

## Terror, Power and the Legitimacy of the State

(Published in Law Digest Issue 8 spring 2015)

[http://issuu.com/nglawdigest/docs/law\\_digest\\_issue\\_8\\_spring\\_2015/1](http://issuu.com/nglawdigest/docs/law_digest_issue_8_spring_2015/1))

### Roseline Njogu & Makambo Makabila

Bodies. Cold bodies. We are still burying the bodies of some of the 147 students killed on 2 April at the Garissa University terror attack. We are a country in mourning...unfortunately; we seem to be in perpetual mourning. The flag is flying at half-mast too often. The Mpeketoni attack of July 2014 left 80 Kenyans dead. And the notorious West Gate Mall attack of September 2013 left at least 67 persons (including children) dead after a harrowing 80-hour hostage encounter. Al-Shabaab claimed responsibility for the attack, asserting that this was retaliation for Kenya's offensive attack on it in Somalia.<sup>1</sup>

While Westgate was not the first (or last since) terrorist attack on Kenyan soil, it stood out for several reasons. Firstly, it was the first major attack targeted at Kenyans per se. In the past, Kenya has been targeted for her cordial relations with other countries, specifically, the United States of America and Israel. The US Embassy bombing of 1998 that claimed the lives of over 200 people, mostly Kenyans, was ironically an attack on the US.<sup>2</sup> The 2002 Mombasa attacks comprising of the simultaneous Kikambala Paradise Hotel bombing that killed 13 people and the unsuccessful surface-to-air missile launch against an Israeli aircraft were both attacks against the state and interests of Israel.<sup>3</sup> For a long time therefore, Kenyans had remained collateral damage in the global war on terror. Westgate changed this.

Secondly, the magnitude and severity of this attack was unique. Since the beginning of *Operation Linda Nchi*, sporadic grenade attacks with few casualties especially along the border towns, was the extent of the 'repercussions' of the military campaign that Kenya had felt. Westgate however left 67 persons including children dead. Due to the centrality and up-market nature of the mall that attracted wealthy Kenyans and expatriates and the ceaseless media coverage given to the onslaught, the attack moved from the realm of security

---

<sup>1</sup> The Kenya Defence Forces (KDF) have been in Somalia since October 16 2011 in an operation dubbed Operation *Linda Nchi* (defend the country) and have routed out the militants from Kismayu and other towns, returning control of these towns to the government of Somalia. While Kenya was the first state to send its troops on this mission, the African Union since February 22, 2012 among other entities are now currently involved in the campaign against *Al-Shabaab* in Somalia under the umbrella of AMISOM. See The Kenyan Military Intervention in Somalia, Africa Report N°184 – 15 February 2012. (Accessed 30 April 2015), AMISOM, <http://amisom-au.org/kenya-kdf/> (Accessed 30 April 2015).

<sup>2</sup> U.S Dept. of Justice (November 18 1998) "[Frontline: The trail of evidence - FBI executive summary](http://www.pbs.org/wgbh/pages/frontline/shows/binladen/bombings/summary.html)". PBS.org. <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/bombings/summary.html> (Accessed 30 April 2015)

<sup>3</sup> Talbot, Anne 'Unanswered questions regarding Kenya terror attacks'. World Socialist Web Site. 5 December 2002. <http://www.wsws.org/en/articles/2002/12/kenya-d05.html> (Accessed 30 April 2015).

operations to an everyday encounter of ordinary citizens. Further, unlike a bombing whose horror begins and ends during the explosion, this terror by gunfire lasted eighty hours, during which terrified shoppers were hunted down and killed by the terrorists. Shoppers from thirteen countries were killed in that attack<sup>4</sup> whose mother countries tried in one way or another to assist in the rescue operations.

Thirdly, the response of the Kenyan security forces to this attack exposed several gaps in the policy of terror and in state security. Clashes between the military and the police resulting in cases of friendly fire, unconstitutional deployment of the armed forces on Kenyan soil,<sup>5</sup> finger-pointing on the inaction to intelligence provided on the terror attacks,<sup>6</sup> among others.

