

Zones of Exception at Sea: Lessons from the debate on the High Risk Area

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Summary

The question of whether and how the so-called High Risk Area (HRA) should be revised increasingly occupied the agenda of the Contact Group off the Coast of Somalia (GGPCS) from 2012. By 2014, the debate became very controversial. The nature of this controversy and the way that the GGPCS could deal with it raises a number of important lessons about the work of the group, but also more general questions about sovereignty, spatiality and the role of demarcated zones in security governance. This lessons learned paper firstly provides a detailed reconstruction of the debate. Secondly, in response to the request of a range of governments to rethink the "paradigm" of the HRA², this paper draws out ten core lessons from the experience with the zone. These lessons are of particular importance in regards to future attempts to establish zones like the HRA and the role that informal governance plays in such processes.

1. Introduction

Throughout history, piracy, “involves a region in which exceptional legal rules apply” as historian Heller Roazen reminds us.³ The global fight against piracy off the coast of Somalia is not much different in this regard. The campaign against piracy defined territory and established what can be called "zones of exception". Such zones are special spaces in which particular forms of rules and regulations apply.⁴ For instance, the authorizing UN Security Council Resolutions, starting with resolution 1816, had a "clearly limited *ratione loci*" ensuring that the right "to enter the territorial sea does not apply to the territorial sea of states other than Somalia (such as Yemen or Kenya)."⁵ With the resolution the UN Security Council defined a particular space in which the fight against piracy should take place, which included Somali territorial waters. One of the first measures of the international navies was to introduce a safe zone for shipping, the International Recommended Transport Corridor.⁶ In this zone of exception vessels were protected by the international naval missions. As Deborah Cowen argues, “the creation of this corridor is literally the production of a new political space” since it establishes new forms of authority and legal regulations.⁷ 2010 saw the creation of another zone the High Risk Area (hereafter HRA). The concept of an HRA was introduced to signify the area where there was a high risk for ships to become the victim of a piracy attack. If firstly used only as a loose term, a concrete area was defined

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² Communiqué of the 18th Plenary of the Contact Group on Piracy off the Coast of Somalia.

³ Heller Roazen (2009: 10), see also Kempe (2010).

⁴ See Ong (2006). It is noteworthy that the maritime has increasingly become carved up in several special zones by international regimes, this includes the Exclusive Economic Zone established by the UN Convention of the Law of the Sea, maritime Search and Rescue Zones, as well as Fishery Zones (see the review in Kraska and Pedrozo 2013 and the discussion of zoning in Bremner 2013, and Peters 2014.)

⁵ Treves 2009: 405.

⁶ Geiss and Petrig 2011: 17.

⁷ Cowen 2014: 153.

in the Best Management Practices for Protection against Somali Based Piracy (BMP). It marked a zone of exception since in this space special precautions should be taken by the shipping industry including a close cooperation with military actors. The HRA is a particular political, legal and security experiment.

This paper, firstly, discusses the functions that the HRA started to play in the larger counter-piracy structures and how it was created together with the BMP. I reconstruct the making and promulgation of BMP and attempts to ensure compliance as well as show how the HRA became linked to other special maritime zones. In the second part of the paper I reconstruct how the HRA increasingly became controversial, and, how international actors aimed at managing and solving the issue. I pay particular attention to how the controversy was addressed by the Contact Group on Piracy off the Coast of Somalia (CGPCS). The paper concludes with a range of explicit lessons from the HRA for the role of such zones in maritime security governance.

2. Making BMP and the HRA

An essential part of the fight against piracy are the so-called Best Management Practices (BMP). Four versions of the BMP were developed by 2011 in response to the increase of piracy incidents in the Western Indian Ocean. The BMPs are guidance documents developed for the shipping industry and prescribe a range of precautionary and self-protective measures in order to limit the risk of being subject of a piracy attack. Following Bryant and colleagues the BMP can be understood as a form of "situational crime prevention", that is, "a strategy that aims to reduce crime by making opportunities for crime less appealing and more risky through the manipulation of the immediate environment".⁸ The BMP in its latest version four prescribe thirteen situational measures that can be grouped in pre- and post-boarding measures.⁹ At the core of BMP are vessel hardening measures and the close coordination between the shipping industry and security actors. Quantitative and qualitative studies have clearly confirmed the effectiveness of the BMP measures in reducing the risk of piracy attacks.¹⁰ Compliance with BMP is one of the four factors explaining the sharp decline of piracy attacks from 2012.¹¹

2.1 The negotiation of the BMP

The origins of the BMP lie, according to Hansen, in the joint attempt of the International Maritime Organization (IMO), the United Kingdom Maritime Trade Organization (UKMTO) and eleven industry associations to develop a guidance document.¹² This so-called "The Advise to Masters" document aimed at outlining a more "hands on approach" to physical security (Hansen 2012: 565) and was formally adopted as IMO Circular 1334 (2009). New versions of the document were produced and published by August 2009 (BMP2) and June 2010 (BMP3), until in August 2011 BMP4 became the standing reference document. The BMP4 document suggests that it is "produced and supported"¹³ by 16 industry associations, which included in addition to those involved in the negotiation of BMP1 seven additional associations.¹⁴ The main international actors engaged in counter-piracy are listed as supporting the BMP, which includes the "big three" naval missions – the Combined Maritime Forces (CMF), the EU Naval Force Atalanta (EUNAVFOR), and NATO's Operation Ocean Shield –, the four liaison offices

⁸ Bryant et al. 2013: 72.

⁹ Bryant et al 2013: 72.

¹⁰ See Hansen 2012, Bryant et al. 2013, Psarros et al. 2013, and Townsley et al. 2015.

¹¹ Bueger 2015a.

¹² See Hansen 2012. BIMCO, CLIA, ICS, IG P&I, IMB, INTERCARGO, INTERTANKO, JHC, JWC, OCIMF and SIGTTO were involved in the process.

¹³ Compare the title page of the BMP4 booklet.

¹⁴ Those were IMEC, Intermanager, ISF, ITF, IPTA, The Mission to Seafarers and the WSC.

supporting these missions – the Maritime Liaison Office of the U.S. Navy (MARLO), the Maritime Security Centre Horn of Africa (MSCHOA), the NATO Shipping Centre (NSC), and UKMTO –, as well as Interpol's Maritime Task Force (MPTF).

The precise details of the negotiation of the BMP are not in the public domain. Diplomats involved in the CGPCS have described the process as a "London-based black box". The document itself refers to meetings of the Industry Organizations. As shown by Hansen (2012) the basis for BMP1 were lessons in thwarting off piracy attacks from other regions, centrally West Africa and South East Asia. Over the evolution of the BMP subsequently practical experience from piracy in the Gulf of Aden as collated and provided by the industry associations and naval missions were subsequently integrated and linked to the operating procedure of the naval liaison offices (UKMTO, MSCHOA, MARLO, and NSC). The first communique of the newly established CGPCS, argued that the BMP "were based on recommendations" by MSCHOA.¹⁵ The 6th communique notes that

"Industry and governments have continued to monitor the tactics used by Somali pirates and, based on evaluations, have revised Best Management Practices (BMPs) and other counter piracy guidance."

