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© Ina Kristine Klinkenberg
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In partnership with the Norwegian Institute of International Affairs
Ina.k.klinkenberg@gmail.com

Noragric
Department of International Environment and Development Studies
P.O. Box 5003
N-1432 Ås
Norway
Tel.: +47 64 96 52 00
Fax: +47 64 96 52 01
Internet: <http://www.umb.no/noragric>

Declaration

I, Ina Kristine Klinkenberg, declare that this thesis is a result of my research investigations and findings. Sources of information other than my own have been acknowledged and a reference list has been appended. This work has not been previously submitted to any other university for award of any type of academic degree.

Signature.....

Date.....

Acknowledgment

Writing this master thesis has been challenging, but also a great process of learning. I would like to thank my supervisor Stig Jarle Hansen for his constructive feedback and guidance.

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Oslo, December 15th, 2013

Ina K. Klinkenberg

Abstract

This thesis examines the regulations governing Private Security Companies (PSC) in the anti-piracy fight. With pirates originating from Somalia expanding their operational field to cover an immense area reaching over the Indian Ocean, Gulf of Aden and into the Arabian Sea, PSCs has become an important deterrent actor safeguarding vessels in pirate prone areas. With PSCs being a relatively new actor within the modern day anti-piracy fight, the thesis seeks to get an understanding of the new legal field surrounding their presence. The significant of studying PSCs in the anti-piracy fight is rooted in the current lack of substantive and systematic information embracing their presence. The result is a knowledge gap which needs to be addressed. The aim of this thesis is therefore to contribute to the understanding of how PSCs are regulated by examining the relationship between the operational field of PSCs and the regulations governing their actions. In order to bridge an understanding of the relationship between PSCs and their regulations, the principal agent-theory has been applied. Drawing on insights from the principal-agent theory helps highlight regulative aspects demonstrating an effective relationship between PSCs and the regulations governing their actions. As the findings reveal, there are currently weaknesses within the regulations governance over PSCs. One factor is rooted in the current knowledge gap as one can argue that regulations have fallen victim of being made without fundamentally grasping the sector they intend to regulate. This has resulted in the emergence of unforeseen situations, such as the rise of floating armouries. Without any overriding international law governing PSCs presence within the anti-piracy fight the field consists of a complex system of regulations creating ambiguity within the field. The ambiguity is rooted in a lack of harmonization, weak wording, insufficient monitoring mechanisms, inconsistency within and between regulations as well as regulations obstructing the efficiency of PSCs mandates. With piracy being an international problem, the regulations governing PSCs should be dealt with accordingly. An international agreement can help solve the complexity hampering the current regulative field governing PSCs. Another solution can be to get in place a vetting system where third parties are introduced to the field in order to quality check that the regulations put forward are withheld. Hence, states can do a much better job in mitigating the flaws within the current regulations in order to secure a high professionalism of PSCs forthcoming presence within the field.

List of Acronyms

BIMCO	Baltic and International Maritime Council
BMP	Best Management Practices
CoC	Codes of Conduct
EU	European Union
EUNAVFOR	European Union Naval Force (also known as Operation Atlanta)
IMB	International Maritime Bureau
IMO	International Maritime Organization
INTERPOL	International Criminal Police Organization
ISO	International Organization for Standardization
NATO	North Atlantic Treaty Organization
NGO	Nongovernmental Organization
PMSC	Private Military Security Companies
PSC	Private Security Companies
RPGs	Rocket-propelled grenades
UAE	United Arab Emirates
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Law of the Sea
UNDP	United Nations Development Program
USA	United States of America
SAMI	Security Association for the Maritime Industry
SOFA	Status of Force Agreements
RUF	Rules for the Use of Force

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Chapter 1: Introduction

Introduction

Since Roman times, pirates have been condemned as “*hostes humani generis*”- the enemy of all mankind.¹ With piracy not just a crime, but very often a violent crime, eradicating the presence of pirates has been of interest throughout history. In mid-2000s the seas outside the coast of Somalia turned into feared pirate hubs.² Somali pirates did not only generate fear and horror along their own coastline, they stretched their operation to cover an immense area expanding over the Indian Ocean, Gulf of Aden and into the Arabian Sea.³ With approximately 90 percent of the world’s trade transported by sea, the need for safe and secure shipping lanes is of great value within today’s globalized world. Among the immense amount of trade transported by sea, 40 percent is passing by areas where Somali pirates operate.⁴ These numbers indicate that in addition of generating fear and human costs, Somali pirates are also victimizing the regional and global economy.

The aim of this qualitative research paper is to examine the introduction of Private Security Companies (PSCs)⁵ to the anti-piracy fight. Focusing on PSCs presence in the anti-piracy fight is of interest as they are a relatively new actor within a field dominated by naval vessels operating under internationally agreed missions.⁶ Another contributing factor initiating the focus of study was rooted in PSCs so far high success rate. Their high success rate is reflected in that 9 out of every 10 failed pirate attack can be linked to the deterrent role of PSCs.⁷ The

¹ Tullio Treves, “Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia”. *The European Journal of International Law* 20, no. 2 (2009):1

² Jay Bahadur, *The Pirates of Somalia; Inside their Hidden World*, (UK: Vintage books, 2012):26-43

³ Foreign Affairs Committee, House Of Commons UK, *Piracy of the Coast of Somalia-Tenth Report of Session 2010-12*, (London: House of Commons, 2011): 3-4 and 15.

⁴ Ibid.