Invariably, in response to Westgate and subsequent attacks, the government has deployed several measures including ordering all urban-based refugees back to the refugee camps, forced repatriation of thousands of refugees living in the camps and elsewhere contrary to principles of International law on protection of refugees and persons fleeing conflicts,<sup>7</sup> carrying out citizen-verification campaigns that entailed capturing all “Somali-looking” individuals and detaining them at a Sports stadium until the verification was complete, in utter disregard of the Constitution, deployment of CCTV cameras across major cities, among others. Many of these measures have been seen as unfairly targeting the largely Muslim and ethnic Somali populations in Kenyan. Needless to say, these measures breed extremism, and give credence to the terrorist ideology of victimhood and subalternism.

In the midst of all these attacks, the state’s response has exposed two unfortunate truths. Firstly, that the state’s theory of terror is inaccurately constructed; is based on a false predicate and therefore attempts to respond to it have failed. The religious extremism rhetoric is faulty. To a large extent, terror, at least in East Africa, has not been about religion only. Secondly, the state is the author of terror through its repression and subjugation of certain people groups. We contend that terror has been about disenfranchisement, lack of citizenship, illegitimacy of the state, and continued subjugation. We have already demonstrated how the Kenyan state, time and again, has responded in a draconian manner that has further alienated marginalized communities. Those

---

<sup>4</sup> Bariyo, Nicholas; Vogt, Heidi; Bryan-Low, Cassell (25 September 2013). "[Kenya Starts Probe in Wake of Mall Siege](http://www.wsj.com/articles/SB10001424052702304526204579096713497161006)". *Wall Street Journal*. <http://www.wsj.com/articles/SB10001424052702304526204579096713497161006> (Accessed 30 April 2015)

<sup>5</sup> Mathiu, Mutuma (September 18 2014) “ Why military response to Westgate attack was delayed” Daily Nation Newspaper. <http://www.nation.co.ke/news/Why-police-response-to-Westgate-attack-was-delayed/-/1056/2457462/-/99cdv2z/-/index.html> (Accessed 30 April 2015)

<sup>6</sup> Nation Team, (September 27 2013) “Kenya: Blame game over Westgate attack”. <http://www.africareview.com/News/Blame-game-over-Westgate-attack/-/979180/2009320/-/73lam3/-/index.html> (Accessed 30 April 2015).

<sup>7</sup> The 1951 UN Convention and 1967 Protocol to the protection of refugees. See, The Principle of Non-Refoulement, (*Article 33(1)*)

same communities then make an excellent recruitment ground for terrorist organizations.

Unfortunately, we have not seen the worst of it yet. The contours of terror are changing. Boko Haram in West Africa has shelved grenade attacks for mass kidnapping of schoolgirls. In Kenya, the suicide bomber gives way to the army of gunmen, carrier pigeons to a superior bird- Twitter, and the target is no longer American, European or Israeli interests, but Kenyans *qua* Kenyans. Farmers, teachers, doctors, briefcase contractors- the face of Kenya. We submit that next in the terrorist playbook could be environmental terrorism.

Environmental terrorism (as distinguished from eco-terrorism) is the use of tactics that destroy or otherwise use the environment to cause death, destruction and political manipulation.<sup>8</sup>

The structural location, infrastructure set-up, the over-dependence on the often strained natural resources coupled with the predictable security lapses create a perfect ground for a lethal attack on environmental resources with unprecedented devastation. For instance, approximately four million Nairobians depend on the Ndakaini dam for water. If a copious amount of arsenic, sodium fluoride, deuterium oxide, sodium cyanide (as almost happened in Harare) or any deadly poison- a commonly Googled category, by the way- were introduced to the dam, every tap in Nairobi would become a loaded gun. The aftermath would be unspeakable. Granted, research shows that poisons may lose efficacy in such large volumes of water. So, scale that down a little. Large housing developments now have private off-grid water supply. More often than not those water points within these estates are not secured and yet, poison in those tanks could wipe out thousands within a few hours. For the terrorist: low risk venture, high impact! Replicate that in hospitals, prisons, or schools and you will have Pharaonic annihilation.

