

KENYA

Country Report: Anti-terrorism laws & policing

1. Country summary

- a. **Government:** Republic
- b. **Population:** 34 256 000
- c. **Size:** 580 367 sq km
- d. **Region:** East Africa
- e. **General:**

Since 1998 there have been two major terrorist attacks in Kenya in which large numbers of civilians have been killed and injured:¹

- On 7 August 1998 the US embassy in Nairobi was bombed, killing 213 people (201 Kenyans and 12 US nationals), and wounding 4,600 (the US embassy in Dar es Salaam, Tanzania was bombed on the same morning killing 11 and wounding 71).
- On 28 November 2002, two suicide bombers drove a car bomb into a Kikambala hotel, near Mombasa killing 15 (twelve Kenyans and three Israelis) and wounding 80. On the same day, an attempted missile attack on an Israeli airliner failed as the plane departed from Mombasa airport carrying over 200 passengers.²

Amnesty International's 2005 report "Kenya: The impact of 'anti-terrorism' operations on human rights" found that the ongoing crackdown on terrorism in Kenya has had an extensive impact on the general human rights situation in the country.³ It expressed particular concern that the Kenyan authorities have failed to act in compliance with international human rights law and standards and Kenyan law in the investigations following the 2002 bombings and other terrorist acts on civilians.⁴

2. Relevant legislation

- *Suppression of Terrorism Bill* 2003 (STB 2003) – this Bill was rejected by parliament in 2003 due to concern about its draconian provisions relating to arrest, detention, use of force and police immunity, as well as protests from Muslim communities that the Bill would be discriminatory in its impact. Many of these provisions have been removed in the ATB 2006 and the STB 2003 has been analysed solely in the context of changes made between 2003 and 2006.
- *Anti-Terrorism Bill* 2006 (ATB 2006)⁵ – the Draft ATB Bill is the focus of this report. Despite not yet having been enacted as legislation it indicates what powers the government is seeking to confer on police via the 'war on terror'. Instances of people's rights being violated by police under the auspices of countering terrorism are numerous. This highlights the ways in which existing legislation is being reshaped in an atmosphere of heightened security.



3. Law summary

To date, Kenya does not have any specific anti-terrorism legislation.

In April 2003, Kenya published a draft Suppression of Terrorism Bill 2003 (STB 2003) but withdrew it after harsh criticism from human rights groups and Kenyan Muslim communities. The Kenyan Government then prepared a new draft but did not officially publish the document or submit it to Parliament. The USA State Department's Office of the Coordinator for Counterterrorism has criticised Kenya for failing to introduce this legislation as well as the anti-money laundering and counterterrorism finance legislation on the grounds that they were "needed to bring the country into compliance with relevant UN resolutions."⁶

On 5 June 2006, the Parliamentary Committee on Administration of Justice and Legal Affairs strongly criticised the draft Anti-Terrorism Bill (ATB 2006). The Committee asserted that the Bill is a response to foreign pressure, particularly from the United States, and not a Kenyan priority. The Committee also reiterated its view that the Bill contravenes rights guaranteed under the Kenyan Constitution.⁷

Despite many changes between the STB 2003 and ATB 2006, a number of the provisions in the ATB 2006 remain concerning. Ostensible improvements such as Section 26 (which requires that "special powers conferred by this Act for the purposes of a terrorist investigation are available only by means of a warrant issued by a judge of the High Court on application by the Commissioner of Police"), and the removal of powers for detention without charge, are negated by Section 27 which confers extensive "powers of investigation in cases of urgency". Similarly, apparent protections in the form of restrictions on the rank of the officer allowed to employ certain powers are significantly weakened by clauses that allow this officer to invoke "the assistance of such other police officers as may be necessary".


The absence of specific legislation does not mean the Kenyan government is not seeking to enact counter terrorism measures. One of the principle measures has been the creation of a specialist Anti-Terrorism Unit within the Kenyan Police, established in 2003.

4. Provisions

a. Definition

Section 2(1) of the ATB 2006 gives "terrorism" the meaning assigned to it in Section 3. Section 3 of the ATB 2006 defines a "terrorist act" as:

- (a) an act or omission in or outside Kenya which constitutes an offence within the scope of a counter terrorism convention;
- (b) an act or threat of action in or outside Kenya which –
 - (i) involves serious bodily harm to a person;
 - (ii) involves serious damage to property;
 - (iii) endangers a person's life;
 - (iv) creates a serious risk to the health or safety of the public or a section of the public;
 - (v) involves the use of firearms or explosives;

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- (vi) involves releasing into the environment or any part thereof or distributing or exposing the public or any part thereof to any dangerous, hazardous, radioactive, harmful substance, toxic chemical, microbial or other biological agent or toxin;
 - (vii) is designed or intended to disrupt any computer system or the provision of services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;
 - (viii) is designed or intended to disrupt the provision of essential emergency services such as police, civil defence or medical services;
 - (ix) involves prejudice to national security or public safety;

and is intended, or by its nature and context, may reasonably be regarded as being intended to intimidate the public or a section of the public; or compel a government or an international organization to do, or refrain from doing, any act, and is made for the purpose of advancing a political, ideological, or religious cause;

- (c) an Act which –
 - (i) disrupts any services; and
 - (ii) is committed in pursuance of a protest, demonstration or stoppage or work, shall be deemed not be a terrorist act within the meaning of this definition, so long and so long only as the act is not intended to result in any harm referred to in sub-paragraphs (i), (ii), (iii) or (iv) of paragraph (b).

