

PROSECUTING SOMALIA PIRATES AS TERRORISTS

ODHIAMBO E.O.S.* , ONKWARE K.*, KASSILLY J.*, NTABO O. M.**

*Centre for Disaster Management & Humanitarian Assistance (CDMHA)
Masinde Muliro University of Science Technology, Kenya

**Dept. of Criminology and Social Work, Masinde Muliro University of
Science Technology, Kenya

This article starts from the assumption that piracy resembles terrorism in many aspects and attempts to support it through both a theoretical investigation and practical examples. The argument it makes is that Somali pirates should be prosecuted as terrorists. Moreover, it emphasizes the idea that for Somalia's neighboring countries and not only the implementation of such an approach consists in resorting to the antiterrorist conventions already in place. Thus, for example, Kenya Navy as a piracy-fighting agency should rely on these conventions to justify the capture and prosecution of pirates in Kenyan courts. In this respect, we emphasize the idea that only by resorting to an established international legal framework can Kenya identify the tools to counter pirates' actions within legal limits. Moreover, this should be paralleled by efforts towards rebuilding Somalia and its institutions if long-term solutions are to be envisaged in the eradication of piracy in the Indian Ocean. In conclusion, the article looks at the concepts of piracy, terrorism and development in the Horn of Africa, suggests that piracy is a form of Terrorism and, makes a series of recommendations.

Key words: piracy, terrorism, country development, Kenya Navy, Horn of Africa

1. INTRODUCTION

Somalia has had no recognised central government since 1991, when President Mohamed Siad Barre was overthrown. Instead, power is divided between various groups including the internationally backed Transitional Federal Institutions and other regional entities such as the breakaway Somaliland, Puntland and Jubaland. International involvement in the country has utterly failed to secure peace. In the past few years, piracy has been on the rise off the coast of Somalia. The International Maritime

Community has been hit by ship hi-jackings carried out by Somalia pirates, in the Western Indian Ocean waters off the East Coast of Africa. The Somalia pirates attack and hijack civilian ships carrying cargo through the Gulf of Aden, toward East Africa. The cargo is withheld and the crews are taken hostages until ransoms are paid by either the hostages' home country or the ship owners. The pirates routinely go unpunished; once they release the hostages, they simply return to their speed boats to plan yet another lucrative capture.

United Nations Convention on the Law of the Sea (UNCLOS), article 101 defines piracy as **(a)** any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed to *(i)* on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; *(ii)* against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; **(b)** any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; **(c)** any act of inciting or of intentionally facilitating an act described in (a) or (b) [1].

First descriptions of the practice of piracy are recorded in Homer's *The Iliad* and *The Odyssey*, and in Greek mythology. At the time, piracy was considered a reputable profession [2]. It was not until pirates began disrupting vital trade routes to the East and to Africa that cities began to form alliances against pirates [3]. Cicero dubbed pirates "hostis humani generi." [4] Contemporaneous laws drafted by Cicero and the Roman Senate construed piracy as both action against individuals and against the nation as a whole [5]. Pirates were viewed as an enemy of the entire human race and could be prosecuted under municipal law after capture, but the right to prosecute was common to all nations [6].

Terrorism is a component of Peace and Conflict Studies that analyses the

interactions between states and other actors in their engagement with each other over legitimacy issues; issues which in turn have a great bearing on development.

Terrorism and development processes have long been considered intertwined. Research shows that acts of terrorism are correlated with economic development and well-being. Persson&Tabellini [7] find empirical evidence consistent with the theory that different political regimes, terrorist or not, have a significant influence on fiscal policy, welfare and corruption. Moreover, Mulligan *et al.* [8] point out that, when economic and demographic variables are taken into account, types of states differ significantly in military spending, torture, execution, censorship, and religious regulation. Thus, the importance and relevance of academic research in the field of piracy, terrorism and development in the Horn of Africa, particularly, is clearly argued [9].

The factors linking piracy to modern-day terrorism and justifying this article's argument that today pirates should be fought just like terrorists are: **(a)** piracy, just like terrorism, embraces the use of terror by non-state actors as a means of coercion directed against states and their citizens; **(b)** piracy has historically been much more than sea-robbery [10]. In this context, piracy, whether perpetrated by private individuals or groups, is to be understood as a political tool

of governments that, by sponsoring such actions, aim to achieve a particular political goal. As such, pirate acts closely resemble terrorist acts; **(c)** pirate motivation throughout history has close resemblance with contemporary terrorist motivation. Similar to the pirates who waged war against a world that they viewed as unjust, today terrorists aim their acts against particular nations, in a war of non-state actors versus states; **(d)** the legal definitions of piracy and terrorism have evolved and have come to resemble one another.

