Assessment of emerging rule of law issues in East Africa: responses, challenges and implications for judicial officers.

Introduction

Transnational crimes are violations of law that involves more than one country in the planning, execution or impact.[1] These crimes may be distinguished from international crimes, which are the subject of the Rome Statute.

Transnational crimes may be placed in three distinct categories: provision of illicit goods (trafficking of weapons, drugs and counterfeit); provision of illicit services (human trafficking) and infiltration of business and government (fraud, racketeering and corruption).

Since the 1990s there has been a global upsurge in transnational crime. A number of reasons have been advanced to explain this. Firstly, the proliferation of these crimes, in the second half of the twentieth century, can be explained in part by the increased transnational flow of people, goods, and money. This process of globalization has contributed to the growth of both licit and illicit economies, always operating side by side. Secondly, the spread of free market economies and democracy in most of the non-western world has contributed to an upturn in spontaneous and un inhibited human conduct which has undermined state authority giving way to illegal activities which the states are unable to control. Another concern is the lethargy of some governments in recognizing the severity of the challenge and in coming to terms with the new features of transnational crime. The transnational criminals of the 1980's and of today are a totally different breed,

[1] In recent times, the United Nations in its **Convention against Transnational Organized Crime** has defined transnational organized crime a bit more broadly to include any criminal activity that is conducted in more than one state but perpetrated in another, or committed in one state where there are spill over effects into neighboring jurisdictions.

combining corporate and criminal cultures, conducting criminal business not only with ruthlessness but also with a degree of business skill, and accumulating enormous wealth with which they are able to divert the course of justice.

By its very nature, transnational organized crime threatens state apparatus, actively weakening the authority of the state and positioning itself as an alternative source of power and resources.

Further, unlike ordinary crime, serious transnational crimes generate fear and anxiety in society and place state agencies under pressure to restore calm and normalcy. Several questions arise in respect of these developments. Is there need to amend our laws to accommodate developments in violent crime or are our respective country laws effective? How should the judiciary respond to the rise in violent and extremist crime?

What is the place of the Judiciary in this transnational crime arena?

Does the Judiciary have a role to play in stemming the tide of transnational crime? Whatever answer we give to this question it would appear that the judiciary should be wary of being perceived as an uncaring, cold and reticent agency far-removed from society, applying laws, which do not reflect the mood of the community and which may endanger the continued safety and welfare of the society. If communities do not feel secure under the umbrella of Judicial interventions there is a likelihood that they would take refuge in self help methods in meeting the ends of justice thereby eroding the rule of law and diminishing the dignity of the Judiciary in society.

Reflections on how the Judiciary should react to an upsurge in violent crime in society may take different positions. First there is the strict approach. In this it is

said that the judiciary must apply only statutory law and the constitution in adjudicating crime and conflict. That it must not allow social concerns to influence its decision-making mechanisms. Second is the accommodative approach. Those who propagate this view take the position that the judiciary should lean towards executive concerns especially on matters touching on state security, shrinking its regard for the rights of the individual. A third and more radical view is that security concerns of an emergency nature takes away all respect for an accused's liberty and permits an extra- legal approach, which the judiciary should legitimize.

Concerns may be raised on these three positions. The strict approach does not permit a differentiation between serious and ordinary crime. For this reason it may appear naïve and project a disconnect between law and society. The accommodation approach, by enlarging executive operational space may risk establishment of precedent that may be abused even for ordinary crime. The extra legal approach, in seeking to place serious or violent crime outside the law may undermine and completely erode the rule of law.

A balancing or choice between these three concepts is problematic. Legal theory does not provide much of an answer. If we take an analogy from '**threshold deontology'** in moral theory then we may accept that judicial diminishing of individual rights in favor of shared safety is a lesser evil, particularly when it is acknowledged that extreme violent crime like terrorism bends away from ordinary law enforcement and more towards national security concerns.

The greatest concern in this exceptionalism view is not just the concern that 'great cases make bad law'[2] but the fear that exceptions created for extraordinary situations may spill over and become the norm. A rule created for an emergency

[2] _N. Sec. co vs. United States, 193 US 197, 1904. Holmes J. dissenting

situation may 'lie about like a loaded weapon'[3] waiting to be misused in different circumstances.

A common victim in trials of violent crime is the right to due process. In ordinary circumstances a suspect is entitled to the following due process rights: access to counsel; prohibition against police violence especially torture and; to expeditious processing failure to which consideration should be made for bail.

Once an accused is brought before a trial court, bail if not already granted, should be given due consideration and during the trial the proceedings must be fair and open and the accused presumed innocent until proven guilty. Further, the accused has a right to know the evidence against him and to a sentence that is appropriate to the crime, if proved. Which of these due process rights are compromised in a super heated transnational crime trial and what are implications for judicial officers?

As a reaction to the increase of serious transnational crime, Kenya's parliament, for example, has sought to amend the Criminal Procedure Code to permit police officers and the courts to deny accused persons bail notwithstanding that the right to bail is a constitutional right that cannot be fettered by statute.[4] The intended insertion immediately after Section 123 of the Criminal Procedure Code Cap 75 Laws of Kenya, subject to Article 49(1)(h) of the Constitution, is proposed to be an exception to the right to bail.[5]

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[3] Koreamtsu vs. United States 323 US 214, 1944; Jackson J dissenting.

[4] The memorandum of objects and reasons and the Statute Law Miscellaneous (Amendments) Bill (2014) proposes to amend the Criminal Procedure Code to prescribe circumstances in which a court or police officers may decline to grant bail to a person.