This definition underwent significant changes between the STB 2003 and the ATB 2006, including the insertion of this explicit exemption of legitimate strike and protest activity.

Section 25 of the ATB 2006, contained in Part V – “Terrorist Investigations”, defines “terrorist” as a person who:

- (a) has committed an offence under this Act; or
- (b) is or has been concerned in the commission, preparation or instigation of acts of terrorism.

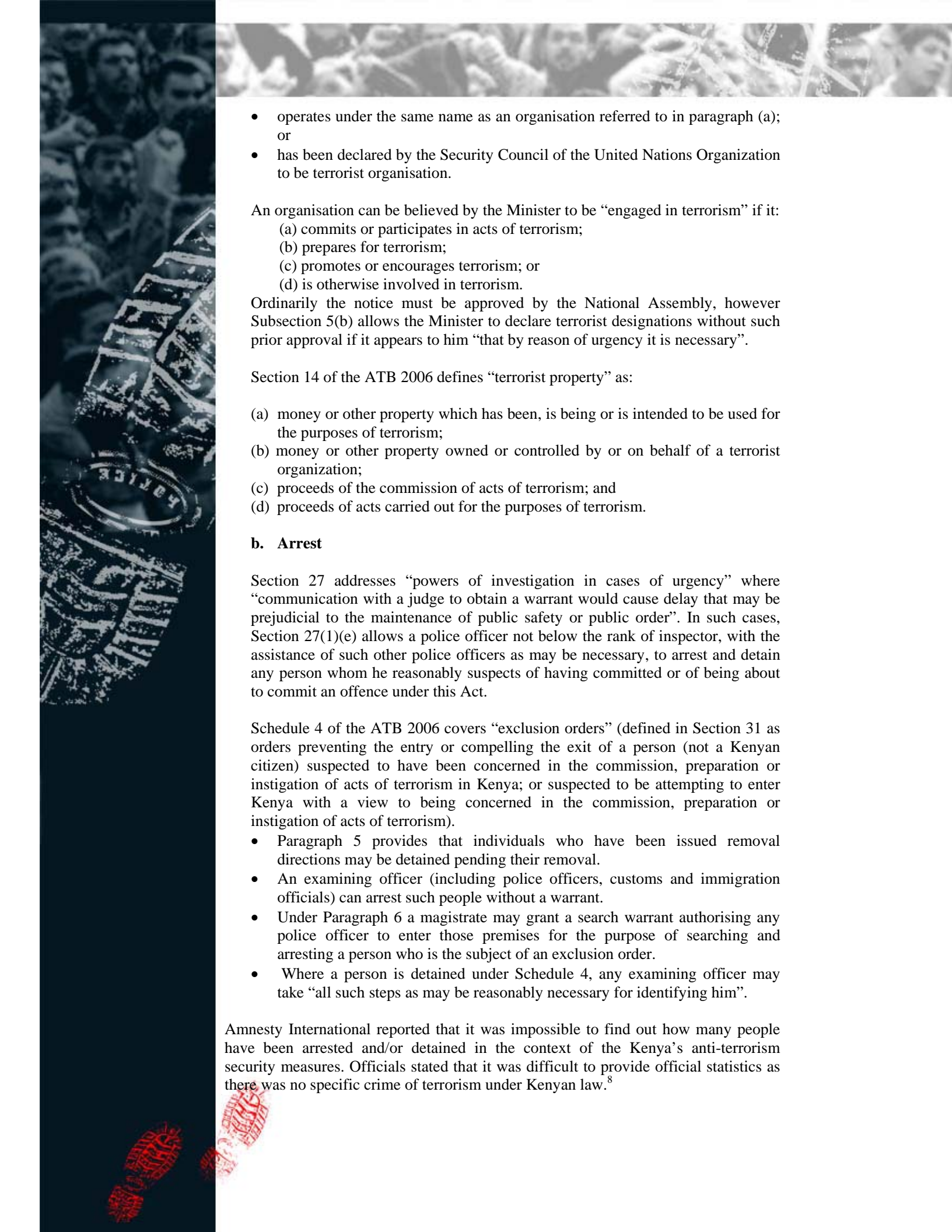
This section also defines “terrorist investigation” as:

- (a) the commission, preparation or instigation of acts of terrorism;
- (b) an act which appears to have been done for the purposes of terrorism;
- (c) the resources of a declared terrorist organisation;
- (d) the possibility of making an order under subsection (3) of section 11[declaration of terrorist organisations]; or
- (e) the commission, preparation or instigation of an offence under this Act.

