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**‘War on Piracy’: the Conflation of Somali Piracy with
Terrorism in Discourse, Tactic and Law**

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ABSTRACT

This paper argues that since 2005, the global security discourse has confused maritime piracy off the Horn of Africa with terrorism. American and European policymakers and financiers have tapped a vulnerable public imaginary to exaggerate Somali pirates as 'maritime terrorists' linked to Shabaab and Al Qaeda, driving the militarization and legal obfuscation of counter-piracy operations. The discursive conflation of piracy and terrorism has thereby launched a tactical and legal War on Piracy that mirrors the War on Terror. This approach is pushing pirates to become more daring and dangerous in response. We conclude that the tactical extension from counter-terrorism to counter-piracy is unlikely to succeed, as it is insensitive to the origins, motives and modus operandi of Somali pirates. The paper proposes a shift from military to developmental responses to piracy, with an emphasis on respecting local institutions of law enforcement and governance in Somalia.

Keywords

Piracy, terrorism, Somalia.

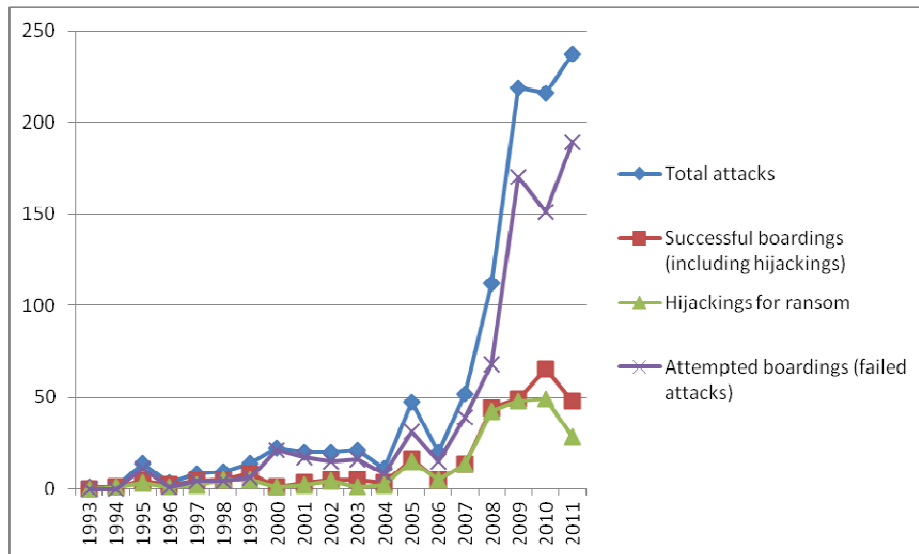
‘WAR ON PIRACY’¹

The conflation of Somali piracy with terrorism in discourse, tactic and law

1 Introduction

With the longest coastline in Africa and its status as a “failure among failed states,” Somalia is now the source of 62 percent of all pirate attacks worldwide.² The Gulf of Aden north of Somalia is a corridor of the Suez Canal route that links the Mediterranean Sea with the Arabian Sea. Pirate gangs have their pick among 20,000 ships that transit the Gulf of Aden annually, including those carrying more than 10 percent of the world’s oil supply. The incidence of Somali piracy rose gradually from 1991 to 2005, when it took off, and surged again in 2008-2009 (see Figure 1). Since then, pirates have pushed out from the Gulf of Aden deep into the Indian Ocean (see Figure 2).

FIGURE 1
Incidence of piracy, 1993-2011 (International Maritime Bureau)

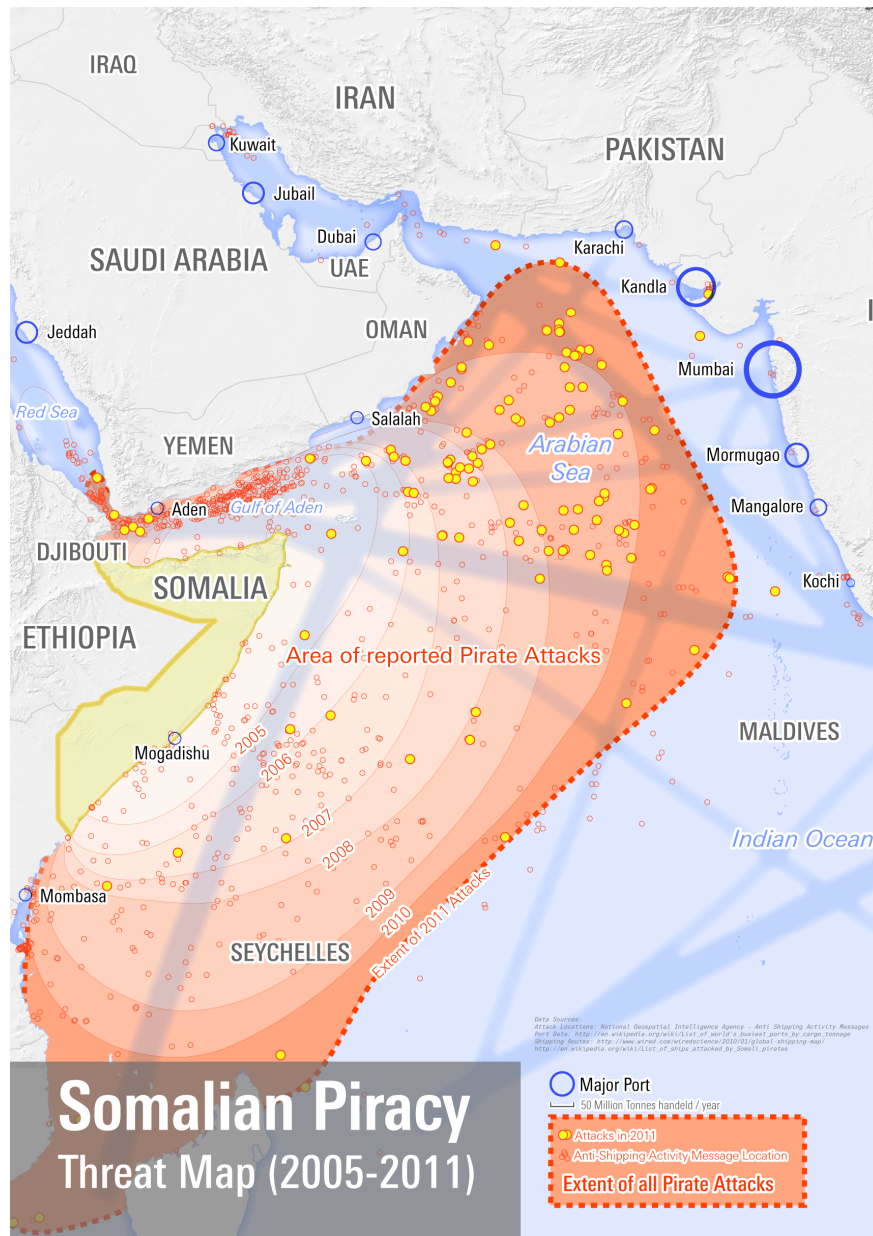


¹ We thank Margarita Petrova for useful comments.

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² Ken Menkhaus, “State Collapse in Somalia: Second Thoughts,” *Review of African Political Economy*, Vol. 30, No. 97 (2003), p. 407; International Maritime Bureau (IMB), *Piracy and Armed Robbery Against Ships, 2011 Report* (London: IMB, 2012), p. 6.

FIGURE 2
Geographical expansion of Somali piracy, January 2005-March 2011 (Geopolicity)

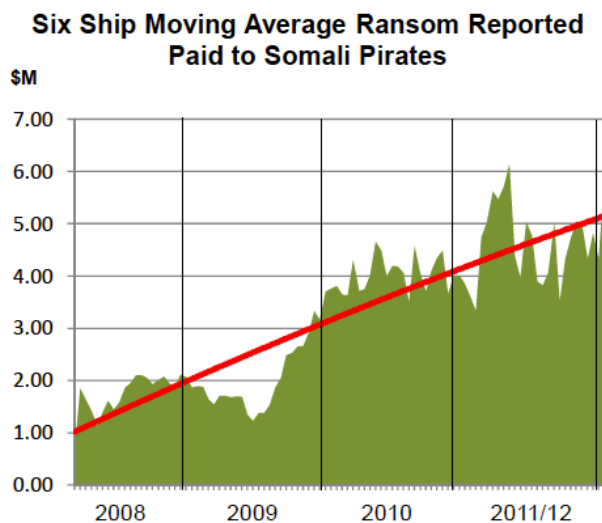


In 2010, the International Maritime Bureau attributed 49 hijackings, 16 boardings and 151 attempted boardings to Somali pirates. 1016 seafarers were held hostage for ransom.³ The vast majority of these hostages were released unharmed after shipowners delivered payment, but 14 were reported

³ International Maritime Bureau (IMB), *Piracy and Armed Robbery Against Ships, 2010 Report* (London: IMB, 2011), p. 8, pp. 11-12.

killed.⁴ Ransom payments to pirates in 2010 totaled US\$112.79 million.⁵ In 2011, hijackings fell to 28 and hostages fell to 470, but boardings rose to 20, attempted boardings rose to 189 and crew fatalities rose to 32.⁶ Despite fewer hijackings, gross pirate revenue also increased in 2011 to an estimated US\$160 million.⁷ The average ransom payment for a vessel and her crew today is US\$5 million and rising (see Figure 3). The highest ransom paid in 2011 was US\$13.5 million for the Greek oil tanker Irene.⁸ It is 80 percent more expensive for shipowners to avoid the Suez Canal and sail around the Cape of Good Hope than it is to take the risk and pay ransom if necessary.⁹ To buffer the additional risk, they take out high-premium insurance, streaming profits to marine insurers.

FIGURE 3
Six Ship Moving Average Ransom Reported Paid to Somali Pirates
(Compass Risk Management)



⁴ Compass Risk Management, "Somali Piracy Crew Fatalities, 2007-2012," last modified February 29, 2012, http://www.compass-rm.com/piracystatistics/Somali_Piracy_Fatalities.pdf.

⁵ "Brits arrested with '£2.2 million ransom for pirates'," *The Telegraph*, February 15, 2012, accessed April 13, 2012, <http://www.telegraph.co.uk/news/worldnews/piracy/8539542/Brits-arrested-in-Somalia-with-2.2-million-ransom-for-pirates.html>.

⁶ IMB, *2011 Report*, p. 6; Compass Risk Management, "Somali Piracy Crew Fatalities."

⁷ Anna Bowden and Shikha Basnet, "The Economic Cost of Somali Piracy," One Earth Future Foundation (2011), p. 2.

⁸ Andrew Mwangura, "VLCC Irene SL Freed by Pirates," *Somalia Report*, August 4, 2011, accessed April 13, 2012, http://www.somaliareport.com/index.php/post/477/VLCC_Irene_SL_Freed_By_Pirates.

⁹ Bridget Coggins, "The Pirate Den," *Foreign Policy*, No. 180 (2010), p. 87.

Somali piracy costs the international community US\$7 billion a year, including ransom payments, excess insurance premiums, rerouting ships around the Cape of Good Hope, naval operations, pirate prosecutions and the effect on littoral economies of the region.¹⁰ This figure does not consider the cost of piracy in terms of maritime trade destruction, which one estimate puts at US\$25 billion.¹¹

Piracy originated after state collapse in 1991, as foreign trawlers began illegally overfishing Somali waters and local fishermen organized to protect their livelihood. The first incidents of Somali piracy were sporadic hijackings or quasi-legal extortion of foreign vessels for fees to fish off the Somali coast.¹² Today, piracy organizations range from two fishermen in a skiff to gangs of several hundred employees, financed either by shareholders or an individual. Generally, the literature prefers the explanation that piracy is an economic crime of opportunity—that a young man rationally weighs risks and rewards when deciding among alternative livelihoods—to the notions that abject poverty or an immutable identity motivates maritime crime.¹³ Elliot Anderson, for example, contends that piracy is “the development of an illegal industry in response to an unjust global power dynamic,” namely the international community’s inability to self-regulate its exploitation of Somali fisheries.¹⁴ Ken Menkhaus qualifies this claim: “The Robin Hood narrative of Somali piracy as a grassroots form of coastal patrol against rapacious foreign fishing vessels is...only partly true, and at any rate has long since been overtaken by less noble motives.”¹⁵ Indeed, pirates today are professional operatives motivated largely by cash; those at the bottom of the piracy hierarchy earn roughly US\$9000 per ransom payment, which dwarfs annual gross domestic product per capita, less

¹⁰ Bowden and Basnet, “The Economic Cost of Somali Piracy,” p. 1.

