilty of an offence.

Also guilty of an offence is any person who publicly wears any clothing in a public place capable of reasonable suspicion that such a person is a member or supporter of a declared terrorist organisation. The police may arrest such a person without a warrant.

The Bill then attempts a definition of terrorist property as “money or other property which has been or is intended or is likely to be used for purposes of terrorism” (including the resources of a declared terrorist organisation). Terrorist property also includes proceeds of acts of terrorism and proceeds of acts carried out for the purpose of terrorism. Several offences are created in relation to terrorist property including fundraising for terrorist purposes, the receipt of money or any other property for terrorist purposes and the use or possession of terrorist property. Any financial arrangement to make money available for terrorist purposes is an offence, as is the removal, transfer or concealment of terrorist property.

The police are allowed to receive information in the knowledge of any alleged terrorist activities and a person does not commit an offence in relation to terrorist property if his conduct has the express consent of the police.

The Attorney-General may, on reasonable grounds of suspicion, apply to the High Court for an order compelling a person to deliver up any document or record relevant to identifying, locating or quantifying any property belonging to a person suspected of terrorism; or requiring a bank, any other financial institution or trustee to produce all information and deliver up documents and records regarding any business transaction conducted by or on behalf of the person concerned.

An authorised officer may seize any cash upon reasonable belief that it is being imported into or exported from Kenya, or is being brought to any place in Kenya, for the purpose of being exported from Kenya as terrorist property. Such seizure is allowed notwithstanding that only part of it is suspected to be terrorist property.

The Attorney-General may apply to the High Court for a provisional order of attachment of terrorist property. Such an order may prohibit third parties from making property available to a terrorist organisation.

The court before which a person is convicted of an offence related to terrorism may order the forfeiture of any property connected with terrorism, or used for an offence.

Authorised officers are also allowed to apply to the High Court *ex parte* for a detention order with respect to the cash seized under the suspicious circumstances. Authorised officers include the Commissioner of Customs and Excise, the Commissioner of Police and the Attorney-General.

The Commissioner of Police is empowered to apply to a judge of the High Court for the issue of a warrant for the purpose of a terrorist investigation.

In case of urgency the police may lawfully make an arrest without a warrant. Customs and immigration officials are empowered to make arrests in the same way as the police.

It is an offence for any person to disclose to another person anything likely to prejudice the investigation, or interfere with material that is likely to be relevant to the investigation.

A person suspected of a terrorist offence may be detained until investigations are completed, without prejudice to the right to legal representation.

The Bill proposes several measures by way of mutual assistance, including the exchange of information at the request of a competent foreign authority where such disclosure is not prohibited by any provision of law and will not be prejudicial to national security.

Further, where a request is made by a state for assistance in the investigation or prosecution of an offence related to terrorism or for the tracking, attachment or forfeiture of terrorist property located in Kenya, the Attorney-General, as the agent of the government, is required to co-operate with the requesting state. Similarly, the government may also make a request to any foreign state to provide information or evidence relevant to an offence under the Act, or for the tracking, attachment or forfeiture of terrorist property located in that state.

Comment on the Bill

The Suppression of Terrorism Bill was, at the time of this study, the subject of robust public debate in Kenya. The publication of the Bill coincided with an announcement by a government minister, quoting intelligence sources, that

Kenya was targeted for a terrorist attack. Kenya has already been the subject of two serious terrorist attacks, each of which led to the loss of life and the destruction of property. The announcement, therefore, was received with widespread public belief.

The minister's announcement led to immediate reaction by the governments of the US and Britain, each of which issued advice to its citizens to avoid non-essential travel to Kenya. As a result, airlines originating in Europe and destined for Nairobi cancelled flights, triggering, in turn, massive cancellations on the part of tourists who, but for the advice, would have visited Kenya. Kenya relies heavily on tourism as a source of livelihood and as the main source of foreign exchange. These cancellations have, therefore, had an adverse economic impact in the country, which has led to public disquiet. In the face of all this the public reaction is ambivalent: on the one hand, it is appreciated that a terrorist attack may occur in Kenya and precautions are necessary to avoid such an attack; on the other hand, the disruptions resulting from the negative publicity the country has attracted have been the source of public concern and anger.

