
Counter-terrorism and the Politics of Aid: Civil Society Responses in Kenya

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ABSTRACT

Against the backdrop of terrorist attacks in 1998 and 2002, Kenya has come under pressure from aid donors and diplomatic circles to co-operate in achieving the political and military objectives of the War on Terror. The Kenyan government has received legal, technical and financial support to implement new counter-terrorism structures. However, while these have raised concerns around human rights and the ability of people to come together and organize on shared interests, the response of civil society in Kenya has been muted. It is mainly human rights campaigners, lawyers, Muslim organizations and leaders, and some politicians that have opposed proposed anti-terrorism legislation. Even fewer groups have spoken out against the government's participation in a regional rendition programme in the Horn of Africa supported by the United States. This weak response reflects the significant ethnic and regional fragmentation that prevails in the country. This article critically examines the impacts of counter-terrorism in Kenya and civil society responses to these in a shifting political landscape.

INTRODUCTION

The horrific bombings of the US embassies in Nairobi and Dar es Salaam in 1998 thrust east Africa to the centre of world concern over the threat of global jihadist terrorism. They also presaged the events of September 11 2001 and the declaration of the global 'War on Terror'. Images of crumbled office blocks and the twisted wreckage of buses and vehicles on the streets of central Nairobi gave rise to public consciousness of Osama Bin Laden and concern over a new brand of transnational terrorism. Following the attacks, US President Clinton ordered the targeted air strike of a pharmaceutical plant in Khartoum, the capital city of neighbouring Sudan, which remains on the

The research on which this article is based was carried out for a project on 'The "Global War on Terror", Non-Governmental Public Action, and Aid'. We are grateful to the ESRC Non-Governmental Public Action Programme for funding. We also thank Elvin Nyukuri for providing excellent research assistance. The Legal Resources Foundation, a Kenyan NGO, helped to organize a roundtable discussion on the research in Nairobi and we are grateful for their support. Finally, the helpful comments of the journal's anonymous referee are acknowledged with thanks.

US list of state sponsors of terror and which, for a time in the 1990s, was official host to Bin Laden. Since then Kenya has been the theatre of further attacks targeting Israeli tourists and commercial interests. The conflagration of violence and renewed clan warfare that has gripped neighbouring Somalia since the invasion in late 2006 by US-backed Ethiopian forces acting against the Islamic Courts Union which briefly governed southern Somalia, have drawn Kenya deeper into the prosecution of the War on Terror.

Kenya's co-operation with counter-terrorism objectives in the War on Terror has, in turn, intersected with social divisions and governance debates in a shifting domestic political context. This has renewed concerns over the treatment of Muslims and Somalis and highlighted the fragility of the civic space that was carved out during the democracy struggles of the 1990s. The Kenyan case thus provides empirical insights into the consequences of new counter-terrorist discourses and measures on civil society, the first theme of this cluster. The background to these concerns and tensions was the historic election in 2002 of a coalition of opposition parties that was supported by a broad spectrum of civil society including churches and religious groups, human rights organizations, and democracy and governance NGOs. With leading civil society actors taking up positions in the new democratic coalition government, many believed that they shared democratic political objectives with the government. In this changed political context, civil society has struggled to define and articulate its roles and has fragmented around discrete ethnic and regional interests reflecting the deep divisions and centrifugal forces seen in wider society. The lack of a common political project has subsequently come to influence civil society's contradictory and often fragmented positions on matters of national importance, as highlighted by its uncoordinated response to the widespread violence that roiled the country in early 2008 following the disputed results of the December 2007 election and the limited responses of civil society to new counter-terrorism measures.

The changing role of diplomacy and aid has also been significant in shaping the contours of state-civil society relations in the context of counter-terrorism. Under considerable pressure from diplomatic quarters and aid donors, the Kenyan government has instituted a new counter-terrorism regime, giving rise to new pressures and threats for civil society. This highlights the strategic use of aid in achieving the political objectives of the War on Terror — the third theme of the cluster. Generally, the leverage of aid has shifted away from previous priorities on good governance and human rights, although these issues acquired new prominence as part of processes of political reform and national reconciliation following the disputed results of the December 2007 election and its aftermath. In recent years donor support for civil society has declined in importance as donors have sought to align with the government's development priorities and goals. This has entailed working more through government programmes and agencies than through civil society groups. Elements of civil society were an important part of internal forces opposing the introduction of new counter-terrorism structures

and advocating for protection of the human rights of terror suspects and treatment of ‘suspect’ communities. However, in spite of the opening of space for political deliberation and debate, the challenges of counter-terrorism have brought to light the lack of political consciousness in mainstream civil society.¹ On the whole, these groups have failed to respond to human rights concerns, the treatment of minorities and restrictions on the spaces for civil society to organize emerging out of the implementation of a new counter-terrorism regime in Kenya.² The lack of civil society responsiveness in Kenya follows a pattern of quiescence on the part of mainstream civil society actors to the introduction of counter-terrorism laws and measures in other political contexts such as the USA, as explored in Mark Sidel’s article in this cluster.

