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Piracy studies coming of age: a window on the making of maritime intervention actors

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Moving on after ten years of piracy studies

The upsurge in maritime piracy off the coast of Somalia between 2008 and 2012, during which hundreds of hostages were taken, inspired a large and varied body of academic work. Under the general heading of ‘maritime security’, scholars from different disciplines such as law, International Relations (IR), sociology, anthropology and area studies examined various dimensions of piracy emanating from the so-called failed state of Somalia. This subset of maritime security studies became known as piracy studies, and included, for example, analyses of legal and operational issues related to the international counter-piracy response, and reflections on the identity and motivations of Somali pirates.

As it stands today, ‘piracy studies’ is an empirically rich body of work, much of which addresses policy-related challenges and opportunities. However, many of these contributions are largely descriptive. Their value notwithstanding, what seems to be missing, a decade into ‘piracy studies’, is dedicated reflection on how, as a subset of maritime security, it can offer conceptual insights of relevance to the field of international security governance and international politics more broadly. This is the main question driving the enquiry undertaken in this article.

We propose that one way of addressing this question, with reference to critical intervention studies, is to examine how responses to Somali piracy have had

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1 Christian Bueger, ‘Piracy studies: academic responses to the return of an ancient menace’, Cooperation and Conflict 49: 3, Sept. 2014, pp. 406–16.
2 Jessica Larsen, ‘Towards maritime security in the Indian Ocean: the case of Seychelles’, Island Studies—Indian Ocean/Océan Indien 3: 1, Nov. 2015, pp. 50–9; Douglas Guilfoyle, ‘Counter-piracy law enforcement and human rights’, International and Comparative Law Quarterly 59: 1, Jan. 2010, pp. 141–69; Tullio Treves, ‘Piracy, law of the sea, and use of force: developments off the coast of Somalia’, European Journal of International Law 20: 2, April 2009, pp. 399–414.
3 Jatin Dua, ‘A sea of trade and a sea of fish: piracy and protection in the western Indian Ocean’, Journal of Eastern African Studies 7: 2, May 2013, pp. 335–70; Stig Jarle Hansen, Piracy in the greater Gulf of Aden: myths, misconceptions and remedies, report no. 2009: 29 (Oslo: Norwegian Institute for Urban and Regional Research, 2009); Stig Jarle Hansen, ‘The dynamics of Somali piracy’, Studies in Conflict and Terrorism 35: 7, Aug. 2012, pp. 234–30; Jay Bahadur, The pirates of Somalia: inside their hidden worlds (New York: Pantheon, 2011); Justin V. Hastings, ‘Understanding maritime piracy syndicate operations’, Security Studies 21: 4, Nov. 2012, pp. 683–721; Anja Shortland and Federico Varese, ‘The protector’s choice: an application of protection theory to Somali piracy’, British Journal of Criminology 54: 5, Sept. 2014, pp. 741–65; Christian Bueger and Timothy Edmunds, ‘Beyond seablindness: a new agenda for maritime security studies’, International Affairs 93: 6, Nov. 2017, pp. 1293–311.
constitutive effects, notably on the intervening actors themselves. As we shall see, the case of counter-piracy off the Horn of Africa reveals the maritime domain as a space where such constitutive effects are particularly visible and interesting to study. This is in part a consequence of the fact that interventions in the maritime domain take place in an arena governed with less structural–institutional density than is generally the case for interventions addressing security challenges ashore. On land, sovereign states occupy clearly demarcated territories, and their laws define how domestic and foreign bodies may act within these territories. International organizations are endowed with what over time has become a relatively distinct set of mandates allowing different institutions to be seen as the ‘go-to’ actors in relation to different security threats. This is not to say that such a division of labour is fixed; rather, it has evolved through years of habit, legacy and expertise. The seas, while not an unregulated domain, are subject to different conditions: the oceans are communal, rather than divided among sovereign states, and no single actor has an exclusive mandate to act upon maritime threats. Rather, states enjoy flexibility in the exercise of their jurisdiction and are subject to limitations on their sovereign rights.

We characterize this condition of security governance at sea as ‘contingency’. One dimension of this contingency is its relatively greater permanence. It stems from the nature of the oceans, including the fact that the vast maritime space beyond territorial waters is not divided into mutually exclusive sovereign spaces in the way that state territory is. Another dimension of this contingency is more temporary. It concerns the maritime as a relatively novel domain of intervention—though arguably in some regions an increasingly settled and institutionalized domain—with, in the case of counter-piracy, no obvious ‘go-to’ intervention actor but rather a set of different actors, including some new as well as more familiar ones.

While the permanent dimension of contingency forms the backdrop against which maritime interventions are shaped, the temporary dimension may change in character should we see the maritime becoming a more common space for interventionism, whether against piracy or against other types of maritime crime. This possibility adds to the importance of understanding the constitutive effects characterizing security interventions in the maritime domain.

As we shall see, the condition of contingency characterizing maritime governance allows states and organizations to position themselves in new constellations vis-à-vis their role in responding to security challenges, and it furthermore invites so-called emerging actors to enter the stage subject to fewer restrictions and customs than is the case on land. Contingency therefore also expresses a more pronounced potential for reordering new and old actors in the maritime domain. Contingency, then, becomes a conceptual point of departure for analysing the case of maritime piracy; and, we believe, it shows the relevance of this case both to current debates in IR and to broader issues of international security. It brings into focus a certain set of constitutive effects exercised by counter-piracy practices on maritime intervention actors. We build on existing literature to argue that using Somali piracy
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as a case-study can offer important conceptual insights. Specifically, we offer a conceptualization of the making of (new) intervention actors and alliances, including their underlying visions of not only maritime but also global order—and ways of achieving this. In short, we argue that the case of piracy off the coast of Somalia has the potential to provide valuable conceptual insights into contemporary security governance and international politics beyond the maritime domain.

Methodologically, the article is based on the authors’ fieldwork and deskwork related to maritime piracy. Since 2014, both authors have engaged in counter-piracy academic research, policy analysis and advice. The article draws on insights gained from this work through a range of data sources, including legal and policy analysis, interviews with key stakeholders involved in counter-piracy off Somalia, participant observation in counter-piracy operations, and policy coordination meetings in European and western Indian Ocean countries. Use of this broad range of sources has enabled us to compose a wide picture illustrating the development of counter-piracy in time and space since 2008 and some of the conceptual promises it holds.