Environmental terrorism tactics vary. Terrorists have used arson for over a century now, with devastating results. Consider, the havoc a strategically set fire could wreak upon any of our expansive unplanned developments. When arson meets the nuances of an unplanned development, poorly served by emergency response systems synonymous with the populous Kibera and Mathare slums and the Eastlands areas of Nairobi, you have a catastrophe. If this were coupled with the destruction of key service installations like communication infrastructure or the bombing of a major hospital, the devastation would be something straight out of the Old Testament.

Unfortunately, while terror is innovating and reinventing itself, the state is adamant and unwilling to change its technologies or theory of terror. Needless to

---

<sup>8</sup> Chalecki, Elizabeth (September 2001). "A New Vigilance: Identifying and Reducing the Risks of Environmental Terrorism". A Report of the Pacific Institute for Studies in Development, Environment, and Security. [http://pacinst.org/wp-content/uploads/2013/02/environmental\\_terrorism\\_final.pdf](http://pacinst.org/wp-content/uploads/2013/02/environmental_terrorism_final.pdf) (Accessed 30 April 2015).

say, this set up is ideal for a disaster of epic proportions. The states lethargy indicates a real indifference to the loss of the lives of its citizens. This *laissez faire* attitude is unfortunately neither new nor uncommon in postcolonial Africa. Many states seem to have inherited the colonizers' disregard for the subjugated African body at decolonization.<sup>9</sup>

We contend, for three reasons, that the solution in this case, is not in the law, but in re-capturing the monopoly of power. Firstly, while the Prevention of Terrorism Act (2012) considers environmental terror tactics "acts of terror", terrorists are not your run-of-the-mill criminals. They do not make dinner plans- they die, or plan to die, "on the job". The law, therefore, however comprehensive, is no deterrent. Secondly, the prescribed penalty of life imprisonment, while "fashionable", is hardly commensurate reparation for the horrors of terror. And finally, by the time the slow wheels of justice bring the terrorists before a court, it is too late. Unspeakable destruction has already occurred.

However, if for no other reason, the state needs to re-capture the monopoly of power, because its survival depends on it. Rudimentary social contract theory argues that a state is formed when individual chooses to submit to the authority of a Sovereign in exchange of security, which is conducive to their own survival. Thomas Hobbes in his philosophical masterpiece, *Leviathan*, while arguing on a purely hypothetical State of Nature contended that men in their natural state are naturally and exclusively self-interested, and equal to one another.<sup>10</sup> That being the case, none of them was safe (even the strongest one could be killed in his sleep).<sup>11</sup> Hobbes' theory explains the modern government-citizen relationship where the citizens cede their individual autonomy to the Sovereign (Government) through electoral processes or obedience (tolerance) to their rule in consideration for satisfaction of their needs and desires, but above all- security. John Locke, another philosopher treading the path taken earlier by Hobbes, sees the provision of security by the Government to the citizens as the consideration in the social contract.<sup>12</sup> According to Locke, the provision of security is the primary function of a Government, and any form of insecurity waters down the essential validity of the contract thereby entitling the citizens to walk away from it without repercussions.<sup>13</sup>

Unlike Hobbes' *Leviathan*, Locke's sovereign can be overthrown. If the state does not discharge the core duty for which it exists viz. to protect life, property and

---

<sup>9</sup> Alemazung, Joy Asongazoh (September 2010) 'Post-Colonial Colonialism: An Analysis of International Factors and Actors Marring African Socio-Economic and Political Development', *The Journal of Pan African Studies*, vol.3, no.10.

<sup>10</sup> Hobbes, Thomas. *Leviathan*. Oxford University Press (1651).

<sup>11</sup> Friend, Celeste (2004). *Social Contract Theory*. Internet Encyclopedia of Philosophy Available at <http://www.iep.utm.edu/soc-cont/> (Accessed 30 April 2015).

<sup>12</sup> Locke, John. *Two Treatises of Government*. Ed. Peter Laslett. Cambridge: Cambridge University Press (1988).

<sup>13</sup> Friend, Celeste (2004). *Social Contract Theory*. Internet Encyclopedia of Philosophy Available at <http://www.iep.utm.edu/soc-cont/> (Accessed 30 April 2015).

liberty, then that state is illegitimate, unnecessary and like King Nebuchadnezzar, its reign has been weighed and found wanting. It will be overthrown.

