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When Jungle Order Rocks the Boat of Legal Order: Inevitability of State Stability for the Peace and Security of Mankind in Africa

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ABSTRACT: This paper discusses the disorder that characterizes the legal order of the modern state in parts of Africa. The capacity to maintain law and order and to exercise monopoly over means of coercion constitutes some of the raison d'etre of the Westphalian state model that pervades every nook and cranny of the continent. However, the inability of the state to meet the existential exigencies of its citizens and, ipso facto, its consequent loss of legitimacy, has generated a groundswell of discontent that has triggered the emergence of centrifugal forces – non-state actors – variously described as rebels, insurrectionists, insurgents, armed bandits, separatist agitators, terrorists, amongst others. But although these forces initially set out as viable alternatives to the state, they soon lose track and threaten not only the peace and security of the state but also of everyone else including their compatriots and neighbouring or contiguous states. Amidst the incapacity of the state to reclaim its lost power or glory, these non-state actors create a jungle order that harks back at Thomas Hobbes' state of nature where life is short, nasty and brutish. Such has become the lot of so many states in Africa. From Nigeria to Central African Republic through the Democratic Republic of the Congo to Somalia, the narrative is similar. This paper examines the background and the foreground of the failure of the legal orders of the state, the disaster that armed non-state actors have become for their compatriots and territorial neighbours and the reluctance of the international community to effectively respond to restore order. Finally, the paper suggests some ways in which the legal order of the state can be rejuvenated in such a way as to be able to meet contemporary needs of law and order on the one hand and freedom and liberty on the other.

KEYWORDS: legal order, jungle order, non-state actors, law and order, peace and security, freedom and liberty

1. Introduction

Societal belief in the sanctity of human life is reflected in the positive obligations states have undertaken under the regime of international protection of human rights both in conventional and customary international law. But events happening in many parts of the world especially Africa belie such notion as the social reality replicates Thomas Hobbes' state of nature where life is short, nasty and brutish. A few instances are apposite here.

In Nigeria, between January 2016 and October 2018, bloody clashes between herders and farmers in North Central Nigeria or in the Middlebelt part thereof, fuelled by government inaction and associated impunity, claimed close to 4,000 lives (Amnesty International 2018, 6). In 2017 and 2018, one of the federating states of the country worst hit by such human catastrophe, Benue State, was frequently conducting mass burials for the slaughtered to the embarrassment of those who place high premium on human life. Amnesty International documents "the failure of the Nigerian government in fulfilling its constitutional responsibility of protection of lives and property by refusing to investigate, arrest and prosecute perpetrators of attacks" (Amnesty International 2018, 6). But till date, the machinery of justice has neither been invoked against the perpetrators nor the conditions for the resurgence of another round of massacre taken care of. Government inaction was so appalling that the Economic Community of West Africa (ECOWAS) court had to rule that government must investigate the mass murders and bring the perpetrators to book (Sahara Reporters 2019).

Also, since Central African Republic (CAR) got independence in 1960, it has known no peace as its eastern and western parts have been at the mercy of violent non-state actors up in arms against one another in a bid to secure their spheres of influence within the country. The conflict is worsened by the religious dimension it has assumed between Christians and Muslims (Global Conflict

Tracker 2019). Consequently, the state has lost control of as much as two third of its territory to these non-state actors. The groups have overwhelmed the state which is now unable to exercise any form of control beyond the precincts or vicinity of its capital. Ultimately, there is severe deterioration of the country's security infrastructure with adverse or dire consequences for its citizens.

Moreover, the experience of the Democratic Republic of the Congo (DRC) is similar to that of Nigeria and CAR. DRC is a country where armed groups numbering up to about 120 have posed serious challenge and threat to the security of lives and property in the eastern part of the country. Because the government could not cope with their activities, the United Nations Organization and Stabilization Mission in DRC (MONUSCO) has since 2010 occupied the troubled country with the mandate of neutralizing armed groups and reducing their threat to state authority and civilian security (Marcucci 2019, 6). There is no indication as to when the situation will normalize or when the UN mission will wind up its operations.