⁵ This thesis will use the definition Private Security Companies (PSC) and not Private Military Companies (PMC). Even though their services overlap and their names are used interchangeably, the technical difference between the two is that PMC mainly offers military combat services, while PSC work with security related to commercial interests. For more info see: GSDRC, Web site, <http://www.gsdrc.org/go/topic-guides/security-sector-reform/private-military-companies> (Accessed: November 10, 2013).

⁶ Small Arms Survey. “Chapter 6: Escalation at Sea: Somali Piracy and Private Security Companies,” in *Small Arms Survey: Moving Targets*, Research project by the Graduate Institute of International and Development studies Geneva, Switzerland, (Cambridge: Cambridge University Press, 2012): 204

⁷ James Brown. “Pirates and Privateers: Managing the Indian Oceans’ Private Security Boom”. *Lowy Institute for International Policy*, http://www.lowyinstitute.org/files/brown_pirates_and_privateers_web.pdf (Accessed: May 01, 2013): 3

combination of PSCs being a relative new actor within the field and the important role they have played in restraining pirate attacks evoked an interest for further examination of its operational arena.

Why study the presence of PSC in the Somali anti-piracy fight?

Attacks originating from Somali pirate hubs increased from 31 actual and attempted attacks in 2007 to an overwhelming 160 in 2011.⁸ The first positive shift towards an overall decrease in attacks from Somali pirates was seen in 2012, as the total number was reduced to 49 attacks.⁹ So far, 2013 has seen a continuance of this positive trend, as there has only been 11 incidents and 2 hijackings reported within the 10 first months of 2013.¹⁰ The drastic decrease in pirate attacks, combined with the high success rate of PSCs, favors the overall interpretation of the important role PSCs play in the anti-piracy fight. What these statistics on the other hand does not reveal, but what this thesis aim to uncover, is whether the promising numbers represents a decrease based on a legitimate and well regulated industry or if the decline is a result of the illegitimate actions of “cowboy” companies. In order to secure that the successful role of PSCs are based on legitimate actions, it is essential that fundamental regulations controlling and monitoring their operations is adequately in place. The need for effective regulations governing the industry is not an insignificant concern, but rather an essential aspect to be given more attention at the international agenda.

At present, there is no overriding international law dealing explicitly with the operational field of PSCs in a maritime context, meaning that the regulative responsibility is in the hand of the state.¹¹ The outcome has been a myriad of differing regulations making the current operational field having been characterized as a legal mess.¹² With a myriad of regulations

⁸ICC International Maritime Bureau. *Piracy and Armed Robbery against Ships*, Annual Report 2011, ed., http://psm.du.edu/media/documents/industry_initiatives/industry_reports/maritime_imb_annual-report-2011.pdf (Accessed: April 24, 2013):5

⁹ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships*, Annual Report, 2012, ed., http://www.crimson.eu.com/assets/2012_Annual_IBM_Piracy_Report.pdf (Accessed: May 21,2013):5

¹⁰ ICC Commercial Crime Center, "Piracy & Armed Robbery News & Figures," October 22, 2013, <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures> (Accessed: May 01, 2013).

¹¹ Even though there are various treaties and Codes of Conduct aiming at PSCs, none of these deals specifically with PSCs in the anti-piracy fight. Example of CoC are: additional Protocol I and II to Article 47 of the Geneva Convention (1949), Convention for the Elimination of Mercenaries in Africa (1972), and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989) and International Code of Conduct for Private Security Service Providers (ICoC).

¹² Anna Petrig. "The use of force and firearms by private maritime security companies against suspected pirates." *International and Comparative Law Quarterly* 62, Issue 03 (2013): 667-701

governing the field (such as the regulations of flag state, territorial state, home state of the PSC etc.) this thesis will uncover how the different laws and guidelines affect the legitimacy and operation of the industry. With the operational arena of PSCs being located far away from the watchful eyes of the media and other corporate oversight mechanisms, an effective regulative system supporting proficient monitoring mechanisms is of special importance.

Another factor initiating the choice of study is rooted in what can be characterized as a current “knowledge gap”. Today, there is a great quantity of literature embracing the role of PSCs in general, such as their presence in armed conflicts as Iraq and Afghanistan.¹³ Even though the current literature addresses topics of relevance when analyzing PSCs presence within the anti-piracy fight, there is an additional need for literature embracing the new legal field arising within a maritime context. In order to effectively regulate PSCs in the anti-piracy fight, it is essential that one not only possess a general understanding of PSCs, but know the specific operational arena of concern. To grasp an understanding of the field of study, information has been collected through analyzing a variety of sources, attending a conference and interviewing people of interest. The intention of this study has been to contribute to the literature by raising awareness of the current regulations governing PSCs presence in the anti-piracy fight.

Research questions

As previously mentioned, the aim of this research is embedded in the longing to grasp an understanding of the new legal field of PSCs in the anti-piracy fight. As PSCs have been a successful deterrent actor, it has been of interest to examine the strength of their regulative arena in order to identify their operational legitimacy within the field.

When entering the field of study, a variety of questions arose. Are PSCs efficiently safeguarding seafarers from Somali pirates? Under what circumstances are states allowing PSCs to operate in the anti-piracy fight? Are states effectively regulating and monitoring PSCs? Are there clear mandates on how to legally repel a pirate attack according to self-defense? Is there any uniformity or cooperation among states when it comes to regulating and

¹³ James Jay Carafano, *Private Sector, Public Wars: Contractors in Combat-Afghanistan, Iraq and Future Conflicts*, (USA: Greenwood Publishing Group, 2008) and; Peter W. Singer, *Corporate Warriors: the rise of the privatized military industry*, (New York: Cornell University Press, 2008).

monitoring the industry? And lastly, with piracy being an international problem occurring on the international arena, shouldn't it be of universal interest that the PSCs in the anti-piracy fight are qualified and efficiently monitored?