This article begins by examining broader reconfigurations in the relations between the Kenyan state, civil society and aid that have reshaped the advocacy context for non-governmental public actors. The subsequent section reviews government policies and attempted legislation on counter-terrorism in Kenya. These have created new pressures and threats for human rights, the treatment of Muslims and Somalis, and the spaces for civil society to organize. The differential responses of civil society to the introduction of new counter-terrorism structures are assessed in the final section.³

SHIFTING CIVIL SOCIETY–STATE RELATIONS AND THE CHANGING ROLE OF AID: TOWARD A CRITICAL UNDERSTANDING OF CIVIL SOCIETY RESPONSES

Shifting state–civil society relations in Kenya and the resulting reconfigurations in the role of aid are important for understanding the impacts and responses of civil society to the introduction of counter-terrorism structures.

1. Mainstream civil society refers to NGOs engaged primarily in service delivery, often funded by donors and the Kenyan government, as well as pioneers of Kenya’s democratic struggle.
2. This is not to ignore the concerted efforts of certain civil society organizations and representatives during the violence of late 2007 and early 2008 to assist displaced peoples; facilitate mediation; form networks and forums to advocate for peace and reconciliation; document violence and human rights atrocities; and seek to influence public debate by blogging and writing opinion pieces for the media.
3. This article draws upon fieldwork in Kenya carried out on several trips between July 2006 and June 2007. The research is based on a review of primary and secondary sources including government and donor documentation and media reports as well as qualitative interviewing with aid and donor agency staff, government officials, democracy and governance NGOs, humanitarian organizations, human rights activists, Muslim community leaders and journalists. A total of fifty-six interviews were carried out in Nairobi and Mombasa. Further, a roundtable was organized in Nairobi with donor agency officials, civil society activists and NGO representatives to scrutinize important themes arising from the interviews and to assess the wider context of donor–civil society relations in Kenya. For reasons of confidentiality, no names of individual interviewees or particular organizations and agencies are cited here.

The role of international development assistance is significant in this analysis because it is an instrument by which foreign governments pursue their political and security interests to defeat terrorist networks and there is evidence that security concerns have seeped into development policies and practices in Kenya (Howell and Lind, 2009; Ruteere and Ogada, 2009). Changes in development aid are also worth examining because such assistance was instrumental to the formation in the 1990s of pressure groups and advocacy organizations that would be expected to organize and lead opposition to the introduction of new security structures. This section explores the changing role of aid in leveraging non-governmental actors in a shifting political landscape characterized by recent violence and the weakening of governance and human rights advocacy groups. This will set the scene to consider counter-terrorism laws and measures in the following section.

International development aid and diplomacy supported the formation of a compendium of pressure groups which, along with religious leaders, was at the forefront of the democratization struggle throughout the 1990s. While these groups enjoyed public goodwill and were outspoken against the excesses of power of the regime of former President Daniel Arap Moi, they never developed strong ties with domestic philanthropy or established paid membership. Thus, they depended on international development aid and diplomatic support for their continued survival. Garnering popular legitimacy by championing democratic values and respect for human rights, their relevance was determined largely by the nature of politics at the time and their opposition to Moi.

However, democracy, governance and human rights groups were unprepared to adjust to the changed political landscape once Moi retired from office and an avowedly reformist coalition of political parties was elected in December 2002. The election victory of the National Rainbow Coalition (NARC), a motley grouping of political parties and former adversaries led by presidential candidate Mwai Kibaki, was seen as a triumph for civil society democratization efforts. The landslide election victory of NARC under Kibaki was tied to its apparent commitment to carrying through governance reforms and a new political dispensation to address corruption, predation, the incompetence of politico-administrative functionaries and routine abuses by the police. Several key positions in the new government were filled by veteran civil society activists and human rights campaigners, including the Minister for Justice and Constitutional Affairs as well as a new ethics tsar in the Office of the President, who had previously headed the Kenya chapter of Transparency International. Indeed, civil society regarded the new government as sharing its own political objectives.⁴

In the democratization struggles leading up to the 2002 election, the growth of civil society was determined by the nature of the Moi regime and insipid

4. Authors' interview with official from a governance NGO (Nairobi, 20 July 2006).

politics at the heart of government at the time.⁵ Following the NARC election triumph, however, civil society seemed rudderless and lacking clear direction or leadership. Subsequent events showed Kenyan civil society to be an arena of political divisions, reflecting the social disharmony seen in wider society. The break-up of the NARC coalition government in 2005, following disagreements over proposed constitutional reforms, set the scene for the 2007 presidential and parliamentary elections.⁶ President Kibaki led the Party of National Unity and drew strong regional support from the central Kenya highlands, his home area. Raila Odinga, who resigned as minister from Kibaki's cabinet after a November 2005 plebiscite, led the Orange Democratic Movement, which attracted a greater breadth of support. The ethnic and regional divisions in civil society, which became evident during the plebiscite in 2005, were laid bare with various civil society actors backing the different political parties who themselves sought to manipulate these divisions. The splits in civil society were demonstrated during the crisis that followed the announcement of the disputed election results. Although some civil society representatives played an important role in documenting and speaking out against human rights abuses, and new networks were formed to promote truth, justice and reconciliation, there was no co-ordinated and systematic response by civil society to the violence. Churches were particularly divided in their positions (*Sunday Nation*, 2008; *Sunday Standard*, 2008). Indeed, the burning of churches and the targeted killing of some clergy during the post-election violence revealed the extent of politicization of key elements of Kenyan civil society. These divisions have damaged the popular credibility and standing of civil society, which has come to be viewed as representing partisan and ethno-regional interests rather than broader public interests.