The article is organized as follows. After this introduction, we outline the development of the counter-piracy field after 2008 and suggest that, at the present moment, there is something distinctive about the maritime domain as a field of intervention which makes it particularly fertile for observation of how the constitutive effects of counter-piracy intervention practices play out. Putting this hypothesis to the test, we then present the conceptual underpinnings of an analytical approach that may help us illuminate this investigation by drawing on critical intervention studies. We then use this approach to analyse the counter-piracy field through three cases. Each case shows a distinct sense of the contingency that characterizes contemporary security governance at sea, focusing respectively on regulation (law), structures (institutions) and practices (actors). Finally, tying these cases to the argument about constitutive effects, the article concludes by suggesting ways in which an examination of this ‘maritime distinctiveness’ might add to our knowledge and understanding of contemporary security governance and international politics more widely.

A brief account of recent counter-piracy efforts off the coast of Somalia

When Somali piracy became an increased threat to seafarers and international trade in the western Indian Ocean, there was no institutional framework in place to deal with it. In June 2008, therefore, the United Nations Security Council (UNSC) unanimously passed Resolution 1816. This resolution urged willing and able states to combat Somali piracy in accordance with existing international law, primarily a set of general provisions in the 1982 UN Convention on the Law of the Sea (UNCLOS). In response to the UNSC resolution, three multinational naval

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4 UN Security Council Resolution Resolution 1816, adopted 2 June 2008, https://www.un.org/press/en/2008/sc9344.doc.htm. (Unless otherwise noted at point of citation, all URLs cited in this article were accessible on 10 April 2019.)
coalitions were formed: Operation Atalanta, the first fleet ever assembled by the EU, soon followed by the US-led Combined Task Force 151 (CTF151) and finally by a NATO mission called Operation Ocean Shield. Alongside these, known as the ‘Big Three’, a number of individual states—including emerging states such as China, India and Russia—deployed warships to join in patrolling the waters off Somalia.

While naval contributions focused specifically on combating piracy at sea, regional states around Somalia were invited to prosecute piracy suspects apprehended by the warships. Kenya, Mauritius and the Seychelles in particular became involved. As they began cooperating with naval states around piracy prosecution, bilateral agreements were signed that laid out the conditions for this interstate collaboration and the proper treatment of prisoners. New transnational collaborations were thus formed. The UN Office on Drugs and Crime (UNODC) and the EU were among the main donors that developed maritime security programmes to support capacity-building of judiciaries, penitentiaries and law enforcement capabilities ashore and at sea. On shore, capacity-building activities were designed to ensure that legal proceedings and conditions of imprisonment respected international standards and to compensate regional states for taking on piracy prosecution on behalf of the international community. At sea, capacity-building aimed at establishing effective regional law enforcement capacity in the maritime domain, capable of deterring pirate attacks and also other types of maritime crime.

Alongside these initiatives (naval coalitions, regional prosecution and capacity-building), states and international organizations came together in new as well as existing policy forums to discuss the various legal and operational challenges arising from counter-piracy efforts. The need to do so arose from the fact that counter-piracy was a hitherto untested endeavour within the international community with no significant precedent. The Contact Group for Piracy off the Coast of Somalia was formed in response to UNSC Resolution 1851 (2008), bringing together over 50 states and organizations to coordinate and develop counter-piracy policy. Also, a Shared Awareness and Deconfliction (SHADE) mechanism was established, providing a framework within which military forces could regularly meet to coordinate operations at sea; participants from the shipping industry and international institutions were invited to attend. These new forums were complemented by the long-established International Maritime Organization (IMO), which was instrumental in producing guidelines and best management practices and engaging in advocacy on behalf of the shipping industry. Another framework worth mentioning is the Djibouti Code of Conduct, an agreement between western Indian Ocean states which spelled out a long-term and multifaceted regional collaboration around mari-

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5 e.g. EU–Seychelles, Acts adopted under Title V of the EU Treaty concerning the signing and conclusion of the Agreement between the European Union and the Republic of Seychelles on the status of the European Union-led force in the Republic of Seychelles in the framework of the EU military operation Atalanta, Council Decision 2009/576/CFSP, https://publications.europa.eu/en/publication-detail/-/publication/160a301e-ea50-44a2-9d98-348160eb6057/language-en.

6 International Maritime Organization, ‘Protection of vital shipping lanes’, Djibouti Code of Conduct. The Code was signed in January 2009 by the representatives of Djibouti, Ethiopia, Kenya, Madagascar, the Maldives, the Seychelles, Somalia, the United Republic of Tanzania and Yemen. Since then, further countries have signed and the Code was revised in 2017.
time security based on the rule of law. It was supported by the IMO and interested
donor countries, which conducted training exercises with regional states as part of
their capacity-building efforts. Through these regular collaborations, the inter-
national community agreed to define the so-called Internationally Recommended
Transit Corridor and the High Risk Area (HRA, later the Voluntary Reporting
Area). Set out formally in the IMO’s best management practices, these are offi-
cially demarcated zones in the western Indian Ocean, which effectively divided the
maritime domain into compartments of security and risk.

These initiatives, most of them new, had in common a voluntary and untried
nature. Naval coalitions, regional prosecution, institutional frameworks and new
policy forums were not an extension of existing procedures and hierarchies known
from established international frameworks and longstanding legacies. They were
primarily an expression of able and willing states and organizations converging
around a common cause: providing the global good of security at sea and the
free and safe passage of international shipping. Indeed, counter-piracy had no real
precedent in recent history, and stakeholders devised the rules and procedures on
an ad hoc basis.

We identify this characterization as the specifically contingent nature of the
counter-piracy field of intervention, the specifics of which we elaborate upon
below. Contingency, as a conceptual approach to the counter-piracy field, opens
up the analysis to the provisional and the unintended, to emergence and change.
As we shall argue, we find this a fruitful path into studying the counter-piracy
field, as a contribution not just to piracy studies but to a more general under-
standing of the power dynamics at play in international relations. Yet contingency
is a perspective that is relatively under-represented within theoretical contribu-
tions to piracy studies.