¹¹ See Sami Bensassi and Inmaculada Martínez-Zarzoso, “How Costly is Modern Maritime Piracy for the International Community?” Munich Personal RePEc Archive Paper 27134, University Library of Munich (2010).

¹² For the history of Somali piracy, see Stig Jarle Hansen, “Piracy in the Greater Gulf of Aden: Myths, Misconceptions and Remedies,” Norwegian Institute for Urban and Regional Research (2009), pp. 19-33 and Jay Bahadur, *Deadly Waters: Inside the Hidden World of Somalia’s Pirates* (London: Profile, 2011), pp. 25-43.

¹³ For good, competing explanations of Somali piracy, see J. Peter Pham, “Putting Somali piracy in context,” *Journal of Contemporary African Studies*, Vol. 28, No. 3 (2010); Peter Chalk, “Piracy off the Horn of Africa: Scope, Dimensions, Causes and Responses,” *Brown Journal of World Affairs*, Vol. 16, No. 2 (2010); Sarah Percy and Anja Shortland, “The Business of Piracy in Somalia,” Discussion Paper 1033, DIW Berlin (2011); Abdi Ismail Samatar, Mark Lindberg, and Basil Mahayni, “The Dialectics of Piracy in Somalia: the rich versus the poor,” *Third World Quarterly*, Vol., 31, No. 8 (2010); and James Kraska, “Freakonomics of Maritime Piracy,” *Brown Journal of World Affairs*, Vol. 16, No. 2 (2010).

¹⁴ Elliot Anderson, “It’s a Pirate’s Life for Some,” *Indiana Journal of Global Legal Studies*, Vol. 17, No. 2 (2010), p. 319.

¹⁵ Ken Menkhaus, “Dangerous Waters,” *Survival: Global Politics and Strategy*, Vol. 51, No. 1 (2009), pp. 22-23.

than US\$300.¹⁶ Non-monetary benefits sometimes accrue to pirates, mainly a mythic social capital believed to buy the latest technology, the biggest houses and the prettiest wives.¹⁷ Of course, fragile state institutions like poor law enforcement are also to blame for the rise in piracy. J. Peter Pham writes, “While state collapse is neither necessary nor sufficient to cause an outbreak of maritime piracy, the spectacular failure of the Somali state has certainly facilitated the emergence of the phenomenon...so as to produce the ‘perfect storm’.”¹⁸

As will be discussed shortly, the international community has militarized the fight against Somali piracy. In the age of terror, this militarization has hinged on the framing of pirates as ‘maritime terrorists’, and governments have declared that pirates cooperate with militant Islamists in Somalia, subsuming counter-piracy under the global War on Terror. Over thirty nations’ naval forces have been deployed to Somali waters since the end of 2008 to deter pirates, but the incidence of attacks has more than doubled since then, and pirates have adopted more sophisticated technology in response, using more dangerous arms and motherships to sail further out to sea.¹⁹

The stage for this offshore drama is a complicated set of governance structures onshore. Civil war led to the collapse of the post-colonial regime of Siad Barre in 1991, paving the way for the most expensive humanitarian operation ever undertaken, followed by fourteen attempts by the international community to piece together a central government. Somalia currently tops every ranking of failed states, while clan-based sub-states like Somaliland and Puntland have declared autonomy and maintain relatively stable governments and economies (see Figure 4). Alongside the resurgence of piracy is the emergence of Harakat Ashabaab Al-Mujahideen (Shabaab), Somalia’s largest and deadliest terrorist organization, which has taken control of most of southern Somalia. From 2007, Shabaab fought daily on the streets of Mogadishu to unseat the internationally-backed Transitional Federal Government, which has generally controlled just a few blocks of the capital. In August 2011, Shabaab mysteriously withdrew from Mogadishu, but the Transitional Federal Government remains incapacitated. In February 2012, Shabaab and Al-Qaeda announced a provisional merger. The concurrent rise of maritime hijackings and terrorist violence in Somalia has created an impression of rampant criminality vulnerable to the conflation of piracy with terrorism.

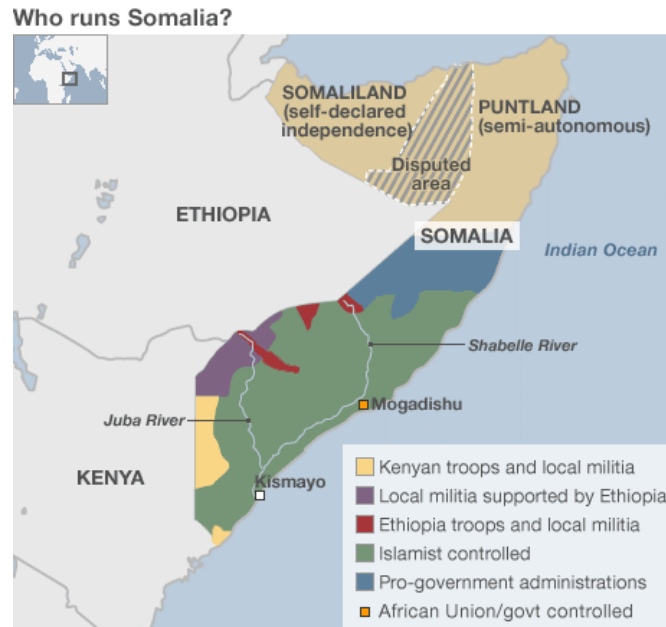
¹⁶ See Bahadur, *Deadly Waters*, pp. 223-233. Given elongating ransom negotiation periods and the growing complexity of the pirate value chain, the lowest ranked pirates (cooks and holders) probably earn about half of Bahadur’s generous estimate of US\$9000. The most recent estimate for Somali gross domestic product per capita is US\$220 (World Statistics Pocketbook, United Nations Statistics Division, 2009).

¹⁷ See Robyn Hunter, “Somali pirates living the high life,” BBC News, October 28, 2008, accessed April 24, 2012, <http://news.bbc.co.uk/2/hi/7650415.stm>.

¹⁸ Pham, “Putting Somali piracy in context,” p. 330.

¹⁹ According to the IMB’s annual reports, there were 112 attacks in 2008, 219 attacks in 2009, 216 attacks in 2010, and 237 attacks in 2011.

FIGURE 4
Political Map of 'Somalia', April 2012 (BBC News)



This paper aims to trace the conflation of Somali piracy and terrorism in the global security discourse from its origins through its precipitation to its contemporary manifestations in counter-piracy and counter-terrorism operations. It is couched in securitization theory, which focuses on the intersubjective processes of state and non-state actors presenting and justifying issues as existential threats requiring emergency measures outside the bounds of normal political procedure.²⁰ Thus, to the extent that the articulation of a security threat determines its graveness, security can be examined as “a discourse through which identities and threats are constituted rather than [purely] as an objective, material condition.”²¹ Discourse here is taken as an extended stretch of conversation, orientations and activities among policymakers, media and the public, within a loose but particular framework. And while constructivist in methodology, the paper is positivist in its insistence that discourse creates permissible conditions for existent policies and practices. Its methods include an extensive literature review; a discourse analysis of policy documents and media reports; eight semi-structured interviews with stakeholders in Kenya (see Appendix for list of informants); and a perusal of piracy case files at the Mombasa Law Courts, Kenya. The conflation of piracy and terrorism has been previously elaborated in terms of post-9/11 rhetoric

²⁰ See Barry Buzan, Ole Waever and Jaap de Wilde, *Security: A New Framework for Analysis* (Boulder: Lynne Rienner Publishers, 1998).

²¹ Barry Buzan and Lene Hansen, *The Evolution of International Security Studies* (Cambridge: Cambridge University Press, 2009), p. 243.

and, regionally, in Southeast Asia. This paper brings these arguments up to date and extends them for the first time to the Somali case, while offering an original analysis of how this discourse has shaped and sharpened Western instruments of war and law in the region to bring development in the Horn of Africa in line with the War on Terror.

Such security concerns are endogenous to human and international development. Security is often integral to the expansion of personal choices, the growth of communities and the provision of entitlements. Conversely, poor conditions of development like inter-group inequality or state ‘failure’ or ‘fragility’ are commonly believed sources of conflict.²² This is especially true in sub-Saharan Africa and since 9/11, when the security-development nexus intensified to compensate for the externalities of ungoverned spaces.²³ Wil Hout writes, “The reconstruction of ‘fragile states’ is the latest witness to the securitisation of development.”²⁴ In brief, the US and European Union fear that terrorist organizations, drug cartels and other such transnational criminal gangs will flourish wherever the rule of law is weak. But as Kees Biekhart, Claire Mainguy, Andrew Mold and Mansoob Murshed expound, “The danger resides in the way in which all social progress (i.e. ‘development’) may come to a halt if reactionary forces manage to convince us that new dangers are constantly on the horizons.”²⁵

With this in mind, the next section reviews the construction of the threat of ‘maritime terrorism’ after 9/11 but before the Somali piracy surge in 2005. Section 3 explains, traces and disputes the discursive conflation of Somali piracy with terrorism since the surge. Section 4 demonstrates the penetration of this discourse into contemporary military and legal strategies of counter-piracy. Finally, the conclusion presents a few alternative, desecuritized policy options to address Somali crime and governance.

²² See Frances Stewart, “Development and Security,” Working Paper 3, Centre for Research on Inequality, Human Security and Ethnicity, University of Oxford (2005).

²³ See Morten Bøås and Kathleen Jennings, “Insecurity and Development: The Rhetoric of the ‘Failed State’,” *European Journal of Development Research*, Vol.17, No. 3 (2005); Jonathan Di John, “The Concept, Causes and Consequences of Failed States: A Critical Review of the Literature and Agenda for Research with Specific Reference to Sub-Saharan Africa,” *European Journal of Development Research*, Vol. 22, No. 1 (2010); and Stephan Klingebiel, “Regional Security in Africa and the Role of External Support,” *European Journal of Development Research*, Vol. 17, No. 3 (2005).

²⁴ Wil Hout, “Between Security and Development: the European Union, governance and fragile states,” *Third World Quarterly*, Vol. 31, No. 1 (2010), p. 141.

²⁵ Kees Biekhart, Claire Mainguy, Andrew Mold and Mansoob Murshed, “Insecurity and Development: Regional Issues and Policies for an Interdependent World,” *European Journal of Development Research*, Vol. 17, No. 3 (2005), p. 358.

2 The post-9/11 conflation of piracy and terrorism, 2001-2005: a review

This section reviews the post-9/11 “rhetoric of ‘floating bombs’” that confused piracy worldwide with terrorism worldwide and challenges the credibility of this threat of ‘maritime terrorism’.²⁶

In international and customary law, piracy and terrorism are distinct crimes. The 1982 UN Convention on the Law of the Sea defines piracy as “acts of violence or detention, or any act of depredation, committed for private ends...on the high seas...outside the jurisdiction of any State.”²⁷ The International Maritime Organization broadens this definition to include “armed robbery against ships...within a State’s internal waters, archipelagic waters and territorial sea.”²⁸ Together, these definitions typify piracy as a private, non-political act. In contradistinction, while definitions of terrorism vary widely, terrorism is commonly the employment of violence against non-combatants for the manipulation of political or ideological ends.

There can be overlap between these definitions, of course, in “political piracy.”²⁹ The conflation of piracy and terrorism is rooted in the perceived threat of ‘maritime terrorism’, a label covering both (a) politically motivated attacks against vessels or structures at sea and (b) politically motivated attacks on land for which ships are used to transport arms or operatives.³⁰ Potential tactics include: “explosives-laden suicide boats...commercial vessels as launch platforms for missile attacks; underwater swimmers to infiltrate ports; unmanned underwater explosive delivery vehicles...[and underwater] mines.”³¹ Al-Qaeda has launched two iconic maritime suicide attacks from Yemen, one against the US destroyer *USS Cole* in 2000 in the port of Aden and the other against the French oil tanker *Limburg* in the Gulf of Aden in 2002.

By far the largest perceived threat is that terrorists will use vessels as ‘floating bombs’—using “merchant and cruise ships as kinetic weapons to ram another vessel, warship, port facility, or offshore platform”—causing mass-

²⁶ Jeremy Engels, “Floating Bombs Encircling Our Shores: Post-9/11 Rhetorics of Piracy and Terrorism,” *Cultural Studies ↔ Critical Methodologies*, Vol. 7, No. 3 (2007), p. 328.