While having many questions and few answers, it was made clear that the aim of the study had to be directed towards the most fundamental aspects related to PSCs presence in the anti-piracy fight. Hence, in order to understand the most essential features related to the operation of PSCs, the attention was drawn towards examining the regulations governing their operational mandates. Based on the questions above, my research question is:

How are the private security companies operating onboard vessels as protection against Somali pirates regulated today? And what can be done to secure the highest level of professionalism related to their future presence?

Operationalization and clarification

In order to answer the specific research question, operationalization and clarifications of the research must be made. The intention of the study has been to reveal whether the call for stronger and more uniform laws regulating PSCs in the anti-piracy fight can be identified. The research is therefore aiming at reaching an understanding of whether the current regulations are adequately embracing the operations of PSCs, or if there is a need of improvement. In order to be able to conduct the research and identify the strength and weaknesses of the current regulative field, a specific attention has been given to case-specific scenarios having emerged from the presence of PSCs in the anti-piracy fight. Illustratively, a case-specific scenario is the rise of floating armouries¹⁴ which have occurred due to the collision between PSCs permission to carry weapons and territorial states heavy bureaucratic laws governing weapon carriage.¹⁵

To be able to evaluate the operational mandates of PSCs, examinations of national and international regulations has been conducted. The aim has been to uncover how the different regulations have interpreted PSCs mandates and to reach an understanding of whether there

¹⁴ Avant Garde Maritime Services, Web site, <http://www.artsrn.ualberta.ca/claypool/courses/art301-2009/301%20PDF%20files/Chicago%20copy.pdf> (Accessed: June 30, 2013).

¹⁵ Oscar Rickett, "Piracy fears over ships laden with weapons in international waters" *The Guardian*, January 10, 2013, <http://www.guardian.co.uk/world/2013/jan/10/pirate-weapons-floating-armouries> (Accessed : May 21, 2013).

are case specific scenarios in need of further study. The most important primary source has been interviews with different actors within the sector as it has provided me with in-depth knowledge uncovering how the current regulations governing PSCs functions in reality.

In order to clarify what I mean when talking about pirates and PSCs, the following paragraph will clarify my interpretations. When talking about piracy I have applied the definition provided by United Nations Law of the Sea (UNCLOS), where piracy is defined as:

- (a) *any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:*
 - (i) *on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;*
 - (ii) *against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;*¹⁶

UNCLOS' definition of piracy has been used throughout the thesis as it is widely recognized within the maritime sector. Additionally, the statistics relied on within this thesis is based on UNCLOS definition.

Finding a universally used definition for PSCs was trickier, as when scanning through the literature, a clear description was seldom provided. Within this thesis, in order to clarify what I mean when referring to PSCs, I have applied a definition provided by the UN Working Group from the United Nations Commission on Human Rights. Their definition is as follows: *“A Private Military and/or Security Company (PMSC) is a corporate entity which provides on a compensatory basis military and/or security services, including investigation services, by physical persons and/or legal entities.”*¹⁷

The variety of services offered by PSCs can be divided into distinct categories. This thesis will build upon the categorization developed by Nis Leerskov Mathiesen, Chief Analyst at Risk Intelligence, who has developed three distinct categories related to the operations of

¹⁶ UNCLOS, “United Nations Convention on the Law of the Sea,” http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (Accessed: May 01, 2013): Article 101.

¹⁷ Office of the United Nations High Commissioner for Human Rights, “Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies: Final draft for distribution, July 13, 2009,” <http://mgimo.ru/files/121626/draft.pdf> (Accessed: August 30, 2013):6

PSCs within the anti-piracy fight.¹⁸ These three groups are: 1) security intelligence analysis and risk advisory services 2) security providers (armed guards) and 3) hijack and hostage negotiators. While some companies work across the whole spectrum, others limit themselves to one or two areas. This thesis will only be concerned with the regulations governing group number two, namely armed security providers stationed onboard vessels. The reason for why the focus will be dedicated to group number two, is because they are providing the most discussed and critical services provided by PSCs in the anti-piracy fight, namely armed protection.¹⁹

Scope and limitations

The aim of this research has been to examine how states regulate the operational mandates of PSCs in the anti-piracy fight. Even though PSCs are used as a mean of protection in pirate prone areas all over the world, this thesis will be based on case studies originating from the east coast of Africa, namely Somali based piracy. Case studies from the east coast of Africa are incorporated within the thesis mainly because of PSCs successful deterrent role within the area.²⁰ Grounded in their success, it was deemed as interesting to examine whether the success was built on effective and legitimate regulative mandates, or if one needs to draw learnings from the Somali based anti-piracy fight in order to improve PSCs legitimization in forthcoming operations. With narrowing down the area of focus to only undertake Somali based piracy, a limitation within my research is that it is context-specific; meaning that generalization outside the given framework lose legitimacy. A weakness within this thesis is therefore that it does not reveal case specific challenges emerging within the worlds numerous piracy prone areas. However, the decision of narrowing down the scope of study was not deemed as a major error. Even though case-specific case-studies are examined, one can argue that the major findings of this thesis reflect PSCs regulative mandates in general.