A scared citizenry will shop around for another protector, and will pay homage to a new supplier of security. Ominously, that competition will most likely take the form of an organized group such as the *Mungiki*, or, yes indeed, the *al-Shabaab*. Because of moving at the speed of molasses and failing to re-imagine the causes of terror, the state will have successfully engineered its own *coup d'état*.

This might sound farfetched, but dismiss it at your own peril. As scholars of Islamic Law, we never imagined the day would come when we could point to a contemporary caliphate. ISIS has done the impossible. Boko Haram has now pledged allegiance to ISIS, extending the caliphate's territory to Africa, and expanding its influence and, in certain quarters, its legitimacy.

Sovereignty is a double-edged sword. Third World sovereignty is at best a conflicted and deeply problematic concept.<sup>14</sup> The Kenyan state already faces a myriad of challenges- as do many states in the Global South- without putting its own sovereignty in question at home. It must effectively deal with terror and regain the monopoly of power- its survival depends on it.

---

<sup>14</sup> Anghie, Antony, *Imperialism, Sovereignty and the Making of International Law*. (2005)

## References

1. Alemazung, Joy Asongazoh (2010) 'Post-Colonial Colonialism: An Analysis of International Factors and Actors Marring African Socio-Economic and Political Development', *The Journal of Pan African Studies*, vol.3, no.10. (September 2010)
2. AMISOM Report (2012) *The Kenyan Military Intervention in Somalia, Africa Report N°184 - 15 February 2012*. Available at <http://amisom-au.org/kenya-kdf/> (Accessed 30 April 2015).
3. Anghie, Antony (2005) *Imperialism, Sovereignty and the Making of International Law*. Available at <http://www.nation.co.ke/news/Why-police-response-to-Westgate-attack-was-delayed-/-/1056/2457462/-/99cdv2z/-/index.html> (Accessed 30 April 2015) (September 18 2014)
4. Bariyo, Nicholas; Vogt, Heidi; Bryan-Low, Cassell (2013). *Kenya Starts Probe in Wake of Mall Siege*. *Wall Street Journal*. Available at <http://www.wsj.com/articles/SB10001424052702304526204579096713497161006> (Accessed on 30 April 2015) (September 26 2013)
5. Chalecki, Elizabeth (2001). *A New Vigilance: Identifying and Reducing the Risks of Environmental Terrorism*. A Report of the Pacific Institute for Studies in Development, Environment, and Security. Available at [http://pacinst.org/wpcontent/uploads/2013/02/environmental\\_terrorism\\_final.pdf](http://pacinst.org/wpcontent/uploads/2013/02/environmental_terrorism_final.pdf) (Accessed 30 April 2015)
6. Friend, Celeste (2004). *Social Contract Theory*. Internet Encyclopedia of Philosophy Available at <http://www.iep.utm.edu/soc-cont/> (Accessed 30 April 2015).
7. Hobbes, Thomas. *Leviathan*. Oxford University Press (1651). <http://www.wsj.com/articles/SB10001424052702304526204579096713497161006> (Accessed 30 April 2015)
8. Locke, John. *Two Treatises of Government*. Ed. Peter Laslett. Cambridge: Cambridge University Press (1988).
9. Mathiu, Mutuma (2014) *Why military response to Westgate attack was delayed* Daily Nation Newspaper. Available at <http://mobile.nation.co.ke/news/Why-police-response-to-Westgate-attack-was-delayed-/-/1950946/2457462/-/format/xhtml/-/3cqc89z/-/index.html> (Accessed 30 April 2015)

**10. Talbot, Anne (5 December 2002) *Unanswered questions regarding Kenya terror attacks*. World Socialist Web Site. Available at <http://www.wsws.org/en/articles/2002/12/keny-d05.html> (Accessed 30 April 2015).**

**11. U.S Dept. of Justice (November 18 1998) *Frontline: The trail of evidence - FBI executive summary*". PBS.org. Available at <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/bombings/summary.html> (Accessed 30 April 2015)**

*Roseline Njogu, Lecturer ([rnjogu@riarauniversity.ac.ke](mailto:rnjogu@riarauniversity.ac.ke)), and Makambo Makabila, Research Assistant ([mmakabila@riarauniversity.ac.ke](mailto:mmakabila@riarauniversity.ac.ke)), Riara Law School*