Insights from recent piracy studies: ‘problem effects’

As noted above, the enormous attention devoted to Somali piracy since 2008 has
generated a new field of ‘piracy studies’ research, which may be regarded as a new
subfield within broader maritime security studies. However, again as noted in the
introductory section of this article, there seems to have been a lack of effort in
piracy studies to consider the conceptual contributions that these empirically rich
analyses can make beyond maritime security. Important exceptions exist, and we
briefly summarize them here.

Hastings and Phillips have used the case of Somali piracy—more specifically,
‘in-country variation in piracy incidence across different regions of Somalia’—as
a starting-point for critical scrutiny of key assumptions in the ‘failed states’ litera-

7 The role of the shipping industry, acting through forums such as SHADE and the IMO (best management
practices, Djibouti Code of Conduct), as well as private initiatives such as Fair Fishing, is another important
dimension of Somali counter-piracy. The explicit role of the industry is arguably unique in relation to what
the UN defined as a challenge to regional peace and security. However, this dimension of counter-piracy lies
beyond the focus of this article.

8 IMO, ‘BMP4: best management practices for protection against Somalia based piracy’, MSC.1/Circ.1339, 14
Sept. 2011, http://www.imo.org/MediaCentre/HotTopics/piracy/Documents/1339.pdf.
ture. They engage with broader questions of political order, violence and the policy implications of what they argue to be a misleading ‘failed state’ framing.9 Along similar lines, it has been argued that there are important limitations to ‘existing metrics of state fragility and governance’, and that these metrics, for example, ‘fail to capture local realities’.10 These are examples of how studying maritime piracy can yield insights of relevance to broader debates in IR, for example by feeding back into debates about failed states, political order and violence.

Also theorizing piracy studies, Bueger has used the example of Somali piracy as a case though which to develop ‘an alternative perspective on piracy based on the study of practice’.11 Addressing an IR audience, Bueger uses Somali piracy as an empirical case through which to introduce and illustrate the relevance of practice theory and of what Bueger refers to as ‘an innovative agenda for studying knowledge generation in international relations’.12

A final example of a contribution that brings theoretical frameworks from the broader field of security studies to bear on ‘the debate on maritime piracy’ is Hastings’ analysis of piracy syndicates, in which he uses the principal–agent framework to understand and explain the organizational dynamics of different maritime piracy syndicates.13 Hastings wishes his contribution to help the debate move beyond a focus on ‘root causes’ of piracy.14 From a different perspective, but still with a focus on ‘pirates’, securitization theory has been used to shed light on the construction of maritime piracy by institutions.15

Adding to this literature, we propose a different conceptual dimension that is worthy of attention, one that is of relevance not just to piracy studies but for international security more broadly. Our aim is to go beyond looking at what we may call ‘problem effects’ — that is, the effects of interventions vis-à-vis the piracy problem itself — and beyond principal–agent dynamics and institutional discursive constructions of piracy, in order to unpack some of the more fundamental dynamics of power at play in the maritime domain.

9 Justin V. Hastings and Sarah G. Phillips, ‘Order beyond the state: explaining Somaliland’s avoidance of maritime piracy’, *Journal of Modern African Studies* 56: 1, 2018, pp. 5–30, https://doi.org/10.1017/S0022278X17000519; Tobias Hagmann and Markus V. Hoehne, ‘Failures of the state failure debate: evidence from the Somali territories’, *Journal of International Development* 21: 1, 2009, pp. 42–57, https://doi.org/10.1002/jid.1482.
10 Bridget L. Coggins, ‘Failing and the Seven Seas? Somali piracy in global perspective’, *Journal of Global Security Studies* 1: 4, 2016, pp. 251–69, https://doi.org/10.1093/jogss/ogw019; Ursula Daxecker and Brandon C. Prins, ‘Financing rebellion: using piracy to explain and predict conflict intensity in Africa and Southeast Asia’, *Journal of Peace Research* 54: 2, 2017, pp. 215–30.
11 Christian Bueger, ‘Practice, pirates and coast guards: the grand narrative of Somali piracy’, *Third World Quarterly* 34: 10, 2013, pp. 1811–27, https://doi.org/10.1080/01436597.2013.851896.
12 Christian Bueger, ‘Experimenting in global governance: learning lessons with the Contact Group on Piracy’, in R. Freeman and J.-P. Voss, eds, *Knowing governance: the epistemic construction of political order* (Basingstoke and New York: Palgrave Macmillan, 2015), pp. 87–104.
13 Hastings, ‘Understanding maritime piracy syndicate operations’.
14 Hastings, ‘Understanding maritime piracy syndicate operations’.
15 Christian Bueger and Jan Stockbruegger, ‘Pirates, drugs and navies: why the western Indian Ocean needs a new security architecture’, *RUSI Journal* 161: 5, 2016, pp. 46–52. For other analyses of discursive constructions of maritime piracy, see e.g. Alex Gould, ‘Global assemblages and counter-piracy: public and private in maritime policing’, *Policing and Society: An International Journal of Research and Policy* 27: 4, 2015, pp. 408–18.
Moving beyond analysis of ‘problem effects’: adding a focus on ‘constitutive effects’

Much existing literature seems to ask: in what sense, or to what extent, has this or that counter-piracy intervention helped address the problem? What gaps still exist, and what constellation of intervention efforts has been most productive in successfully suppressing Somali piracy? These are all important questions, and in various ways, piracy studies have helped shed light on what we call ‘problem effects’.

What we add to this literature is attention to another type of effect that intervention practices have produced in the counter-piracy field. We propose to study how various external actors’ responses to Somali piracy have had constitutive effects ‘back onto’ these intervening actors. We do this by reversing the dominant direction of assessment from, to put it as succinctly as possible, how actors shape the maritime domain to how the maritime domain shapes the actors. Our focus is on how counter-piracy responders, more specifically actors participating in interventions, are constituted in this role—a question that hitherto has received little attention in piracy studies. This is not to say that there is no literature on the various counter-piracy responders. Indeed, some of this also links up to broader debates—for example, by using the case of Somali counter-piracy activity to challenge assumptions in the literature on multinational military cooperation.16 However, within this literature, there has to date been no specific consideration of how this broad range of different intervention actors not only respond to piracy, but also, in the process of doing so, constitute themselves as ‘go-to’ actors in a new domain of maritime security intervention (outside armed conflict).