A desired outcome initiated by different actors within the maritime sector, has been the creation of “soft laws” such as guidelines and codes-of-conduct (CoC) through self-

¹⁸ Nis Leerskov Mathiesen, “Private security companies in anti-piracy operations” *Risk Intelligence Report*, http://www.chicagomanualofstyle.org/tools_citationguide.html(Accessed: August 27, 2013).

¹⁹Ibid.

²⁰ Brown, *Pirates and Privateers*, 3

regulation.²¹ Even though this thesis examines different international self-regulative initiatives and acknowledges their importance within the field, the major attention has been dedicated to the binding regulations governing PSCs in the anti-piracy fight. The reason is embedded in the fact that when analyzing how PSCs are regulated within the anti-piracy fight today, it is the binding regulations that have a direct bearing on how they are governed. Additionally, as PSCs are permitted to use lethal force according to self-defense, one can proclaim that self-regulative initiatives are inadequate as the industry needs binding laws ensuring safe use of arms.²² Even though binding regulations are in focus, this thesis acknowledges the role of self-regulative initiatives and how they can take part in securing the highest level of professionalism within the industry in forthcoming years.

With their having been raised concerns that PSCs are causing an additional threat to innocent seafarers, it has been of interest to examine the truth behind the claim as it has a direct bearing on the quality of the regulations governing PSCs.²³ Unfortunately, this has not been achievable to a satisfying degree, as gathering thorough information of specific case-studies was both difficult and time-consuming. This made it not possible within the scope of this thesis to conduct in-depth investigations providing a solid quantity of proofs. The thesis has therefore limited itself to only conduct one in-depth investigation of a situation taking place of the coast of Yemen.²⁴ The lack of thorough case-studies affects the overall validity of my research as there are few case-studies backing up my arguments. On the other hand, available literature and statistics have effectively been used to fill in the missing unit.

Thesis outline

The subsequent chapter will introduce the methodological framework of this thesis. The chapter will put forward how information has been collected through the qualitative approach

²¹ Examples of self-regulative initiatives are: ISO Pas 28007, SAMI, RUF (100 Series Rules), BIMCO, GUARDCON. See, Brown, *Pirates and Privateers*, 3

²² Lindsay Cameron. "International Humanitarian Law and the Regulation of Private Military Companies," From the conference: *Non-State Actors as Standard Setters: The Erosion of the Public-Private Divide* (2007), <http://www.baselgovernance.org/fileadmin/docs/pdfs/Nonstate/Cameron.pdf> (Accessed: September 24, 2013).

²³ BAIRD Maritime, "Illegal trawlers drive out Somali fishermen," http://www.bairdmaritime.com/index.php?option=com_content&view=article&id=10580:illegal-trawlers-drive-out-somali-fishermen-&catid=115:fisheries-and-aquaculture&Itemid=210 (Accessed: November 12, 2013) and, IZN/ETH Zurich, "Pirates vs Private Security," April 14, 2010, <http://www.isn.ethz.ch/Digital-Library/Articles/Detail/?id=114981> (Accessed: November 12, 2013).

²⁴ Alan Katz, "Fighting Piracy Goes Awry With Killings of Fishermen," *Bloomberg*, September 17, 2012, <http://www.bloomberg.com/news/2012-09-16/fighting-piracy-goes-awry-with-killings-of-fishermen.html> (Accessed: May 01, 2013).

of the research. Following, in chapter 3, the theoretical framework of this thesis is provided. The main focus within the theoretical framework is a literature review determining what can be argued to be a current knowledge gap when it comes to the literature embracing PSCs. The chapter continues by introducing principal-agent theory as it creates a foundation for further analysis. Drawing on insights from the principal-agent theory will help highlight various regulative aspects related to the relationship between PSC and the regulations governing them. In chapter 4, the reader will be presented to the maritime industries self-regulative initiatives. This chapter will demonstrate the role the self-regulative initiatives have in relation to the binding regulations governing PSCs. Chapter 5 will examine how the regional states in the pirate prone areas have responded and regulated the presence of PSCs. Here topics related to the right of innocent passage, floating armories and UNCLOS will be analyzed. Chapter 6 will dig deeper into the legal use of force in regards to self-defense. The chapter will embrace aspects related to how states have approached the legal use of force within their own regulations. Chapter 7 will look at how PSCs are monitored within the sector. Efficient mechanism of monitoring is of importance as it embraces the transparency and legitimacy of the industry. Chapter 8 will provide a discussion of the findings of this thesis, before the whole thesis and its findings is summed up in the final chapter embracing the concluding remarks.

Chapter 2: Methodological Framework

Research Design

The purpose of this study is to investigate the current regulations governing PSCs in the anti-piracy fight. With PSCs being introduced as a protective lethal mean against pirates, understanding the regulations governing their operational mandates is of interest. This is of significance as on one hand, PSCs are a highly successful deterrent actor, while on the other hand, the regulations governing their operations is accused of being a legal mess.²⁵ In order to effectively examine the regulations governing the PSCs in the anti-piracy fight, case specific scenarios have been incorporated throughout the study. Due to a scarcity of data and literature related to the presence of PSCs in the anti-piracy fight, exploratory research was conducted to begin with. After having got a hold of the various aspects related to the private security industry in general and within the anti-piracy fight, the focus was directed towards interpreting the regulations governing PSCs operational mandates. In line with narrowing down the area of focus, the research turned into holding an investigative approach.

In order to answer the research question, information has been collected through literature reviews, interviews and by attending a conference arranged by the Norwegian Hull Club (Norwegian insurance company) where topics of interest were discussed. By using more than one method of data collection, a triangulation of results was achieved. Triangulation helps increase the credibility and validity of the study as it provides the ability to cross-check information.²⁶ In the case of this study, triangulation has been conducted by cross-checking the available second hand information with answers collected through interviews and conversations with people of interest.