Later communiqués refer to the BMP more clearly as "industry-agreed".¹⁶ A report by the ICS (2013) refers to the BMP as "developed by industry with advice from the military". Official records are inconclusive of who the main authors of the BMP were. It is perhaps best to consider the BMP as a co-production process that brings together the expertise of the industry, of the international naval missions and prior guidance documents developed in the IMO.

2.2 BMP and HRA

In the evolution of the BMPs the most significant step is that from version two to three. Version three does not only for the first time acknowledge the military operations as supporters, but also provides a range of definitions. In BMP3 also the HRA is defined for the first time. The second version of BMP did not explicitly define a distinct risk area, but already mentions the term in a very loose sense.¹⁷ BMP3 introduced the idea of a high risk area as the zone to which the BMP should be applied. BMP3 defined this zone in the following way:

"The High Risk Area for piracy attacks defines itself by *where the piracy attacks have taken place*. For the purpose of the BMP, this is an area bounded by Suez to the North, 10 degree South and 78 degree East. While to date attacks have not been reported to the extreme East of this area, they have taken place at almost 70 degree East. There remains the possibility that piracy attacks will take place even further to the East of the High Risk Area. Attacks have occurred to the extreme South of the High Risk Area."¹⁸

BMP4 reiterated this zone in geographical terms, yet, widened the definition by referring to the zone as the place where "piracy activity" have taken place.¹⁹ If the notion of "piracy attacks" is a clearly definable legal term, the notion of "piracy activity" is more ambiguous and open to interpretation. "Piracy" is in the BMP4 not defined in legal terms²⁰, but as "all acts of violence against ships, her crew

¹⁵ 1st Communique of the CGPCS.

¹⁶ 7th Communique, 10th Communique.

¹⁷ In BMP 1 it is already mentioned 3 times. BMP 2 mentions the term 6 times, though it is not very specific on its territorial scale loosely referred to Gulf of Aden, wider Western Indian Ocean.

¹⁸ BMP 3, p. 3, emphasis added.

¹⁹ BMP 4, p.3.

²⁰ The UN Convention of the Law of the Seas, para 101 defines piracy as occurring in the high seas, and hence excludes any crimes in territorial waters.

and cargo. This includes armed robbery and attempts to board and take control of the ship, wherever this may take place".²¹

2.3 Ensuring BMP Compliance

Much of the initial discussions of the BMP did not concern the content of the document, but how to ensure the compliance with the guidelines. Four means of ensuring compliance were used. 1) The BMP documents were formalized through the endorsement of each version by the CGPCS, the IMO and the UNSC. 2) A declaration was drafted by which states and their shipping administrations formally committed to the BMP and their distribution. 3) Physical artefacts were created to allow for the wide distribution and circulation of the BMP. 4) Compliance with the BMP was increasingly monitored through the shipping industry and SHADE.

1) *The Formalization of BMP.* Records show the importance of the Working Group 3 of the CGPCS, the meetings of the Shared Awareness and Deconfliction (SHADE) forum and the Maritime Safety Committee (MSC) of the IMO in the evolution of the BMP. While there is no indication from official documents that these fora have had an influence on the content of the BMP, these groups were certainly instrumental in formalizing the BMP, and as discussed further below in distributing them and ensuring compliance.

The CGPCS welcomed BMP1 in its first plenary and substantial discussions on the BMP were conducted in the Working Group 3 (WG3), initially chaired by the US and from 2012 by the Republic of Korea. In the first WG3 meeting in February 2009, the BMP1 were presented by the ICS. "WG3 welcomed the initiative and forwarded the text to Working Group 1 (in charge of coordination and capacity-building and the Plenary for consideration".²² The WG3 facilitated the submission of the first versions of the BMP to the IMO's MSC,²³ and similar actions were conducted for the following versions of the document. The CGPCS welcomed in its communique each of the updates of BMP.²⁴

According to representatives of the ICS, the CGPCS in particular served

"as a platform for the *recognition* of the Best Management Practices (BMP), developed 'by industry for industry' as practical guidance on the deterrence and avoidance of Somali Pirate Action Groups. The BMP were subsequently submitted to the International Maritime Organization (IM) and circulated officially by the organization. [...] While the Contact Group is not a legislating body, it has facilitated the development of essential guidance at *faster rate* than is normally possible under conventional legislative mechanisms".²⁵

BMP3 and 4, and with it the HRA, were officially endorsed by the CGPCS, but also by the IMO²⁶ and the UN Security Council.²⁷

2) *The New York Declaration.* Already in its inaugural meeting the CGPCS identified compliance with the BMP to be a core problem. In response the group developed a declaration to ensure that flag state authorities known as 'open registries' would contribute to the dissemination and compliance of the BMP. During the 3rd plenary meeting of the CGPCS in New York on May 29, 2009, representatives from the Bahamas, the Republic of Liberia, the Republic of Marshall Islands, and the Republic of Panama, together representing more than fifty percent of the world's shipping by gross tonnage, signed the so-called New York Declaration. In the declaration the governments and their flag state authorities

²¹ See BMP4, p.1. A more detailed and precise definition of piracy attacks and piracy activity is given in the Annex to the BMP4.

²² Chul 2014: 41.

²³ Chul 2014: 41.

²⁴ Compare 4th, 6th and 10th Communique of the CGPCS.

²⁵ Hincliffe and Stawpert 2014: 46, emphasis added.

²⁶ See e.g. IMO A 26/Res.1026 (2009). The BMP4 were published as MSC.1/Circ.1339

²⁷ See e.g. UNSC RES/1950 (2010), para 20.

committed themselves to “to promulgating internationally recognized best management practices for self protection to vessels on their registers.” Also Cyprus, Japan, Singapore, the United Kingdom, the U.S. and South Korea signed the declaration.

3) *Physical Artefacts*. Print copies of BMP3 and BMP4 were produced in a pocket-size format and widely distributed. The intention was that "every mariner in the world would carry the BMP in his pocket". As NATO's Joint Analysis and Lessons Learned Centre phrased it, "those involved in identifying and publishing best practices collaborate to aggressively distribute the booklet to as many recipients as possible" (NATO JALCC 2011: 19). The printing of the BMP4 booklet was financed by the industry associations involved and 50.000 copies were made freely available.²⁸ The United Kingdom's Hydrographic Office, an executive agency of the UK's Department of Defense providing navigational aids, published a navigational chart that referred to the BMP. What was initially called the "Anti-Piracy Planning Chart" and later the "Maritime Security Chart" Q6099 - Red Sea, Gulf of Aden and Arabian Sea lists the basics of the BMP and also marks the HRA through red lines in the chart. The chart was freely distributed and ten thousand copies were made available.²⁹ The industry organizations also produced together with the navies a movie explaining and supporting BMP of which free copies were distributed.³⁰

4) *Monitoring Compliance*. Significant efforts were made by the navies and shipping associations to increase the level of BMP compliance through monitoring. This was a particular issue on the agenda of WG3.