In making this argument, we draw on insights from critical intervention studies in IR. This literature has pointed out since the early 1990s that when states or ‘the international community’ intervenes in a given state, what happens is not that a predefined and fixed meaning of state sovereignty is transgressed;17 rather, the intervention and the attached justification illuminate what state sovereignty is not, thereby helping to fix the meaning, at least temporarily, of a key concept in IR—namely, that of sovereignty—which should be treated not as a given but as constructed, including through discourses and practices of intervention.18 The very justifications that make such intervention practices acceptable, in the face of the principle of state sovereignty, contribute to fixing the meaning of what acceptable state sovereignty looks like at a given point in history.

While drawing on these important and valuable insights, we shift the focus of the analysis of constitutive effects in two ways. First, we argue that constitutive

16 Sarah Percy and Anja Shortland, ‘The business of piracy in Somalia’, Journal of Strategic Studies 36: 4, 2013, pp. 541–78.
17 Cynthia Weber, Simulating sovereignty: intervention, the state and symbolic exchange (Cambridge: Cambridge University Press, 1995).
18 Weber, Simulating sovereignty; Vivienne Jabri, Discourses on violence: conflict analysis reconsidered (Manchester: Manchester University Press, 1996); David Campbell, National deconstruction: violence, identity, and justice in Bosnia (Minneapolis: University of Minnesota Press, 1998); Helle Malmvig, State sovereignty and intervention: a discourse analysis of interventionary and non-interventionary practices in Kosovo and Algeria (Abingdon: Routledge, 2006); Lene Hansen, Security as practice: discourse analysis and the Bosnian war (Abingdon: Routledge, 2006).
effects are also produced when the object of intervention is not another sovereign state but illegitimate non-state actors: in this case, Somali citizens committing the illegal act of piracy. The kinds of constitutive effects to which we call attention in this article are those that apply to intervention actors, rather than those relating to the principle of state sovereignty. Second, we suggest that the constitutive effects to which post-structuralists have already pointed in detailed discourse analyses can also fruitfully be studied in the domain of maritime interventions—with a focus not on discourses but on the unfolding intervention practices that for more than ten years have developed on the back of an initial UN counter-piracy mandate. This is, we believe, a fruitful perspective, because it brings to the fore underlying dimensions of power that are produced and appropriated in counter-piracy activity. The ensuing analysis has a bearing not only on conceptual understandings of the maritime domain, but also on policy formation.

To understand this process more fully, we now examine key elements characterizing counter-piracy. We present three cases that concern, respectively, the legal, institutional and functional dimensions of counter-piracy. Through these cases, we unpack the contingency characterizing the maritime domain in questions of counter-piracy. This will help us arrive at a new conceptual contribution that we believe counter-piracy can make to the study of international security.

**Case 1: legal contingency of regulatory regimes**

We begin by reflecting on the legal characteristics of counter-piracy, as these determine fundamentally which actors and actions are called into play at sea. The main source in the international legal framework governing not only counter-piracy, but all matters concerning the world’s oceans, is UNCLOS. UNCLOS is a framework convention concerning central aspects of the use of the seas and conduct at sea. 19 It rests on the overarching principles of freedom—of navigation, of use of natural resources and for purposes of marine research; and of sovereignty—of a state’s interests within its own territorial waters and, to a limited extent, in international waters and the exclusive economic zone (EEZ), in which the littoral state has special rights regarding the use of marine resources. 20

UNCLOS stipulates freedom of navigation as a common good. Contrary to any part of land territory, which belongs to individual sovereign states, the oceans belong to all humankind. While this allows ships to travel and, for example, catch fish in waters extending outwards from territorial waters, the maritime domain and its resources—again in contrast to land—belong to no one state. In the same spirit, maritime piracy is considered a threat to all humankind—hostis humani generis—and criminal jurisdiction over it therefore enjoys universal application. This means that any state can exercise its jurisdiction and apprehend piracy suspects without

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19 Yoshifumi Tanaka, *The international law of the sea* (Cambridge: Cambridge University Press, 2012).
20 Territorial waters extend to 12 nautical miles (nm) from the coastline; the EEZ reaches from 12 to 200 nm, and the high seas from 200 nm outwards. Piracy is defined in article 101 of UNCLOS as taking place in the EEZ and high seas.
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flag state consent. However, whereas UNCLOS obliges state parties to suppress piracy (article 100), it only allows states or third parties to prosecute suspected pirates (article 105). There is no international court or tribunal with the mandate to prosecute maritime piracy suspects, as there is for other crimes defined in international law, most notably those covered by the Rome Statute of the International Criminal Court. It is thus left to the discretion of the apprehending state to decide on the course of action following arrest. This means that counter-piracy extends from international law into domestic criminal law and criminal procedure law when piracy suspects are to be prosecuted. It is therefore no wonder that the counter-piracy legal framework has been referred to as a ‘patchwork’, and an ‘increasingly comprehensive and decentralized legal framework’.

The absence of obligation to prosecute, and the lack of a dedicated tribunal, again stand out in contrast to the legal position in respect of acts carried out on land: where a criminal act within a state’s territory would—all things being equal—produce both arrest and prosecution, those legal obligations are subject to a higher degree of ad hoc flexibility in the maritime domain. Because the maritime domain is a common good, rather than any one state’s sovereign responsibility, legal obligations pertaining to it are less distinct. We call this legal contingency: legal obligations are contingent upon the particularity of the maritime domain as open to all on the high seas, and upon the maritime issue in question. Jurisdiction may pass from one state to another, or to none at all.