This research falls under the broader categorization of being a qualitative study.²⁷ A qualitative study is a research strategy aimed at gathering in-depth analysis of smaller but focused samples, compared to a quantitative study concentrating on large sample sizes.²⁸ As there currently is a lack of detailed information and few statistics concerning the topic of

²⁵ Petrig, *The use of force and firearms*, 667-701

²⁶ Uwe Flick, *Designing Qualitative Research* (Great Britain: SAGE Publications Ltd, 2012): 1-15

²⁷ Alan Bryman, *Social Research Methods*, (New York; Oxford University Press, 2008): 367

²⁸ *Ibid.* 697

interest, the material to initiate an interesting quantitative analysis was not in place. Another reason for why a qualitative analysis was chosen over a quantitative is rooted in the difficulty in finding a representable quantifiable size of informants holding the needed information in relation to the topic of research. According to the circumstances and research environment, it was deemed more efficient and trustworthy to gather information from the sources available and conduct in-depth interviews with people of interests.

Interviews and informants

The informants used for this thesis consist of a great variety of actors within and outside the maritime field. People from maritime associations, lawyers, journalists, experts, captains and the Norwegian Ministries are some of the selected informants that have been interviewed. As the aim was to get as broad interpretation of the topic as possible, there were not many narrowing criteria's (such as age, country of origin, workplace etc.) limiting the group of informants. The only criteria put forward when selecting informants was whether they had directly or indirectly worked with or embraced information concerning the presence of PSCs in the anti-piracy fight. When deciding not to set forth criteria's narrowing down the group of informants, it was of special importance to always possess solid background information of the informants before conducting an interview as well as when interpreting their answers. This was of significance in order to eliminate the chance of misinterpretations as well as to better understand the degree of self-interests enshrined within the answers. The answers were therefore always examined in relation to whether the informants had a direct or indirect relationship to the topic of research from an economic, social or political perspective.

All the informants that have been contacted have for ethical and practical reasons been informed about the nature of the project and that it will be published. The interviews were not deemed as posing any threat to the safety of informants. Nevertheless, some may feel that their participation can have a consequence in relation to their professional acquaintances, therefore, the highest possible degree of anonymity was ensured throughout the research.²⁹

Even though there has been a great variety of informants interviewed for the study, there is one important group which I did not successfully establish contact with, namely the private

²⁹ Cris Shore and Susan Wright, "Introduction" in *Policy Worlds: Anthropology and the Analysis of Contemporary Power*, ed. Cris Shore, Susan Wright and David Pero, (New York: EASA Series No.14 Berghahn Books, 2011).

security companies. Unfortunately this leads to a missing unit within the study. In order to diminish this error, I have talked to various informants who have worked closely with or embraced deep knowledge about PSCs. In addition, the missing unit has been compensated by second hand information gathered from press releases, news articles and information on different PSCs web-sites. Even though interviews would have been the desired option, the availability of sources has effectively filled in the missing element.

All the interviews have been conducted in Norway and the majority of interviews have been done electronically (phone or e-mail). Even though face-to-face interviews would have been desirable, there were different operational aspects making it difficult within the scope of this thesis. One important factor was the distance between the interviewer and the interviewees. With informants spread all over the world, arranging personal meetings would have been both costly and time consuming. Another important aspect was the informants' busy time schedules, which meant they preferred to take the interviews by phone or e-mail as they considered it to be less time-consuming.³⁰ As most of the interviews were short and effective (between 15-40 min, 4-8 questions), the majority of informants invited me to contact them again when new questions arose during the work. This was an offer followed up in the majority of cases.

Having short and concise questionnaires required thorough preparation time, as each questions had to be directly linked to the topic of concern in order to receive the needed information. Hence, a double-barreled question (a question asking two things) was avoided as it easily confuses the informant, affecting the thoroughness of the answer.³¹ The decision of having short and concise questionnaires has been an important feature in regards to the outcome of information this thesis builds on. First of all, short questionnaires' has proved to be sufficient as the majority of informants have responded positively to my request. Secondly, having few, but concise questionnaires' has also been deemed as a successes as the answers received where thoroughly reflecting the questions asked. With their being a current lack of information grasping how PSCs are regulated within the anti-piracy fight, the thoroughness of the answers received from informants where essential for the quality of the further research.³²

³⁰ Bryman, *Social Research Methods*, 436

³¹ *Ibid.* 241.

³² Cf. Appendix 1.

Telephone interview

When conducting a telephone interview there are certain issues to bear in mind. One lost feature when conducting a telephone interview is the interpretation of non-linguistic observations such as physical and facial gestures.³³ On the other hand, the cadences of the voice can be a source of help when interpreting how the informant responds and reacts to the questions. Concerning whether the answers differ between telephone and face-to-face interviews, research has proven that there is no big difference. This is exemplified in a research conducted by Struges and Hanrahan where both face-to-face and telephone interviews had been piloted. The results indicated that there is no significant difference in how informants answer.³⁴ As most of the informants had a professional and not a deep personal relationship to the topic of concern, the loss of interpreting body language was not deemed as a major obstacle to the validity of the research.