Once a criminal investigation is classified as concerning terrorism, certain waivers of rights (discussed below) are allowed, some of which are human rights violations in themselves and others which foster situations conducive to abuse.

Section 11 of the ATB 2006 defines “a declared terrorist organisation” as one which:

- has, by a notice in force under this section, been declared to be engaged in terrorism; or

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- operates under the same name as an organisation referred to in paragraph (a); or
 - has been declared by the Security Council of the United Nations Organization to be terrorist organisation.

An organisation can be believed by the Minister to be “engaged in terrorism” if it:

- (a) commits or participates in acts of terrorism;
- (b) prepares for terrorism;
- (c) promotes or encourages terrorism; or
- (d) is otherwise involved in terrorism.

Ordinarily the notice must be approved by the National Assembly, however Subsection 5(b) allows the Minister to declare terrorist designations without such prior approval if it appears to him “that by reason of urgency it is necessary”.

Section 14 of the ATB 2006 defines “terrorist property” as:

- (a) money or other property which has been, is being or is intended to be used for the purposes of terrorism;
- (b) money or other property owned or controlled by or on behalf of a terrorist organization;
- (c) proceeds of the commission of acts of terrorism; and
- (d) proceeds of acts carried out for the purposes of terrorism.

b. Arrest

Section 27 addresses “powers of investigation in cases of urgency” where “communication with a judge to obtain a warrant would cause delay that may be prejudicial to the maintenance of public safety or public order”. In such cases, Section 27(1)(e) allows a police officer not below the rank of inspector, with the assistance of such other police officers as may be necessary, to arrest and detain any person whom he reasonably suspects of having committed or of being about to commit an offence under this Act.

Schedule 4 of the ATB 2006 covers “exclusion orders” (defined in Section 31 as orders preventing the entry or compelling the exit of a person (not a Kenyan citizen) suspected to have been concerned in the commission, preparation or instigation of acts of terrorism in Kenya; or suspected to be attempting to enter Kenya with a view to being concerned in the commission, preparation or instigation of acts of terrorism).

- Paragraph 5 provides that individuals who have been issued removal directions may be detained pending their removal.
- An examining officer (including police officers, customs and immigration officials) can arrest such people without a warrant.
- Under Paragraph 6 a magistrate may grant a search warrant authorising any police officer to enter those premises for the purpose of searching and arresting a person who is the subject of an exclusion order.
- Where a person is detained under Schedule 4, any examining officer may take “all such steps as may be reasonably necessary for identifying him”.

Amnesty International reported that it was impossible to find out how many people have been arrested and/or detained in the context of the Kenya’s anti-terrorism security measures. Officials stated that it was difficult to provide official statistics as there was no specific crime of terrorism under Kenyan law.⁸



c. Detention/custody

The STB 2003 allowed for the detention of suspects for up to 36 hours without access to anyone but the detaining police officer. This provision was removed from the ATB 2006. However, as the below provisions indicate, the ATB 2006 did not completely remove provisions allowing for detention in the absence of a warrant.

Section 27 of the ATB 2006 covers “powers of investigation in cases of urgency” where “communication with a judge to obtain a warrant would cause delay that may be prejudicial to the maintenance of public safety or public order”. In such a case, Section 27(1)(e) allows a police officer not below the rank of inspector, with the assistance of such other police officers as may be necessary, to arrest and detain any person whom he reasonably suspects of having committed or of being about to commit an offence under this Act.

The police officer using this power must bring the matter before a judge of the High Court within 48 hours.

Schedule 3 of the ATB 2006 addresses port and border control. It allows examining officers to question a person who has arrived or is seeking to leave Kenya for the purpose of determining:

- (a) whether there is any reasonable cause to suspect that the person is a terrorist; or
- (b) whether the person is subject to an exclusion order.