During the March 2010 meeting of WG3, it was decided that a survey would be conducted to determine how administrations were disseminating and implementing BMPs. The results were presented at the 6th plenary of the CGPCS and according to the communique

“Of the 29 Administrations that attended the meeting, 18 Administrations responded including the four largest ship registries. All responding Administrations disseminate BMPs to their fleets; implementation being voluntary for most of the Administrations, mandatory for others, with several using the International Ship and Port Security Code (ISPS) framework for incorporating counter-piracy measures into ship security plans.”³¹

The 7th communique includes a strong plea to ensure BMP compliance. As it is stated in the communique:

“The Contact Group encouraged each member of the international community to take practical steps to ensure a greater level of compliance, including ways to provide incentives to industry and merchant shipping companies for better compliance with the BMPs.”³²

Also the industry and the naval forces contributed to the attempts of monitoring compliance. The big three naval mission wrote, for instance, in April 2010 a letter to all major shipping associations and companies encouraging them to do all they can to increase compliance and alerting them about the fact that they monitor compliance. The 8th Communique, of 21st March 2011 notes that

“Working Group 3 continues to monitor findings in coordination with Working Group 1 regarding the effectiveness of Best Management Practices (BMPs), and more needs to be done. The use of BMPs has been continuously demonstrated to reduce the likelihood of a successful attack. [...] The Working Group remains concerned about vessels that are not following BMPs and other counter piracy guidance. In view of the increasing monetary levels of ransom payments and the recent escalation of violence by pirate gangs, Working Group 3 is urging flag-states to increase their own efforts to enforce the use of industry

²⁸ See Intertanko (2011).

²⁹ See Chair Summary of the SHADE Meeting, 27.10.2009.

³⁰ See Intertanko (2011).

³¹ 6th Communique of the CGPCS.

³² (7th communique of the CGPCS, p.3.

compliance with anti-piracy BMPs. The CGPCS noted the working group's interest in the need to leverage economic mechanisms to provide potential incentives for increased use of BMPs. For example, though insurance organizations have endorsed BMPs, underwriters have been challenged to seek ways to maximize compliance with self-protection measures among their clients. Also, Industry Groups and the Seamen's Church Institute will continue to develop and refine guidance for Company Security Officers (CSOs) to prepare for the contingency of an attack, and for post-incident care of affected seafarers, respectively. Working Group 3 will continue to monitor the extent and the effectiveness of BMPs and other counter-piracy guidance, and to refine and adapt them appropriately".³³

2.4 Conflation of Zones and the Legalization of the HRA

Since the first publications of BMP, the HRA, was related to and became a core reference zone for a range of other international regulatory and coordination processes. The BMP4 HRA needs to be understood in relation to at least four process: 1) the Voluntary Reporting Area established by UKMTO and MSCHoA, 2) the military planning area of SHADE, 3) the High Risk Area and Extended Risk Area of the International Bargaining Forum, 4) the Listed Area of the Lloyds Joint War Committee and 5) legislations and regulations in regard to armed guards on-board merchant vessels.

1) Voluntary Reporting Area of UKMTO and MSCHoA: The UKMTO was established in 2001 to improve coordination between the UK government and the shipping industry. Since then it has supported the CMF with a maritime situational picture. From 2007 its work has shifted towards piracy. It maintains a voluntary reporting scheme (VRS) "under which merchant vessels make regular reports, providing their position/course/speed and estimated time of arrival at their next port while transiting the region." MSCHoA was created together with the EU's operation EUNAVFOR as its liaison office for the industry. MSCHoA records which vessel are transiting the region.

Reporting to the centers is a vital component of the BMP: "An essential part of BMP that applies to all ships is liaison with Naval/Military forces".³⁴ Following the BMP, UKMTO maintains the VRS for the region "bound by Suez, 78 degree East and 10 degree South".³⁵ MSCHOA's reporting system refers explicitly to the HRA, in calling upon vessels to "register their movement only once upon entering the High Risk Area as set out in BMP".³⁶

2) Military planning and SHADE: Military mandates are not directly tied to the HRA and tend to differ in terms of the geographical operations area they define. EUNAVFOR's mandate for instance is ambiguous about the area it works in. The mandate states that

"area of operations of the forces deployed to that end shall consist of the Somali coastal territory and internal waters, and the maritime areas off the coasts of Somalia and neighbouring countries within the region of the Indian Ocean".³⁷

The HRA is however also a reference point in military coordination in the frame of the Shared Awareness and Deconfliction (SHADE) mechanism. "The SHADE meetings were established in 2009 to provide a tactical-level, non-political forum in which all military elements engaged in CP operations in the Gulf of Aden and off the Horn of Africa can discuss successes and challenges, share best practices, and coordinate forthcoming activities".³⁸ SHADE is sometimes referred to as a "miracle", since it

³³ 8th communique of the CGPCS, p.7.

³⁴ BMP4, p.11.

³⁵ BMP4, p.85.

³⁶ MSCHOA 2015.

³⁷ EU Council 2012, para 1.2.

³⁸ NATO JALCC 2011: 19.

implies in particular the coordination of all international navies in bypassing headquarters and higher political levels.³⁹ The big three naval missions, which co-chair SHADE, are listed in the BMP document. Yet, the link between BMP and SHADE is also established in practice. The basis for SHADE meetings is the Maritime Situational Awareness (MSA) picture that UKMTO and MSCHOA provide for naval operations, which is, as discussed, based on the HRA. Part of the MSA services that MSCHOA provides for SHADE participants is also the so-called Mercury information sharing platform. Among other items Mercury provides a graphical presentation on the basis of the HRA.

3) *IBF High Risk Area and Extended Risk Area*: The International Bargaining Forum (IBF) is the forum that brings together the International Transport Federation (ITF) and the international maritime employers that make up the Joint Negotiating Group (JNG) to agree on standard labour contracts for seafarer. All parties to the IBF (including the ITF) are organizations mentioned as producers and supporters of the BMP4. In response to piracy off the coast of Somalia, the IBF agreed in 2005 to introduce the concept of a "warlike operations area" which refers to the area 12 nautical miles off the northern Somali coast. In 2008 the IBF added the concepts of, a "high risk area" and an "extended risk area". The *high risk area* refers to a zone close to the Somali coast:

"The Western Border of this High Risk Area runs from the coastline at the border of Djibouti and Somalia to position 11 48 N, 45 E; from 12 00 N, 45 E to Mayyun Island in the Bab El Mandeb Straits. The Eastern Border runs from Rhiy di-Irisal on Suqutra Island to position 14 18 N, 53 E; from 14 30 N, 53 E to the coastline at the border between Yemen and Oman, together with a 400 mile zone off the eastern coast of Somalia, i.e. from Suqutra Island down to the Kenian border in the South".⁴⁰

The *extended risk area* is equivocal with the BMP4's HRA (although excluding the warlike operations area, and the high risk area):