Against this backdrop of division and weakness within civil society, the role of aid has shifted as donors have sought to support the Kenyan government since Moi left office. The election of NARC heralded a new trust and confidence in the capacities and commitments of the government to improve the performance of state institutions. This, in turn, dovetailed with shifts in donor aid approaches more widely to align with the development

5. Authors' interview with a university scholar (Nairobi, April 2007).

6. Debates on changing the constitution centred on limiting the powers of the presidency by dividing executive powers between the president and a new position of prime minister. The first draft of the constitution, known as the Bomas Draft, was prepared by a broad constitutional assembly but was subsequently amended by elements close to the President who supported the continued concentration of powers in the presidency. The amended draft, known as the Wako Draft, was voted on in a plebiscite in November 2005, which was won by the 'No' camp that supported shifting power to an executive prime minister as proposed in the Bomas Draft. This led to a split in the government and the resignation or firing of ministers aligned with the 'No' camp led by then minister Raila Odinga, leaving the cabinet composed of close allies of the president. Since 2005 there has been an impasse on constitutional change.

priorities and objectives of aid-recipient governments, as well as to better co-ordinate and harmonize bilateral aid by channelling greater support through government-owned programmes. Thus, since 2002 bilateral donors have sought to work with and through government departments and programmes as opposed to emphasizing their support to civil society as a way of pressuring a change in government. Kenyan civil society activists argue that these fundamentally different aid dynamics have made it more difficult for pressure groups to access donor funds.⁷ These shifts in aid approaches indicate how donors often equate governance with government. The emphasis on checks and balances fades away once a government that speaks the language of good governance comes to power.

Indeed, although it is questionable whether aid flows to civil society have actually diminished since 2002, as explained below, it is more certain that there has been less diplomatic support for Kenyan democracy and governance groups, particularly those which contested the government's counter-terrorism policies and attempted legislation. Several important bilateral donors have supported a large reform programme on the Governance, Justice, Law and Order Sector (GJLOS), a government programme involving private sector actors in managing procurement systems and finances.⁸ The programme envisages an ideal type relationship between the state and civil society whereby non-state actors implement reforms under priority areas that have been agreed by the government and donors. GJLOS incorporates a fund for supporting civil society, which the government has opposed although it has welcomed civil society inputs in service delivery in sectors such as health and education.⁹ Civil society representatives have objected fundamentally to receiving support under a government-controlled programme and have come to openly question the government's commitment to reforms. While NGOs attribute their funding difficulties to decreasing foreign assistance for civil society, leading bilateral donors including USAID and DFID have argued that their funding for Kenyan government programmes is drawn from new support, which is reflected in an increase in their overall aid allocations to Kenya in recent years. Still, donors tacitly recognized the difficulty many NGOs encountered in accessing donor funds for work on democracy and governance and sought to establish a funding facility for non-state actors outside of GJLOS.¹⁰ But here, too, divisions emerged between civil society, which insists on greater representation in deciding on the use of these funds, and donors who believe this could lead to partiality and disagreements.¹¹

7. Comments by participants at roundtable discussion on 'Civil society and the securitization of aid in Kenya' (Nairobi, 19 January 2007); authors' interview with head of human rights NGO (Nairobi, 18 July 2006); authors' interview with civil society programme officer in bilateral donor agency (Nairobi, 19 July 2006).

8. See www.gjlos.go.ke.

9. Authors' interview with official from a bilateral donor agency (Nairobi, 18 January 2007).

10. Authors' interview with a European diplomat (Nairobi, 2 February 2007).

11. Authors' interview with a human rights lawyer (Nairobi, 5 June 2007).

The changing aid context in Kenya has highlighted the fragility of liberal, predominantly urban-based NGOs that advocate on issues of democracy, governance and human rights. Donor support is clearly important for the survival of many Kenyan governance and human rights pressure groups. There is not a philanthropic tradition of supporting non-governmental political action in Kenya that focuses on advocacy, rights and activism on public interest issues. In contrast there is a long tradition of charitable giving and community support for those in need. Furthermore, the popular credibility of groups advocating on democracy, governance and human rights issues has suffered as civil society has fractured along partisan, ethnic and regional lines. The reduced emphasis on civil society support in international aid could be a moment for Kenyan civil society to renew its purpose and develop stronger ties with domestic constituencies. However, by attributing their funding difficulties to shifting aid approaches, NGOs in the democracy and governance sector have deflected attention from issues that are more fundamental to their longer-term existence and position in Kenyan civil society.