Nowadays, piracy is seen less as sea robbery and more as maritime terrorism, as discussed below and as reflected in modern-day treaties such as the Geneva Convention, UNCLOS, etc. Worth mentioning, in this respect, is the following view: *“As the world has moved beyond the Cold War into a new century and new political realities, so too will piracy law adopt these realities within a new, unabashedly political, definition.”*[11] Therefore, it is crucial to understand how piracy, terrorism and development forces interact together in order to make the world a better place via peace. In this paper, we extend the frontier of knowledge in the field of piracy and terrorism by analyzing: **(1)** what is meant by piracy and terrorism; **(2)** the nature of piracy, terrorism and development in the Horn of Africa; **(3)** piracy as a form of terrorism, and **(4)** some recommendations concerning better ways of prosecuting pirates as terrorists.

2. METHODOLOGY

The sensitivity of this study required that primary and secondary researches be employed. Primary data involved interviewing captured pirates in Kenyan jails, former hostages of pirates, as well as selected individuals of Somalia origin found in the North Eastern province of Kenya bordering Somalia.

The investigation method employed consisted in snowballing, where one interviewee led to the other and so on until a sufficient number was reached. Thus, 180 people were interviewed and they expressed their views concerning the nature of piracy, terrorism in Somalia and its threat to Kenya.

Secondary data entailed a critical analysis of the existing literature on the subject under discussion. Consequently, the authors of this paper conducted an extensive library research on papers, reports, journals and books approaching similar topics. The result of their sampling was their division into the following major topics of discussion: piracy, terrorism and development. Thus, some of the findings of this research are presented below.

2.1. PIRACY, TERRORISM AND DEVELOPMENT IN THE HORN OF AFRICA

Dahama and Bhatnagar [12] quoted by MacMichael [13] define community development as the act of bringing forth the potential abilities and qualities of a group's members who live together in a common territory and who have an interdependent relationship with each other. This

definition can be traced back to Carl Taylor. The latter views community development as a method through which people in villages get involved in the improvement of their own economic and social conditions and, hence, become effective in working in national development programs [14]. Thus, as the United Nation argues, community development should be a process by which the efforts of the people themselves are united with those of the government authorities to improve the economic, social and cultural conditions of communities that are part of a nation and to enable them to fully contribute to a national program.

The conclusion to be drawn from the above definitions is the view that community development is more than just economic development. It is a process or effort of building communities on local level with emphasis on building the economy and forging and strengthening social issues [15]. Thus, community development involves moving from the “*traditional*” ways of living to more “*progressive*” ways of living [16]. The central idea here is that for community development to progress well there should be community organization. The nature of community organization will determine the principles by which that community guides itself and, as a result, the extent to which the same community is prone to piracy and terrorism.

Terrorism is, debatably, a humanitarian crisis. The humanitarian and economic costs of conflicts can be astronomical. For this reason, humanity

remains engaged in a struggle to prevent conflicts from occurring at the expense of development. This undertaking warrants a better understanding of the reasons underlying conflict emergence and of the means to be employed in preventing or lessening their burdens. A few researchers have discovered that geopolitical factors may affect conflict initiation, payoffs, and outcomes. Filson and Werner [17], for example, develop a formal model of conflict showing that democratic regimes are sensitive to the institutional constraints and costs of war. A careful study of Somalia would explain why there is sustained piracy and terrorism in the Horn of Africa courtesy of the Al Shabab.

2.2. PIRACY AS A FORM OF TERRORISM

Pirates could be more effectively prosecuted if they were treated as terrorists. As a result, a variety of anti-terrorist conventions could become available as basis for their criminal prosecution [18]. Some of these conventions are worth reminding: the Convention for the Suppression of Unlawful Seizure of Aircrafts; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf [19]; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; the International Convention against the Taking of Hostages;

the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; the International Convention for the Suppression of Terrorist Bombings [20].

These anti-terrorist conventions could either be relied upon directly, should the piracy act fit within the precise framework of one of these acts, or simply be used as jurisdictional and procedural models for the handling of pirates' captures and trials [21].