²⁷ UN Convention on the Law of the Sea (1982), Article 101.

²⁸ International Maritime Organization, “Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships [Resolution A.1025(26)],” Annex, Section 2.1 (2009).

²⁹ Samuel Pyeatt Menefee, “Terrorism at Sea: The Historical Development of an International Legal Response,” in *Violence at sea: A review of terrorism, acts of war and piracy, and countermeasures to prevent terrorism*, ed. Brian A.H. Parritt (Paris: International Chamber of Commerce Publishing SA, 1986), p. 192, quoted in Adam Young and Mark Valencia, “Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility,” *Contemporary Southeast Asia*, Vol. 25, No. 2 (2003), p. 270.

³⁰ See Michael Greenberg et al., *Maritime Terrorism: Risk and Liability*, RAND Center for Terrorism Risk Management Policy (Santa Monica: RAND Corporation, 2006), pp. 9-28.

³¹ White House, “National Strategy for Maritime Security” (2005), p. 4.

casualty destruction.³² The root of this perception lies in 9/11. Barry Buzan and Lene Hansen explain, “One of the curious twists of 9/11 was the way it put emphasis on the vulnerability of [civil infrastructure] to [attack using] readily available civil technologies as weapons.”³³ In addition to planting a “nuclear or radiological dirty bomb...on a vessel in a major port,” terrorists can also leverage a vessel’s cargo—like chemicals, petroleum or liquefied natural gas—as explosive material.³⁴ Jeremy Engels writes that an oil tanker, if “exploded in a port such as Singapore, Boston, or Galveston, would wreak more havoc than the bombs dropped on Hiroshima and Nagasaki.”³⁵

Indeed, after 9/11, while US policymakers and media launched their War on Terror from the Khyber Pass to the Persian Gulf, from the Sahara to the southern Philippines, they also hypothesized the union of maritime pirates and terrorists, what Engels calls the “rhetoric of ‘floating bombs’.” The 2002 National Security Strategy of the United States argues, “Terrorism will be viewed in the same light as slavery, piracy, or genocide: behavior that no respectable government can condone or support and all must oppose.”³⁶ Engels claims this statement discursively grouped piracy with premeditated political violence. Southeast Asia, where maritime raiding had long been a legitimate part of trade and warfare, became the first suspect region between 2002 and 2005, especially as militant secessionists in Muslim areas of the Philippines and Indonesia adopted more violent maritime tactics. Adam Young and Mark Valencia write, “Since the events of 11 September 2001, the conflation of ‘piracy’ and ‘terrorism’ has become common in the mass media and government policy statements, both within and outside [Southeast Asia].”³⁷ For example, an October 2003 article in the *Economist* and a subsequent report in *Foreign Affairs* dwelled on the terrorist motivations behind the hijacking of the chemical tanker *Devi Madrim* off the coast of Sumatra, Indonesia—an allegation made initially by Aegis Defence Services, a London-based private military contractor, and later deemed hogwash by the International Maritime Bureau and the ship’s owner.³⁸ In July 2005, the Lloyd’s Joint War Committee (JWC), a London network of marine insurers, classified the Strait of Malacca as a war risk area because of the risk of piracy and maritime terrorism. The JWC based this rating on a controversial report it had commissioned to Aegis Defence Services. Under pressure, the JWC withdrew this classification in August 2006.

The withdrawal of the Strait of Malacca as a war risk area signals that despite the fear that pervades the discourse of maritime terrorism, most analysts concur it constitutes a less than credible threat. Peter Chalk of the

³² Ibid., p. 4.

³³ Buzan and Hansen, *Evolution of International Security Studies*, p. 239-240.

³⁴ White House, “National Strategy for Maritime Security,” p. 24.

³⁵ Engels, “Floating Bombs,” p. 331.

³⁶ White House, “National Security Strategy of the United States” (2002), p. 6.

³⁷ Young and Valencia, “Conflation of Piracy and Terrorism in Southeast Asia,” p. 269.

³⁸ Martin Murphy, *Contemporary Piracy and Maritime Terrorism*, Adelphi Paper 388 (London: Routledge/International Institute of Strategic Studies, 2007), pp. 7-8.

RAND Corporation claims, “The world’s oceans have not been a major locus of terrorist activity,” and calculates from the RAND Terrorism Database that only two percent of all international terrorist attacks over the past thirty years have been against maritime targets.³⁹ Naval scholar Martin Murphy asserts, “Maritime terrorism has posed a threat to a very modest number of countries” and that “these threats have been largely peripheral.”⁴⁰ Though acknowledging that “one cannot completely discount the rather widespread fears of much worse to come,” Bjørn Møller of the Danish Institute for International Studies judges that “maritime terrorism has so far been a very minor problem.” He adds that the worst case scenarios are “highly unlikely” and that some well-publicized maritime attacks have had “rather insignificant consequences.”⁴¹

There are two reasons for the “relative paucity” of maritime terrorism: (1) logistical challenges and (2) limited public resonance. First, as Chalk notes, “In a world of finite human and material assets, the costs and unpredictability associated with expanding to the maritime realm have typically trumped any potential benefits that might be garnered from initiating such a change in operational direction.” Chalk refers here to the “mariner skills” and “specialist capabilities” necessary to plan and execute an attack at sea, for terrorists who are “inherently conservative when it comes to choosing attack modalities” due to limited resources and “ceilings in operational finance.”⁴² Murphy elaborates, “The sinking of a large cruise ship or ferry, killing thousands of Westerners...or the execution of multiple and harmful attacks on the world’s maritime transport system are all scenarios that are less easily brought about than equivalent events on land.” Second, an attack at sea is unlikely to elicit as much publicity as an attack on land, making maritime terrorism less attractive and less productive for terrorists. While admitting some maritime attacks have “briefly caught Western media attention,” Murphy states, “As a rule, when attacks have been mounted at sea, the results in terms of publicity have been limited.”⁴³

Maritime terrorism has witnessed a “modest yet highly discernable spike” in the past decade.⁴⁴ But Murphy insists, “It is important not to exaggerate the threat from maritime terrorism.” Referencing UK Admiral Sir Alan West’s assertion that maritime terrorism is a “clear and present danger” that could “potentially cripple global trade,” Murphy calls this “surely an overestimation of the threat.” He warns,

³⁹ Peter Chalk, *The Maritime Dimension of International Security: Terrorism, Piracy, and Challenges for the United States* (Santa Monica: RAND Corporation, 2008), p. 19.

⁴⁰ Murphy, *Contemporary Piracy and Maritime Terrorism*, p. 70.

⁴¹ Bjørn Møller, “Piracy, Maritime Terrorism and Naval Strategy,” Danish Institute for International Studies (2009), pp. 23-25.

⁴² Chalk, *Maritime Dimension of International Security*, pp. 19-20.

⁴³ Murphy, *Contemporary Piracy and Maritime Terrorism*, p. 69.

⁴⁴ Chalk, *Maritime Dimension of International Security*, p. 19.

Discussion of maritime terrorism in the media, the academy and intelligence agencies can suffer from circularity, whereby analysts and commentators discuss possible scenarios, terrorists listen, analysts then pick up chatter that reflects their speculations, and take it to be proof that their suspicions were correct.⁴⁵

Thus, the discursive “chatter” about pirates conducting terrorist attacks, though unwarranted, gathered speed after 9/11, crystallizing anxiety into policies like those toward Southeast Asia.

But if the threat were incredible, why would piracy be exaggerated as terrorism? Adam Young and Mark Valencia suggest that, since 9/11, maritime powers have inflated the threat of maritime terrorism to exert pressure on weaker states to sign the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention), and use the case of Southeast Asia to illustrate their point. Largely drafted in response to the Palestinian Liberation Front’s hijacking of the *Achille Lauro* cruise ship in 1985, the SUA Convention extends state jurisdiction over international waters and mandates cooperation with maritime terrorism prosecutions of other States Parties. More recently, it has been promoted as a counter-piracy measure. Young and Valencia deduce that the US and other maritime powers are hoping for the SUA to get them a foot in the door in terms of extraterritorial jurisdiction over acts of terrorism. The states of Southeast Asia, including Malaysia and Indonesia, have largely declined accession to these conventions, since they threaten the sovereignty of transitional states and states with disputed maritime boundaries. “However,” Young and Valencia contend, “if ‘piracy’ and ‘terrorism’ are fused into a general threat to maritime security, developing countries may find outside ‘help’ easier to accept and to ‘sell’ to their domestic polity.” So, the authors continue, “It may be in the United States’ interest to conflate piracy and terrorism to persuade reluctant developing countries to assist maritime powers pursue pirates and terrorists in their territorial and archipelagic waters.”⁴⁶

Importantly, while pirates have been analogized to terrorists since 9/11, initially it was the other way around. Paul Silverstein demonstrates how in the immediate wake of 9/11, pundits deemed the Barbary ‘pirates’ of Ottoman North Africa the “historical forebears of twenty-first-century Islamist militants, as ‘terrorists by another name’.”⁴⁷ The First Barbary War—begun with the dispatch of the US Marines to Tripoli in 1801—even inspired Captain Glenn Voelz, a history professor at West Point, to wonder if “we are still fighting the same war” two hundred years later.⁴⁸ Silverstein writes, “The Barbary Analogy has been a potent arm in the ideological battle that has paralleled the...war on

⁴⁵ Murphy, *Contemporary Piracy and Maritime Terrorism*, p. 71.

⁴⁶ Young and Valencia, “Conflation of Piracy and Terrorism in Southeast Asia,” pp. 276-277.

⁴⁷ Paul Silverstein, “The New Barbarians: Piracy and Terrorism on the North African Frontier,” *The New Centennial Review*, Vol. 5, No. 1 (2005), p. 180.

⁴⁸ Richard Leiby, “Terrorists by Another Name,” *The Washington Post*, October 15, 2001, quoted in Silverstein, “New Barbarians,” p. 180.

terror...The equation of piracy and terrorism has outlined a wider field of international engagement that has further reified the geographic and cultural poles of a putative 'clash of civilization'.⁴⁹ The Barbary Analogy was made before Somali piracy ever grabbed the headlines, but its field of engagement has widened since 2005 to spin contemporary maritime crime off the Horn of Africa as a trend of global jihad.

3 The discursive conflation of piracy and terrorism in Somalia, 2005-2012

Given the discursive construction of the global threat of 'maritime terrorism' since 9/11, as discussed in Section 2, this section (1) traces the extension of this rhetoric of 'floating bombs' to Somalia and (2) refutes the claim that Somali piracy and terrorism are linked or identical.

The case of Somalia

After Somali piracy surged early in 2005, the administration of US President George W. Bush issued the National Strategy for Maritime Security (NSMS) in September the same year. The opening lines of the NSMS read, "The safety and economic security of the United States depends upon the secure use of the world's oceans. Since the attacks of September 11, 2001, the Federal government has reviewed and strengthened all of its strategies to combat the evolving threat in the War on Terrorism."⁵⁰ Thus, in a single turn, contemporary maritime security fell under the ambit of the War on Terror. The NSMS makes a further conjecture to link piracy with terrorism: it fears that "the capabilities to board and commandeer large underway vessels—demonstrated in numerous piracy incidents—could also be employed to facilitate terrorist acts."⁵¹ The Bush administration followed suit with the Policy for the Repression of Piracy and Other Criminal Acts of Violence at Sea in 2007, which interprets piracy as a terrorist threat. This document outlines a single policy to address both piracy "for private ends" and "criminal and terrorist activities not defined as piracy." It justifies this grouping by saying, "The combination of illicit activity and violence at sea might...be associated with...terrorism."⁵² Lending credence to Young and Valencia's analysis on Southeast Asia, the document proposes the SUA Convention as the relevant legal standard for both crimes.

The Bush administration seized advantage of the dramatic rise in piracy off the Horn of Africa to press its regional counter-terrorism ambitions, which were live from October 2002 with the launch of Operation Enduring Freedom—Horn of Africa (OEF-HOA), part of the US war in Afghanistan.

⁴⁹ Silverstein, "New Barbarians," p. 183.

⁵⁰ White House, "National Strategy for Maritime Security," p. ii.

⁵¹ Ibid., p. 5.