COUNTER-TERRORISM STRUCTURES AND IMPACTS ON CIVIL SOCIETY

Against this backdrop of shifting state–civil society relations in a politically and socially fractured landscape, the Kenyan government has instituted a range of new counter-terrorism structures, but outside of a legal and policy framework. These structures encompass a suite of measures to enhance intelligence gathering as well as policing and surveillance of suspect communities, including, for example, the Anti-Terrorist Police Unit (ATPU), the draft Suppression of Terrorism (SOT) Bill, and the proposed Proceeds of Crime and Anti-Money Laundering Bill. Unsurprisingly, foreign security assistance and training aid were pivotal to the establishment of many post-9/11 counter-terrorism structures in Kenya. These feature new and greater levels of co-operation with foreign security and intelligence agencies, some by way of extra-judicial practices and institutions. Kenya was one of only five states to receive special training through the US government's Anti-Terrorism Assistance Program in the 2005 budget, which included support for establishing a National Security and Intelligence Services agency (NSIS) (Harmony Project, 2007). Other measures have included the establishment of a Joint Terrorism Task Force in 2003 and the National Security Advisory Committee in 2004 (*ibid.*: 57). The US government has also funded the establishment in Kenya of a National Counter-Terrorism Centre that, notionally, sits within the NSIS but is rumoured to be under the direct operational guidance of Washington.¹²

12. Roundtable on 'Human rights in a cross-border context: Kenya and Ethiopia' (Chatham House, 2 April 2007).

Police raids on Muslim neighbourhoods in Nairobi and Mombasa have been a key facet of counter-terrorism strategies in Kenya. Many of these raids have been led by the Anti-Terror Police Unit (ATPU), which was established in 1998 within the national police force following the US embassy bombing in Nairobi. In 2002 after the hotel bombing in Kikambala north of Mombasa, police swoops on Muslim neighbourhoods caused scrutiny and public debate on the involvement of foreign security agencies in the surveillance, arrest and interrogation of terror suspects. Human rights groups and the Kenyan media have reported numerous instances in which foreign security services interrogated terror suspects, in some cases involving the use of force as well as torture during interrogations (Amnesty International, 2005; authors' interviews). Alleged infringements of human rights of terror suspects were again highlighted by the capture of terrorism suspects in Kenya following the flight of civilians and fighters from southern Somalia into Kenya in early 2007. This followed military action led by the Ethiopian government against the Islamic Courts Union, which briefly governed southern Somalia in 2006. The Kenyan government co-operated in a regional rendition programme backed by the USA involving the transfer of terror suspects, including many Kenyan nationals, to Somalia and then secretly to prisons in Ethiopia (Muslim Human Rights Forum, 2007). The USA acknowledged that its intelligence agents interrogated terrorism suspects in Kenya and again when they were detained in Ethiopia (*New York Times*, 2007). One suspect was extradited to Guantanamo Bay (*Daily Nation*, 2007). The circumstances of arrest and detention of terror suspects in these cases have shown that Kenyan authorities failed in certain instances to comply with international human rights law and standards as well as Kenyan law.

More robust policing has been matched by closer scrutiny of individuals applying for identification papers and travel documents. These efforts, and other post-9/11 counter-terrorism measures, tie into broader political and deeper historical contexts concerning the identity, citizenship and political rights of Muslim communities along the coast and in North Eastern Province. Human rights campaigners and Muslim leaders allege that it is more difficult for Muslims to obtain identity cards that are required for employment, as well as passports to be able to take up overseas education and employment opportunities.¹³ In the public's imagination, the counter-terrorism crackdown by the government is seen to affect coastal Swahili peoples and Kenyan Somalis. Social divisions between the majority Christian 'upcountry' tribes and Muslim communities have come to shape public attitudes on counter-terrorism and the indifference observed in the response of many Kenyans toward the detention of terror suspects. This is evident in the relative inattention of the Kenyan media to the detention of terror

13. Authors' interview with head of national Muslim advocacy organization (Nairobi, 19 July 2006); authors' interview with commissioner, Kenya National Commission on Human Rights (Nairobi, 18 January 2007).

suspects in the country. Commenting on the case of Mohammed Kubwa, a terror suspect who was detained without charge for three years in connection with the bombing of the Israeli tourist hotel north of Mombasa in 2002, a programme officer of a private foundation in Nairobi questioned, 'If Kubwa had been a Christian Kikuyu [the largest tribe in Kenya], would it [the story of his detention] have been picked up [by the media]? It is about citizenship; that is clear'.¹⁴

Kenya's counter-terrorism structures have been introduced in a legal vacuum. Human rights groups maintain there is no legal basis for some measures including the creation of the ATPU. Since 2002, diplomatic missions in Nairobi representing leading western donors have pressured the Kenyan government to adopt controversial new counter-terrorism legislation. Efforts by the Kenyan government to pass a Suppression of Terrorism Bill (SOT) in 2003 failed. The government withdrew the bill following intense public opposition by the media, human rights organizations, Muslim groups, and, crucially, members of the Parliamentary Committee on Justice and Constitutional Affairs charged with reviewing the bill before it was debated. The government initiated fresh discussions on the bill in 2005 and a new Anti-Terrorism Bill was circulated to government departments in 2006.

In early 2008 the Attorney General published a Proceeds of Crime and Anti-Money Laundering Act, which is a response to UN resolution 1373 (2001) that requests governments to undertake measures to limit the use of businesses, remittances and charities to finance terrorism.¹⁵ The bill proposes to establish a Financial Reporting Centre that will collate and disseminate information, which it will share with other investigative authorities and law enforcement agencies (*East African Standard*, 2008). Muslim leaders have strongly opposed the bill, claiming that it includes many of the same clauses that appeared in the SOT Bill (*East African Standard*, 2007). An audit of the bill by the parliamentary House Business Committee revealed that twenty-two clauses in the SOT Bill had been lifted word-for-word and incorporated into the Proceeds of Crime and Anti-Money Laundering Bill (Muslim Human Rights Forum, 2008).