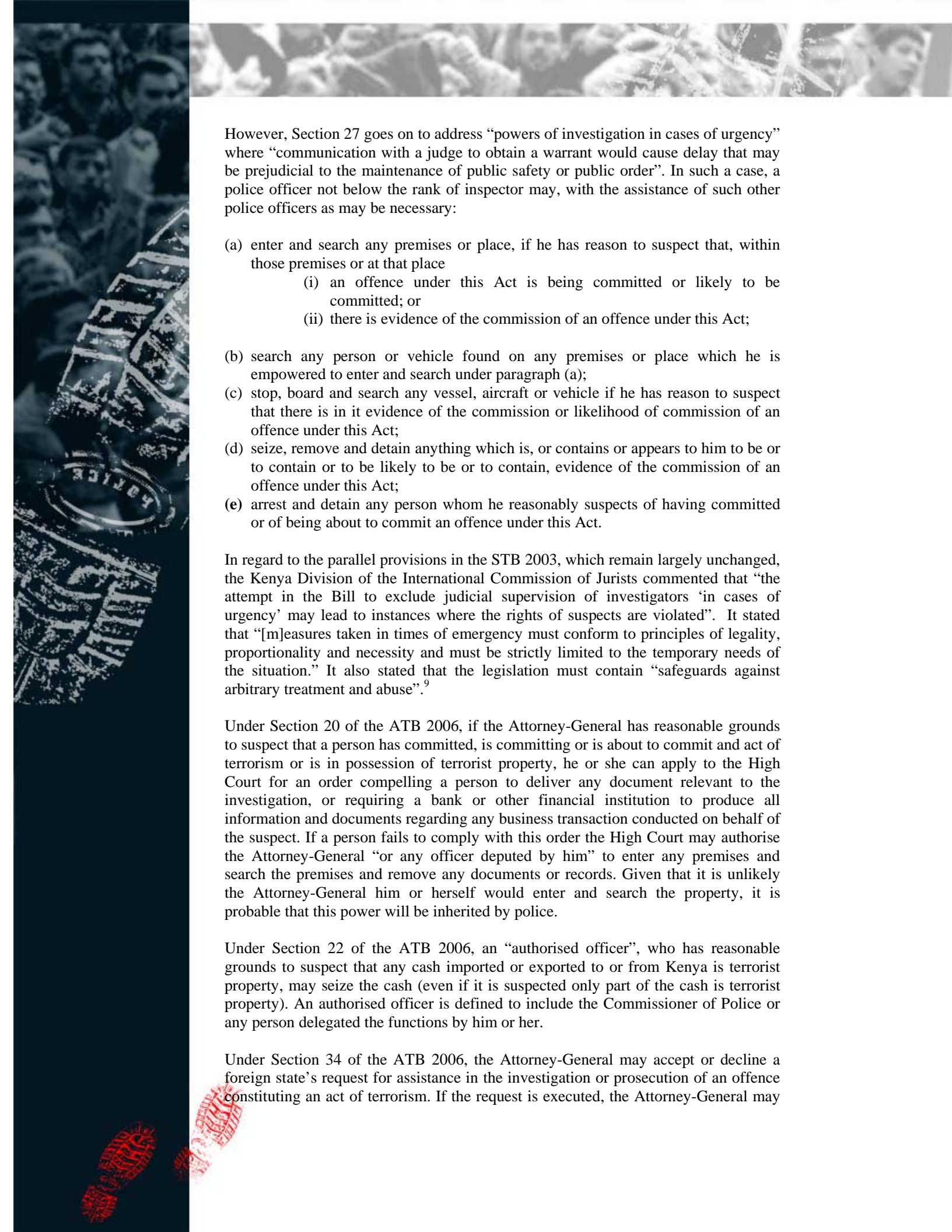
The person questioned must give the examining officer any information in his possession requested by the officer; produce either a valid passport or other document establishing identity and citizenship; declare and produce any documents specified by the examining officer. For the purposes of exercising this power, the officer may stop a person or vehicle and detain the person for up to six hours. Under Paragraph 6 an officer who questions a person may, for the purpose of determining whether he or she is ‘a terrorist’:

- (a) search the person;
- (b) search anything which he has with him, or which belongs to him; and which is on a ship or aircraft;
- (c) search anything which he has with him, or which belongs to him; and which the examining officer reasonably believes has been, or is about to be, on a ship or aircraft;
- (d) search a ship or aircraft for anything falling within paragraph (b).

d. Use of force

Part V of the ATB 2006 covering “terrorist investigations” sets out in Section 26 that the “special powers conferred by this Act for the purposes of a terrorist investigation are available only by means of a warrant issued by a judge of the High Court on application by the Commissioner of Police”. Under such a warrant, a police officer above the rank of inspector is given the power:

- (a) to enter the premises specified in the warrant;
- (b) to search the premises and to search any person, and inspect any document, record or thing, found therein; and
- (c) to seize and retain any relevant material, including any relevant document, record or thing, found therein.