⁵² White House, "Policy for the Repression of Piracy and Other Criminal Acts of Violence at Sea" (2007).

By February 2006, the CIA was funneling US\$100,000 a month to an alliance of warlords (The Alliance for the Restoration of Peace and Counter-Terrorism) to crush the Islamic Courts Union (ICU), a locally popular network of sharia courts many analysts have judged moderate and peaceful.⁵³ Pushed to defend itself, the ICU militarized, defeated the warlords and assumed control of Mogadishu in June 2006. OEF-HOA then aided an Ethiopian military intervention to eliminate ICU rule in December 2006 and January 2007.⁵⁴ The US contributed to this war because it was aware and afraid of affiliations some members of the ICU might have had with Al-Qaeda, though such allegations were largely unsubstantiated.⁵⁵ While there was proof that Somalia played a minor role in Al-Qaeda operations (i.e., as a transit point for arms and operatives), by itself this proof never sufficed to justify direct military intervention, as the Bush administration had debated internally as early as 2002.⁵⁶ Effectively, the Bush administration exploited the coincidence of militant Islamism and maritime crime in the Horn of Africa from 2005, exaggerating piracy as a trend of global jihad to advance its counter-terrorism agenda for the region.

This strategy worked because in the Western social imaginary, reports, photographs and YouTube videos of Somali pirates taking sailors hostage are difficult to differentiate from those of terrorists taking passengers, journalists and aid workers hostage. Armed Muslim youth, in an environment of lawlessness, conflict and poverty, are kidnapping international targets on the high seas with automatic weapons and rocket-propelled grenades. Incidents of kidnapping for ransom *look* like acts of terrorism, which are “choreographed...to achieve maximum publicity” and often involve “holding hostages whose survival then depends on meeting certain demands.”⁵⁷ The assumed parallelism becomes dominant because “cognitively and affectively, it is easier to act on old, concrete fears than on new, untested hopes.”⁵⁸ For the public, “terrorism” even becomes a “term of comfort,” according to Engels, because “in the midst of murky...threats, terrorist violence [is] comfortable

⁵³ See Mark Mazzetti, “Efforts by CIA Fail in Somalia, Officials Charge,” *The New York Times*, June 8, 2006, accessed April 25, 2012, <http://www.nytimes.com/2006/06/08/world/africa/08intel.html?pagewanted=all>; “Fall of Mogadishu leaves US policy in ruins,” *The Guardian*, June 10, 2006, accessed April 25, 2012, <http://www.guardian.co.uk/world/2006/jun/10/rorycarroll.oliverburkeman?INTCMP=SRCH>; Ted Dagne, “Somalia: Current Conditions and Prospects for a Lasting Peace,” US Congressional Research Service (2011), pp. 18-21; International Crisis Group, “Can the Somali Crisis Be Contained?” Africa Report No. 116 (2006).

⁵⁴ Dagne, “Somalia,” pp. 17-18.

⁵⁵ Ibid.

⁵⁶ Ken Menkhaus, *Somalia: State Collapse and the Threat of Terrorism*, Adelphi Paper 364 (London, Routledge/International Institute of Strategic Studies, 2004), p. 68.

⁵⁷ Brian M. Jenkins, “Terrorism and Kidnapping,” RAND Corporation Paper Series (1974), p. 3.

⁵⁸ Jennifer Mitzen, “Ontological Security in World Politics: State Identity and the Security Dilemma,” *European Journal of International Relations*, Vol. 12, No. 3 (2006), pp. 362-363.

because it...[can] be defeated by the American military.”⁵⁹ The public fascination with hostage situations, rooted in the imaginary of terrorism and nurtured by the media, further confuses the general perception of the pirate problem, as it seems to have all the right ingredients for militant Islamism. Murphy articulates the potential challenge facing the US and its allies:

If al-Shabab were to gain access to the northern coast of Puntland, then its terrorists would certainly be better positioned to attack international shipping using pirate tactics. The situation would become even worse if Yemen, already politically fragile, also fell under Islamist sway...[putting] both sides of the Gulf of Aden...in hostile hands...Ceding control of the Horn of Africa and exposing shipping and naval vessels to greater risk would be a nightmare in waiting for Washington and many of its allies.⁶⁰

Of course, while this “nightmare” scenario is unlikely, it is invoked to generate fear. Short of the worst case scenario, in which Al-Qaeda and Somali pirates combine forces to wreak global havoc, pirates are rumored to have operational and financial interactions with militant Islamists. Jay Bahadur, a journalist of Somali piracy, writes, “In a world dominated by the discourse of the war on terror, various policy analysts, journalists, and politicians pushing particular agendas inevitably began to speculate about pirate cash ending up in the hands of terrorists.”⁶¹ Some of these claims are elaborate: the London-based *Jane’s Terrorism and Security Monitor* reported in 2008 that pirates were transporting arms and fighters for Shabaab in return for training and weapons, and that the two forces had trained together in naval tactics.⁶² Reports abound of pirates paying 20-50 percent of ransom money to Shabaab.⁶³ The claim goes that because Shabaab has expanded its domain to include pirate ports like Kismayo since August 2008 and Xarardheere since December 2010, pirates must be paying commission to Shabaab in arms, cash or services.⁶⁴ Not one of these allegations has been proven, and they are disputed below.

Among the most vocal proponents of the pirate-jihadi nexus are marine insurers. If terrorists endanger certain waters, underwriters can categorize these as areas of enhanced risk and multiply insurance rates up to 300 fold for ships sailing those waters. Additionally, kidnap and ransom insurance has multiplied ten fold, cargo insurance premiums in war risk areas have risen by between

⁵⁹ Engels, “Floating Bombs,” pp. 339-340.

⁶⁰ Martin Murphy, “Dire Straits: Taking on Somali Pirates,” *World Affairs* (July/August 2010), p. 96.

⁶¹ Bahadur, *Deadly Waters*, p. 48.

⁶² Martin Plaut, “Pirates ‘Working With Terrorists,’” BBC News, November 19, 2008, accessed April 25, 2012, <http://news.bbc.co.uk/2/hi/7737375.stm>.

⁶³ Mohamed Ibrahim, “Somalia and global terrorism: a growing connection?” *Journal of Contemporary African Studies*, Vol. 28, No. 3 (2010), pp. 290-291.

⁶⁴ A typical footnote to such statements will cite an unnamed informant, or read as follows: “The [cited] report includes only one explicit source to support its allegations that there is a link between piracy and the radical Al Shebab group in Somalia, a source that failed to fully corroborate its assertion” (Hansen, “Piracy in the Greater Gulf of Aden,” p. 15).

US\$25 and US\$100 per container, and hull insurance has doubled due to piracy.⁶⁵

As early as 2004, Lloyd's of London, the world's largest and oldest marine insurer, published articles in its newsletter with the following titles:

Maritime terrorism is a ticking timebomb: The global supply chain is in jeopardy. Pirates have evolved from clusters of commercial plunderers to a sinister and organised force that relishes the prospect of toying with the levers of the world economy.

We ignore threats at our peril: We may think terrorist attacks are unlikely, but, if they happen, they will be devastating—and piracy is a real threat.⁶⁶

With such melodramatic language, insurers inject panic into the piracy discourse “to produce knowledge of risk by objectifying everything into degrees of chance of harm,” because they know their “rates ebb and flow to the degree that a perception of danger is rhetorically constructed.”⁶⁷ In March 2006, Lloyd's decreed that pirate attacks and terrorist attacks would be covered by a single scheme for policyholders because of “difficulty in distinguishing” between the two.⁶⁸ The Lloyd's Joint War Committee then designated the Gulf of Aden a war risk area in May 2008. In April 2009, Lord Peter Levene, then Lloyd's chairman, announced, “Nearly all of the ships pirated this year are insured within Lloyd's either by hull underwriters, hull war underwriters, kidnap and ransom underwriters or through reinsurance. And the peril of piracy, traditionally covered by the hull policy, is currently being moved into the war policy.”⁶⁹ Due to these shifts, marine insurers earned US\$635 million in 2011 from piracy-related insurance premiums, dwarfing the US\$160 million earned by Somali pirates last year.⁷⁰ This makes Lloyd's the biggest profiteer of Somali piracy and the party most invested in the propagation of the pirate-jihadi nexus.

The conflation of piracy and terrorism in Somalia—thus fueled by certain political and financial interests, the remote threat of Al-Qaeda commandeering pirate ships, and a vulnerable public imaginary—has fed a media circus. A

⁶⁵ Anna Bowden, “The Economic Cost of Maritime Piracy,” One Earth Future Foundation (2010), pp. 10-11.

⁶⁶ Dominick Armstrong, “Maritime terrorism is a ticking timebomb,” *Lloyd's List*, June 22, 2004 and David Osler, “We ignore threats at our peril,” *Lloyd's List*, February 16, 2005, quoted in Engels, “Floating Bombs,” pp. 333-334.

⁶⁷ Richard Victor Ericson, Aaron Doyle and Dean Barry, *Insurance as Governance* (Toronto: University of Toronto Press, 2003), p. 5, quoted in Engels, “Floating Bombs,” p. 333; Engels, “Floating Bombs,” p. 334.

⁶⁸ “New Lloyd's Policy Wording Covers Terrorist ‘Piracy,’” *Insurance Journal*, March 20, 2006, accessed April 25, 2012, <http://www.insurancejournal.com/news/international/2006/03/20/66594.htm>.

⁶⁹ Lord Peter Levene, “Today's Piracy Problem,” Lloyd's Press Centre, April 27, 2009, accessed April 25, 2012, http://www.lloyds.com/Lloyds/Press-Centre/Speeches/2009/04/Todays_piracy_problem.

⁷⁰ Bowden and Basnet, “The Economic Cost of Somali Piracy,” pp. 11-16.

small sampling of titles of implicated newspaper articles and books: “Warnings from Al Qaeda Stir Fear that Terrorists May Attack Oil Tankers”; “The Next 9/11 Could Happen at Sea”; “Ocean Terrorists”; *Terror on the Seas: True Tales of Modern-Day Pirates*; “Somali Pirates Form Unholy Alliance with Islamists”; *Pirate State: Inside Somalia’s Terrorism at Sea*; “Jihad and Piracy in Somalia.”

Under conditions of uncertainty, the repeated invocation of these possible connections, however unwitting, has achieved a critical mass that makes the Somali pirate-jihadi nexus real and amplifies its threat. This process is parallel (though substantively different) to the production of the terrorist threat. Barry Buzan and Lene Hansen explain, “The constitution of terrorist profiles is...always prophetic, seeking to identify the future threat, and thereby ultimately producing its own subject.”⁷¹ It now appears that Somali piracy can only mean something or merit public attention within the terror discourse.⁷²

Defusing the ‘floating bombs’ fallacy

Like the global threat of maritime terrorism, as discussed in Section 2, the discursive conflation of Somali pirates and terrorists is also less than credible. There are distinct signs of rivalry, rather than cooperation, between pirates and militants in Somalia. When the Islamic Courts Union came to power in Mogadishu in 2006, inheriting a surge in piracy, it publicly declared piracy haram and ended all maritime crime, taking special efforts to crack down on pirate bases and threatening pirates with punishment under sharia. On ICU watch in the last six months of 2006, there was only one reported hijacking, of the vessel *Veesham I*, and the ICU tracked it down within a week and rescued it.⁷³

More recently, since Hizbul Islam, a splinter group of the ICU, conquered the pirate ports of Xarardheere and Hobyo in April 2010 (and Shabaab later absorbed them), there have been conflicting reports about the relationship between pirates and militants in the surrounding region. Some report a deal whereby Shabaab earns a 20-50 percent commission for vessels held and ransomed at Xarardheere, while others report such a deal went sour when the

⁷¹ Buzan and Hansen, *Evolution of International Security Studies*, p. 249.

⁷² Engels, “Floating Bombs,” p. 331.