Kenya has been under pressure to enact anti-terrorism laws as a basis for reassuring the international community that a legal framework to fight terrorism is in place and that, therefore, Kenya need not be isolated. The advice by western governments to their citizens not to visit Kenya is, however, viewed as an attempt to isolate a country whose close relations with the West have already extracted a heavy price in terms of terrorism.

Public authorities in Kenya have attempted to demonstrate seriousness in the fight against terrorism by making arrests of those allegedly responsible for the latest terrorist attacks in Kenya. However, controversy always accompanies such efforts, with the country's sizeable Muslim population claiming that it is being targeted for harassment and unfounded official reprisals under the guise of fighting terrorism. It is this political background against which public response to the proposals in this Bill must be understood.

Not unexpectedly, the public has mostly been hostile to the Bill's proposals. Its definition of terrorism has been one of the important points of criticism. According to Dick Maragia, a Kenyan lawyer resident in the US, "there is little doubt that the current Bill is not clear on what constitutes terrorism and how this can be distinguished from ordinary offences under the Penal Code or other statutes".⁶⁷ Tom Ojienda, a Nairobi lawyer, has written that the definition of terrorism in the Bill "is vague and open to several interpretations with the possibility of unlawful incarceration and sacrifice of fundamental human right".⁶⁸

Macharia Gaitho, a journalist with the *Daily Nation*, a local newspaper, has termed the Bill "a rather outrageous piece of anti-terrorism legislation that is not only a shameless product of the US Attorney-General, but the most unconstitutional document and affront to civil liberties we have ever had foisted upon us".⁶⁹

His opinion represents a widely held view in Kenya that the Anti-Terrorism Bill is an American piece of legislation that is being forced on Kenya irrespective of Kenya's own needs or realities.

Clause 18 of the Bill creates immunity for persons who would otherwise be guilty of terrorism if they were "acting with the express consent of a member of the police force". This provision is viewed as intended to provide room for informers and spies to be planted in organisations with a view to exposing terrorism. One commentator wrote in reference to this provision, that "once this law is passed, you cannot trust anybody; you can never know if they are working for Big Brother".

Other concerns include the provisions which make it an offence to wear uniform or clothing associated with terrorism or terrorists. The Muslim community has viewed this provision with grave concern, fearing that it will target people who wear Islamic dress. The community has tried to make it clear that it is terrorists who wear Islamic dress and not Muslims who wear terrorist dress. The provision is therefore viewed as highly prejudicial and an unacceptable form of patronage by the West, which seeks to prescribe how people may dress.

The Attorney-General, who published the Bill, has been the subject of criticism in, among others, the following words:

By drafting this Bill and presenting it to Parliament for debate, he has caused taxpayers' money to be wasted on a futile exercise, well aware that what he is asking Parliament to debate is unconstitutional and a violation of Kenya's integrity and sovereignty. He has rendered himself unfit and incompetent to continue holding the office of the Attorney General, and as such should resign.⁷⁰

The perception in Kenya is therefore that the country needs anti-terrorism legislation, but not in the form in which it has been proposed through the Bill. Given the massive rancour which the Bill has aroused, it is highly unlikely that it will be enacted in its present form. It is even possible that the Bill may be withdrawn and re-drafted to take into account the concerns raised.

Notes

- 1 The Corruption Perception Index (CPI) is published annually by Transparency International, the leading global anti-corruption organisation. In 1996 it ranked Kenya as the third most corrupt country in the world. Since then it has been ranked as one of the most corrupt countries, year after year.
- 2 For example, a Cabinet Minister made claims of recoveries of money previously held abroad as proceeds of corruption. See also 'Sh15b recovered in war on graft', says Kiraitu, *Daily Nation*, 3 March 2003.
- 3 See, for example, Otsieno Namwaya, The big issue, *East Africa Standard*, 8 December 2003, p 3. It is claimed that in respect of the removal of the Director of KACA, John Harun, "Mwau's fate was seen to have been orchestrated by powerful political forces that loathed his self-conceited crusade against corruption that appeared to threaten their interests".
- 4 In *Stephen Mwai Gachiengo v. Republic* (unreported), High Court Miscellaneous Application No. 302 of 2000.
- 5 In *Republic v. Attorney General ex parte Kipng'eno arap Ngeny* (unreported).
- 6 Act 3 of 2003.
- 7 Act 4 of 2004.
- 8 Anti-Corruption and Economic Crimes Act, section 6(1).
- 9 Section 8.
- 10 Section 3.
- 11 Section 5(1).
- 12 Section 7(1)(a)(b) and (c).
- 13 Section 7(1)(h).
- 14 Section 27.
- 15 Section 28(8).
- 16 Section 47.
- 17 Section 48.
- 18 Section 55(2).
- 19 Section 55(6).
- 20 Section 56.
- 21 The Public Officer Ethics Act, section 5.
- 22 Section 11 and 12 generally.