However, Section 27 goes on to address “powers of investigation in cases of urgency” where “communication with a judge to obtain a warrant would cause delay that may be prejudicial to the maintenance of public safety or public order”. In such a case, a police officer not below the rank of inspector may, with the assistance of such other police officers as may be necessary:

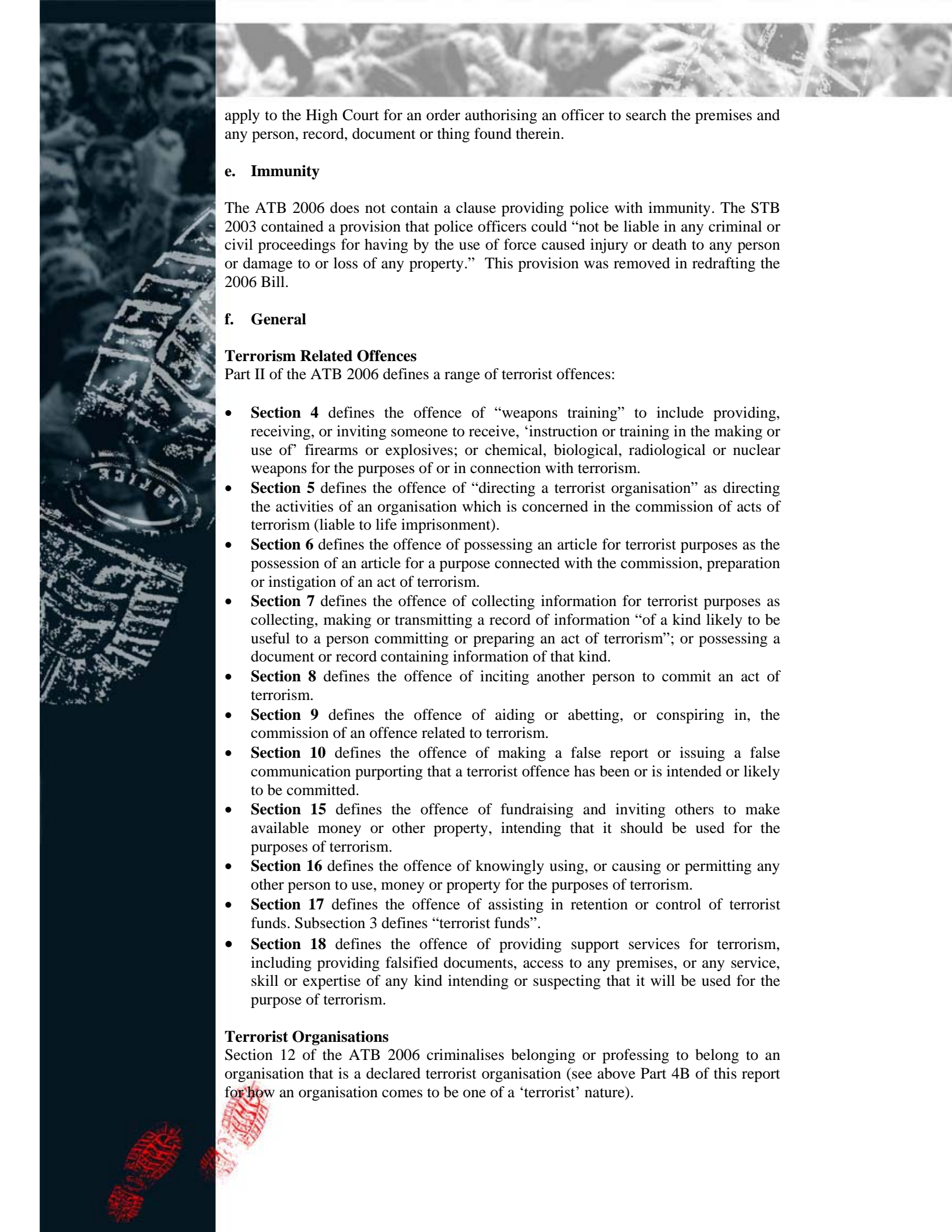
- (a) enter and search any premises or place, if he has reason to suspect that, within those premises or at that place
 - (i) an offence under this Act is being committed or likely to be committed; or
 - (ii) there is evidence of the commission of an offence under this Act;
- (b) search any person or vehicle found on any premises or place which he is empowered to enter and search under paragraph (a);
- (c) stop, board and search any vessel, aircraft or vehicle if he has reason to suspect that there is in it evidence of the commission or likelihood of commission of an offence under this Act;
- (d) seize, remove and detain anything which is, or contains or appears to him to be or to contain or to be likely to be or to contain, evidence of the commission of an offence under this Act;
- (e) arrest and detain any person whom he reasonably suspects of having committed or of being about to commit an offence under this Act.