"The western border of the Extended Risk Zone runs from the coastline at the border of Djibouti and Somalia to position 11 48 N, 45 E; from 12 00 N, 45 E to Mayyun Island in the Bab El Mandeb Straits. The eastern border is set at 78 E, the southern border is set at 10 S and the Northern Border set at 26 N. Additionally, the IRTC in the Gulf of Aden".⁴¹

In these IBF areas, seafarers are entitled to receive special benefits, such as hazard pay or the right to refuse sailing. The agreement also directly refers to the BMP in stating that "The adoption of Best Management Practice is required as a minimum standard of protection." It was estimated that the costs of the IBF agreements were at almost 72 million US Dollar in 2014.⁴²

4) *JWC Listed Area*: The Joint War Committee of the Lloyds Market Association (JWC), is the main standard setter for insurance contracts that determines which areas face special war-like risks. If an area is listed by the JWC then shipowners must seek special permission of their underwriters before their vessel can enter it. Underwriters may then amend cover terms before granting permission for vessels to enter the Listed Area, usually with an additional premium, or refuse to grant cover altogether".⁴³ A report estimates that the costs in additional premiums linked to the JWC are above 76 million US\$ in 2014.⁴⁴ The JWC "comprises underwriting representatives from both the Lloyd's and IUA company markets, representing the interests of those who write marine hull war business in the London market. It usually meets quarterly".⁴⁵ As Lobo-Guerrero notes, "it makes recommendations based on evidence it considers relevant. Due to the unpredictability of piracy risk, such evidence is not based on actuarial science, as standard insurance would in principle do, but relies on the judgment of committee members

³⁹ McKnight 2012: 166.

⁴⁰ IBF 2008.

⁴¹ IBF 2008.

⁴² OBP 2015: 14.

⁴³ Tyler 2013.

⁴⁴ OBP 2015: 12.

⁴⁵ JWC 2015.

influenced by intelligence reports and recommendations made by an external security consultant."⁴⁶ The consultant he refers to is the private security analysis company Aegis DS based in Scotland. The JWC publishes its recommendations in a document titled "Hull War, Piracy, Terrorism and Related Perils Listed Areas". The coast off Somalia was listed for the first time in June 2005 (12nm from the coast). This area has since been extended and by December 2010 the area was defined in the following way:

"Indian Ocean / Arabian Sea / Gulf of Aden / Gulf of Oman / Southern Red Sea. The waters enclosed by the following boundaries: a) On the north-west, by the Red Sea, south of Latitude 15 N b) on the west of the Gulf of Oman by Longitude 58 E. c) on the east, Longitude 78 E d) and on the south, Latitude 12 S excepting coastal waters of adjoining territories up to 12 nautical miles offshore unless otherwise provided".⁴⁷

This area has not been revised since. The JWC is explicit in how it sees this zone related to the HRA. As it states on its website: "The JWC Listed Area is currently similar to but not the same as the UKMTO and BMP areas but in part serves a similar purpose, to alert ships to the potential dangers." (JWC 2015). The JWC listed areas are also directly linked to the IBF areas (Tyler 2013). The establishment of the warlike operations area of the IBF in 2005 was a direct reaction to the JWC decision to list this area.

5) *Legal provisions for the use of armed guards on-board vessels.* Neither the BMP nor the HRA have a formal international legal status, although they were endorsed by the IMO and the UNSC.⁴⁸ As discussed, as an outcome of the New York Declaration, the BMP and the HRA in particular have however been linked and integrated in flag state legislations. The intricate question of how to regulate the use of private armed guards onboard merchant vessels⁴⁹ has led to a further set of legislations which refer to the HRA. For instance, regulations in Japan and the UK allow the use of private armed guards under exceptional circumstances and identifies these circumstances as transiting through the HRA.

In summary, several other zones of exclusion are linked to the BMP's HRA and the zones are nested in each other. The actors in charge for these areas belong to those producing and supporting the BMP. Phrased otherwise, the BMP are the basis of cooperation for a broad range of actors and provide a shared strategic narrative. The interests of a broad range of actors come together and are translated in the BMP ranging from the interests of various industry bodies to states. The HRA as defined by the BMP provides the spatial reference for this cooperation. The HRA in this way is also a zone of 'exclusive cooperation'.⁵⁰ Indeed the BMP and with it the HRA are the 'nodal point' of the state-industry cooperation in the fight against piracy. In consequence in the discussion of the HRA many different issues and interests intersect.

3. The HRA Controversy

The last major piracy attack recorded by the international navies took place in 2012. Yet, navies continue to observe "suspicious activity" and suggest that "it is highly likely that the pirates retain the capability of conducting acts of piracy against vessels of opportunity".⁵¹ As a consequence of the drop of successful piracy incidents, the extent of HRA became increasingly contested and a range of states

⁴⁶ Lobo-Guerrero 2012: 73.

⁴⁷ JWC 2010.

⁴⁸ They might hence be considered as 'soft law'.

⁴⁹ See Liss and Schneider (2015) and Cullen and Berube (2011).

⁵⁰ See Bueger 2013.

⁵¹ NATO NSC 2015.

called for updating the BMP. The BMP4 document itself foresees that the BMP will require updating and in its section 13 suggests that

"The Industry Organisations engaged in producing this Booklet will endeavour to meet regularly and will ensure the BMPs are updated as necessary, based upon operational experience and lessons learned."⁵²

Between 2009 and 2011 the BMP were continuously improved and revised. Whether and how an update of BMP4 should take place in the light of the decline of the number of attacks became the subject of a significant controversy.

3.1 How the HRA became controversial

An incident that sparked the debate took place on the 15 February, 2012. In the *Enrika Lexie* incident two Indian fishermen on board the fishing vessel *St Antony* were killed by shots fired by two Italian marines.⁵³ The marines were acting as vessel protection attachment on board the Italian oil tanker, the *Enrika Lexie*, and mistakenly assumed that the fishermen were pirates. The incident occurred in the Indian EEZ, approximately 20.5 nautical miles off the coast. The Indian Coast Guard intercepted the Italian oil tanker and ordered it to navigate to a nearby Indian port, where the two Italians were arrested and charged with murder. The case, which is at present still unresolved, led not only to diplomatic tensions between India and Italy, but also to significant public attention in India for the consequences of counter-piracy and the HRA for Indian coastal communities.⁵⁴ Since the incident, the revision of the HRA became a top priority of Indian foreign and security policy. India is together with Egypt the core government calling for a revision of the HRA.

Shortly after this incident, the HRA controversy leaves first visible traces in official documentations. It is firstly mentioned in the communique of the 11th plenary of the CGPCS on 29th March 2012, which states that the plenary

"took note of the fact that the reach and extent of piracy in the East Arabian Sea/Western Indian Ocean region, especially east of 70 degrees East, had reduced since May 2011 and recognized that this might present a timely opportunity for industry to review the limits of the piracy High Risk Area."