NGOs have been a specific focus of money laundering suspicions in Kenya. In general, the Kenyan government has increased checks on NGOs as part of its counter-terrorism efforts. However, pressures and threats for civil society generated by new counter-terrorism structures have disproportionately impacted Muslim organizations and groups where a 'siege mentality' has begun to take hold. This is reflected not only in the aforementioned raids in Muslim neighbourhoods but also in the targeting of Muslim NGOs. The closer inspection of NGOs goes back to the aftermath of the 1998 bombing of the US embassy, when several Muslim NGOs providing relief assistance

14. Methodological workshop on 'Civil society, aid and security in eastern Africa' (Nairobi, 6 June 2007).

15. Authors' interview with official from a governance NGO (Nairobi, 20 January 2007).

in refugee camps in North Eastern Province bordering Somalia were forced to close or suspend their activities. Some NGO staff were detained and interrogated by security agencies and the foreign heads of some groups were deported. Eventually, some organizations were allowed to re-register but they faced constant monitoring and obstruction by the police and provincial administration in the areas in which they operated.¹⁶ In the intervening period, five Muslim NGOs have been proscribed often at the behest of foreign governments. The Saudi Al Haramain Foundation was proscribed in 2003 and has been subject to investigations in the USA. The Crescent of Hope, which did relief work in northern Kenya, was forced to close. Some organizations have voluntarily closed down under immense government pressure, such as the Al Ibrahim Foundation. Other organizations such as the Africa Muslim Agency, Young Muslims Association and Northern Aid continue to operate but under stringent conditions and in spite of administrative interference by provincial authorities.¹⁷ Many civic leaders in Muslim communities contend that the crackdown on larger welfare-oriented Muslim NGOs has caused a ripple effect impacting community-based organizations which partnered with the larger NGOs in running orphanages, schools and health centres, particularly in North Eastern Province.¹⁸ The longer-term impact of the clampdown has been to cast suspicion over Muslim community groups, madrassas, local chapters of Middle Eastern charities and Muslim philanthropists.

A clampdown on Muslim groups has been matched by greater restrictions on the flow of funds originating from states in the Gulf and Middle East. Funding from this region was relatively important for Muslim organizations working in North Eastern Province. However, Muslim groups have had difficulty in generating media attention and public concern over this crackdown, partly because of the failure of NGOs and community leaders to document the precise impacts, for example in terms of numbers of children denied schooling or orphans being turned away as a result of the loss of Middle Eastern philanthropy.

In other ways, the spaces for Muslims to organize have been constrained by various counter-terrorism measures and practices. Madrassas and mosques have been constructed as sites for radicalization and extremism and have come under greater scrutiny. Consultants for the Ministry of Education suggested assessing the content of madrassa curricula.¹⁹ Other proposals have sought greater regulatory oversight of mosques through central registration and monitoring charitable flows through mosques. Currently, there is no central registration or regulatory authority for mosques or madrassas. These proposals have not been pursued but they have reportedly had the effect of

16. Authors' interview with official from a Muslim organization (Nairobi, 19 July 2006).

17. Authors' interview with a Muslim human rights activist (Nairobi, 31 January 2007).

18. Authors' interview with a security analyst (Nairobi, 22 January 2007).

19. Authors' interview with official from a Muslim organization (Nairobi, 19 July 2006).

intimidating local people who would otherwise give donations to madrassas or mosque committees.²⁰

Security concerns have also crept into discussions around a proposed new regulatory framework for NGOs as signalled in the Sessional Paper Number One of 2006 agreed by cabinet, with various political leaders associating the activities of some organizations with terrorism. Although the political rationale for the new framework is to fight corruption in NGOs which are perceived to be misused for personal enrichment rather than undertaking activities for public benefit, some government officials have made statements expressing concern over prospective linkages between NGOs, terrorism and money laundering. This suspicion of NGOs as conduits for terrorist financing and money laundering is a recurring aspect of global political discourses on terrorism (Howell and Lind, 2009). Political opponents in Malawi and Zambia have been labelled as terrorists. Rebels in Congo and Rwanda have also been branded terrorists, and beyond negotiation (BBC News online, 2007). In Uganda, the government passed new legislation in 2006 that requires NGOs to re-register on an annual basis; it also created representation for security agencies on the government's NGO registration board but not for NGOs themselves (Civil Society Watch, n.d.). Similar suspicions can also be seen in the case-studies of the USA (Sidel) and Uzbekistan (Stevens) in this cluster.