In regard to the parallel provisions in the STB 2003, which remain largely unchanged, the Kenya Division of the International Commission of Jurists commented that “the attempt in the Bill to exclude judicial supervision of investigators ‘in cases of urgency’ may lead to instances where the rights of suspects are violated”. It stated that “[m]easures taken in times of emergency must conform to principles of legality, proportionality and necessity and must be strictly limited to the temporary needs of the situation.” It also stated that the legislation must contain “safeguards against arbitrary treatment and abuse”.⁹

Under Section 20 of the ATB 2006, if the Attorney-General has reasonable grounds to suspect that a person has committed, is committing or is about to commit and act of terrorism or is in possession of terrorist property, he or she can apply to the High Court for an order compelling a person to deliver any document relevant to the investigation, or requiring a bank or other financial institution to produce all information and documents regarding any business transaction conducted on behalf of the suspect. If a person fails to comply with this order the High Court may authorise the Attorney-General “or any officer deputed by him” to enter any premises and search the premises and remove any documents or records. Given that it is unlikely the Attorney-General him or herself would enter and search the property, it is probable that this power will be inherited by police.

Under Section 22 of the ATB 2006, an “authorised officer”, who has reasonable grounds to suspect that any cash imported or exported to or from Kenya is terrorist property, may seize the cash (even if it is suspected only part of the cash is terrorist property). An authorised officer is defined to include the Commissioner of Police or any person delegated the functions by him or her.

Under Section 34 of the ATB 2006, the Attorney-General may accept or decline a foreign state’s request for assistance in the investigation or prosecution of an offence constituting an act of terrorism. If the request is executed, the Attorney-General may



apply to the High Court for an order authorising an officer to search the premises and any person, record, document or thing found therein.

e. Immunity

The ATB 2006 does not contain a clause providing police with immunity. The STB 2003 contained a provision that police officers could “not be liable in any criminal or civil proceedings for having by the use of force caused injury or death to any person or damage to or loss of any property.” This provision was removed in redrafting the 2006 Bill.

f. General

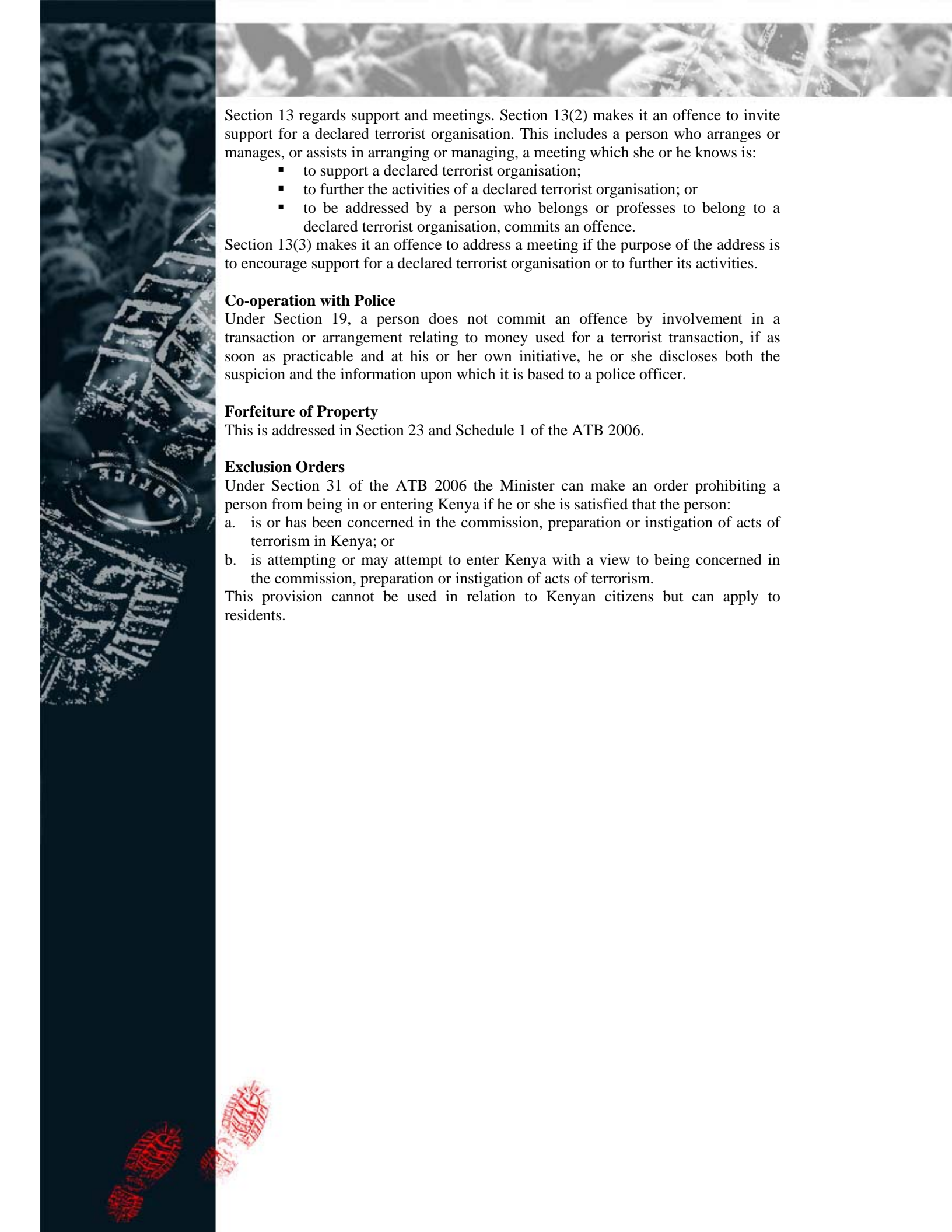
Terrorism Related Offences

Part II of the ATB 2006 defines a range of terrorist offences:

- **Section 4** defines the offence of “weapons training” to include providing, receiving, or inviting someone to receive, ‘instruction or training in the making or use of’ firearms or explosives; or chemical, biological, radiological or nuclear weapons for the purposes of or in connection with terrorism.
- **Section 5** defines the offence of “directing a terrorist organisation” as directing the activities of an organisation which is concerned in the commission of acts of terrorism (liable to life imprisonment).
- **Section 6** defines the offence of possessing an article for terrorist purposes as the possession of an article for a purpose connected with the commission, preparation or instigation of an act of terrorism.
- **Section 7** defines the offence of collecting information for terrorist purposes as collecting, making or transmitting a record of information “of a kind likely to be useful to a person committing or preparing an act of terrorism”; or possessing a document or record containing information of that kind.
- **Section 8** defines the offence of inciting another person to commit an act of terrorism.
- **Section 9** defines the offence of aiding or abetting, or conspiring in, the commission of an offence related to terrorism.
- **Section 10** defines the offence of making a false report or issuing a false communication purporting that a terrorist offence has been or is intended or likely to be committed.
- **Section 15** defines the offence of fundraising and inviting others to make available money or other property, intending that it should be used for the purposes of terrorism.
- **Section 16** defines the offence of knowingly using, or causing or permitting any other person to use, money or property for the purposes of terrorism.
- **Section 17** defines the offence of assisting in retention or control of terrorist funds. Subsection 3 defines “terrorist funds”.
- **Section 18** defines the offence of providing support services for terrorism, including providing falsified documents, access to any premises, or any service, skill or expertise of any kind intending or suspecting that it will be used for the purpose of terrorism.

Terrorist Organisations

Section 12 of the ATB 2006 criminalises belonging or professing to belong to an organisation that is a declared terrorist organisation (see above Part 4B of this report for how an organisation comes to be one of a ‘terrorist’ nature).



Section 13 regards support and meetings. Section 13(2) makes it an offence to invite support for a declared terrorist organisation. This includes a person who arranges or manages, or assists in arranging or managing, a meeting which she or he knows is:

- to support a declared terrorist organisation;
- to further the activities of a declared terrorist organisation; or
- to be addressed by a person who belongs or professes to belong to a declared terrorist organisation, commits an offence.

Section 13(3) makes it an offence to address a meeting if the purpose of the address is to encourage support for a declared terrorist organisation or to further its activities.

Co-operation with Police

Under Section 19, a person does not commit an offence by involvement in a transaction or arrangement relating to money used for a terrorist transaction, if as soon as practicable and at his or her own initiative, he or she discloses both the suspicion and the information upon which it is based to a police officer.

Forfeiture of Property


This is addressed in Section 23 and Schedule 1 of the ATB 2006.

Exclusion Orders

Under Section 31 of the ATB 2006 the Minister can make an order prohibiting a person from being in or entering Kenya if he or she is satisfied that the person:

- a. is or has been concerned in the commission, preparation or instigation of acts of terrorism in Kenya; or
- b. is attempting or may attempt to enter Kenya with a view to being concerned in the commission, preparation or instigation of acts of terrorism.

This provision cannot be used in relation to Kenyan citizens but can apply to residents.



5. Examples

Definition

The malleability of the definition of ‘terrorism’ has significantly impacted on the human rights of both Kenyans and foreigners in Kenya. Kenyans who fought in the Mau Mau rebellion have taken the British Government to court for alleged human rights abuses. Their application reflects international uncertainty surrounding the concept of terrorism itself. While the colonial government referred to the Mau Mau as “terrorists” in the 1950s, the Kenyan Mau Mau Trust has now delivered a dossier to the British High Commission in Nairobi, entitled “Kenya: White Terror”. “More than 200,000 Kenyan freedom fighters were detained in camps in a bid to force them to abandon their nationalist goals in the 1950s.”¹⁰

Link:

http://www.iss.co.za/dynamic/administration/file_manager/file_links/0205A.HTM?link_id=3&slink_id=2095&link_type=12&slink_type=13&tmpl_id=3#article6

Arrest and Detention

Amnesty International gives extensive details of the violations, including arbitrary arrests, incommunicado detention without charge, torture, and harassment of relatives of those suspected of terrorism.