In the UN Security Council debate on piracy on the 19th of November 2012 under the presidency of India, the government of Egypt argued that it

"attaches great importance to the proper definition of the high risk area, where the risk of piracy abounds, and emphasizes that the definition should be based on clear and welldefined criteria, so that the resources allocated for counter-piracy measures can be more effectively used by focusing on the areas where actual incidents of piracy take place".⁵⁵

The subsequent presidential statement stated that the UN Security Council

"notes the request of some Member States on the need to review the boundaries of the High Risk Area on an objective and transparent basis taking into account actual incidents of piracy, noting that the high risk area is set and defined by the insurance and maritime industry".⁵⁶

⁵² BMP4, p.51.

⁵³ See the discussion in Guilfoyle (2012), Black (2013), Sankar (2013).

⁵⁴ There is a range of reports in prominent Indian newspapers, including Anandan (2013a and 2013b)

⁵⁵ UNSC 2012a, p.9.

⁵⁶ UNSC 2012b.

This view was reaffirmed in precisely the same words in UN Security Council Resolution 2077 (2012) from the 21st of November 2012. Egypt raised the issue also in the 91st session of the MSC that took place from 26 to 30 November 2012.⁵⁷ As it is summarized in the committee report:

“17.11 The delegation of Egypt, supported by Saudi Arabia and the League of Arab States, expressed concern that the definition of High Risk Area given in the Best Management Practices for protection against Somalia-based piracy (BMP4) was inaccurate with respect to the Red Sea and Suez Canal where no attacks had taken place. The observer from BIMCO stated that industry was aware of the concerns and that it had been agreed the issue would be discussed in Working Group 3 of the Contact Group on Piracy off the Coast of Somalia. The delegation of the United Kingdom advised that they were facilitating an ad hoc meeting to take place in London in January 2013, invitations for which would be issued shortly, which would consider issues relating to the High Risk Area and report back to the next meeting of Working Group 3 in February.”⁵⁸

The following 13th plenary meeting of the CGPCS convened in New York on 11th of December 2012 reacted to the UNSC resolution in confirming the idea of an ad-hoc meeting to address the issue. As it states in the communique, the CGPCS plenary

“noted the proposed meeting of a sub-group of WG 3 on 15 January 2013 in London which will include interested Member States and representatives of the insurance and maritime industry to further discuss the issue of the review of existing boundaries of the High Risk Area on an objective and transparent basis taking into account actual incidents of piracy.”

The meeting of this subgroup of the Working Group 3 of the CGPCS chaired by South Korea, was held on the 15th of January 2013. Prior to the meeting Jiyoung Kim, the South Korean chairman of the working group was cited in an Indian newspaper in saying that “the appeal of India and Egypt for a revision of the scope of HRA would be discussed on an objective and transparent basis at Tuesday’s meeting”.⁵⁹ In his opinion

“It is industries, as editors of the BMPs, that define and revise the scope of the HRA... At the latest WG3 meeting, industries expressed that they do not consider the revision of the BMP4 including the scope of the HRA, in spite of the proposal of India and Egypt. WG3 chair suggested holding a meeting on the HRA within parties interested in order to continue the discussions on the scope of HRA” (Anandan 2013a).

An official of India’s Directorate-General of Shipping is cited in *The Hindu* that the London meeting did not lead to any results:

“We have been trying for a resolution to this effect, with little success. We told the forum in London that there was a marked decrease in pirate activity in the Arabian Sea after the Navy began intensive patrolling” (Anandan 2013b).

Anil Devli, chief executive officer of Indian National Shipowners Association (INSA), told the same newspaper

“There were opposing views. After much debate, it has been decided to record the views of both sides and this matter will be deliberated at the next contact group meeting to be held in Korea.”⁶⁰

The working group meeting Devli refers to was held in February in Seoul. The HRA was further discussed and the chairmen summarized the results in the following way.

“In consideration of WG3 mandate which does not include demarcation of the HRA, the Chair suggested periodic threat assessments completed of the HRA by the naval forces and a continued dialogue between

⁵⁷ According to the Economic Times (2012), also the government of India raised the issue at the MSC of the IMO, which is however not recorded in the records of either the 91st or 92nd MSC.

⁵⁸ IMO MSC 91/22, p. 60.

⁵⁹ Anandan 2013a.

⁶⁰ Anandan 2013b.

industries and relevant governments (Egypt and India) on the possibility to reduce the HRA and cost analysis by the industry, including insurance fee. The Chair proposed to have another Ad-Hoc meeting on the HRA during the first half of this year to discuss threat assessment and any changes on the position of the industry and governments (Egypt and India) in consideration of matters, including the idea of transit corridor in the western Indian Ocean.”

The 14th plenary of the CGPCS held in May 2013 took note of these results and recommended to hold a further meeting. As it is summarized in the communique:

“The CGPCS takes note of the report of the WG3 meeting, which included discussions on the issue of the HRA, bearing in mind that the HRA is defined in the industry-developed BMP publication series. Egypt, India, and Oman had previously submitted papers replying to inquiries of the industry and requesting review of the scope of the HRA at the WG3 ad hoc meeting on HRA on 15 January in London. In light of the discussions of the issue and the clarifications made during the meeting, the WG3 will hold another ad hoc meeting on the HRA in the second half of this year to review the threat assessment by naval forces, any changes in the position of stakeholders, and the possibility of reducing the scope of the HRA.”

For unknown reasons the further meeting was however not convened. In the 15th plenary of the CGPCS in Djibouti, 11th and 14th November 2013 the HRA led to a heated debate in WG3. By now it was a much contested issue and the debate laden with frustration. As it is reflected in the communique:

“The Chair of Working Group 3 (WG3) noted the enduring concern of some countries over the scope of the High Risk Area (HRA). He reported that WG3 was not able to agree on the convening of an ad hoc meeting this year to discuss the matter as industry desired more time for internal deliberation after the first meeting of a SHADE working group to conduct a threat analysis in December 2013. Several delegations expressed the importance of implementing the decision taken by the 14th Plenary meeting of the CGPCS to hold an ad hoc meeting to review the scope of HRA before the end of the year, while expressing regret that the meeting has not been convened. Those delegations have noted their view that the extended HRA as outlined in BMPs 3 and 4 does not reflect the reality regarding piracy activity in the Red Sea and some parts of the Indian Ocean.”

In 2014 the CGPCS was however re-structured and after a strategy meeting held in January, the WG3 ceased to exist in its original form. The question of the ad-hoc meeting was placed as an item under the new Working Group "Maritime Counter Piracy and Mitigation Operations". The group co-chaired by Japan, the Seychelles and the United Arab Emirates was seen as successor of WG3 where the issue was previously discussed. The institutional reform of the CGPCS was formally adopted at the 16th plenary meeting in New York on 14th May 2014, and the first meeting for the new working group was announced to be held in conjunction with the next plenary. In consequence, by the 16th plenary no meeting on the HRA had been convened. Again the issue led to considerable tensions during the plenary, and a further recommendation to convene such a meeting was included in the communique. It was stated that

“The CGPCS noted the enduring concern of some countries on the scope of the High Risk Area (HRA) and the fact that the ad hoc meeting to discuss this issue, as agreed to in previous Plenaries, is yet to be held. Further to the deliberations of the 14th and 15th Plenaries, a recommendation is made to the WG Maritime Counter Piracy and Mitigation Operations to convene the ad hoc meeting on the HRA issue just before the next CGPCS meeting.”