E-mail interview

A minority of the interviews was conducted through e-mail correspondence. A feature completely lost when using e-mail is all forms of non-linguistic features, as well as the ability to conduct vocal interpretations. Additionally, the loss of spontaneity can also be considered a limitation as the informants had time to ponder their answers before sending them.³⁵ What on the other hand is positive with conducting e-mail interviews is that some of the informants are better writers than speakers. In situations where interviews have been conducted with people holding English as a second language, understanding written answers can in some situations be considered easier, as informants may e.g. hold a strong accent.³⁶ Another positive aspect was the elimination of synchronous interview-times as it provided informants with the freedom to answer when they had time. In the case of this study, e-mail interviews opened up the door for accomplishing a richer sample of informants.

³³ Annie Irvine, Paul Drew and Roy Sainsbury, "Am I not answering your questions properly? Clarification, adequacy and responsiveness in semi-structured telephone and face-to-face interviews". *Qualitative Research SagePub Journals*, 5 (2012): 89

³⁴ Judith E. Struges and Kathleen J. Hanrahan, "Comparing Telephone and Face-to-Face Qualitative Interviewing: A research Note," *Qualitative Research SagePub Journals*, 10 (2010): 113-121.

³⁵ Roberta Bampton & Christopher J. Cowton, "The E-interview", *Forum: Qualitative Social Research*, 3 no.2 (2002):3

³⁶ Lokman I. Meho. "E-Mail Interviewing in Qualitative Research: A Methodological Discussion" *Journal of American Society for Information Sciences and Technology*. 57, no. 10 (2006): 1289.

Document analysis

Parts of my research can be classified as a desktop study, as a great amount of information was collected from analyzing books, reports, newspapers, online journals, official documents, Blogs, websites and other publications that were considered trustworthy. The majority of official documents researched originate from the International Maritime Organisation (IMO), United Nations (UN), International Maritime Bureau (IMB), International Organisation for Standardization (ISO) and from different national ministries. In order to evaluate the trustworthiness of a document, the information given was always cross-checked with other sources. Cross-checking sources helped understand the authors' level of conformability within the text. Conformability of a text refers to the objectivity of the author when conducting a research.³⁷ Another technique employed to increase the credibility of a source is, as mentioned above, discussing the same topics originating from the second hand sources with my informants. A methodological triangulation provides more accurate and nuanced results as it helps reveal biases within the different sources relied on. Triangulation does not eradicate all forms of bias, but it helped create awareness of their existence within the research. Triangulation can be divided into "within-methods" looking at internal validity within one type of data collection and "between-methods" grasping the external validity. The triangulation used within the scope of this thesis builds on "between-methods" as the triangulation involved contrasting different research methods.³⁸

The data/statistics of availability for this research originated mainly from the IMO, IMB, UN and the Lloyd's List Intelligence (one of the biggest intelligence firms within the shipping sector).³⁹ The inclusion of statistics within this thesis helped legitimate the point of view as it provided data to my descriptions. The statistical sources relied on are considered trustworthy as their information is the most commonly used within different media outputs, national documents, scholarly articles, etc. Furthermore, the data originating from these sources has not been produced specifically for the purpose of social research and can therefore be classified as a non-reactive form of information.⁴⁰ Reactivity within research refers to how the outcome of a text is affected when the author or research participant knows their text will be

³⁷ Ibid. 379

³⁸ Todd D. Jick, "Mixing Qualitative and Quantitative Methods: Triangulation in Action," *Administratively Science Quarterly*, 14 no. 4 (1979):603.

³⁹ Lloyd's List Intelligence, Web Site, <http://www.lloydslistintelligence.com/llint/index.htm> (Accessed: October 12, 2013).

⁴⁰ Bryman, *Social Research Methods*, 515

further studied.⁴¹ The lower the reactivity of a text is, the higher is the validity. Even though a text is condemned to hold a low reactivity, one should always keep in mind that authors may have a specific point of view that they want to get across. It is therefore always of great importance to reflect on the origin of the source and whether the meaning and expressions put forward are understood correctly. When discussing reactivity within the aim of this research it is significant to keep in mind PSCs ability to hold things secret. As a negative reputation harms the legitimacy of PSCs business, hiding information or turning information into their favor are important aspects to reflect upon throughout the research.

IMBs statistics of reported pirate attacks are the datasets primarily used within this thesis. IMB was the first of its kind to start collecting data on pirate attacks (started 1992) and offer the most complete datasets today.⁴² When analyzing the datasets from IMB it was important to keep in mind that there has been a problem with inconsistent reporting of attacks. This is rooted in the challenges of coordinating the multinational nature of the shipping industry as well as the lack of any overriding framework and a systematic recognized reporting system.⁴³ While the bias of over-reporting can be linked to the inclusion of suspicious vessels in the statistics, the underreporting is grounded in the lack of reports concerning violence against smaller vessels and fishing boats.⁴⁴ Consequently, it is important to remember that the statistics do not sincerely reflect reality as one has to recall that the total number of pirate attacks might be higher or lower, without knowing exactly by how much. On the other hand, these statistics provide an overall facet of whether there is a rise or decrease in attacks.

The press articles posted online in newspapers, journals and on Blogs were used to remain updated on the most current actions, changes and activities among pirates and PSCs. These sources have been of great importance as the topic of research is a currently ongoing process debated at the international arena. When relying on mass-media outputs for my research, inter-textuality is important to be aware of, in order to increase the validity of the research. Inter-textuality refers to the link between documents, as documents often refer to or respond to other documents.⁴⁵ Accordingly, possessing in-depth knowledge about the

⁴¹ Ibid. 698

⁴² IMB Piracy Reporting Centre, Web Site, <http://www.icc-ccs.org/piracy-reporting-centre> (Accessed: October 01, 2013).