There are two points of particular relevance to be drawn from this brief presentation of the legal provisions governing counter-piracy. First, the oceans are, generally under UNCLOS, a space of potentially highly limited state jurisdiction that to a large extent excludes the exercise of a state’s sovereign rights: no one state has an exclusive right or obligation to act, react or extract. Second, and pulling in the opposite direction, the oceans are a space of universal jurisdiction, specifically in respect of piracy, that thus includes all state parties in the possibility of exercising their sovereign rights over that crime: all state parties may act on the provisions addressing the crime of piracy. As such, the governance of the maritime domain finds part of its contingency in the way it is subject to regulation. State sovereignty and jurisdiction at sea are bound by the distinctive possibilities of the maritime regulatory regime, in an opposite relationship to that pertaining on land, where no territory is under the jurisdiction of more than one state. Therefore in the case of Somali piracy, an elaborate burden-sharing between actors was devised to distribute responsibilities of apprehension and prosecution according to ability and willingness.

Eugene Kontorovich, ‘The piracy analogy: modern universal jurisdiction’s hollow foundation’, Harvard International Law Journal 45: 1, 2004, pp. 183–237. Article 100 of UNCLOS obliges state parties to collaborate around the suppression of piracy; article 105 allows for its prosecution.

James Anderson, ‘A sea of change: reforming the international regime to prevent, suppress and prosecute sea piracy’, Journal of Maritime Law and Commerce 44: 1, 2013, pp. 47–68.

Guilfoyle, ‘Counter-piracy law enforcement and human rights’.

Until 2011, the UN estimated that 90% of piracy suspects were released without trial; this is commonly believed to be because of the lack of obligation to prosecute. See for example UNSC Resolution 1976 (2011).
Case 2: mandate contingency of institutional frameworks

The contingency characterizing the regulatory regime that governs counter-piracy in the maritime domain is echoed in its institutional structures. This is illustrated by the way in which the international community institutionally anchored its response to calls from the UNSC. The UNSC passed six resolutions in 2008 on the topic of Somali piracy, deeming it a threat to regional stability and, indirectly, to international security. Yet the threat of Somali piracy was new, and there was no obvious responder. No organizations existed with the dedicated mandate to combat piracy. No bodies were concerned with funding or coordinating law enforcement at sea. There was, for instance, no established UN mission, as is often seen in response to the issuing of such resolutions regarding land-based peacekeeping. Nor did the job of responding fall specifically upon NATO, as piracy is a crime rather than an act of war. Nor was there one particular state that was the obvious candidate for a leading role (based, for example, on historical legacies). The lack of obligation in international law to exercise criminal jurisdiction over maritime piracy thus seems to be reflected in the institutional framework of maritime law enforcement. Consequently, not one but three separate naval coalitions were established, as noted above. Each mission varied slightly from the others in its mandate and thus the three fulfilled different roles in theatre.

The first of the Big Three naval forces was the EU’s Operation Atalanta. Established by an EU Council decision in December 2008, Atalanta represented the EU’s first naval common defence mission. Its mandate has recently been extended until 2020.

Next came the US-led CTF151, established in January 2009 in response to UNSC Resolution 1814. It was set up within the framework of the existing US naval coalition, Combined Maritime Forces (CMF), which dated back to the 2001 Operation Enduring Freedom, mandated by UNSC Resolutions 1368 and 1373 to address the threat of terrorism following the 9/11 attacks on US soil.

The third was set up by NATO, which already had a patrol mission, Allied Protector, in the Indian Ocean. Its mission specific to counter-piracy, Operation Ocean Shield, was approved in August 2009, and closed down in December 2016.

The counter-piracy mandates of the Big Three differed, allowing each to pursue a distinctive role. Atalanta’s mandate tasked the naval forces of EU member states and collaborating states with the protection of World Food Programme (WFP) vessels delivering humanitarian aid to Somalia, and the protection of other vessels off the coast of Somalia, through the ‘deterrence, prevention and repression of...’

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25 UNSC resolutions 1814 (2008), 1816 (2008), 1838 (2008), 1844 (2008), 1846 (2008) and 1851 (2008).
26 In March 2018, for example, the UNSC adopted Resolution 2406, which extended the mandate of the UN Mission in South Sudan, UNMISS.
27 Percy and Shortland, ‘The business of piracy in Somalia’.
28 UNSC Resolution 1368, adopted 12 Sept. 2001, http://unscr.com/en/resolutions/doc/1368; UNSC Resolution 1373, adopted 28 Sept. 2001, https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf.
29 Allied Protector ran from April to August 2009; before that, Allied Provider had run from October to December 2008, escorting WFP supplies in the Indian Ocean. See Jessica Larsen, Conceptualising the legal assemblage: an anthropological analysis of counter-piracy law and practice off the coast of Somalia (Copenhagen: University of Copenhagen Faculty of Law, 2017), pp. 77–8.
acts of piracy and armed robbery’. The mandate also included monitoring illegal fishing. In short, it sought to address a range of maritime security issues simultaneously. While the establishment of Atalanta was triggered by Somali piracy and the UNSC’s call to action, it allowed the EU to fulfil multiple functions in the maritime domain for the first time in the institution’s history; as mentioned above, the EU was also involved in capacity-building of regional security institutions on land.

CTF151 was mandated—in accordance with the UNSC resolutions—‘to deter and disrupt piracy and armed robbery at sea and to engage with regional and other partners to build capacity’. As such, this naval mission formed, and still forms, part of a broader US-led naval coalition of 33 nations tasked not only with countering Somali piracy but also with ‘defeating terrorism’, ‘encouraging regional cooperation, and promoting a safe maritime environment’. Whereas responding to UNSC resolutions passed in 2008 became a way for the EU to launch its very first maritime operation, for the CMF it became a way to expand its existing intervention profile focused on (maritime) security.

The objective of the NATO mission was to escort WFP supplies in the Indian Ocean. While its mandate is classified, NATO states online that the objective of Operation Ocean Shield was to ‘provide naval escorts and deterrence while increasing cooperation with other counter piracy operations in the area’. NATO thus remained within its framework of conventional military capabilities, albeit in a policing capacity.

It is important to note not only the differing mandates of the Big Three, but also the fact that their mandates were not drawn up in advance, but were devised for the specific purpose of dealing with this single maritime security issue. Again, this stems from the fact that there was no obvious responder in existing institutional frameworks ready to intervene at sea. We may call this mandate contingency.