Furthermore, terrorism has worsened the structure of domestic and international security. There are so many terrorist groups operating within territorial states and, more often than not, across borders, including Al-Qaeda, Al Shabaab, Boko Haram, etc. They ply their 'trade' indiscriminately leaving in its wake sorrow, tears and blood. Terrorists have seized states by the jugular and established therein parallel 'governments.' The states are simply helpless; they just endure the terrorists (Igbinedion 2017, 511).

From the foregoing, it is pretty clear that there are non-state actors (NSAs) engaged in challenging the existence or legitimacy of the state. The intriguing part of this development is that they are not so ambitious as to aim at establishing their own independent state *a la* ISIS but they are content with remaining an integral part of the state to, like termites, eat away its substance. The primary purpose or function of the state is to maintain law and order for the benefit of itself, its citizens and the international legal order. In order to do this effectively, the state is presumed to possess monopoly of violence. In fact, the state is usually described as a coercive legal order because it has the power and authority to subject every person or entity within its territory to legitimate violence for the purpose of its corporate existence, survival or preservation. However, NSAs are increasingly contesting state monopoly over means of violence through their illegal acquisition and use of a variety of weapons to wreak havoc on lives and property within the state and to impose their dis(order), parallel order or anarchy therein. Incidentally, not a few NSAs have so firmed up their acts that they can be arguably said to have dispossessed the state of such monopoly. As this happens, the state is deemed to have lost its raison d'etre or legitimacy. The aims of the actors are narrow and their modus operandi oppositional to the purpose of the state. But the effects of their anarchic operations are not only internalized; they also negatively affect the international obligation of the state to control its territory harmoniously with its obligations to contribute to maintaining the peace and security of mankind.

This paper examines the increasing capacity of non-state actors to challenge the state to such an extent that the former dangerously affect the security of lives and properties of persons within the territory and, perhaps more important, the peace and security of mankind. Section 2 considers the existing Westphalian order while Section 3 examines the disorder therein. In Section 4, the paper suggests some measures that may help the state to regain its strength and exit such messy order. Section 5 concludes the discussion.

2. The Westphalian Order

The foundation of contemporary modern state system is largely traceable to the signing of the Peace of Westphalia Treaty (concluded in Münster and Osnabrück) on 24 October 1648, which formally ended the 30-year internecine war (1618-1648) in Europe (Al-Kassimi 2015, 2; Pietras 2007, 135). The Westphalian model is based on the sovereignty of the territorial state and elucidates that each nation-state has sovereignty over its territory and domestic affairs, to the exclusion of all external powers, on the principle of non-interference in another state's domestic affairs (Al-Kassimi 2015, 1).

According to Daud Hassan, the Treaty ensured that Westphalia sovereignty was tied to state territory, implying separation of states and the absolute temporal power or authority of its government over the affairs of the territorial state (Hassan 2006, 67). Therefore, Lebedeva and Marchetti outline the features of the Westphalian state to include sovereignty, formal equality of states, indifference of international organizations to domestic matters, non-interference in internal affairs and the right to self defence (Lebedeva & Marchetti 2016, 3). The UN Charter of 1945 contains two of the principles, including that of sovereign equality and non-intervention in the domestic affairs of the state (Article 2(1) & (7), UN Charter 1945).

There are broadly two types of sovereignty, namely, external sovereignty and internal sovereignty. External sovereignty is addressed to states, powers or entities outside the beneficiary state to let the latter be. It restrains those outside powers from interfering in the internal affairs of the state. Otherwise known as negative sovereignty, it is contained in article 2 of the UN Charter 1945. Additionally, external sovereignty extends to, in the context of decolonization, the transformation of the prerequisites for statehood from empirical sovereignty to juridical sovereignty (Kreijen 2004, Caps 3 & 4) and the principle of *uti possidentis juris* (as you possess continue to possess). On the other hand, internal sovereignty is the objective features or qualities the state exhibits including those of territory, population, government and capacity to enter into legal relations (Montevideo Convention 1933, art. 1). Moreover, within the context of recognition, the European Union (EU) has added another layer of features, guidelines or conditions to be met by states intending to join the regional body. In December 1991, foreign ministers of the EU set the conditions to include: respect for human rights, guarantees for minorities, respect for inviolability of frontiers, acceptance of commitments to regional security and to settle by agreement all issues bordering on state succession (Hillier 1994, 114).