3.2 Resolving the HRA Controversy: Towards BMP5?

In the preparation to the 17th plenary the 2014 chairmanship of the CGPCS, the European External Action Service, took over the initiative. It was announced that a meeting on the HRA was to be held in the evening before the official events of the counter-piracy week comprised of working group meetings and the plenary. An invitation was sent out to all stakeholders of the CGPCS. At the meeting the industry associations participating regularly in the CGPCS (Intertanko, Intercargo, ICS, OCIMF) gave a joint

presentation. The two main governments calling for a revision of the HRA, Egypt and India, also gave presentations. The presentations were followed by comments from delegations, with a range of Western Indian Ocean countries supporting the call for a revision of the HRA. The purpose of that meeting was to allow all stakeholders to explain their position and put forward ideas on the scope of the HRA. The meeting did not have a clear outcome, and during the CGPCS meeting it was decided to convene a further meeting to agree on how to proceed in the matter. This was reflected in the communique of the 17th plenary in the following way:

"A special, ad hoc meeting on the scope of the High Risk Area (HRA) was convened on 26 October 2014, ahead of the Plenary. The purpose of this meeting was to allow all stakeholders to explain their position and put forward ideas on the scope of the HRA. Stakeholders agreed to a high degree of responsibility by all stakeholders in approaching this subject. Stakeholders expressed the wish to identify a shared, common, way forward. While it is evident that the decision to change or revoke the HRA procedurally rests with industry, it is acknowledged that interested, non-industry stakeholders should be consulted when reviewing the scope of the HRA. The meeting agreed that a future meeting on the same subject should be convened by the Chair of the CGPCS by end of March 2015 to facilitate a recommendation on the review of the scope of the HRA. The delegations from Djibouti, Egypt, Pakistan and Saudi Arabia have noted that the extended HRA as outlined in BMP3 and 4 does not reflect the reality regarding the absence of piracy activity in the Red Sea and the Northern Arabian Sea in the EEZ of Pakistan."

The follow-up meeting was convened in Brussels on the 13th of March 2015. A broader coalition of states now supported the case for a revision, which included Russia and Indian Ocean littoral states. During the meeting, the shipping associations made an innovative proposal, that is, to disentangle the HRA from the reporting area in the BMP4, and re-name this area as "Reporting Area". Transcending the problem in such a way was to clarify the link between HRA and the other zones of exception. For the littorals this compromise proposal, however, did not go far enough. They called for a thorough revision of the HRA as well as a review of the process by which decisions on the current or future HRAs are made. Littoral states questioned the authority of the industry to make such decisions through self-regulation without appropriate consultation with governments. The meeting however had a tangible outcome. Facilitated by the acting chairman, the agreement reached at the meeting was to initiate a process by which the HRA could be revised. The basis for this process was a "threat assessment" that the "big three" naval missions (EUNAVFOR, NATO, CMF) would conduct until the next CGPCS plenary meeting in July 2015. All stakeholders were invited to provide an input to this threat assessment. It was also decided that the industry associations would then draw on the threat assessment to conduct a "risk assessment" on whether the HRA should be revised.

In the meantime the governments of Egypt and Oman submitted their case to the 95th Maritime Safety Committee (MSC) of the IMO.⁶¹ The MSC took up the case. The industry represented by ICS, BIMCO, Intercargo, INTERTANKO and OCIMF referred to the process of the CGPCS and

"was of the view that it would be counterproductive for the Committee to intervene in that process given the likely nearness of its resolution, and particularly given that most States attending MSC also participate in the CGPCS and its work."⁶²

A broad range of governments however supported the Egyptian proposal and decided, "after an intense discussion"⁶³, to issue a circular on the matter. In the circular the MSC notes that

"the HRA as defined in the BMP is susceptible to change based on changes in the actual threat circumstances and therefore the Committee expressed sympathy for the proposal by Egypt to remove the Gulf of Suez and the Red Sea from the HRA definition in the BMP. The Committee therefore observed

⁶¹ Agenda Item MSC 95/15/1 Proposal to clarify the High Risk Area as defined in the Best Management Practices for Protection against Somalia Based Piracy (BMP 4)", submitted by Egypt on 14.4.2015. Agenda Item MSC 95/15/5 "Piracy High Risk Area" submitted by the Sultanate of Oman on 17.4.2015.

⁶² MSC 95/22, p.63-64.

⁶³ Lloyds Register (2015: 9)

that HRA may now be incorrect terminology for describing the area in which piracy attacks have not taken place but where preparatory self-protection measures are nevertheless recommended. The Committee calls on the authors of the BMP to take necessary steps to amend the coordinates of the HRA in view of excluding the above mentioned area from the HRA definition at the earliest time taking into consideration the threat assessment and respectfully requests them to report back to MSC at its next session".⁶⁴

While not referring to the case of Oman, with the circular the MSC strengthened the case for a revision of the HRA, which also gave the CGPCS process a clear steer into that direction.

The threat assessment of the big three was firstly presented at a 2015 SHADE meeting and then subsequently at the Working Group on Operations meeting held a day prior to the 18th CGPCS plenary.⁶⁵ Also the Indian navy conducted a threat assessment which was presented at this meeting.⁶⁶ The presentations were not further discussed in the Working Group and the issue was left to the plenary the next day. At the plenary, shorter versions of the threat assessments were presented again followed by statements of delegations on the subject. A broad coalition of governments, including China, Russia, several Western Indian Ocean and also South East Asian governments, now supported the call for revision of the HRA. The Industry Associations present at the plenary agreed to follow the process and to conduct their "risk assessment" by October 2015. Whether the CGPCS should task the industry to *review* the HRA or to *revise* it, was debated at length. The communique of the meeting included a larger reconstruction of the history of the HRA debate and as the main outcome the plenary agreed on the following paragraph in the communique:

"The CGPCS considers that the HRA may now be an incorrect terminology for describing the areas in which piracy attacks have not taken place for a number of years. The CGPCS agrees that the two assessments mentioned in para 18 above, form an adequate basis for the review of the scope of the HRA. The CGPCS calls on the industry, authors of the BMP, to take the necessary steps to make a substantive review of the HRA, including the coordinates, within three months and report to the Chair accordingly."

3.3 The arguments

To understand the debate it is important to reconstruct the arguments and claims made so the underlying issues come to the fore. There are two principle parties in the controversy. This is, on the one side, a group of littoral states directly affected by the HRA since their territorial waters and EEZ are included. The group is led by the governments of Egypt and India. On the other side, are the industry organizations representing the shipping industry in the CGPCS. All parties agree in principle that the BMP and the HRA have been useful tools to contain piracy, yet the question of which space the HRA should cover is controversial.