In fact, the contingency of institutional frameworks in the maritime domain had the further effect of allowing a certain flexibility in defining the problem to which institutions were responding. An example of this is the much-celebrated regional law enforcement hub in the Seychelles, which many international donors supported by providing personnel and equipment. Its name was the Regional Anti Piracy Prosecutions and Intelligence Coordination Centre (RAPPICC), and it opened in February 2013 with the UK as its main donor. However, at this point in the international counter-piracy effort, piracy was waning. Other maritime crime seemed to be growing in activity—or perhaps the increased law enforce-

30 Larsen, Conceptualising the legal assemblage, pp. 74–5.
31 CTF151: Counter-piracy, https://combinedmaritimeforces.com/ctf-151-counter-piracy/.
32 https://combinedmaritimeforces.com/about/, accessed 26 July 2018. See also US Naval Forces Central Command, ‘Combined Maritime Forces—US 5th Fleet’, https://www.cusnc.navy.mil/Combined-Maritime-Forces/.
33 James Kraska and Paul Pedrozo, International maritime security law (Leiden and Boston: Martinus Nijhoff Publishers, 2013).
34 NATO Allied Maritime Command, Operation Ocean Shield, https://nmc.nato.int/missions/operation-ocean-shield.aspx.
35 Larsen, Conceptualising the legal assemblage, p. 252.
iment and intelligence presence in the region made state authorities more aware of other maritime crime, not least drug smuggling.\textsuperscript{36} The UNSC began stressing the importance of preventing maritime crime other than piracy around Somalia, not only in separate resolutions (e.g. UNSCR 2023 on charcoal smuggling),\textsuperscript{37} but also in further resolutions addressing Somali piracy. For instance, the UNSC recalled the importance of preventing illegal fishing and dumping in the western Indian Ocean in 2010,\textsuperscript{38} and took note of the illegal trafficking of drugs in 2015.\textsuperscript{39} Almost as if in response, RAPPICC changed its name two years after opening to the Regional Fusion and Law Enforcement Centre for Safety and Security at Sea (Reflecs3). The renaming from ‘Anti Piracy’ in RAPPIC to ‘Security at Sea’ in Reflecs3 is arguably a testament to the way in which counter-piracy interventions broadened their focus to encompass a range of maritime crimes, of which piracy was but one. This mandate contingency was made possible by the contingency of institutional frameworks dealing, or hitherto not dealing, with ocean governance.

The expansion of counter-piracy mandates to address other forms of crime was not confined to the western Indian Ocean. Building on the experience of Atalanta, the EU established another patrol fleet to look out for incidents of human smuggling and trafficking in the Mediterranean Sea.\textsuperscript{40} Replicating the idea of Atalanta, Operation Sophia continues to function in 2019. Its presence reflects the perceived success of the EU’s first common defence policy at sea in the western Indian Ocean.

These two examples of mandate contingency, from the Seychelles and the EU, show how counter-piracy interventions evolved and suggest variations of so-called ‘mission creep’, whereby the mandate originally legitimizing an intervention shifts to cover other policy areas. As counter-piracy efforts developed, the problem that intervention actors claimed expertise in addressing came to be just part of a much broader concern with maritime crime more generally—both off the coast of Somalia and elsewhere in the global South. In other words, we see how the loose institutional framework in the maritime domain made possible a reconfiguration of not only how institutions should respond (mandate), but also to what they should respond (issue).

Case 3: functional contingency of conventional and emerging actors

There is a third sense in which governance of the maritime domain shows a sense of contingency. This relates to the legal and institutional conditions discussed

\textsuperscript{36} Bueger and Stockbruegger, ‘Pirates, drugs and navies’.
\textsuperscript{37} UNSC Resolution 2023, adopted 5 Dec. 2011, https://www.securitycouncilreport.org/wp-content/uploads/Somalia%20RES%202023.pdf.
\textsuperscript{38} UNSC Resolution 1950, adopted 23 Nov. 2010, para. 6, http://unscr.com/en/resolutions/doc/1950.
\textsuperscript{39} UNSC Resolution 2246, adopted 10 Nov. 2015, http://unscr.com/en/resolutions/doc/2246.
\textsuperscript{40} Council of the European Union, Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR MED), Official Journal L122, 19 May 2015; G. Butler and M. Ratcovich, ‘Operation Sophia in uncharted waters: European and international law challenges for the EU naval mission in the Mediterranean Sea,’ Nordic Journal of International Law 85: 3, 2016, pp. 235–59.
above. The flexibility in regulatory structures and informality of governance structures necessitated a comprehensive yet hitherto untested pattern of collaboration to suppress Somali piracy. To ensure effective law enforcement, it was necessary to pool resources and expertise and to work out an appropriate division of labour among the state and institutional actors involved. We call this *functional contingency*, as it relates to the development of practices and actors working within the legal and institutional structures that condition counter-piracy interventions. As no single state or organization had an appropriate existing mandate, or was the obvious ‘go-to’ responder, counter-piracy off Somalia constituted an intervention in which multiple actors participated. In this process, ad hoc governance environments and new collaborative relations were formed; in this way, participation in counter-piracy efforts presented an opportunity for actors to carve out particular intervention profiles and claims to expertise, and for the building of alliances. The legal and institutional contingency characterizing maritime security governance created a space in which intervention practices in the form of counter-piracy had ‘effects’ not only *vis-à-vis* Somali piracy but also beyond that: counter-piracy efforts also became a way in which various actors sought to constitute themselves as ‘preferred’—if new—maritime intervention actors.

A case in point is the EU as an actor in the maritime domain. The EU had, up until the establishment of Operation Atalanta, chosen to ‘play a passive role and let others take the lead’ in questions of international security. From 2008 onwards, however, the EU has constituted itself as a major maritime security actor. Although the EU was completely new to this task, it managed to be the first in theatre. In comparison, NATO—despite being a military alliance with warships at its command and an existing presence in the western Indian Ocean—responded all of nine months after the EU’s Atalanta mission was established. One reason is that whereas NATO is a purely military alliance, the EU has extensive political structures and consolidated power, which enabled it to set up its response within a relatively short period.

Moreover, the EU sought to establish itself by taking a different approach from that of the other naval actors combating Somali piracy. Notably, Operation Atalanta was never the only policy instrument through which it addressed the issue of Somali piracy. Besides the military arm of the EU’s intervention, a civilian regional capacity-building programme was devised under the name EU CAP Nestor (later EU CAP Somalia) to support the region’s law enforcement capabilities.