International law erects these protective devices in order to lay a solid foundation for the state and its government to be as responsible and responsive as possible to its citizens and to the international community. International legal order does not permit the existence of multiple or cacophonous voices. Therefore, the state, including those comprising federated units, is one with one voice. Out of the attributes of statehood enumerated by the Montevideo Convention, that of 'government' is outstanding. This is because, with the state as a mere abstraction, the government is the human agency that symbolizes state sovereignty and is saddled with the responsibility of carrying out its purposes. Incidentally, the quality of the government largely determines the wellbeing of the state, its citizens and its capacity to adequately handle its relations with the outside world. In other words, there is a proportional relationship between a good government and a responsible state and vice versa. If the government gets it right, the state is at peace with itself and its neighbours. Specifically, the state would be able to lay a foundation for the provision for at least the bare necessities of life for its citizens and maintain law and order within its domestic terrain, and contemporaneously meet its international obligations towards the international community relating to human rights protection and the peace and security of mankind. Otherwise, things may fall apart and slide into anarchy within its territory and such outcome may have negative consequences for the state's citizens and its capacity to fulfil its international obligations. Therefore, in order for the state to do well in this regard, it is invested with monopoly over means of violence which, as the need arises, it may deploy to maintain or sustain law and order in its territory. The responsibility and responsiveness of the state can make the difference as to whether it is ultimately successful or unsuccessful.

According to Chaudhry (2013, 168-170), determining the success or otherwise of a state necessarily entails the consideration of certain indices, including legitimacy, capacity, the worth of individual interest as opposed to collective interest, and the inclusivity or exclusivity of its constituent parts. The successful state is legitimate if it relies on consent rather than coercion, on authority as opposed to power (Chaudhry 2013, 170-172); it has capacity to provide collective goods including both first and second generation rights (the maintenance of security and order to health care and welfare) (Chaudhry 2013, 169); collective interests prevail over narrow individual

interests based on the rule of law; and it is socially, politically and economically inclusive (Chaudhry 2013, 169-70). Therefore, Brookst simply concludes that a state would be successful if it controls defined territories and populations, conduct diplomatic relations with other states, monopolizes legitimate violence within its territories, and is able to provide adequate social goods to their populations (Brookst 2005, 1160).

Thus, it is when a state fulfils these parameters that it is able to effectively maintain law and order within its territory and meet its international obligations regarding the peace and security of mankind. The next section examines the disorder in the state.

3. Disorder In The State

The reality of post-1945 international law has reduced states from exclusive subjects to primary subjects of international law (Lanovoy 2017, 563) as evidenced by the admission to the international plane of non-state actors (NSAs) such as international organizations and individuals (Reparation for injuries suffered in the service of the United Nations Case (1949) ICJ, 179). Although such states retain their dominant status as subjects of international law, NSAs have been able to demonstrate their presence therein, however peripheral or marginal (Lanovoy 2017, 563). Their emergence, aided by the wave or gale of globalization and human rights movement that swept across the nook and cranny of the global community, has been largely beneficial. Thus, NSAs such as multinational corporations (MNCs), other business firms, non-governmental organisations (NGOs) and philanthropic foundations fill functional spaces instead of territorial spaces (Chaudhry 2013, 176), take on key governance roles in the authoritative allocation of values for societies by developing, monitoring and even enforcing standards, rules and practices that regulate some aspects of social life, including business, human rights or labour across jurisdictions (Breslin & Nesadurai 2018, 188).

However, the activities of some other NSAs such as Violent Non-State Actors (VNSA) are inherently detrimental to the state. Citizens of many states have discovered to their chagrin that the state's promise of the good things of life, for example, democracy, freedom and good governance, etc, has become a ruse or pipe dream. Many of the states are weak, soft or failing (Kreijen 2004, Cap. 1). Their governments display poor response credentials and actually lack the capacity to adequately resolve the concerns of their citizens either proactively or reactively, present the state as a polity of economic and political zero sum game and a haven that is hostile to or intolerant of contrary views or alternatives. In fact, these governments demonstrate acute incapacity to create the enabling environment for their compatriots to access the necessities of life. For example, the incumbent Nigerian government demonstrates these traits through its poor delivery of goods and services, lack of commitment to the rule of law, disobedience of court orders, promotion of narrow interests over general interests, privileging of nepotism over nationalism contrary to constitutional provisions and lopsided law enforcement based on base politics and parochial considerations. Such dismal performance undermines the good will of the state and weakens its ability to attract the patriotism of its citizens. It is worse for developing states whose historical colonial past has actually triggered in the citizens poor sense of fidelity to nationhood and loyalty towards the primordial public than to the civic public (Ekeh 1975, 92-93) According to Chaudhry, states with such capacity gaps tend to develop functional holes that offer opportunities to non-state actors (Chaudhry 2013, 169).