Piracy, as this article argues, constitutes terrorism on the high seas, and pirates should be treated as terrorists. It is likely that, at present, the activities of Somalia piracy fund Al Shabab terrorist activity. For example, pirate speed boats routinely seize weapons from victim vessels and may be involved in the resale and smuggling of such weapons to terrorist groups.

There are several reasons for which it is very difficult to fight pirates smuggling weapons at state level. Thus, pirate ships routinely fly so-called flags-of-convenience, these ships may be registered through another state's shipping company or the pirates themselves may come from a variety of different countries [22]. Thus, weapon smuggling pirates should be fought at international level, just like terrorists, and should be prosecuted on the basis of anti-terrorist international conventions [23].

Piracy often exists in support of terrorism and serves to fund terrorist groups. There have been situations

when pirates have gone after ships carrying valuable cargo; this suggests that pirates may be paying off port and government officials, who supply them with ships' manifests, detailing the ships' cargo, and who then suppress investigations into the captured ships and cargo [24]. Thus, pirates are able to sell the ship's cargo seized for handsome profit, which in turn may fund specific terrorist group.

From a theoretical standpoint, pirates and terrorists differ in one aspect: the latter seem to function on the basis of a particular political or religious ideology, while the former, at least in Somalia, seem purely driven by financial gains [25].

Pirates and terrorists, however, have many similarities. First, both piracy and terrorism are a form of organized crime, with powerful masterminds and numerous executioners. Therefore, going after the latter may not be enough. Instead, one may have to focus on the former. Thus, when going after the Somali pirates, Kenya needs to be able to go after the masterminds that the Somali warlords hide behind the lawlessness of mainland Somalia [26]. Customary international law does not provide capturing nations with the authority to enter Somalia's territory to arrest piracy masterminds and, while some of the 2008 U.N.S.C. resolutions go as far as to authorize capturing nations to enter Somali territorial waters and the Somali land, this option has not been exercised yet by any piracy-fighting nation. However, there are some anti-terrorist conventions that authorize

other nations to enter Somalia in pursuit of pirate/terrorist masterminds and that improve the existing and somewhat limited legal tools already available to nations fighting piracy [27].

Second, both piracy and terrorism exist at a supra-national level, perpetrators of pirate/terrorist crimes act on a private basis, beyond the sponsorship of any particular state, and their targets do not come solely from one particular state. The Somali pirates have gone after ships of many different nationalities so far, and the hostages have come from different countries. Terrorists, similarly, have operated against many different nations like Kenya, for example, and harmed nationals of many different states [28]. Therefore, in fighting pirates, similarly to fighting terrorists, nations should come together to form coalitions, and to rely on international law for tools that will provide them jurisdiction to go after and try captured pirates.

Third, both terrorists and pirates apparently thrive in regions where the reign of the law is little or nonexistent. Thus, while it seems that terrorists have found a safe place in the mountains of Afghanistan, the pirates have been thriving in the war-torn Somalia. Therefore, similar to the means employed to fight terrorism, countries may resort to international law to find authority to conduct air or land-based military initiatives against pirates [29]. Thus, since fighting pirates is not too far from fighting terrorists, Kenya needs to be able to treat pirates just like terrorists. In this respect, it is of utmost importance

to widen the range of the already available legal, military and political strategies to attain the aforementioned goal. One such strategy could consist in resorting to anti-terrorist conventions in order to justify for the apprehension of pirates on Somali land or for the prosecution of pirates in Kenya or other regional partners [30].

3. CONCLUSIONS

Modern-day piracy, currently thriving in Somalia and possibly spreading to other regions of the world, is a serious threat to all naval nations, to their ships and crew members, as well as to their cargo. Somalia pirates by the way they conduct their operations (*e.g.* going after prey regardless of its nationality), operate like terrorists. Therefore they can be viewed as a global threat to nations and as menace on all seas. Moreover, they pose an even more serious threat due to their possible association with other terrorist groups, or because their activities could fund such groups.

All countries, and especially those with a significant naval presence, should undertake serious efforts to fight piracy in Somalia, and to ensure that piracy does not re-emerge in another lawless region. Pirates need to be fought in a serious manner: by being captured, prosecuted and punished in the courts of piracy-fighting states. In order to accomplish these goals, piracy-fighting countries should equate piracy with terrorism, should rely on anti-terrorist conventions as a legal basis for the battle against piracy,

and should continue to cooperate in their struggle against pirates. In fact, piracy, exactly like terrorism, thrives in government-less states, war-torn regions, and impoverished areas. Thus, the best long-term solution against piracy may be the developed world's commitment to re-establish functioning order in the developing and failed states, like Somalia.