⁷³ International Maritime Bureau (IMB), *Piracy and Armed Robbery Against Ships*, 2006 Report (London: IMB, 2007), pp. 11-12. Three unsuccessful attacks were recorded, but only after late November, when hostilities began between the ICU and the Ethiopian military. J. Peter Pham points out that the owner of the *Veesham I* was a financier of Somali Islamism, and so the rescue “had less to do with any principled opposition to piracy” (Pham, “Putting Somali piracy in context,” p. 329). However, the ICU’s proclamations and the 75 percent drop in attacks compared to the first six months of the year speak to the contrary.

two parties could not agree on a cut.⁷⁴ Some outlets report that Shabaab leader Sheikh Hassan Afrah—of the same sub-clan (Suleiman) as the majority of Xarardheere pirates—is responsible for receiving Shabaab’s cut from pirate ransoms and troubleshooting frictions between the two parties.⁷⁵ And yet other sources report that Sheikh Yusuf Sheikh Isse, Shabaab’s governor for the region, purged its towns of pirate activities.⁷⁶ Interviews with stakeholders in Kenya confirm and dispel some rumors about cooperation between Shabaab and the pirates of Xarardheere. Andrew Mwangura, a renowned pirate negotiator and founder of the Seafarers’ Assistance Programme in Mombasa, Kenya, believes that “a pact was made last year [2010] between the Xarardheere [pirate] group and Al-Shabaab” that involved a percentage cut, but that the pirates only agreed in order “to cool them [Shabaab] down.” Mwangura says the sustainability of this pact is “impossible” and that it “won’t hold water,” primarily because pirates do not want to confront terrorist financing laws, which would proscribe the payment of ransoms to pirates if they were Shabaab affiliates.⁷⁷ As one Somalia analyst puts it, for pirates, “giving money to Al-Shabaab...[is] simply a very, very bad business decision.”⁷⁸ Aden Maow Abdi of the UK Department for International Development (DFID) suggests Shabaab may be extracting “access fees” from pirates in Xarardheere as it does from humanitarian agencies as a “cost of doing business,” especially since Shabaab is “under financial pressure.”⁷⁹ Though terrorist financing laws may disagree, there is a clear distinction between paying, say, a port toll and commissioning suicide bombers, or between extracting such a toll and commissioning pirate ships to sea. According to Mwangura, there is further proof that pirates have set sail from southern ports controlled by Shabaab, but anchored hijacked vessels further north in Puntland while ransoms were negotiated, to avoid Shabaab’s port commissions and sharia law.⁸⁰ In sum, it appears that Shabaab, under financial pressure, coerced pirates of Xarardheere into a financial arrangement that is not buoyant in the long term, and has probably already sunk. Lauren Ploch of the Congressional Research Service concludes, “US Navy officials have not

⁷⁴ “Somali rebels agree ransom deal with pirate leaders,” Reuters Africa, February 22, 2011, accessed April 25, 2012, <http://af.reuters.com/article/topNews/idAFJ0E71L05920110222>; Mohammed Omar Hussein, “Rift comes in between Al-Shabab and Somali Pirates,” Somaliweyn, February 19, 2011, accessed April 2, 2012, http://www.somaliweyn.org/pages/news/Feb_11/19Feb15.html; Bahadur, *Deadly Waters*, pp. 49-50.

⁷⁵ Dahir Abdulle Alasow, “Al-Qaeda foreign operatives dominate Al-Shabaab executive council,” *Suna Times*, May 5, 2011, accessed April 25, 2012, <http://www.sunatimes.com/view.php?id=392>.

⁷⁶ “Al Shabaab claims pirates purged from Harardhere,” Shabelle Media Network, May 22, 2011, accessed April 2, 2012, <http://www.shabelle.net/article.php?id=6815>.

⁷⁷ Interview with Andrew Mwangura, July 31, 2011, Mombasa, Kenya.

⁷⁸ Bahadur, *Deadly Waters*, p. 51.

⁷⁹ Interview with Aden Maow Abdi, July 15, 2011, Nairobi, Kenya.

⁸⁰ Interview with Mwangura.

found that fighters associated with Al Shabaab have financial ties to piracy at present, but the potential for personnel linkages may remain.”⁸¹

In the only two instances of large-sample research with Somali pirates, interviewees have not presented ideological or political motivations for their crimes and have denied affiliation with militant Islamist groups. Bahadur writes, “During my months in Puntland, I questioned every pirate I met about Islamist ties, and received the same vehement denials from every one.”⁸² Karine Hamilton writes, “While conducting research in Kenya where over 100 Somalis accused of piracy are currently imprisoned and undergoing prosecution, I found general consensus that Somali piracy was unrelated to Islamic politics and was instead strictly an economic crime.”⁸³ Admittedly, Puntland and Kenya are not the most likely places to find a pirate-jihadi nexus, but at least a handful of Bahadur’s and Hamilton’s interviewees were from southern Somalia.

Hamilton’s finding that Somali piracy is “strictly an economic crime” is reinforced in the broader literature. Bjørn Møller distinguishes between maritime terrorism and piracy, the former “for the sake of some higher cause” and the latter “for selfish reasons.” He insists, “Whereas it is conceivable that maritime terrorists will gradually transform themselves into pirates, a transformation in the opposite direction is well nigh inconceivable,” and the links between the two groups, “largely non-existent.”⁸⁴ Peter Chalk arrives at the same conclusion: “To date, there has been no credible evidence to support speculation about...a nexus emerging [between pirates and terrorists].” He claims that while the “objectives of the two actors remain entirely different,” the “presumed convergence” between piracy and maritime terrorism “has informed the perceptions of governments, international organizations, and major shipping interests around the world.”⁸⁵

Interviews with counter-piracy professionals in Kenya confirm that this discursive conflation has penetrated counter-piracy practices. For example, Shamus Mangan, Prosecutions Advisor of the Counter Piracy Programme of the UN Office on Drugs and Crime (UNODC), says,

⁸¹ Lauren Ploch et al., “Piracy off the Horn of Africa,” US Congressional Research Service (2011), p. 13.

⁸² Bahadur, *Deadly Waters*, p. 49. Bahadur met dozens of pirates in formal and informal contexts. He writes, “Over the course of my visits to Puntland, from January to March and June to July of 2009—as well as subsequent trips to London, Romania, Nairobi, and Mombasa—I spoke not only to pirates, but also to government officials, former hostages, scholars, soldiers, and jailors” (Bahadur, *Deadly Waters*, p. 11).

⁸³ Karine Hamilton, “The Piracy and Terrorism Nexus: Real or Imagined?” Proceedings of the 1st Australian Counter Terrorism Conference, Edith Cowan University, Perth, Western Australia, November 30, 2010, p. 28.

⁸⁴ Møller, “Piracy, Maritime Terrorism and Naval Strategy,” pp. 4-5.

⁸⁵ Chalk, *Maritime Dimension of International Security*, p. xiv.

There is anecdotal evidence of links between Al-Shabaab and pirates. Somalia is a competition among militias, clans, terrorists and other groups. I'm sure there's links between different things...Pirates and terrorists are right next to each other. I'm sure you can imagine [links between them]...There are obviously links. It seems pretty clear that there are at least financial deals between Al-Shabaab and pirates.⁸⁶

Similarly, Alex Muteti, Principal State Counsel at Kenya's Directorate of Public Prosecutions and a member of its counter-piracy task force, says,

No one has properly traced piracy proceeds to Al-Shabaab and its network. It's an old question of rumor and fact. You can speculate one way or the other, but you can't rule it out. Pirates have admitted to gunrunning and trafficking between Somalia and Yemen. They will not tell you they're terrorists, but with connections to two kinds of crime, you can imagine a window to other kinds of crime...⁸⁷

Mangan and Muteti both ask that one "imagine" the connections between pirates and terrorists, which is far from the legal standard of beyond a reasonable doubt. Such imaginations necessarily rest in the realm of the discursive, but shape counter-piracy practices, to which we now turn.

4 'War on Piracy': the tactical and legal conflation of piracy and terrorism in Somalia

Since the extension of the rhetoric of 'floating bombs' to Somalia, as discussed in Section 3, the international community has predicated its counter-piracy strategies on the War on Terror, in effect launching a War on Piracy. This War on Piracy entails (1) the militarization of the seas and (2) the obfuscation of the law, mirroring existing counter-terrorism strategies and disregarding the actual nature of piracy.

The militarization of the seas amid rising violence

In October 2008, NATO deployed its warships to patrol Somali waters and escort vessels carrying food aid. In December 2008, the European Union launched its first naval mission, the EU Naval Force Somalia (EUNAVFOR) or Operation Atalanta, to prevent and disrupt piracy off the Somali coast and to escort humanitarian vessels. Around this time, the navies of China, Russia, India, Japan, Iran, Saudi Arabia, Malaysia, South Korea, Yemen and the United Arab Emirates launched independent counter-piracy missions. Pirates, it seemed, were an enemy against whom the whole world could unite.⁸⁸

The US National Security Council's December 2008 report, "Countering Piracy Off the Horn of Africa: Partnership and Action Plan," recommended the deployment of "law enforcement and naval air and surface assets" to

⁸⁶ Interview with Shamus Mangan, July 13, 2011, Nairobi, Kenya.

⁸⁷ Interview with Alex Muteti, July 27, 2011, Mombasa, Kenya.

⁸⁸ See Bahadur, *Deadly Waters*, pp. 137-154.

strengthen patrols of the Gulf of Aden.⁸⁹ It continued, “We will seize and destroy any implements of piracy and, in appropriate cases, seize and destroy vessels outfitted for piracy.”⁹⁰ On January 12, 2009, twelve days before President Bush left office, the US Navy established Combined Task Force (CTF) 151 to conduct such search and destroy missions to combat piracy off the Horn of Africa. CTF 151 is a division of the Combined Maritime Forces (CMF), a multinational naval partnership mandated to secure Middle Eastern waters as part of Operation Enduring Freedom. But the creation of CTF 151 was only a formality; CMF already operated CTF 150, which was protecting the Gulf of Aden and Arabian Sea from terrorism through the use of search and destroy missions, and which had used these tactics in encounters with pirates since 2006.⁹¹ In August 2008, CTF 150 had also created a Maritime Security Patrol Area in the Gulf of Aden to protect its shipping interests from “destabilizing activities.”⁹² So, while CTF 151 was established after NATO’s and the EU’s forces, the US, through CTF 150, was the progenitor of the militarization of counter-piracy.

With its roots in CTF 150, CTF 151 embodies the idea that identical tactics and units should be used to fight piracy as to fight terrorism. Admiral Mark Fox, current commander of both forces, confirmed this when he said that “only counter-terrorism measures” can defeat Somali piracy, saying he is “loathe to hope or to assume [a linkage between pirates and Al-Shabaab] hasn’t occurred.”⁹³ With their tactical roots in the War on Terror, and their rhetorical justification found in the Bush administration’s conflation of piracy and terrorism, the US, NATO and EU naval missions off the Horn of Africa amount to a War on Piracy.

These naval missions operate under the sanction of UN Security Council resolutions, which since June 2008 have authorized states to enter the territorial waters of Somalia and use “all necessary means” to repress acts of

⁸⁹ National Security Council, “Counteracting Piracy Off the Horn of Africa: Partnership and Action Plan” (2008), p. 8.

⁹⁰ Ibid., p. 11.

⁹¹ US Naval Forces Central Command Public Affairs, “Suspected Pirates Captured Off Somali Coast,” January 21, 2006, accessed April 25, 2012, http://www.navy.mil/search/display.asp?story_id=22026; US Navy Combined Forces Maritime Component Public Affairs, “Coalition Naval Assets Challenge Hijackers On South Korean Motor Vessel,” April 4, 2006, accessed April 25, 2012, http://www.navy.mil/search/display.asp?story_id=22991; Gary E. Weir, “Fish, Family and Profit: Piracy and the Horn of Africa,” *Naval War College Review*, Vol. 62, No. 3, pp. 21-23.

⁹² International Chamber of Commerce - Commercial Crime Services, “Coalition warships set up Maritime Security Patrol area in the Gulf of Aden,” August 26, 2008, accessed April 25, 2012, <http://www.icc-ccs.org/news/473-coalition-warships-set-up-maritime-security-patrol-area-in-the-gulf-of-aden>.