But because the state lacks the statecraft, finesse or initiative to handle these challenges from its constituent parts, it simply resorts to brute force. The ensuing sour relationship between the state and its citizens drives the latter to the conviction of the inevitability of employing force to counter the state and seeking ways to undermine its monopoly over the means of violence or to dethrone the state from its exalted position as a monopolistic user of the means of legitimate violence by acquiring weapons of attacks and warfare. With such empowerment, aggrieved citizens aggregate and articulate their grievances through several media including riots, violent demonstrations and, in the extreme of cases, outright struggle for self-determination, as demonstrated by Indigenous People of Biafra (IPOB) in Nigeria, Ambazonia Defence Forces (ADF) in Cameroon and Catalan Independence Movement in Spain.

VNSAs, which include bandits, militias, rebels, revolutionaries, terrorists, etc, are inherently "illegitimate vis-à-vis the classical state system in part because the essence of being a state is having a monopoly on the legitimate use of violence" (Chaudhry 2013, 173). They confront and mercilessly mess up the state and, with their access to weapons of war, they embark on militancy, gangsterism, banditry and terrorism and in the process challenge state monopoly over means of violence. In many parts of Africa, VNSAs have so successfully wrestled or contested with the state that they have carved out spheres of influence or power for themselves in the territorial state. In the worst of cases, some of their activities violate rules of international criminal law, for example, the genocidal attacks by herders on targets in Benue State of Nigeria (Amnesty International 2018, 6). The activities of VNSAs such as Boko Haram insurgents and other violent actors throw the state or a part thereof into anarchy reminiscent of Hobbesian state of nature where life is short, nasty and brutish. Specifically, the consequent disorder regenerates further insecurity ranging from electoral violence, thuggery, armed banditry and it gets even complicated when they seek to sustain themselves and their illegal enterprises by embarking on mercantile activities such as kidnapping, illegal mining, oil bunkering, drugs trafficking and collection of tributes from their subjects. Their activities destabilize the state and create the regime of fear to torment their compatriots who, being forced to embark on illegal emigration, acquire the status of political and economic refugees in foreign land. Through such disorder in place, VNSAs undermine the capacity of the state to fulfil its domestic and international obligations particularly those relating to guaranteeing the peace and security of mankind.

Unfortunately, the international community keeps quiet, expecting the state to act for itself. But in many cases this may be impossible especially where high ranking government officials are behind the violent activities or at any rate tolerating them, for example, the genocide in Rwanda, xenophobic attacks in South Africa and herdsmen slaughter of farmers and everyone else in Benue.

The foregoing shows that VNSAs have come of age and are determined to use all means necessary to delegitimate the state and mess up the lives and property of their compatriots and create problems for others in far flung jurisdictions. The next section proffers some suggestions for reform.

4. Suggestions For Reform

The diagnoses of the incapacity of the state to assert itself and retain its status as the monopolist user of legitimate means of violence in the face of existential challenges posed by NSAs is unfortunate. Nevertheless, in order to help the state out of such disorder, the paper recommends certain steps below.

4.1 Economic Empowerment

It is true that the agitation of non-state actors is substantially founded on the inability of the state to provide the basic necessities of life. But many states cannot do this under the current international economic order. To the extent that the order does not help majority of the states to break even, it is deficient. This was actually the context of the sponsorship by developing states in the 1970s of the New International Economic Order (NIEO). However, because it was not and is still not supported by the critical actors on the world stage, especially the West, all proposals, recommendations or resolutions made thereunder have floundered. Thus, the developed states and the developing states remain as sharply divided over the right to development (which derives from NIEO) as they were in 1986 when the right was declared. Therefore, states need to build a consensus around the NIEO that will assist the developing states to improve their economic fortunes. Additionally, developing states need the assistance of the developed states in recovering assets plundered from the former but laundered in the latter by corrupt public officials. Corruption is one of the channels through which the much or little resources of the state, meant for human and national developmental purposes, is siphoned out of the state to the foreign-based private estates and bank accounts of corrupt public officials. States adopted the United Nations Convention against Corruption (UNCAC) 2003 as, inter alia, a tool to facilitate the recovery and repatriation of such assets but practical problems bordering on state sovereignty and legal

evidential proofs hinder victim states from recovering their assets. Therefore, custodial states (usually the developed states) need to genuinely use their municipal legal orders towards the end of proactively assisting states victims of economic despoliation to recover assets.