[5] Article 49(1)(h): "*An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.*"

We must remember that the Universal Declaration of Human Rights provides for the right to a fair and public hearing by an independent and impartial tribunal[6] and the right of the accused to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.[7] In addition, the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, envisage judges with full authority to act, free from pressures and threats, adequately paid and equipped to carry out their duties. Do members of the judiciary feel compelled to return a guilty verdict because the accused faces a socially reprehensible crime? A suspect for mass murder turns to the court for a safeguard of the right to be treated humanely (even when his alleged victims have not benefited from humane treatment from him); equally, victims look up to the courts for justice (even vengeance). How does the court balance these mutually exclusive but legitimate opposite expectations.

Adjudicating transnational crimes such as terrorism, money laundering, cybercrimes, banking frauds, and drug trafficking poses substantial multifaceted challenges. On a general scale, there are significant difficulties in terms of adequately trained personnel and operational infrastructure needed to resolve these crimes. This starts with investigators, moves to prosecutors and sometimes court personnel who may not be well versed in the unique aspects of transnational offenses. In addition, the legal framework in respect of these growing crimes has several gaps especially with regard to formulation and enforcement of regulatory laws.

[6] Art 10.
[7] Article 11.

Quite apart from this, the multi-national nature of transnational crimes poses unique challenges in their adjudication. In many instances, the adjudication of trans- national criminal cases is burdened by the provisions of **Mutual Legal Assistance Treaties**. The MLATs control the manner by which the prosecution may lawfully gather evidence and often restrict its use by the defence. It is observed that in restricting defence access to evidence the MLATs create inequalities that imbalance criminal trials. This unequal access to evidence may give way to in-accurate convictions, as the defence is disadvantaged in its evaluation of evidence. For the Judiciary, the inability to compel sharing of evidence may constrain a fair assessment of the facts and may lead to punishing the innocent and discharging the guilty.

With respect to drug trafficking, the criminal justice system is evidently rendered inefficient because of the powerful connections and immense wealth of drug lords, allowing them to easily circumvent the process. Another challenge in addressing drug trafficking offences is with the law itself.[8] Police officers cite the law as a porous sieve, especially with regard to bail implying that police can let go of drug suspects in their custody and who, for obvious reasons, will go underground and never turn up for their pending cases.

Further, information on the nature, characteristics and strength of drug trafficking groups remains anecdotal rendering state reaction to the threat knee-jerk and often ineffective. Even when information is available it is packaged and shared in a very discreet and guarded manner limiting it to state security agencies and keeping it away from other organs that would otherwise assist in reinforcing safety for communities. In spite of this paucity of information there is sufficient data to indicate a nexus between drugs, crime and terrorism.

[8] See for example, The Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994).

With respect to terrorism, there have been numerous cases in which terrorists have sought to obstruct justice by threatening prosecutors, judges and other officers of the court or by intimidating or attacking witnesses. Without proper protection for judges and court personnel, courts are often unable to function effectively or fairly when they are the object of threats or potential threats by terrorist groups or their supporters. Similarly, any criminal justice process can be paralysed by the system's inability to protect all participants against intimidation and retaliation. Part of the core capacity of the criminal justice system to deal with acts of terrorism is capacity to effectively ensure the security of judges, prosecutors and other court personnel, witnesses and all others who participate in court proceedings.

In addition, some countries in the region have not ratified or acceded to all treaties, which aim at globalizing efforts against transnational crime. This includes the 16 universal counter terrorism treaties, the anti drugs and human trafficking treaties etc. The gaps in ratification weaken international cooperation and suggest that the rate of domestication of these treaties is also impeded.

In adjudicating transnational crime, an evidence-based approach is required. Often the prosecution is disadvantaged by lack of physical evidence, as well as its forensic examination and the need to preserve its integrity, from the crime scene to the courtroom. For this reason, courts find themselves unable to convict on anecdotal or hearsay evidence when there are clear gaps in the chain of evidence.

Lastly, combating transnational crime and terrorist networks requires strong rule of law-based criminal justice responses. While many countries in the region still need to improve basic criminal justice capacity, there is a pressing need for specialized knowledge and skills to be able to relate to the facts and conduct of these crimes.

Political Interferences

Is there any measure of political or executive interference in the adjudication of transnational crimes? Among other things, political interference impairs the rule of law and law enforcement. This is particularly so with cases involving drug trafficking and other high profile crimes.

Future trends

Establishment of courts with special jurisdiction

Some countries have established courts with special jurisdiction to try transnational crime, especially terrorism. It is sometimes argued that it is necessary to establish courts with special jurisdictions, especially to hear terrorist cases. Although that can be a problematic course of action, national criminal procedures may allow some adaptations without going as far as establishing special courts. In many countries, regular courts have sometimes been given a special jurisdiction or mandate greatly shaped by the nature of the crimes to be prosecuted. For example, it is possible to allow for the centralization of certain cases by identifying a pool of magistrates who will be habilitated to hear certain types of cases and therefore may develop a particular competence, including cases involving terrorist offences. Prosecutions of certain types of cases involving terrorist groups can be centralized in a certain part of the country, allowing a group of judges (as well as prosecutors and defence counsels) to specialize in those cases. The centralization of cases and the specialization of certain magistrates can also make it easier to prevent various attempts at obstructing justice and to protect those involved against possible intimidation or retaliation.

Is the anxiety created by trans-national crimes and state reaction, a short-term coincidence of cause and effect or does it portend a long-drawn state of affairs? There are policy and legal implications to these questions. For example, Is the threat posed by trans-national crime a matter of law enforcement, state security or is it a military issue (or perhaps a combination of these?). The answers to these questions may provide a measure of understanding on the complex dilemma that judicial officers may find themselves in.

In conclusion I ask the question: where is the place of the Judiciary in the fight against transnational crime?