The littoral states base their case on the claim that the HRA affects their economy and security in negative ways, and in consequence any HRA should be limited to what is absolutely necessary.⁶⁷ States hence call for excluding their territorial waters and Exclusive Economic Zones, as well as reducing the eastern border of the HRA to 65 degrees East. As reflected in the 2015 proposal to the MSC⁶⁸, the government of Egypt's case is based on the observation that no piracy incident has occurred in the Gulf of Suez and the Red Sea, notably including Egyptian territorial waters. The geographical conditions of the area and the alertness of security forces patrolling it, make piracy incidents moreover unlikely. Hence in the eyes of the Egyptian government, the criteria set out for the definition of the HRA in the BMP4 are not met. Egypt further points to the consequences of the HRA and argues that

⁶⁴ MSC.1/Circ.1506 [12.6.2015]

⁶⁵ Add further details.

⁶⁶ Add further details.

⁶⁷ Add more details.

⁶⁸ MSC 95/15/1.

“the impact of the High Risk Area definition in the BMP on Egypt and Red Sea Countries includes: 1) the reputation of the ports located in these areas is negatively affected by this classification; 2) the increase of costs of cargo transport from/to Egyptian ports in the Gulf of Suez and Red Sea due to the increase of insurance premiums and the increase of the risk allowance paid to seafarers in addition to the costs of PCASP; and 3) the existence of PCASP causes security, legal and sovereignty issues.”⁶⁹

The government of India firstly observes that no piracy incident has taken place east of 65 degree East since 2012. Secondly, it argues that reassurances are given by the Indian navy and coast guard that piracy incidents are not likely to return to the area. Thirdly, India points to the negative effects of the HRA for the security of its coasts and the communities living and working in it. As it is well summarized by the Indian journalist Anandan,

“It [the HRA] also drove ships to choose routes abutting the coast, very often transgressing dense fishing zones, in a bid to skirt the designated ‘piracy zone.’ This detour of cargo vessels continues to cost the country dear, thanks to frequent conflicts and collisions involving fishing boats and ships leading to an escalation of violence in the contiguous seas.”⁷⁰

Despite general claims that the HRA implies insecurity and violence in India’s coastal waters, linked to the employment of armed guards and increasing traffic, according to *The New India Express*, Indian government officials have also directly linked the HRA to the *Enrica Lexie* case. A government official is quoted in saying that “the *Enrica Lexie* incident, which led to the shooting of two Indian fishermen, was a direct result [of the HRA]”.⁷¹ India further builds its case in pointing to the economic costs linked to the HRA and claiming that higher insurance premiums increase the cost of transport in and out of the country.

The Sultanate of Oman argues in a similar way to India and Egypt. As it is expressed in the letter to the MSC:

“Keeping the Sea of Oman within the High Risk Area is no longer justified and has an unwarranted and significant negative impact on the international economy. The Sultanate of Oman strongly requests that the Sea of Oman be removed from the definition of the High Risk Area as defined in BMP4 and other reports. We also call upon the international community to refrain from naming the Oman Sea as a High Risk Area.”⁷²

The industry firstly claims that states do not have the authority to make such a request, since such authority rests with the industry and that the BMP are a mean of self-governance and regulation. Secondly, their case against a revision is based on the fear over the consequences of reducing the HRA and producing BMP5. The argument is that a revision process will potentially lead to a decline of compliance with BMP4 and a significant reduction of the engagement of the international community. This in turn might lead to a rise of pirate activities. As two representatives of the ICS phrased it in 2014:

“There is no easy way to solve the crisis, and the solution lies upon the four distinct, but complementary, pillars of counter-piracy, namely BMP, armed guards where necessary, military deployment and capacity building ashore. Removing or weakening any one of those pillars would compromise the good work to date and open the door for a resurgence in hijack attempts”.⁷³

As industry representatives phrased it at the October 2014 CGPCS meeting: It is “too early to declare mission accomplished”. The revision of the HRA would imply a “very real risk of undoing all the good work”.⁷⁴

⁶⁹ MSC 95/15/1.

⁷⁰ Anandan 2013b.

⁷¹ Mitra 2013.

⁷² MSC 95/15/5.

⁷³ Hinchliffe and Stawpert 2014: 47.

⁷⁴ Power Point slides of the industry representatives, given at the Dubai meeting.

3.4 What's at Stake in the HRA Controversy?

Several concerns intersect in this debate. The first is a *problem of uncertainty*. It is a fact accepted by everyone that the current system contains piracy successfully. The system is however costly. It is unclear what can be removed from it without risking the return of piracy, but also what structures will be required to contain piracy in the medium and long term.

Secondly, the debate is about the *ownership of the BMP*, that is, whether the BMP are owned exclusively by the industry or whether governments should have the right to influence or even determine the content of the BMP. The process by which the BMP were developed was intransparent and not documented. As shown, official records do not allow for a conclusion on the lead authorship but document that industry as well as state actors represented through SHADE and other military bodies participated in the formulation of the BMP. State actors and international organizations participated in developing the BMP and the CGPCS, the IMO and the UNSC gave the BMP legitimacy by endorsing them. Whether it was the industry or governments who were in the lead is not immediately clear.

This concerns, thirdly, also the larger question of whether the security of the shipping industry should be governed through *self-regulation or state-regulation*. The industry associations take the position that the self-regulative bodies that have been created over decades (such as the JWC or the IBF) should be the primary instance, and states should only take action under exceptional circumstances (and if requested by the industry). The littoral states in turn argue that states have the primary responsibility over the security of shipping and hence should have the authority to decide whether and how the industry can regulate itself.

The fourth issue is *epistemic*. It concerns the question of who should have the authority to establish if there is a "high risk" and what methodology should be used to do so. The CGPCS aimed at solving this issue by giving the authority to the military intelligence of the naval coalition forces. This, however, not only potentially excludes the independent deployers (such as China and Russia) from the process (although they were invited to provide inputs). It also raises questions over methodology, that is, whether military intelligence agencies have the right tools and knowledge required to assess whether there is pirate activity and whether a risk exists. Unsurprisingly the military coalitions refrained from doing a "risk" assessment, and argued that they can only conduct a "threat" assessment. This assessment not only drew on a methodology which seems not to be in line with the state of scientific research⁷⁵, but also produced inconclusive results.

The fifth issue is linked to the *authority and legitimacy of the CGPCS* as the forum where the issue should be resolved. As shown, the CGPCS was instrumental in facilitating the BMP and ensuring high compliance. It is also the only place where all actors involved in counter-piracy engage with each other directly. Yet, whether the issue should be resolved in the CGPCS became contested. In the HRA debate several of the opponents questioned whether the issue could be resolved in the CGPCS, or better be handled in other fora such as the MSC of the IMO. Participants also questioned that the representatives of the industry who participate in the CGPCS legitimately represent the entire industry and hence should be allowed to speak in the name of the entire group of industry actors supporting the BMP. Regional states seemed to question the legitimacy of the CGPCS based on its inability to solve the HRA controversy. For the government of Egypt the consequence was to raise their concerns in the MSC of the IMO, while other parties remained committed to have the issue resolved within the CGPCS.