COMING UP SHORT: CIVIL SOCIETY RESPONSES TO COUNTER-TERRORISM STRUCTURES

Human rights networks, legal groups and Muslim organizations have been galvanized to organize against proposed anti-terrorism legislation through the formation of new ad hoc networks and groups such as the Muslim Human Rights Forum and the Coast Anti-Terror Network. A coalition of human rights activists and organizations through the Kenya Human Rights Network organized a concerted campaign against the SOT Bill. The position of these groups was that fundamental human rights must be protected, mechanisms to fight terrorism must safeguard human rights and that counter-terrorism should be a partnership between the state and society and not a unilateral extension of bureaucratic and policing powers. In particular, civil society groups objected to the definition of 'terrorism' in the bill, which was felt to be vague and open to a number of interpretations. The bill proposed to grant wide discretionary powers to policing agencies such as the right to stop and search, and detention of suspects without charge. Another concern was that the bill lowered fair trial standards by requiring the prosecution in terror cases to show 'reasonable suspicion' based on the 'balance of

20. Authors' interview with a Muslim leader (Nairobi, 16 January 2007).

probabilities' rather than prove their case beyond reasonable doubt, thus shifting the burden of proof to suspects. Objections were also raised that the bill targeted Muslim communities. In this regard, a clause that made it an offence for people to dress in such a way 'as to arouse reasonable suspicion that he is a member of a declared terrorist organization' caused particular concern amongst Muslim communities, who have their own distinct way of dressing (Republic of Kenya, 2003). The bill also granted the minister responsible for national security the power to make exclusion orders, but only against individuals with dual citizenship. This was perceived as directly targeting Muslims, many of whom descend from immigrants from Somalia, the Arabian Peninsula and south Asia. In response to the bill, the Kenya National Commission on Human Rights, the governmental human rights watchdog, stated '[L]aws or policies must not target or appear selective by community or group' (KNCHR, 2003: 8).

Civil society opposition to new counter-terrorism structures arose against a background of human rights infringements and the abuse of powers by political functionaries and state security personnel under the Moi regime and colonial rule. Another concern was that counter-terrorism was being used as a subterfuge to restrict government opposition. Section 9 of the SOT Bill conferred upon the minister responsible for national security powers to proscribe any organization suspected of supporting terrorism, but without establishing the norms to be used in determining suspicion. **This matter was complicated by the broad and unclear definition of 'terrorism' in the bill. To date there is no consensus on a definition of terrorism even within multi-lateral institutions such as the UN. This complicates law making on counter-terrorism since there is no internationally agreed legal definition.** Northern governments, in passing their own anti-terrorism legislation, have tended to define the terrorist threat as qualitatively new and different, requiring extraordinary legislation.²¹

Kenyan scholar Professor Ali Mazrui noted that the SOT Bill 'is so wide-ranging that the police or the minister can decide which kind of public demonstration constituted support for terrorist forces abroad' (Mazrui, 2003: 5). The bill did not propose any appeal mechanism or independent adjudication authority in cases where an organization wants to contest the minister's declaration. New offences were also proposed for persons who are members, supporters, or fundraisers for organizations declared to support terrorism. As elsewhere in the bill, the use of indistinct language and inadequate definition of terms cast a shadow over individuals and groups who might have sought to assist an organization, as they risked being charged for 'supporting' terrorism if that group was under suspicion by the government. As a prominent human rights activist stated to the press:

21. Roundtable discussion on 'Civil society and the securitisation of aid in the EU' (London, 8 November 2006).

This is a threat to civil society and activists. They can choose to declare the KHRC [Kenya Human Rights Commission, an NGO] a terrorist group for speaking out and demonstrating against detention. It even puts you [the journalist] at risk for the simple reason that you are writing about and against the anti-terrorism bill, making you a target and possible terrorist suspect. (*Weekly Brief*, 2003: 15–16)

A contributing factor to civil society opposition to proposed anti-terror legislation is the sentiment that Kenyans are being made to put in place legal and security measures to fight a threat that does not concern them. Kenyans commonly believe that they are victims of a political and military fight between the USA and Islamic militants. One civil society activist explained it this way, ‘the perception of most Kenyans is that the Kenyan victims of [terrorist] attacks are collateral damage and not targets themselves . . . Kenyans view themselves as caught up in the crossfire and [believe] that the conflict is not ours. It is western targets that have brought terror to Kenya’.²² Generally, counter-terrorism is not a public policy priority and some Kenyan leaders believe they are being forced into co-operating in the War on Terror on terms determined by the USA.²³ Civil society critiques of the bill have emphasized the causes of human insecurity for Kenyans such as economic disparities, limited access to resources and criminal activity. In comparison, terrorism has been seen to be unimportant.²⁴

Civil society efforts were effective in drawing attention to the SOT Bill and mobilizing concern within key political constituencies, especially Muslim communities. Civil society and parliamentary opponents to the bill presented a coherent argument concerning the need to safeguard human rights which, in the Kenyan political context, were attained through a long struggle. Still, as noted above, the government has gone on to institute counter-terrorism structures through a more diffuse range of measures and practices thereby avoiding the probable debate that would arise if it were to publish another umbrella anti-terror law. Unsurprisingly, it has been more challenging for civil society leaders who organized in response to the SOT Bill to mobilize the same level of opposition to the Proceeds of Crime and Anti-Money Laundering Bill or to other counter-terrorism responses such as the Kenyan government’s co-operation in a regional rendition programme. As also noted, the rapidly changing political context in Kenya has also made it more difficult for civil society to present a co-ordinated response because civil society itself is split along regional and ethnic lines (Kenya Human Rights Institute, 2008).