⁴³ Kaija Hurlburt, "The Human Costs of Somali Piracy, 2011" *Oceans Beyond Piracy*, http://oceansbeyondpiracy.org/sites/default/files/human_cost_of_somali_piracy.pdf (Accessed: August 14, 2013): 2-4

⁴⁴ Brown. *Pirates and Privateers*, 6

⁴⁵ Paul Atkinson and Amanda Coffey, "Analyzing Documentary Realities, in Silverman" in *Qualitative Research: Theory, Method and Practice*, ed., D Silverman (London: Sage Publications Ltd., 2004): 58

published documents and the link between them was vital in order to increase the validity of the sources relied on. Even though mass-media outputs can be argued to hold a distinct level of reality, they were an essential informational source in regards to the topic of research. This is grounded in the fact that when studying an area in transition, knowing the current changes, happenings and proceedings is vital for the accuracy of the findings of the study. Even though studying an arena in constant change is demanding as unforeseen happenings occur, the asset is that the outcomes of one's research can play a contributive role for the future direction of the area one studies.

There are different features one should have in mind when relying on websites as a source of information. Websites and specific information on websites have the tendency of appearing and disappearing from public access. This can have led to situations where I might have based my research on sources that no longer exist or are available when this paper is completed. In order to avoid such situations, cross-checking information has been of great importance. Not only does it help legitimize the information used, it also provides the ability to find sources of high reliability.⁴⁶ Scott has created four criteria that should be kept in mind when assessing the quality of a document. The four criteria are authenticity, credibility, representativeness and meaning.⁴⁷ Shortly summarized, authenticity refers to whether the source is reliable and of unquestionable origin; credibility is whether the record gives an accurate standpoint which is free from errors; representativeness refers to whether the evidence is typical of its kind and if not, what is the scope of disparity, and lastly is meaning, reflecting whether the evidence is clear and gives a strong significance of what the document contains.⁴⁸ Even though these criteria are broad and in some cases difficult to evaluate, they have when possible, been applied when assessing the quality of the documents used for this research.

When applying Scott's four criteria to my research in general, a special attention have been raised towards credibility and authenticity as I have relied on mass-media outputs. The reason for the concern regarding credibility and authenticity is that in some occasions there is no author taking responsibility for the text. Without knowing the person behind the text I could not determine whether the author and information given within the article hold a trustworthy position and provide an accurate vision. Then again, applying a triangulation increased the validity regarding the credibility and authenticity of the sources.

⁴⁶Bryman, *Social Research Methods*, 629

⁴⁷Monageng Mogalakwe. "The Use of Documentary Research Methods in Social Research" *African Sociological Review*, 10 no. 1 (2006): 224-228

⁴⁸Bryman, *Social Research Methods*, 516

Case-studies

In order to grasp a deeper understanding of the current laws and guidelines governing the presence of PSCs in the anti-piracy fight, a case study approach has been included. According to Yin, a case study is an empirical inquiry that “*investigates a contemporary phenomenon within its real life context, especially when the boundaries between phenomenon and context are not clearly evident*”.⁴⁹ Adding case studies to the research of PSCs operating in the anti-piracy fight strengthen the ability to investigate the phenomenon in its context. Accordingly, including case studies provides a descriptive analysis of the complexity within the current regulations.

Within this thesis, the major case-study is built upon the laws and regulations of PSCs sailing under the flag of the USA, UK, Norway and Denmark. There are different reasons for why the regulations belonging to exactly these four states were examined. First of all, they were chosen because all of the four states have accepted the use of armed guards on board their vessels. Secondly, all the states have strong shipping interests, making it interesting to see how their interests are reflected within their regulations. Thirdly, most of the hired armed guards originate from the US and UK, making these states of special interest.⁵⁰ And lastly, all the documents needed for the analysis of the regulations were in a language the researcher understood, obviating the need of a translator and eliminating the risk of misinterpretations due to translation difficulties.

In addition to examining the regulations belonging to the four flag states, there has been conducted one in-depth study of a happening in Yemen as well as smaller case-studies related to current discussable actions having taken place within the anti-piracy fight. The happening in Yemen will be discussed in greater detail later on, but briefly explained, the case is rooted in a debate embracing whether a life was lost or not from shots fired from armed guards onboard a Norwegian tanker. With a scarcity of information available concerning the happening in Yemen, information has been gathered through interviews and applying for documents through the Norwegian “Freedom of Information Act”. Collecting information was time-consuming as the documents applied for took abnormal long time to achieve, as well as the majority of information was confidential, meaning that informants did not want to go into great detail. This affected the thoroughness of the information embracing the case-study.

⁴⁹ Robert K. Yin, *Case Study Research: Design and Methods*. (USA: Saga Publications, 2009): 13

⁵⁰ Brown, *Pirates and Privateers*, 6

Chapter 3: Theoretical frameworks

Introduction

Before analyzing the regulations governing PSCs in the anti-piracy fight, the subsequent section will shed light on the theoretical framework in which the research question will be analyzed. The principal-agent theory will be applied within this thesis as it creates a foundation for my further analysis. This is grounded in the theory seeking to explain the relationship between principals and agents, reflecting the connection between PSCs and the regulations governing their actions. Including the insights of the principal-agent theory within this research will help create a platform where a fruitful discussion of the research question will be analyzed. Before introducing the theory of interest, a literature review will be included, providing the reader with an overview of the current aspects related to the regulative arena surrounding PSCs in the anti-piracy fight.