⁷⁵ The SHADE assessment exclusively relied on data gathered through intelligence without making sources transparent. It adopted an assessment methodology based on three factors – intent, opportunity and capability.. The assessment not only excluded factors which have proven to matter, such as the role of coastal populations, legitimacy and corruption, they did not address, what is at the heart of the debate, spatiality, that is, where attacks and activity take place.

4. Lessons from the HRA Controversy

A number of core lessons can be distilled from the HRA controversy. These pertain in particular to the question of how to design the prospective BMP5 as well as set up other zones of exception in the future. They are, however, also lessons that point to the limits of purely pragmatic international policymaking processes.

The HRA was introduced as a quick fix. The intent was to focus attention, give guidance to the shipping industry and coordinate international activities. The primary attention went into the question of how compliance with the BMP could be strengthened. When the notion was introduced no one anticipated the quick success of the international community and that piracy attacks would simply stop. The process of making the BMP was not documented, and hence the question of how they could be 'unmade' remained unclear. No mechanism was put in place for how to revise the area if needed.

Lesson 1: Future introductions of similar zones will need to be aware of the un-intended consequences and establish a review mechanism from the onset.

Part of the HRA controversy was the problem of conflating different counter-piracy zones, namely the zones established by the insurance industry for mitigating financial risks, by the IBF to negotiate labour contracts, by the shipping industry for strengthening self-protective measures and by the states to coordinate their naval protection and patrol program. The relations between these different zones was unclear and never officially clarified.

Lesson 2: In establishing a zone of exception ensure accuracy in naming, by clearly documenting who establishes what zone for which purpose.

To label the special zone "high risk area" was a misnomer. While the concept of "high risk" appeared self-evident to all involved in counter-piracy when it was introduced, it is not. What precisely constitutes 'risk' and how it can be measured is contested, and furthermore, whether a risk is "high" or "low" is a matter of subjective interpretation. Without clearly established criteria when a risk is "high" the notion has the potential to cause controversy.

Lesson 3: Labelling a zone of exception is a crucial issue and ambiguous notions such as "high" are better avoided.

The notion of risk and ambiguous references such as "pirate activity" moreover raise the question of who has the authority to determine what kind of risk exists in an area. These questions were left open in establishing the HRA. The so-called threat assessments were not in line with the state of the art of research on piracy as well as risk assessment methodology.

Lesson 4: Zones of exception should be defined and reviewed by establishing objective criteria.

Lesson 5: A zone of exception requires to identify which agencies have the authority to carry out assessments.

Lesson 6: Assessment methodologies should draw on the state of research.

One factor hindering the revisions of the HRA was the reproduction of the material by which the BMP were disseminated. The global distribution of the BMP booklet and the navigation charts contributed to higher BMP compliance. This, however, also implied that these materials cannot be easily replaced.

Lesson 7: In disseminating information about a zone of exclusion, keep reversibility and reproduction costs in mind.

The way the HRA was introduced it includes the exclusive economic zones as well as the territorial waters of a range of littoral states. Labelling territorial waters as piracy risk zones is firstly questionable

in legal terms because, under UNCLOS para 101, the concept of piracy refers to crimes outside of territorial waters. Secondly, even if a zone of exclusion is introduced only for the purpose of industry self-regulation, it raises concerns over state sovereignty, and in consequence states must have a say in the establishment and/or revision of such zones.

Lesson 8: If industry actors introduce zones of exception for self-regulative purposes, they must seek the dialogue with states in appropriate international organizations such as the International Maritime Organization.

Lesson 9: States should closely monitor if and when industry actors aim at establishing zones of exception and seek the dialogue with these actors through established and appropriate channels.

The BMP were introduced as a kit of advice and a self-regulative device. There was no intention to give them legal status. The HRA however achieved a semi-legal state through references to the BMP and the HRA in domestic regulations and counter-piracy legislations. This does not only make revisions more complicated, but also implies that the industry cannot revise the area without consulting legislators.

Lesson 10: In establishing zones of exception exercise particular caution about legal repercussions and whether and how a zone becomes embedded in national and international legislation.

5. Conclusion

The fight against piracy led to a remarkable cooperation between governmental authorities and the shipping industry. The success in containing Somali piracy can be partially explained by this cooperation. The texture woven around the BMP made this cooperation possible. The history of the BMP was a remarkable experiment. The BMP defined standards and ensured the collaboration between the shipping industry and navies. The BMP documents are situated in a legal and political grey zone. On the one hand, the BMP gained authority by being agreed by the industry and hence being owned by corporations. On the other hand, governmental actors not only contributed to the making of the BMP, but also worked towards ensuring compliance, endorsed the BMP in the UNSC, the IMO or via the New York Declaration, as well as monitored compliance. Organizing the government-industry cooperation in such a way followed a strategy of “calculated informalization”. The focus was pragmatic and based on experimentation with what could work, leaving many of the larger political and legal questions bracketed. With the diminishing urgency of the piracy problem the BMP texture, however, started to erode. The politics of the BMP and larger questions of legitimacy and authority came to the fore. The authority inscribed in the BMP was tied to a particular space, the HRA. The HRA is a zone of exception in which particular forms of regulations are at play and actors cooperate differently than they do in other spaces. Unsurprisingly then the politics of the BMP were tied to that space, and it was the controversy over whether and how this space should be defined and revised that brought the politics of the BMP to the light. The HRA controversy is about territory (what space should be exceptional?), authority (who governs the space?), but also expertise (what knowledge decides about the exception?).

The controversy showed the value of the CGPCS as the forum in which the debate could be transparently addressed (and hopefully be settled). The only failure in this regard was to take up the issue too late, with almost two years passing by until a sufficient process was initiated which took the concerns of the littoral states seriously. While the IMO MSC also played a vital role in resolving the initial controversy, it was the informal governance of the CGPCS which allowed for a process in which the arguments on the HRA could be debated and a solution developed. Not everything what was at stake could be resolved in the CGPCS, and once the dust of the HRA controversy starts to settle, the broader questions of the state-industry relation in maritime security are likely to reappear in other contexts.

With the HRA the international community has experimented with a new form of political and legal space. The pragmatic politics of making the BMP, the calculated informality of the industry-governmental relation worked and the de-politicization of the HRA played a core part in containing piracy. With the immediate fight against piracy being over, it not only became clear that this zone of exception is, like any other of such zones, deeply political. It raised larger questions of how maritime insecurity can be governed in particular regions and what roles zones of exception should play in it. Managing the complexity of maritime security and working towards the effective governance of the oceans⁷⁶, will depend on how governable spaces are demarcated and defined. The lessons outlined in this paper show that the problems of working with the tool of zones of exception at sea. If future zones of exception at sea are planned, than one should be wary of the unintended consequences that pragmatic politics produce. A definition of the space in legal, political and epistemic terms is required. An approach which is purely driven by problem solving might be very successful in the short term, but may lead to problems when the time perspective shifts to the mid-term and transition strategies are required.

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⁷⁶ See Bueger (2015b) for an outline of the complexity and challenges associated with maritime security.

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