⁹³ “Counter-terror tactics needed to fight pirates,” Sify News (via Agence France-Presse), January 27, 2011, accessed April 25, 2012, <http://www.sify.com/news/counter-terror-tactics-needed-to-fight-pirates-us-news-international-lb1gEacjja.html>.

piracy.⁹⁴ In December 2008, the UN Security Council extended this authorization to “land-based operations” and “all necessary measures that are appropriate in Somalia.”⁹⁵ Condoleeza Rice, then US Secretary of State, said that “pursuing pirates on land would have a significant impact” and that “maritime operations alone were insufficient for combating piracy.”⁹⁶

Indeed, despite the strength deployed, naval patrols are probably among the most fruitless military operations. There are simply too few ships to patrol the 6.5 million square kilometers (or 2.5 million square miles) of the southern Red Sea, Gulf of Aden, Arabian Sea and Somali Basin where piracy is concentrated.⁹⁷ With the current deployment, assuming an immediate distress call is sent, a ship must successfully evade boarding for at least twenty minutes before a naval helicopter or warship reaches the scene, which is a long time for lethargic tankers chased by deft craft.⁹⁸ Upon arrival of the navy, if the attack has escalated to a hostage situation, the rules of engagement generally proscribe further action. Shipowner reports to the International Maritime Bureau frequently express frustration that distress calls go unanswered altogether.

Based on their econometric model, Anja Shortland and Marc Vothknecht suggest that while the Maritime Security Patrol Area and its companion, the Internationally Recommended Transit Corridor, in the Gulf of Aden may reduce the number of *successful* attacks by 4 percent and the probability that a given attack will be successful by 20 percent, those same measures may increase the total incidence of piracy by as much as 18 percent.⁹⁹ The authors reason these naval measures may streamline vessels for attack, effectively making them sitting ducks stolen right under the noses of the mightiest navies of the world. After controlling for confounding variables, these negative effects disappear, and the authors conclude that “naval counter-piracy efforts have therefore not been counter-productive, but they have failed to deter (an increasing number of) pirate crews from trying their luck in the Gulf of Aden.”¹⁰⁰ Still, supporting the initial interpretation, Shortland and Vothknecht calculate that pirates appear more likely to attack after a successful naval interception, and that they do not appear to fear the prospect of arrest.

According to Noor M. Noor, President of the Puntland Non-State Actors’ Association (PUNSAA), from the Somali perspective, the navies are “protecting illegal fishing vessels but not protecting the fishermen.”¹⁰¹ This

⁹⁴ UN Security Council Resolution 1816, June 2008.

⁹⁵ UN Security Council Resolution 1851, December 2008.

⁹⁶ UN Department of Public Information, “Security Council authorizes states to use land-based operations in Somalia,” December 16, 2008, accessed April 25, 2012, <http://www.un.org/News/Press/docs/2008/sc9541.doc.htm>.

⁹⁷ US Naval Forces Central Command Public Affairs, “Combined Maritime Forces,” accessed April 25, 2012, http://www.cusnc.navy.mil/cmfc/cmfc_command.html.

⁹⁸ Anja Shortland and Marc Vothknecht, “Combating ‘maritime terrorism’ off the coast of Somalia,” *European Journal of Political Economy*, Vol. 27, Supp. 1 (2011), p. 6.

⁹⁹ *Ibid.*, p. 14.

¹⁰⁰ *Ibid.*, p. 13.

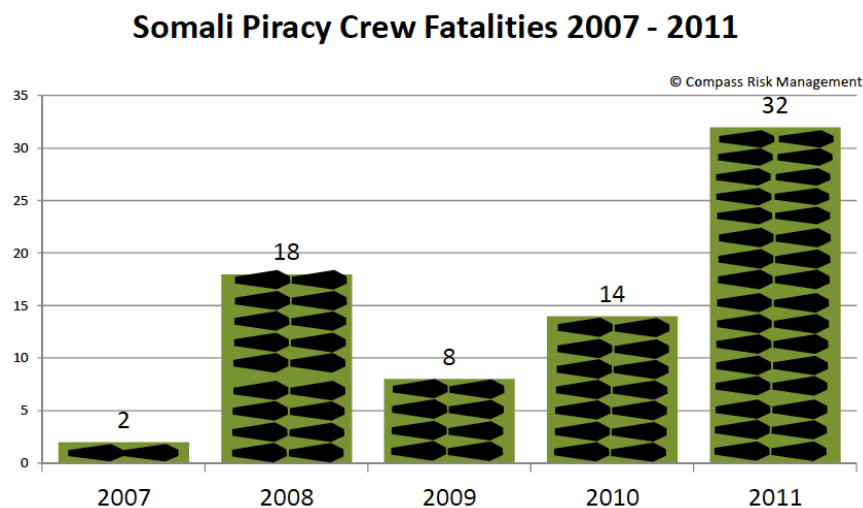
¹⁰¹ Interview with Noor M. Noor, July 15, 2011, Nairobi, Kenya.

perception is exacerbated by the mistakes of naval forces; Shamus Mangan of UNODC states, “The majority of apprehended ‘pirates’ are released at sea, in part because you never know if naval interceptions are of regular fishermen.”¹⁰²

Upon the launch of all naval operations in 2009, attacks in the Gulf of Aden dropped 50 percent the next year, but pirates sailed further out to sea for prey, as far South as the Seychelles, and total attacks amounted to a record high.¹⁰³ Peter Chalk of RAND says, “I don’t think that the naval presence out there has anything to do with the protection of ships. It’s been politicized.”¹⁰⁴ What, then, might motivate the deployment of such extravagant force? These naval forces are explicitly part of broader government policies toward Somalia, East Africa and the Arabian Peninsula, policies conceived within the fragile states discourse to contain the negative externalities of a weak or failed state. For international actors, the most concerning of these externalities is of course terrorism. Indeed, today, according to DFID’s Aden Abdi, “Drone attacks against terrorists are coming from the same warships patrolling the Gulf of Aden and Indian Ocean against piracy.”¹⁰⁵

Statistics compiled by Compass Risk Management show that crew fatalities have risen over the years, from two fatalities in 2007 to 32 in 2011, and several stakeholders point to increasing injuries and fatalities among both hostage crews and pirates (see Figure 5). Noor, of PUNSAA, says, “The

FIGURE 5
Somali Piracy Crew Fatalities 2007-2011 (Compass Risk Management)



¹⁰² Interview with Mangan.

¹⁰³ International Maritime Bureau (IMB), *Piracy and Armed Robbery Against Ships, 2009 Report* (London: IMB, 2010), p. 6.

¹⁰⁴ Peter Spiegel, “Bush Administration Had Issued Plan for Pirates in December,” *The Wall Street Journal*, April 9, 2009, accessed April 25, 2012, <http://online.wsj.com/article/SB123931064271506281.html>.

¹⁰⁵ Interview with Abdi.

violence of piracy is new.”¹⁰⁶ Mangan claims that accompanying the rise of violence in pirate operations is “an increase of violence in naval operations.” He adds, “As militaries get more violent, it makes sense that pirates are retaliating,” summing up the pirate attitude as, “‘Unless you release our guys, we won’t release yours’.”¹⁰⁷ For example, the forces of CTF 151 may have provoked the February 2011 killing of four Americans aboard their yacht, the *Quest*, when authorities—against standard negotiation practices—took custody of two pirate negotiators who had come aboard the USS *Sterett*. Tailed by four US warships and apparently squabbling among themselves, pirates onboard the *Quest* panicked and killed the hostages, which prompted the naval capture of all pirates.¹⁰⁸ In April 2011, for the first time, pirates held some hostages of the MV *Asphalt Venture* even after receiving a ransom for their release; Indian nationals were not released, “to exert pressure on the Indian Navy, which is notorious for its aggression, to release detained pirates and withhold force,” according to Andrew Mwangura, the pirate negotiator. Mwangura says this indicates a “shift to political motivations” for piracy.¹⁰⁹ These events show that pirates—whose injury or murder of hostages is extremely rare and would be “akin to destroying elephant tusks,” or burning their money—are responding to naval aggression in kind, politicizing in the process.¹¹⁰

The turbid legal regime of counter-piracy

Like the War on Terror, the War on Piracy entails the construction of legal architecture in its support. Given the muddle of international and domestic laws on piracy, and that prosecuting captured pirates in Somalia is not entirely viable, piracy is becoming legally conflated with terrorism. UN agreements and resolutions are the legal platform for the War on Piracy, but its proponents have pursued law-making and prosecutions amid considerable legal ambiguity, which opens the door to exceptional legal practices and rights violations, as the War on Terror has proven. To make this argument, four manifestations of the counter-piracy legal regime are presented: (1) the 1988 Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation (SUA Convention); (2) Executive Order 13536 signed by US President Barack Obama; (3) the emerging practice of detention at sea; and (4) the UN practice of promoting regional piracy prosecutions, notably in Kenya.

¹⁰⁶ Interview with Noor.

¹⁰⁷ Interview with Mangan.

¹⁰⁸ Eric Schmitt, “Seizing of Pirate Commanders Is Questioned,” *The New York Times*, February 23, 2011, accessed April 25, 2012, <http://www.nytimes.com/2011/02/24/world/africa/24pirates.html?pagewanted=all>.

¹⁰⁹ Interview with Mwangura. Mwangura relates another incident from June 2011 in which the Seychellois coast guard “intimidated” pirates on a hijacked vessel with its helicopters, despite pleas from the vessel’s owners that the coast guard back off. The pirates drowned and shot one hostage to “show they meant business” in the face of such intimidation.

¹¹⁰ Interview with Abdi.

First, as the basis for prosecuting both pirates and other maritime criminals, the Bush administration's 2007 Piracy Policy and 2008 Action Plan both invoke the standard of the 1988 SUA Convention and the 2005 Protocols to the SUA Convention. Recall that the SUA Convention was largely drafted in response to the Palestinian Liberation Front's hijacking of a cruise ship in 1985, extending state jurisdiction over international waters and mandating cooperation with maritime terrorism prosecutions of other States Parties. The 2005 Protocols amended the SUA Convention to further criminalize the transport of anyone who has committed a hijacking or terrorist attack and the transport of materials intended to make biological, chemical or nuclear weapons. The SUA Convention and its 2005 Protocols mention "terrorist" or "terrorism" 23 times, but "pirate" or "piracy" none, so the Bush administration's proposal that these instruments be used to prosecute pirates legally conflates them with terrorists.¹¹¹ This corroborates the argument of Adam Young and Mark Valencia, who claim that the push to ratify the SUA Convention motivates the conflation of piracy and terrorism in Southeast Asia. The 2008 Action Plan further claims, "The 1979 Hostage Taking Convention, the 2000 Transnational Organized Crime Convention, and the 1999 Terrorist Financing Convention may apply to piracy cases in some circumstances."¹¹² The first dangerously defines "all acts of taking of hostages as manifestations of international terrorism"; the second would unnecessarily group piracy with the illegal shipment of drugs, arms and people by sea; and the third would insist that pirate money is used or allocated for terrorist offenses, which remains unproven.¹¹³

A deeper look into the content of the SUA Convention and its 2005 Protocols reveals that it has gained newfound prominence amid post-9/11 fears of maritime terrorism. Recall the rhetoric of 'floating bombs', including the threat of exploding a nuclear or dirty bomb in a port or sailing an oil tanker into a port, causing mass destruction. Fears of weapons of mass destruction (WMD) are particularly severe in the maritime domain. The 2005 National Strategy for Maritime Security warns, "Vessels can be used to transport powerful conventional explosives or WMD for detonation in a port or alongside an offshore facility." It continues, "WMD issues are of the greatest concern since the maritime domain is the likely venue by which WMD will be brought into the US."¹¹⁴

With this fear of WMD terrorism in mind, the Bush administration in 2003 established the Proliferation Security Initiative (PSI), a multinational, informal effort whose primary objective was to interdict WMD trafficking by

¹¹¹ "Armed robbery" is mentioned once. International Maritime Organization, Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation [SUA Convention] (1988) and International Maritime Organization, Protocol of 2005 to the SUA Convention (2005).

¹¹² National Security Council, "Countering Piracy Off the Horn of Africa," p. 13.

¹¹³ UN International Convention against the Taking of Hostages (1979), Preamble.