4.2 Democratic empowerment

It is necessary to couple the preceding suggestion with democratic empowerment of the citizens of states towards the end of their having real capacity to decide who gets into political office, when and how. The world-acclaimed way of accessing power and office is regular or periodic elections. But, in many developing states, incumbent presidents or Heads of States and other politicians manipulate the electoral process for their narrow interests to the detriment of the general public. The international community invests much interest, hope and resources in the electoral processes of many states but such efforts are wrongly targeted or channelled. The international community takes it for granted that it is enough to financially assist electoral agencies of states, rely on the promises offered by state agents of free, fair and credible elections or to send electoral observers to some polling booths on elections day. These are grossly inadequate because by and large elections are nonetheless rigged and candidates who lost declared winners. But the truth of the matter is that elections are manipulated towards a particular end not only on the day of elections but throughout the processes from the preparations to the declaration of winners and losers. The international community has done little or nothing to critically follow the trail leading to elections and the declaration and the installation of candidates. The international community need to be more involved in the democratic process so as to help these states and their citizens elect candidates that would form responsive and responsible governments capable of patriotically, pragmatically and creatively care for their people or meet their needs. Specifically, the input from or the involvement of the international community should be an active one that can assist citizens to easily ease off irresponsible and reckless rulership through the ballot box.

4.3 Legal intervention

There could be irreconcilable differences between the state and its constituent part, manifesting in armed struggles and the attendant loss of lives and property and the weakening of the capacity of the state to maintain law and order within its territory. Such circumstances can lead to refugee crises to the detriment of neighbouring economies and the inability of the state to prevent the commission of heinous crimes or atrocities injurious to the peace and security of mankind. Therefore, in order to avoid further damage or carnage, any constituent desirous of exiting the state on the basis of the principle of self-determination ought to be allowed to go. But current international law does not favour such peaceful step based on such principles as uti possidetis juris, sovereign equality and non-intervention in the internal affairs of states. These principles need to be revisited so that where a centrifugal force is able to demonstrate the sufficient interest to exit an existing state, the international community should assist it to do so. Otherwise, the current hostile attitude of international law to self-determination leaves only one option to the agitators: armed struggle. Unfortunately, this was what happened before Eritrea got independence from Ethiopia, and South Sudan from Sudan. The narrative needs to change. Essentially, we need to interrogate traditional beliefs or principles of non-intervention or non-interference especially where human lives, peace and security are involved. Fortunately, an aspect of current international law allows humanitarian intervention but the benchmark needs to be adjusted so that the gladiators do not get to the boiling point of breaking limbs and bones before humanitarian intervention is contemplated.

5. Conclusion

This paper examined the order of the state and challenges posed to its existence or legitimacy by non-state actors especially those that are of violent character, that is, VNSA. It observed that though the life of the state is boosted by both external and internal sovereignty, its internal dynamics, including its incapacity to provide for its citizens and the terribly poor governance strategies of its government create the enabling environment for non-state actors oppositional to the state.

Consequently, the citizens are disenchanted. But because the state cannot manage such disenchantment with maturity, it erroneously employs brute force to quell voices of dissent. And since citizens are not willing to submit to such intimidation, they strategize to confront the state with tools of violence and eventually succeed in dethroning the state as the lone monopolistic user of the means of violence in the land. Ultimately, the VNSA throws the state into a state of anarchy to the detriment of their compatriots, the state's capacity to responsibly maintain law and order in its territory and its ability to fulfil its international obligations relating to maintaining the peace and security of mankind.

Therefore, the paper suggests some economic, political and legal measures to re-empower the state to be responsible and be restored to its lost position as the monopolistic possessor of the means of legitimate violence within its territory.

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