Civil society responses to counter-terrorism in Kenya have refracted against the shifting orientation of aid since former President Moi left office in 2002. This is because the effective efforts of the few organizations

22. Authors’ interview with a human rights lawyer (Nairobi, 20 January 2007).

23. Authors’ interview with official from a bilateral donor agency (Nairobi, 19 July 2006).

24. Authors’ interview with official from a human rights agency (Nairobi, 17 July 2006).

and groups that have taken up these challenges in documenting and exposing government security practices as well as opposing the SOT Bill have been achieved without support from donors. Rather, these groups have relied on voluntary contributions of time, expertise and material support, goodwill from communities they seek to represent, and the cultivation of professional links with international human rights organizations and networks to effectively do their work. Although new restrictions on civil society were part of the SOT Bill and related counter-terrorism measures, mainstream civil society — that is, NGOs engaged primarily with service delivery often funded by donors and the Kenyan government, as well as pioneers of Kenya's democratic struggle such as the National Council of Churches of Kenya and the National Convention Executive Council — has been largely silent. Human rights groups and Muslim groups were the exceptions in organizing against the introduction of new counter-terrorism measures, laws and practices. Church clergy have been silent on the treatment of Muslims in counter-terrorism operations even though they had worked with Muslim religious scholars and leaders on constitutional reform issues in the run up to the 2005 plebiscite. At that point, disagreements emerged around the inclusion in the draft constitution of *Kadhis* courts for safeguarding Muslim personal law.²⁵ The disagreements led to Muslim clerics withdrawing from the inter-faith Ufungamano Initiative that had lobbied for constitutional reform.²⁶ The media, too, has tended to cover human rights violations of terror suspects from a security perspective without interrogating government actions in the name of security (*East African*, 2007). Public opinion in Kenya is that counter-terrorism measures affect Muslims. Mainstream civil society has been blinkered in its view of what constitutes 'civil society', seeing it as one that does not include Muslim organizations and civic groups, and thus does not seek common cause with organizations for whom counter-terrorism is a major concern. The leader of one Muslim organization we interviewed explained the divisions within civil society *vis-à-vis* the pressures caused by counter-terrorism:

Civil society is split into three groups. One group, out of fear, has stayed out of the question [of counter-terrorism] altogether. They fear being implicated by association and fear that their funding from western governments will be withdrawn. This is mostly Kenyan NGOs. But international NGOs have also not raised their voice on terrorism in Kenya, at least not locally. I can be clean as snow but if I am arrested on suspicion of terrorism, then everyone in the NGO community abandons me. There is a whole environment of fear. A second group take this as a *fait accompli*, that this is part of American power. The United States is the strongest power and you cannot do anything, is their view. They will talk with us [Muslim organizations] and identify right and wrong in the global War on Terror, and even

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25. *Kadhis* courts have jurisdiction over aspects of Muslim personal law and were provided for in Kenya's post-independence constitution. Christians opposed the inclusion of the courts in the proposed draft constitution, arguing that Muslim leaders sought to introduce *Sharia* law in the country.
26. Authors' interview with security analyst (Nairobi, 22 January 2007).

sympathize with us, but they are resigned. Then there is a third group, consisting of a handful of organizations, that is challenging this directly . . . Almost all non-Muslim NGOs are in the first and second group. They are silent and not opening up much to us and we don't know why.²⁷

Two of the difficulties for civil society organizations that want to work on emerging security issues are the lack of donor support, and the acute bureaucratic pressure on organizations that speak out against government counter-terrorism policies and practices. Representatives of human rights organizations have complained that the government uses the Kenya Revenue Authority to intimidate groups that speak out.²⁸ The position of such groups is made more problematic by the relative lack of donor leverage over the government on human rights issues in the context of donor priorities which have shifted from human rights to security. According to some civil society actors, mainstream NGOs risk losing donor support if they are seen to be helping Muslim organizations and human rights groups that are working on counter-terrorism.²⁹ Donor agencies have not funded civil society advocacy efforts in this area; any such efforts have occurred in spite of administrative harassment and bureaucratic obstruction in gaining access to sensitive information on terrorism suspects and police raids.

A further factor contributing to the reticence of mainstream groups on terrorism issues is that national civil society leadership has failed in recent years. The collapse of the NGO Council, the representative body for NGOs in Kenya, epitomized the factional differences and infighting that have hindered civil society in the post-Moi political context. Human rights organizations and Muslim groups have tried to work around these constraints by coming together in ad hoc coalitions and networks to oppose particular measures and laws but this does not overcome the need for an umbrella body to give leverage to the advocacy issues and actions of a smaller number of organizations and groups. The lack of a unifying political project, as was the case during the democratic struggle throughout the 1990s when civil society coalesced around its opposition to the Moi regime, has also impaired efforts to strengthen civil society's co-operation and co-ordination.