4. RECOMMENDATIONS

Prosecuting pirates as terrorists is an issue of concern both at national and international level. Therefore, based on the analysis carried out in this article, the authors believe that each state, starting from the correct identification and assessment of its own needs and strategic goals, should fight piracy as terrorism. As a result, as far as Kenya is concerned, a set of recommendations is deemed as of utmost importance to be highlighted at the end of this paper.

A. The greatest threats to the security of Kenyan citizens are diseases and crime. Helping the Kenyan government address these top concerns, especially on the North Eastern and Coast, will make Kenyans more likely to report suspicious activities and might encourage them to more aggressively oppose pirates and terrorist influences. Improving health care and criminal justice may thus do more to combat pirates and terrorism than policies that specifically seek to enhance "counter piracy", "counter terrorism" or "anti-terrorism" capacities [31]. With the massive amounts of counter-piracy and counter-terrorism-related funding

provided by the development partners like the U.S. some may argue that Kenyan officials may actually gain from having a continuing piracy and terrorist threat in the country [32]. A possible solution to that could reside in refocussing security assistance to areas, that offer fewer opportunities for patronage than direct payments for military hardware, such as increased governance and disciplined forces training.

B. Stimulating development and foreign aid that helps rural disaffected populations in Somalia and North Eastern, Coastal Kenya will not only earn good will and legitimacy for the Somalia Transitional Government and Kenya central government, but will also increase the price Pirates and terrorists need to pay to buy local assistance and acquiescence. Removing local tolerance of Al Shabab activities and preventing the emergence of safe havens requires persistent development and law enforcement efforts [33]. Somalia Transitional Government, the Kenyan government alongside with their development partners should increase economic development in Somalia and North Eastern Kenya and Coastal provinces. A sustained commitment to improving the economic status of Somalia and North Eastern and Coastal Kenyans is likely to produce two benefits: increased intelligence on piracy and terrorist activities, and increased economic aid which raises the cost of piracy and terrorists of providing social services as a buy-in mechanism for their dangerous goals.

C. One way to reach equilibrium is to focus more on improving the capacity of local business interests to develop their own security infrastructure [34]. Rather than focusing on building a security architecture that secures an unemployed, poor and restless populace prone to radical recruitment, more pragmatic aid policies might support local actors with an economic interest in imposing favorable security conditions. Providing incentives that promote effective, internally generated and sustainable counter piracy, counter terrorism measures tailored to unique local conditions is important particularly to Somalia, North Eastern and Coastal Kenya. North Eastern towns like Mandera and Coastal town like Kiunga in Kenya provide the best opportunity in the country for Al-Shabab and its associated movements to operate. Not as anarchic as Somalia, Northeastern and Coastal Kenya provides a permissive environment for Al-Shabab. Pirates and terrorists operating there may find a sympathetic population from which to draw support.

D. Institutional reforms in the Somalia Transitional Government and Kenya law enforcement sector and economic development on the Somalia and Kenyan North Eastern and Coast are the key to preventing the emergence of pirates and terrorist safe havens. Direct military assistance will have limited impact given the political constraints on the Somalia Transitional and Kenyan

government [35]. Instead, counter piracy and counter terrorism efforts should focus on reducing the structural injustices which alongside such factors as weak disciplined forces capacity and disgruntled citizens willing to tolerate the presence of foreign militants may make Somalia and Kenya a valuable operational haven for pirates and terrorists.

E. The problem in Somalia cannot be resolved unless the socio-economic and political issues are addressed.

Kenya Military should therefore act appropriately such as preventive military action [36]. Major maritime powers should enhance partnership with regional countries that are non-partisan on supporting different Somalia clans like Kenya to establish law enforcement and jurisdictional networks, so that pirates are apprehended as often as possible, and so that those who are captured are always prosecuted. The possibility of detained pirates' prosecution should be increased through jurisdictional agreements among maritime powers and regional countries, making at least one criminal forum available for all captured pirates [37]. Shipping companies themselves should contribute to the global fight against piracy, by contributing financially and logistically to maritime countries already engaged in the process of eradicating piracy.

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