¹¹⁴ White House, "National Strategy for Maritime Security," p. 4.

sea or air “to and from states and non-state actors of proliferation concern.”¹¹⁵ Bjørn Møller of the Danish Institute for International Studies writes, “What makes it relevant for the struggle against piracy and maritime terrorism are the provisions for the search and seizure of ships and the term ‘non-state actors of proliferation’.”¹¹⁶ The PSI sought to operate within international law, yet the UN Convention on the Law of the Sea (UNCLOS) and customary international law “do not contain any entitlement to stop and search a foreign ship simply because it is suspected to engage in proliferation activities.”¹¹⁷ Clearly, alternative legal cover would be necessary for the PSI’s naval interdictions, and the US chose to pursue its counter-terrorism and nonproliferation agendas through the SUA Convention. Though the SUA Convention had previously focused only on maritime terrorism apart from the nuclear threat, “the US suggested amending the SUA Convention [with a nonproliferation clause] with the [ultimate] aim of combating terrorist activities on the high seas.”¹¹⁸

And so, the 2005 Protocol to the SUA Convention criminalized the transport by sea of anyone who has committed a hijacking or terrorist attack and the transport by sea of “any equipment, fissionable materials...or related technology” intended to “significantly contribute to the design, manufacture or delivery of a biological, chemical or nuclear weapon.”¹¹⁹ To couch the WMD concern in counter-terrorism terminology, “the wording of the [amendments] resembles definitions of terrorist acts contained in UN conventions directed against specific aspects of terrorist activities.”¹²⁰ Thus, based on the perceived but remote threat of WMD terrorism at sea, the US conflated the nonproliferation and counter-terrorism regimes in pursuit of legal cover for the Proliferation Security Initiative and the War on Terror.

But would this be enough? The 2005 Protocol to the SUA Convention would take years to ratify, and even then demanded costly formal procedures to enable the boarding of a suspicious vessel in international waters. However, Article 110 of UNCLOS already stipulated “a ship may be forcibly boarded on the high seas if it is reasonably suspected of engaging in piracy or slave trade.”¹²¹ Maritime piracy was on the rise in 2005, and indeed—like proliferation before it—would shortly become entangled in the War on Terror. But the US is not party to UNCLOS, so chose the SUA Convention to justify

¹¹⁵ US Department of State, “Proliferation Security Initiative,” accessed April 25, 2012, <http://www.state.gov/t/isn/c10390.htm>.

¹¹⁶ Møller, “Piracy, Maritime Terrorism and Naval Strategy,” p. 29.

¹¹⁷ Maximilian Malirsch and Florian Prill, “The Proliferation Security Initiative and the 2005 Protocol to the SUA Convention,” *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Journal of Comparative Public Law and International Law)*, Vol. 67 (2007), p. 235.

¹¹⁸ Malirsch and Prill, “Proliferation Security Initiative and the 2005 Protocol,” p. 236.

¹¹⁹ International Maritime Organization, Protocol of 2005 to the SUA Convention (2005).

¹²⁰ Malirsch and Prill, “Proliferation Security Initiative and the 2005 Protocol,” p. 237.

¹²¹ UN Convention on the Law of the Sea (1982), Article 110.

its naval interdictions of suspected pirate vessels, thereby conflating its counter-terrorism, counter-proliferation and counter-piracy purposes and laws. Unfortunately, the SUA Convention is a poor choice to interdict and prosecute pirates: Young and Valencia point out, “The enumeration of offences under its Article Three, even if interpreted broadly, will clearly cover only the serious but admittedly less common incidents of vessel hijackings and not the most common forms of piracy and armed robbery at sea.”¹²²

The second legal conflation of piracy and terrorism came in April 2010, when President Barack Obama signed Executive Order 13536 proclaiming that protracted violence, piracy and the arms trade in Somalia “constitute an unusual and extraordinary threat to the national security and foreign policy of the United States.” The order continues to “declare a national emergency to deal with that threat.”¹²³ It paves the way for the seizure of property and financial assets of Somali pirates by grouping them with terrorists. The order blacklists eleven individuals as members of Shabaab, though two of the eleven—Abdullahi Abshir, also known as “Boyah,” and Garaad Mohammed—are pirate ringleaders, and not associates of Shabaab. Ransom payments to these pirates are thus banned. Shortland and Vothknecht say, “A policy of never negotiating with hostage takers is sub-optimal...and therefore unlikely to succeed.”¹²⁴ What more, such an order is ineffective; Mwangura dismisses the relevance of the US ransom rule because payments can still be made under US law to the thousands of unlisted pirates, given the cooperation among gangs.¹²⁵

Third, an ongoing case in the US further elucidates the legal conflation of piracy and terrorism and identifies detention at sea as a high-risk arena for abuse. The case is the indictment of Ahmed Abdulkadir Warsame, a Somali man, for providing material support to terrorists. On April 19, 2011, at the prompt of informants, Warsame was caught in a skiff or fishing vessel (reports vary) in the Gulf of Aden for suspicion of support to Shabaab and Al-Qaeda. Some bloggers claim he is a pirate, though this has not been officially alleged.¹²⁶ Prior to his turnover to a New York court, Warsame was held and interrogated on the warship *USS Boxer* for two months, which amounts to “secret” and

¹²² Young and Valencia, “Conflation of Piracy and Terrorism in Southeast Asia,” p. 277; See also Wojciech Stankiewicz, “International Terrorism at Sea as a Menace to the Civilization of the 21st Century,” *The American Behavioral Scientist*, Vol. 48, No. 6 (2005), pp. 690-691.

¹²³ White House, “Blocking Property of Certain Persons Contributing to the Conflict in Somalia,” Executive Order 13536, April 12, 2010, in *Federal Register*, Vol. 75, No. 72 (2010), p. 19869.

¹²⁴ Shortland and Vothknecht, “Combating ‘maritime terrorism’,” p. 16.

¹²⁵ Interview with Mwangura.

¹²⁶ John Glaser, “Somali Pirate Gets the Ax from Both Parties,” *Antiwar.Blog*, July 6, 2011, accessed April 25, 2012, <http://www.antiwar.com/blog/2011/07/06/somali-pirate-gets-the-ax-from-both-parties/>; John Hayward, “The Somali Pirate Interrogation,” *Human Events: Powerful Conservative Voices*, July 7, 2011, accessed April 25, 2012, <http://www.humanevents.com/article.php?id=44705>.

“extralegal” detention, according to the editors of *The New York Times*.¹²⁷ The *USS Boxer* is the former flagship of CTF 151, the US-led counter-piracy task force, and is now stationed in the Gulf of Aden to launch special operations and drone attacks as necessary against terrorist targets in Yemen and Somalia.¹²⁸ The US seems to be taking advantage of its counter-piracy presence, which is conceived within the War on Terror and which appears seamless with the counter-terrorist task force, to advance its interests, which may compromise rights of detainees like Warsame under the Geneva Conventions. While Obama decided to try Warsame in a civilian court as opposed to Guantanamo Bay, the practice of detention at sea can nonetheless set a slippery slope to injustice. *The New York Times* editors suggest this may indicate “another parallel system of unlimited detention and interrogation without rights outside...constitutional norms.”¹²⁹

This legal interpretation is disputed, but the point persists, that the Warsame case can open the door to the abuse of powers and rights violations in America’s pursuit of war, namely indefinite detention at sea for a range of offenses loosely tied to terrorism.¹³⁰ In April 2011, the UN urged the establishment of legal procedures for detention of pirates at sea.¹³¹ In June 2011, Admiral William McRaven, commander of the naval team that killed Osama bin Laden, testified before the Armed Services Committee of the US Congress. The following exchange took place between Senator Lindsey Graham of South Carolina and McRaven:

GRAHAM: If you caught someone tomorrow in Yemen, Somalia, you name the theater, outside of Afghanistan, where would you detain that person?

M CRAVEN: Sir, right now, as you’re well aware, that is always a difficult issue for us...No two cases seem to be alike...In many cases, we will put them on a naval vessel and we will hold them until we can either get a case to prosecute them in US court or...

GRAHAM: What’s the longest we can keep somebody on the ship?

M CRAVEN: Sir, I think it depends on whether or not we think we can prosecute that individual in a US court or we can return him to a third party country.

GRAHAM: What if you can’t do either one of those?

¹²⁷ “Terrorism and the Law,” Editorial, *The New York Times*, July 16, 2011, accessed April 25, 2012, <http://www.nytimes.com/2011/07/17/opinion/sunday/17sun1.html>.

¹²⁸ Kokstad, “RFA Cardigan Bay, Ft. Victoria, Argus off Yemen,” *Flags of Convenience*, July 7, 2011, accessed April 25, 2011, <http://convenientflags.blogspot.com/2011/07/rfa-cardigan-bay-ft-victoria-off-yemen.html>.

¹²⁹ “Terrorism and the Law,” *The New York Times*.

¹³⁰ See the debate at *Lawfare* (<http://www.lawfareblog.com>) and *Opinio Juris* (<http://www.opiniojuris.org>).

¹³¹ UN Security Council Resolution 1976, April 2011.

M CRAVEN: Sir, it—again, if we can’t do either one of those, then we’ll release that individual and that becomes the—the unenviable option, but it is an option.¹³²

The release by the US military of enemy combatants is unlikely, especially in the absence of a standard procedure for their handling, which is perhaps why Graham seemed worried in his questioning about the proposed length of detention. *The Guardian* reports, “There is some evidence that the US government is turning to detention at sea as a way of avoiding legal and political impediments in the treatment of terror suspects, both domestically and on the international stage.”¹³³ Since 2005, following the blowouts of Guantanamo Bay and Abu Ghraib, it appears possible that the conflation of piracy and terrorism has been crafted with the propagation of detention at sea in mind, an explanation that would be consistent with Young and Valencia’s argument about the US pursuit of extraterritorial jurisdiction over international waters.

Fourth, the prosecution of pirates in Kenya, from apprehension to sentencing, also shows signs of conflating piracy with terror. The UN and the naval missions of NATO, the EU and the US all support the prosecution of captured pirates, but there is reluctance on the part of every nation to detain and try foreigners in lengthy, politicized, expensive processes. While fourteen non-African governments—including the US, Spain and the Netherlands—have tried, convicted and sentenced pirates, there is fear in these countries that pirates would prefer a short jail sentence followed by asylum in the country of their punishment, to returning to Somalia. The response is the sponsorship of detention and trials in regional prisons and courts, namely in Kenya and the Seychelles, and more recently in Somaliland, Puntland, Mauritius and Tanzania. In return for millions of dollars in aid for the modernization of their prisons, police forces and courts, these governments have signed agreements to prosecute pirates, but are “hot and cold” in their acceptance of cases, sometimes rejecting new cases for months on end.¹³⁴

Once pirates are apprehended, they may be held in the brig of a naval vessel for several weeks, as it “takes a while to identify the country of prosecution and sail to port,” according to Keith Wileman, Legal Liaison Officer for EUNAVFOR.¹³⁵ This detention at sea, as in the Warsame case, may be illegal, especially given the naval proclivity to apprehend fishermen and

¹³² Robert Chesney, “What would we do with detainees captured outside Afghanistan?” *Lawfare*, June 29, 2011, accessed April 25, 2012, <http://www.lawfareblog.com/2011/06/what-would-we-do-with-detainees-captured-outside-afghanistan-must-read-testimony-from-mcraven-and-allen-on-counterterrorism-policy/>.

¹³³ Ed Pilkington, “Obama under fire over detention of terror suspect on US navy ship,” *The Guardian*, July 6, 2011, accessed April 25, 2012, <http://www.guardian.co.uk/law/2011/jul/06/obama-detention-terror-suspect-us-navy-ship>.

¹³⁴ Interview with Mangan.

¹³⁵ Interview with Keith Wileman, July 27, 2011, Mombasa, Kenya.

the Kenyan law that requires a detainee's production before a magistrate within 24 hours of arrest.¹³⁶ Such detention can also open the door to further abuse. In one ongoing case in which 24 alleged pirates were arrested by the Danish warship *HDMS Esbern Snare*, the suspects were held for 38 days before they were transferred to Kenya, and a Mombasa court is investigating the defense's claims of "serious physical [and] mental torture" at the hands of the Royal Danish Navy.¹³⁷ Mombasa's Directorate of Public Prosecutions has received requests for prosecution of pirates up to three weeks after the apprehension date. State counsel Alex Muteti says, "Some packages come to our desk with insufficient evidence, or without evidence at all." In these cases, Kenya will refuse prosecution. Muteti says, "We do not want to be regarded as the Kenyan Guantanamo."¹³⁸ If accepted, a case can last two to three years before a ruling is issued. Wileman says some cases begun in 2009 are ongoing, and Muteti says that of the 130 alleged pirates in Kenyan jails, only five cases have been concluded.¹³⁹ Furthermore, Abdi of DFID says, "Trying pirates in Kenya cultivates the common Kenyan perception of Somalis as Muslim criminals through TV images and news reports, exacerbating the existing stigma of Somali refugees, residents and citizens in the eyes of many Kenyans."¹⁴⁰ Indeed, while we watched Citizen TV's 'News at 9' program one evening with a Kenyan family, a segment ran about a pirate trial. A young man turned to us and said, "It is good that Kenya is stopping these Al-Qaeda networks."