In comparison, NATO’s Operation Ocean Shield and CTF151 were purely military missions. NATO, for example, had a ‘no boots on the ground’ policy, and confined its interventions to security operations at sea. An important reason for this difference was that NATO, unlike the EU, did not have an existing political and diplomatic component to its structure; NATO is an alliance of member states.

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41 Bueger, ‘Experimenting in global governance’.
42 B. Germond and M. E. Smith, ‘Re-thinking European security interests and the ESDP: explaining the EU’s anti-piracy operation’, *Contemporary Security Policy* 30: 3, 2009, pp. 573–93.
43 Larsen, *Conceptualising the legal assemblage*, p. 76.
principally focused on conventional defence. This difference arguably became an important factor in the EU’s ‘success’: for instance, its ability to undertake the political negotiations necessary to conclude transfer agreements with regional states helped to ensure legal process once piracy suspects had been apprehended. Some alliance members decided to contribute their naval assets to the EU naval force rather than to NATO for this very reason. This example shows how a conventional actor in the international domain benefited from functional contingency and was able to constitute and position itself in the international community as a central player in counter-piracy vis-à-vis other intervention actors.

Another example of functional contingency in the maritime domain is the number of additional actors that became involved in the region, including China, India and Russia, all of which primarily contributed by deploying warships to patrol the western Indian Ocean. However, states other than the ‘usual’ (western) donor states also increasingly provided onshore interventions. In particular, counter-piracy coincided with the adoption by certain of the Gulf states of a more interventionist foreign policy focused on the Horn of Africa. For instance, Saudi Arabia and the United Arab Emirates began constructing critical infrastructure in the Horn, including in Somaliland, Eritrea and Djibouti. Projects included building new ports and, under agreements with local authorities, military bases. Since the Horn and its contiguous waterway represent an economically strategic location for oil-producing states in the Middle East trading energy with European countries, analysts speculated that Gulf states were increasingly eager to gain a presence in this region to create security for the transport of oil through the Gulf of Aden. More pertinent, for Saudi Arabia such engagement provided a presence in a strategic location across the Red Sea from which to engage in its proxy war with Iran in Yemen. The maritime security component of Gulf state interventions justified their increasing presence in the Horn, but it effectively reached further into a broader set of sectoral issues on which Gulf states began to collaborate with Horn countries, namely aid and critical infrastructure.

China, for its part, also built a military logistics base in Djibouti, as part of its ‘belt and road initiative’, to supply its naval assets. As a result of interventions to

44 Marianne Riddervold, ‘Finally flexing its muscles? Atalanta: the European Union’s naval military operation against piracy’, European Security 20: 3, 2011, pp. 385–404.
45 Marianne Riddervold, The maritime turn in EU foreign and security policies: aims, actors and mechanisms of integration (Cham: Springer International, 2018), ch. 10.
46 Jos Meester, Willem van den Berg and Harry Verhoeven, Riyal politik: the political economy of Gulf investments in the Horn of Africa, CRU report (Clingendael: Netherlands Institute of International Relations, April 2018); Karen E. Young, The emerging interventionists of the GCC (London: LSE Middle East Centre, Dec. 2013).
47 Brendon J. Cannon and Ash Rossister, ‘Ethiopia, Berbera Port and the shifting balance of power in the Horn of Africa’, Rising Powers Quarterly 2: 4, 2017, pp. 7–29.
48 M. Amin, ‘The Berbera Port agreement and its potential repercussions’, Horn of Africa Bulletin 30: 2, 2018, pp. 33–9.
49 Kristian Coates Ulrichsen, ‘The geopolitics of insecurity in the Horn of Africa and the Arabian peninsula’, Middle East Policy 18: 2, 2011, pp. 120–35; Meester et al., Riyal politik.
50 Christopher Layne, ‘The US–China power shift and the end of Pax Americana’, International Affairs 94: 1, Jan. 2018, pp. 89–112; Rosemary Foot, ‘Remembering the past to secure the present: Versailles legacies in a resurgent China’, International Affairs 95: 1, Jan. 2019, pp. 143–60; Shahar Hameiri and Lee Jones, ‘China challenges global governance? Chinese international development finance and the AIIB’, International Affairs 94: 3, May 2018, pp. 573–94; Alice de Jonge, ‘Perspectives on the emerging role of the Asian Infrastructure Investment
counter Somali piracy, China suddenly found its base just a few kilometres from those of the United States and France, among other states increasingly present in the Horn. India, meanwhile, used the international counter-piracy presence to draw closer to the Seychelles in the western Indian Ocean by donating equipment to the Seychelles; and this relationship was soon strengthened when India acquired one of the Seychelles’ 115 islands for military purposes.51

The key point arising from these observations regarding developments in governance relations following counter-piracy off Somalia is the entry of a range of new actors into this maritime intervention space. Beginning with a focus on Somali piracy, this space later expanded to encompass other types of maritime challenges and strategic interests. In increasingly direct response to Somali piracy, such functional contingency in the intervention activity arguably reflects broader developments relating to the more activist foreign policies conducted by emerging states, through which they can not only contribute to the provision of global goods (here maritime security) but also develop new allies in the region, to the distinct benefit of national agendas. The consequences remain to be seen. But the maritime domain seems a fruitful place to draw out the contours of this development. What this can contribute conceptually is the topic of the next section.

Examples of constitutive effects: intervention actors, alliances and arrangements

The three case-studies above demonstrate how the effects of counter-piracy interventions go beyond those (intended or unintended) of various intervention endeavours in solving the problem of Somali piracy—important though these are, of course. Approaching the study of counter-piracy from a perspective that more explicitly appreciates the distinct contingency of governance in the maritime domain, as described above, facilitates appreciation of the importance of another type of effect, namely the ‘constitutive effects’ to which these intervention practices give rise. The contingent conditions in international law and governance structures have allowed both new and old actors to position themselves in what was a new domain of international security intervention. Recalling the discussion above of ‘mission creep’ and emerging actors, we may note that the intervention practices of, and interactions between, different actors have contributed to the constitution of those actors in important ways. That is, intervention practices have had significant bearings on their ability to establish themselves as ‘go-to’ maritime intervention actors vis-à-vis different aspects of maritime governance.