Still another reason is the production of suspicion and fear around Muslim organizations, which has undoubtedly impacted on civil society as a whole. Kenyan Muslims, who have been disproportionately affected by the introduction of counter-terrorism structures, have responded in various ways to the pressures and threats they have faced. In reply to the proposed monitoring of mosques by the state, for example, some Muslims proposed that mosques register with the government and keep a list of their members, which would then be made available to the state, as is done in Turkey. Others within

27. Authors' interview with a Muslim leader (Nairobi, 16 January 2007).

28. Author's interviews (Nairobi, January 2007).

29. Authors' interview with a Muslim human rights activist (Nairobi, 31 January 2007).

the community strongly resisted any attempts at government oversight.³⁰ Some Muslim leaders and groups have vocally opposed counter-terrorism measures, laws and practices, as seen in their efforts to organize against the SOT Bill. A Muslim organization has also sought to document the culpability of the Kenyan government in the rendition of 152 terror suspects to Somalia, including twenty Kenyan citizens (Muslim Human Rights Forum, 2007). Groups such as the Council of Imams and Preachers of Kenya and the National Muslim Leaders Forum have been outspoken in the media against police raids on Muslim neighbourhoods and have met with politicians and government officials to voice their concerns. In other ways, Muslims are adapting to rather than resisting increased pressures, but this typically involves restricting their own efforts and rights to organize. Many groups are not seeking to formally register because they are resigned to the possibility of being denied registration.³¹ This self-censorship is also seen in organizations which avoid the use of Arabic names or the word 'Muslim'. Some groups have sought legal shelter by becoming a programme of a registered organization, a tactic used in the 1990s by human rights organizations who encountered difficulties registering during the Moi regime.

CONCLUSION

The increasing inclusion of Kenya into the military and political prosecution of the global War on Terror has coincided with processes of democratization and the opening of political space. Observers have noted that in some cases fighting terrorism goes hand in hand with spreading democracy, as proposed laws have generated widespread debate in some new democracies such as South Africa and the Philippines (Whitaker, 2007). One of the key questions of this cluster concerned the extent and ways in which civil society has responded to the introduction of new counter-terrorism measures, laws and policies. Proposed anti-terrorism legislation has provoked responses in Kenya, but only from a minority segment of civil society consisting of urban-based lawyers, human rights organizations, and groups representing Muslims who are disproportionately affected by new counter-terrorism measures and practices. Opposition to specific anti-terrorism measures, laws and practices in Kenya has occurred in spite of a lack of institutional support and funding, intimidation by governmental regulatory bodies and the associated risk of de-registration and blacklisting for groups organizing on these issues, as well as the possibility of losing donor funding for other activities on the basis of being perceived as sympathizing with terrorists. This key finding tallies with the third cluster theme regarding the relationship between aid

30. Authors' interview with official from a Muslim organization (Nairobi, 19 July 2006).

31. Authors' interview with a Muslim leader (Nairobi, 16 January 2007).

and post-9/11 security objectives, and partially explains the quiescence of mainstream civil society to counter-terrorism measures and discourses.

Although the space for political debate and discourse is large and expanding, this has brought about the fragmentation of civil society into disparate groups coalescing around discrete ethnic, regional and partisan interests. The effects of fragmentation are magnified by the disintegration of the NGO Council as the representative body of NGOs at higher levels of political debate and policy making. The failures of NGO representation at a national level have impeded greater degrees of connection among different interest groups, which could leverage the interests and concerns of smaller groupings and thus inject civil society more forcefully into discussions around the War on Terror in Kenya and the region. The formation of ad hoc coalitions and networks to advocate against specific counter-terrorism practices, measures and proposed laws is an adaptation to the post-2002 political landscape in which civil society is under growing pressure to better define and more forcefully assert its role and purpose *vis-à-vis* democracy, governance and human rights issues. This is especially urgent in view of aid trends toward supporting government programmes and priority areas, which has entailed a reduced emphasis on civil society support as a component of better governance (see the Introduction to this cluster). The strong protestations of civil society in the face of these changes ultimately points to its aid dependence and the lack of private donorship in Kenya in support of human rights. The challenges facing civil society in Kenya include the persistent international pressure on the Kenyan government to co-operate in the War on Terror, the subtle introduction of counter-terrorism measures outside of a supportive legal framework, and internal divisions within civil society that preclude a more coherent advocacy strategy and plan. In some ways this is also a historical opportunity because it means that civil society groups have to develop stronger roots in society if they are to garner moral, political and financial support. The focus of donors on strengthening government may also, in the long run, create an opening for human rights groups to embed themselves to a greater extent.

In many ways, these difficulties speak to the divisions seen in wider society and the lack of political consciousness among mainstream civil society. Many counter-terrorism issues such as police raids and the treatment of terrorism suspects are perceived to involve Muslims, which again ties into larger political discourses beyond Kenya that construct Muslim communities as suspicious — a thread that runs through the articles of this cluster. Thus, in mainstream public debate, the significance of new counter-terrorism structures for the fundamental human rights of all, as well as for the actors and spaces of civil society, has been lost. Many young Muslims in Kenya, in turn, feel targeted by counter-terrorism operations and believe their interests are sacrificed in discussions on ‘security’ that dominate policy in the global War on Terror. **All of this points to a continuing need for civil society to make its contribution to policy discussions and public debates.** The effective

efforts of the few organizations and groups that have taken up these challenges in documenting and exposing government practices show that there is scope for civil society to organize more determinedly and coherently around new and emerging counter-terrorism measures, laws and security practices. Further, while resistance to counter-terrorism measures has revealed fissures and splits within civil society, it also serves as a binding process for those organizations participating, which in the long run should contribute to building a stronger civil society.

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