Link: <http://web.amnesty.org/library/index/engact400092006>

Kenya’s Anti-Terrorism Police

Government funded Anti-Terror Police Unit

‘Tensions have been high between the Muslim community and the Kenyan government. Muslims on the coast, the northeast and in Nairobi complain that they have been persecuted on the flimsy excuse of being terrorist suspects. The government-funded Anti-Terror Police Unit has been allegedly fleecing businesses belonging to ethnic Somalis and Arabs on the claim that they finance terrorists. The unit was set up in 2003 to probe Kenya’s Islamic militants, including the recovery of missiles and the forging of links to friendly foreign security services’.¹¹

Link: <http://www.jamestown.org/terrorism/news/article.php?articleid=2370154>.

Deportation of Terrorist Suspects

Kenya has been criticized for a number of cases of people of Somali origin being deported to Somalia in relation to suspected associations with terrorism. The deportees had fled Somali conflict, and many were Kenyan residents or nationals. One case involved a Canadian national who lives in Nairobi. There has been considerable concern at the risks of ill-treatment or torture facing these men.

Links: <http://www.cbc.ca/world/story/2007/01/22/makhtal-kenya.html#skip300x250>,
http://www.amnesty.org.au/Act_now/action_centre/featuredaction/somalia_asylum_seekers_unlawfully_detained

Police Discrimination

During the International Commission of Jurists’ hearing for its global report, complaints were raised regarding poor policing, incidents of arbitrary arrest and torture in the investigation of past terrorist attacks in Kenya. Reference was also made to impunity and lack of accountability of law enforcement officers. In particular, the eminent jurists received many submissions concerning the vulnerability of the Muslim community to police in East Africa as a result of counter-terrorism laws and policies.¹²

Link: http://ejp.icj.org/hearing.php3?id_rubrique=11.



Criticism from the Kenya National Commission on Human Rights

Maina Kiai, the chairman of the Kenya National Commission on Human Rights, has strongly accused the police of human rights abuses. According to a proposal made by him, amongst other reports, he mentions that Kenyans were being sent to Somalia on terrorism accusations. He stated that “seventy six terror suspects were detained in various city police stations without being charged in court.” Such actions have caused the Commission to suspect the Government for applying the controversial anti-terror Bill. The Bill was not passed into law since it contained provisions that could be damaging to the fundamental human rights individuals.¹³

Link: <http://allafrica.com/stories/200701311039.html>

¹ In the absence of internationally accepted definitions of the terms “terrorism”, “terrorist” and “terrorist act”, in this report these terms refer to either the definition as enshrined in the country’s legislation, or the common use of the term. The use and meaning of these terms is addressed in CHRI’s report “Stamping Out Rights: The impact of anti-terrorism laws on policing” (2007).

² Amnesty International (2005) *Kenya: The Impact of "Anti-Terrorism" Operations on Human Rights*: <http://web.amnesty.org/library/index/engaf320022005> as on 1 February 2007.

³ Ibid.

⁴ Ibid.

⁵ CHRI has been provided with a draft copy of this Bill by the International Commission of Jurists Kenya Division.

⁶ United States Department of State, Office of the Coordinator for Counterterrorism (2005) *Country Reports on Terrorism*: <http://www.state.gov/s/ct/rls/crt/2005/64335.htm> as on 1 February 2007.

⁷ International Commission of Jurists (2006) “Kenya: Parliamentary Committee opposes new anti-terrorism bill” *E-Bulletin on Counter-Terrorism and Human Rights*, 12 June: <http://www.icj.org/IMG/ICJBulletinJune06.pdf> as on 1 February 2007.

⁸ Amnesty International (2005) *Kenya: The Impact of "Anti-Terrorism" Operations on Human Rights*: <http://web.amnesty.org/library/index/engaf320022005> as on 1 February 2007.

⁹ International Commission of Jurists, Kenya Division, *Analysis of the Suppression of Terrorism Bill 2003*. Provided to CHRI by the International Commission of Jurists.

¹⁰ Institute of Security Studies (2005) ‘British colonial forces accused of terror tactics in Kenya’, *African Terrorism Bulletin*, 7 February.

¹¹ Kyama, R (2006) ‘The Threat of Terrorism to Kenya’ *Terrorism Monitor* 4(19), 5 October:

<http://www.jamestown.org/terrorism/news/article.php?articleid=2370154>: as on 1 February 2007.

¹² International Commission of Jurists, Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights (2006) *Press Release: Eminent Jurists Panel Concludes Hearing on Terrorism and Human Rights in East Africa*, 2 March: http://eip.icj.org/IMG/pdf/Press_release_Kenya_hearing-2.pdf as on 1 February 2007.

¹³ (2007) ‘Kenya: Police accused of Rights Abuse’, *The Nation (Nairobi)*, February 1.