Thus, rather than restricting the analysis to the level of ‘problem effects’ in relation to the challenges of Somali piracy, or maritime crime more broadly, we

Bank’, International Affairs 93: 5, Sept. 2017, pp. 1061–84.

51 The agreement with India came under intense criticism from the political opposition in the Seychelles, which claimed that the government had neglected transparency and consultation. Consequently, the agreement was annulled (Reuters, ‘Seychelles parliament blocks planned Indian naval base on remote island’, 22 June 2018, https://in.reuters.com/article/seychelles-india/seychelles-parliament-blocks-planned-indian-naval-base-on-remote-island-idINKBN1BlOy/.)
may explore another important type of effect: namely, how these counter-piracy interventions produce intervening actors, in particular how the constitutive effects of counter-piracy interventions play out in relation to the status and position of intervening actors themselves, none of which entered the scene of maritime counter-piracy with a well-established legacy or a strong claim to expertise within this particular intervention domain. The conceptual approach of studying the contingency of maritime governance helps draw out the processes of how actors were constituted through their responses to the problem of Somali piracy.

Not only does this add an additional dimension to the study of the ‘effects’ to which counter-piracy interventions give rise; it also adds an analytical dimension, which renders the study of interventions aimed at countering piracy (or other types of maritime crime) relevant for a broader policy and IR audience. Concerning this point, at least two other examples are worth mentioning. We have already alluded to them in the cases discussed above; here we will show that they illustrate how empirical insights from counter-piracy studies can feed into broader conceptual development.

First, as critical intervention studies focus on the constitution of both states and the international community, so too may an analysis of the constitutive effects of counter-piracy interventions entail an analysis of new ‘alliances’, divisions of labour and rivalries. Owing to the contingency of regulatory structures, the lack of a previously established division of labour in maritime security governance and the broad range of intervention actors that seek to claim a role in this domain, counter-piracy interventions become a particularly interesting case through which to explore the emergence of new power constellations. Studying the security practices of these actors reveals not only established alliances and conventional rivalries in international relations, but also new collaborative constellations, and emerging ambitions of new actors contesting fragile power balances in the waning multilateral world order. Indeed, because governance in the maritime domain is not characterized by the same degree of stability as governance mechanisms on land, it is a space in which the emergence of new alliances, collaborations and rivalries becomes more apparent and can fruitfully be studied. Positioning, shifting power balances and alliances come more to the fore in this contingent domain, where analysis cannot rely so strongly on conventional assumptions of roles and activities in the international community. Because of the fluidity of governance structures, conventional alliances are more easily reordered and traditional avenues of action destabilized. To some extent, this is a noteworthy difference from what is generally seen on land, where the established multilateral world order is less disputed from within and more contested by emerging actors from without—notwithstanding recent anti-globalist initiatives, such as the US withdrawal from international climate, trade and human rights agreements, or the UK exit from the EU, through which the liberal world order is increasingly coming under threat. But here lies the increased relevance of the contingency found in the maritime domain: its potential use in analysing how the responses of new and existing actors are illustrative of such developments on the global stage.
Second, intervention practices in the maritime domain have had constitutive effects vis-à-vis structures—for example, in establishing new governance arrangements, such as the HRA, mentioned above. Once established, the HRA had impacts on the transit routes and insurance policies of the shipping industry, as well as the governance practices of international security actors. Notably, of course, it has affected those tasked with patrolling and receiving the advised reporting from vessels passing this area.

Thus, looking at ‘effects’ of counter-piracy interventions other than those they have on the problem of piracy itself could well entail not only analysis of the production of intervention actors and positions, but also analysis of other aspects of political ordering that intervention practices contribute to constituting—sometimes with important implications for how security governance is then conducted.

As these examples illustrate, the approach introduced in this article arguably opens up a broader research focus on exploring constitutive effects of counter-piracy and other maritime interventions not just around intervention actors but also more widely. Another such area of further study would be an exploration of how counter-piracy interventions off Somalia have seemingly been constitutive of what is now a much broader domain of maritime interventionism, concerned with combating maritime crime rather than only maritime piracy. Indicative of this is the change in the titles of programmes by intervention actors; for example, the UNODC’s original ‘Counter Piracy Programme’ has now changed its name to the ‘Global Maritime Crime Programme’. These are only some of the questions to which a focus on constitutive effects of maritime intervention practices helps call attention, thus opening up new avenues of research.

**Conclusion**

In summary, we propose a focus on contingency and constitutive effects as a distinct approach to the study of maritime security governance. The ocean provides a fertile and open field within which international relations and power politics can play out in practice.

Counter-piracy off the coast of Somalia took place in conditions of maritime security governance characterized by a distinct sense of contingency. This contingency is apparent in the fact that the regulatory structures and constellation of actors in these counter-piracy efforts do not adhere to predefined mandates and hierarchies. It is also apparent in the absence of distinct institutional profiles and legacies, which enables the entry of new intervention actors (states and institutions) and the negotiation and constitution of new profiles of those actors. The ‘loose’ governance structures required states to collaborate and coordinate their actions in new ways—and, with that, also opened up a space which allowed states and organizations to negotiate their positions as intervention actors in deciding how to govern and protect the maritime domain and how to conduct security operations at sea.
As long as the maritime domain is characterized by such conditions, it provides space for negotiation of existing structures of governance: a space for familiar actors to define new roles and for new actors to enter not only maritime intervention but also broader issues such as defining a global (maritime) order.

A conceptual approach to the study of maritime security should be able to grasp both change and continuity, and to lift out of empirical cases information about the ways in which shifting power relations and constitutive effects play out at sea. Approaching the legal, institutional and functional aspects of counter-piracy off Somalia through their contingent condition enables an analysis of maritime security governance which attends to and appreciates the importance of the constitutive effects of intervention practices on, and beyond, intervention actors. This brings out forcefully the underlying dimensions of power that are produced and appropriated in the counter-piracy field, an insight that not only has theoretical repercussions but should also inform policy.