- 23 Section 26(1).
- 24 Section 30.
- 25 Section 35.
- 26 The Anti-Corruption and Economic Crimes Act, Section 37.
- 27 See, for example, A Odera, Kenya turned into a haven for drug barons, *Expression Today*, 11 February 1999, p 1.
- 28 Act 4 of 1994.
- 29 For example, the penalty for possession of prohibited substances for own use is imprisonment up to 20 years (section 3(2)(b)) and in every other case it is a fine of not less than Ksh1 million or three times the value of the prohibited substance, whichever is the greater, or imprisonment for life, or both such fine and imprisonment.
- 30 Section 7.
- 31 Section 20(1).
- 32 Proviso to Section 20(2).
- 33 Section 59(1).
- 34 Section 59(2).
- 35 Section 49.
- 36 The courts routinely handed down sentences of not less than ten years for all convictions under the Act, this being the minimum sentence that they considered themselves bound to give. Previously, such offences would typically attract only light penalties.
- 37 Unpublished report on the workshop on legal and institutional arrangements in guidelines for the Kenya Drug Control Master Plan, held at the Kenya College of Communication and Technology, Mbagathi, Nairobi, on 12 May 1999.
- 38 Ibid.
- 39 Ibid.
- 40 Central Bank of Kenya Act, section 4.
- 41 Regulation No. CBK/PG.12.
- 42 Chapter 488 of the Laws of Kenya.
- 43 Regulation on Money Laundering, Part II, paragraph 1.
- 44 Ibid, Part IV, paragraphs 1 and 2.
- 45 Ibid, paragraph 2.1.

- 46 Ibid, paragraph 2.2.
- 47 Ibid, paragraph 6.
- 48 Ibid, paragraph 5.
- 49 *Republic v Crucial Properties Ltd.*
- 50 Central Bank of Kenya, Forex Bureau Guidelines, p 2.
- 51 Ibid, paragraph 3.3.
- 52 Ibid, paragraph 3.5.
- 53 A Odera, How drug money is laundered in Kenya, *Expression Today*, 11 February 1999, p 3.
- 54 Ibid.
- 55 Central Bank of Kenya, op cit, paragraph 1.2.
- 56 Interview with a member of staff of the Postal Corporations of Kenya, July 2002.
- 57 Email correspondence with Mickel Edwerd of the United Nations Drug Control Programme, July 2002.
- 58 Ibid.
- 59 Ibid.
- 60 Under the Building Societies Act, Chapter 489, Laws of Kenya.
- 61 The Regulation only covers financial institutions as defined in the Act, which do not include building societies.
- 62 In the Goldenberg scandal, (Kenya's worst financial scandal), it has been claimed that the known architect of the scandal acted not only for himself but also for the then-ruling elite in Kenya with whom he had arrangements based on fear.
- 63 The chaotic state of Kenya's land and company registers is discussed by the author fully in a previous unpublished paper prepared for the Institute for Security Studies, entitled 'Typologies of laundering in Kenya'.
- 64 See, for example, the Anti-Corruption and Economic Crimes Act, 2003.
- 65 Chapter 75, Laws of Kenya.
- 66 *Intercon Services Limited v Standard Chartered Bank* (unreported), High Court Civil Case No.761 of 1985.
- 67 Bosire Maragia, The pitfalls of the Anti-Terrorism Bill, through email, 8 July 2003. Maragia is a Kenya lawyer working in the US.

- 68 Tom Ojienda, The Anti Terrorism Bill: Is it valid? Unpublished paper submitted for a seminar on the Bill held by the Law Society of Kenya, Nairobi, 2003.
- 69 Macharia Gaitho, Kenyans must reject Anti-Terrorism Bill, *Daily Nation*, 2 July 2003.
- 70 Harrison Kinyanjui, Anti-terror law will roll back Kenya's civil liberties, *The East African*, June 30 to July 7 2003, p 4.