On November 5, 2010, seventeen suspected pirates apprehended at sea by the US Navy were acquitted in a Mombasa court. Police then re-arrested them under the charge of unlawful presence in Kenya, though a judge ordered them repatriated to Somalia. Nine days later, 139 illegal immigrants including the

¹³⁶ To restart the clock, the Kenyan police generally re-arrest suspects once they are brought to shore, according to Wileman and Muteti.

¹³⁷ We attended a hearing for the 24 accused pirates in the case of the *F/V Ariya* on August 3, 2011 at the Mombasa Law Courts, Kenya. As of August 2, 2011, when we perused the case file (No. CR2006/11, including charge sheets, reports from the Royal Danish Navy, medical assessments and court proceedings), several irregularities had been recorded. On June 20, 2011, the police filed Miscellaneous Application No. 159 to extend pre-charge detention for two days, claiming the need for more time "to do the basic confirmation and interrogation." Two of the accused have been assessed by dental x-rays as potentially under eighteen years old, with the defense claiming one boy is fifteen. The defense has protested delays in medical attention to serious wounds (such as lodged bullets) and has further alleged the unlawful detention of the accused in solitary confinement. The Royal Danish Navy and local authorities reject all claims of abuse.

¹³⁸ Interview with Muteti. Muteti suspects that navies sometimes request prosecution of detainees in other countries before being denied and approaching Kenya.

¹³⁹ According to Wileman and Muteti, this is because (a) the jurisdiction of relevant legislation is itself under trial, (b) courts are unclear on the doctrine of joint offenders and what constitutes an attack, (c) possession of firearms must be shown to be illegal by a strict standard, and (d) the Kenyan justice system is generally backlogged, corrupt and slow.

¹⁴⁰ Interview with Abdi.

seventeen suspected pirates were transferred to a jail in Garissa near the Somali border, after which their fate is unknown.¹⁴¹ When we investigated this matter, Alinur Dengicha, an officer of Kenya's Anti-Terrorist Police Unit stationed in Garissa told us, "Kenya has no terrorism act, so suspected militants are charged instead with unlawful presence in Kenya. The maximum penalty is a couple months, after which they are released...I don't know where."¹⁴² Himish Abdikadir of the British High Commission in Nairobi says, "War on Terror policies...can lead to the misapplication or confusion of standards, for example, the way they might try terrorists and pirates, when they're different things."¹⁴³ Taken together, these facts cast doubt on the legitimacy of prosecutions of pirates and terrorists in Kenya, and point to a legal conflation of the two groups.

In short, piracy and counter-piracy are now entangled with the War on Terror and its excesses, which are crystallizing in Somalia on land and offshore. The discursive conflation of piracy and terrorism, it seems, is being operationalized, militarily and legally. It could take material shape by providing international legal legitimacy for counter-insurgency forces to enter Somali waters and lands under the guise of counter-piracy operations. This may be unfolding presently, with the EU's March 2012 approval to attack pirate bases on land, coinciding with Kenya's and Ethiopia's military interventions against Shabaab and a 5000-troop boost to the African Union Mission in Somalia. Given the already fuzzy distinction between counter-piracy and counter-terrorism operations, the counter-piracy measures of detention at sea and specialized trial could be adopted in counter-terrorism operations, providing the veil of legal sanction of what might otherwise amount to violations of international law.

Skeptics may acknowledge the false conflation of piracy with terrorism, but believe that the engagement of similar units and tactics is nonetheless required to defeat each threat, or is the only convenient or practical option. Such arguments, however, deny the unique operations and motivations of each phenomenon and hastily assume that similar or identical military and legal instruments may be used to combat threats as divergent as piracy and terrorism.

¹⁴¹ For more on this story, see Tom Odula, "Kenyan court frees 17 suspected Somali pirates," Associated Press, November 5, 2010, accessed April 27, 2012, http://www.boston.com/news/world/africa/articles/2010/11/05/kenyan_court_frees_17_suspected_somali_pirates/; "Nation's police arrest five suspected Somali pirates," *The East African*, November 16, 2010, accessed April 27, 2012, <http://allafrica.com/stories/201011220486.html>; "Kenya urged to change stance on piracy trials," *Daily Nation*, December 19, 2010, accessed April 27, 2012, <http://www.bartamaha.com/?p=39923>.

¹⁴² Interview with Alinur Dengicha, officer of Kenya's Anti-Terrorism Police Unit, July 25, 2011, Garissa, Kenya.

¹⁴³ Interview with Himish Mahmoud Abdikadir, July 21, 2011, Nairobi, Kenya.

5 Conclusion

In sum, the conflation of piracy with terrorism can be backdated to 9/11, and the emergence of Shabaab on the scene in 2007 amid the simultaneous upsurge in piracy propelled this conflation, leading to the use of strategies of the War on Terror when fighting pirates and spawning a War on Piracy. This War on Piracy mirrors the premises of the War on Terror by adopting strategies that advance militarization and legal obfuscation, pushing pirates to become more daring and dangerous in response.

One must remember that pirates and Islamists are not natural bedfellows. It was the “fear of European conquest” that motivated Barbary pirates and Barbary Islamists to join forces in the sixteenth century and “set out on their sea *jihad*,” presenting an unprecedented threat to the global order of the age. Historian Adrian Tinniswood writes, “Without that fear of conquest, Barbary’s socialised piracy would never have grown into the scourge of Christendom, its followers would not have become the shock troops on the front line of the defence of the Islamic world.”¹⁴⁴ In the early nineteenth century, the US sent frigates and Marines “to the shores of Tripoli” in the Barbary Wars, conflating maritime criminals with Islamist governors and driving the two actors ever closer together.¹⁴⁵

History may be repeating itself in Somalia today, as foreign military intervention drives pirates and militant Islamists to attempt cooperation under duress, further upsetting the prospects for security and stability in the Horn of Africa. In this scenario, counter-terrorism strategies are bound to fail against piracy; they are simply beside the point. As Tinniswood writes, “[The global counter-piracy operation] continues to fail, for exactly the same reasons that it failed in the past: as the story of the Barbary pirates shows, the only long term solution to the problem lies onshore, and it can only be achieved by making fundamental changes within a culture which regards piracy as a legitimate activity.”¹⁴⁶ Somali piracy would thus be best addressed on land, through governance strategies that delink it from the militarism of the War on Terror. From the lens of securitization theory, “Security should be seen as a negative, as a failure to deal with issues as normal politics...When considering securitizing moves such as...a ‘war on crime’, one has to weigh the always problematic side effects of applying a mind-set of security against the possible advantages of focus, attention, and mobilization.”¹⁴⁷ As implied here, desecuritization would entail a shift from military to civilian counter-piracy strategies.

Stephan Klingebiel claims that short-term, “myopic” military responses “should not be allowed to obscure the fact that long-term development goals

¹⁴⁴ Adrian Tinniswood, *Pirates of Barbary: Corsairs, Conquests and Captivity in the Seventeenth-Century Mediterranean* (London: Vintage, 2010), p. 300.

¹⁴⁵ The US Marines’ Hymn begins: “From the Halls of Montezuma / To the shores of Tripoli / We fight our country’s battles / In the air, on land, and sea.”

¹⁴⁶ Tinniswood, *Pirates of Barbary*, pp. xv-xvi.

¹⁴⁷ Buzan, Waever and De Wilde, *Security*, p. 29.

must be assigned high priority.”¹⁴⁸ The first step to crafting desecuritized, developmental solutions to piracy is freeing up the funds to do so. Peter Chalk writes, “The cost of deploying one frigate to the Gulf of Aden for six months...could theoretically cover the wages of 100,000 police officers over the same period.”¹⁴⁹ Indeed, drawing down the counter-piracy forces off the Horn of Africa and building the capacities of locally owned and culturally acceptable law enforcement in Somaliland, Puntland and South-Central Somalia would better prevent piracy at sea. If successful, such strategies may also contain and weaken terrorists onshore. Other steps may include embracing the rules of engagement proscribing aggressive rescue operations that endanger the lives of captive crews and launching efforts to fight illegal fishing in order to earn the trust of Somali communities.

Of course, there may be less political will to usher in an era of peace in Somalia than most domestic and international actors are willing to admit. Anja Shortland contends that “Puntland’s political elites are...unlikely to move decisively against piracy” because of trickle-down economic benefits to Puntland communities from piracy.¹⁵⁰ Using satellite imagery (nighttime light emissions and high resolution daytime images), she demonstrates that the coastal villages of Hobyo and Eyl and especially the urban centers of Garowe and Bosasso have experienced increases in affluence out of step with the region, and explains why piracy is the cause.¹⁵¹ Moreover, analyzing data from the Food Analysis and Security Unit – Somalia, Shortland shows how the injection of ransom payments into Puntland communities offsets rises in food prices amid the global commodity boom, increases the wages of casual workers in pirate boomtowns, and drives up the price of cattle, benefitting pastoralists.¹⁵² International actors also have limited incentives to change the status quo of piracy, according to Sarah Percy and Shortland. Shipowners prefer to gamble than to implement even the cheapest onboard anti-piracy measures, because of the low probability of attack. Navies, given their mandate, need only to hinder piracy, not end it, in order to show they are successful, because of widespread recognition that the ultimate solution must play out on land. Insurance companies earn considerable profits off piracy and the confusion about maritime terrorism, as do private security contractors who have recently joined the counter-piracy effort off Puntland.¹⁵³ Percy and

¹⁴⁸ Stephan Klingebiel, “Regional Security in Africa,” pp. 446-447.

¹⁴⁹ Chalk, “Piracy off the Horn of Africa,” p. 100.

¹⁵⁰ Anja Shortland, “Treasure Mapped: Using Satellite Imagery to Track the Developmental Effects of Somali Piracy,” Africa Programme Paper, Chatham House (2012), p. 2.

¹⁵¹ See *ibid.*, pp. 10-19.

¹⁵² See *ibid.*, pp. 6-9.

¹⁵³ See Bahadur, *Deadly Waters*, pp. 74-75 and Mark Mazzetti and Eric Schmitt, “Blackwater Founder Said to Back Mercenaries,” *The New York Times*, January 20, 2011, accessed April 25, 2012, <http://www.nytimes.com/2011/01/21/world/africa/21intel.html?pagewanted=all>. While there are reports that a deal linked to Blackwater has been suspended, in our interview, Noor M. Noor disagreed this is the case.

Shortland write, “Piracy is...not just profitable in Somalia, but creates opportunities for businesses around the world.”¹⁵⁴ They conclude, “The players on the Somali pirate stage...may be in a symbiotic state, where there are few incentives for anyone involved in any aspect of piracy—whether perpetrating it or attempting to control it—to alter what they are doing.”¹⁵⁵

In short, the conflation of piracy with terrorism in media, academia and policy is unmerited and counter-piracy initiatives should be detached from counter-terrorism commands and strategies. Tinniswood writes, “Pirates are history. The history of piracy, whether on the Barbary Coast or in the Horn of Africa, shows us—what? That we never learn? That we invent our heroes? That those we cast as demons play their parts too well? All of those things. Above all, it shows us that the demons are human, too.”¹⁵⁶

To break the cycle of history, then, it is time we start learning and stop inventing our heroes. Most importantly, if the demons are human, too, then it is time to stop casting them as demons.

¹⁵⁴ Percy and Shortland, “The Business of Piracy,” p. 27.

¹⁵⁵ Ibid., pp. 23-24.

¹⁵⁶ Tinniswood, *Pirates of Barbary*, p. xvi.

Appendix: List of informants and interview dates

Shamus Mangan, Prosecutions Advisor, Counter-Piracy Programme, UN
Office on Drugs and Crime
July 13, 2011, Nairobi, Kenya

Aden Maow Abdi, Somalia Programme Officer, UK Department for
International Development
July 15, 2011, Nairobi, Kenya

Noor. M. Noor, President, Puntland Non-State Actors' Association
July 15, 2011, Nairobi, Kenya

Himish Mahmoud Abdikadir, Political Officer for Somalia, British High
Commission
July 21, 2011, Nairobi, Kenya

Alinur Dengicha, Officer, Anti-Terrorist Police Unit, Kenya Police
July 25, 2011, Garissa, Kenya

Keith Wileman, Legal Liaison Officer, EU Naval Mission for Somalia
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