Literature review

The increasing presence of PSCs in the anti-piracy fight has fostered heated discussions among and within maritime specialists, private security scholars and national and international institutions. The current debates have been related to increased weapon use, lack of monitoring mechanisms, the fear of increased violence at sea, and the legal use of force when repelling a pirate attack.⁵¹ Arguably, all these concerns have one thing in common, namely that they see a rise when there is a lack of strong and effective regulations governing the operational mandates of PSCs. Ms. Patel, Chairperson of the UN Working Group on the use of Mercenaries, shares the concern as she has strongly called upon the international community to “...reach an agreement on regulations and procedures regarding the use of

⁵¹ Examples of discussions are presented in: Caroline Liss. “Regulating Private Military and Security Companies at Sea: New Developments and Challenges,” Published by the *Institute for Near East and Gulf Military Analysis (INEGMA)* on behalf of the second United Arab Emirates Counter Piracy Conference, 2012 Dubai. Available at: <http://www.counterpiracy.ae/upload/Briefing/Carolin%20Liss-Essay-Eng-2.pdf> (Accessed: July 08, 2013) and Petrig, *The use of force and firearms*, 667-701

*armed personnel in the shipping industry... ”*⁵², cautioning that the failure to do so can lead to fatal consequences.

According to Janice E. Thomson, the approach states have had towards regulating PSCs within the maritime sector has been inconsistent throughout history.⁵³ Illustratively, until the nineteenth century, mercenaries (the ancestors of PSCs)⁵⁴ had no strings attached to their use of violence at sea when operating outside of the contractor state’s territory. The transformation towards eliminating nonstate violence conducted abroad saw a rise during the institutionalization of sovereignty in the nineteenth-century, reflecting that no state could exercise sovereignty over the high sea.⁵⁵ As the individual citizen was seen as the ostensible source of sovereignty, states could no longer disclaim responsibility for the violent actions conducted by their citizens when sailing in international waters. With states holding responsibility over actions conducted in foreign waters by private actors, states are in a position where the wrongdoing of PSCs can lead to diplomatic confrontations between states. Accordingly, with states bearing a responsibility over the actions of PSCs in the anti-piracy fight, it should be of interest among states to eliminate the risk of diplomatic disputes by securing proficient regulations.

In the last couple of years, topics related to the need for stronger and more uniformed regulations have been debated within the maritime industry, as well as among journalists and scholars concerned with the inclusion of PSCs in the anti-piracy fight.⁵⁶ PSCs presence in warfare in general has, on the other hand, faced continual attention throughout history with a blossom the last decade resulting from PSCs presence in Iraq and Afghanistan.⁵⁷ The growing attention raised towards PSCs in warfare has increased the amount of literature discussing important matters related to the regulations governing PSCs. Despite the fact that there is extended literature related to the use of PSCs in general, one can argue that there currently is a

⁵² UN News Center, “*Somalia: UN experts on use of mercenaries urge greater oversight for private security contractors.*” Web Site, <http://www.un.org/apps/news/story.asp?NewsID=43797#.UkaO3obDvWg> (Accessed: June 05, 2013).

⁵³ Janice E. Thomson, *Mercenaries, pirates and Sovereign: State-building and Extraterritorial violence in early modern Europe.* (New Jersey: Princeton University Press, 1994): 146-153

⁵⁴ Mercenaries have been a historically constant phenomenon which today is criminalized. In contrast to mercenaries, PSC are transnational companies which are legally registered and work under contracts for a great variety of actors, such as states, NGOs and private firms. More information can be found at: Hyder Gulam, “*The Rise and Rise of Private Military Companies,*” *Peace Operation Training Institute*, <http://cdn.peaceopstraining.org/theses/gulam.pdf> (Accessed: January 12, 2013):6

⁵⁵ Thomson, *Mercenaries, pirates and Sovereign*, 146-153

⁵⁶ Cf. supra note 51

⁵⁷ Examples can be found in: Singer, *Corporate Warriors*. Deborah Avant, *The Market for Force: The Consequences of Privatizing Security* (UK: Cambridge University Press, 2005). Christopher Kinsey, *Corporate Soldiers and International Security: The Rise of Private Military Companies* (Oxon: Routledge, 2006).

knowledge gap when it comes to writings covering the regulations of PSCs operating in the anti-piracy fight. The current knowledge gap is rooted in the fact that mainstream literature does not embrace the case-specific scenarios emerging from the introduction of PSCs in an anti-piracy context. Without literature embracing the case-specific scenarios, one cannot effectively examine how the current regulations function in practice. Additionally, the existing literature discussing PSCs in the anti-piracy fight has not been taken to a deeper level, as there are only a handful of scholarly documents addressing the regulations governing PSCs in the anti-piracy fight. Consequently, one can argue that there is a current lack of systematic and substantive information available for the public in raising awareness of the problem issue.

General literature embracing the regulation of PSCs

Before digging deeper into the claim that there is a knowledge gap, it has to be acknowledged, that one can draw linkages between the existing literature of PSCs in general and within the anti-piracy fight. Singer sees the rise of the private security industry after the Cold War, as a result of the decreased ability of states to respond to the mounting diversity of threats.⁵⁸ In resemblance to Singers statement, the anti-piracy fight can be exemplified as a threat that states could not protect its citizens against, as introducing PSCs was deemed as a necessary security measure.⁵⁹ Illustratively, even though stats have initiated naval presence and international task forces within the anti-piracy fight, their security measurers did not fully succeed in safeguarding seafarers. This is entrenched in the vast amount of area devoted to each deployed naval ship. To draw a comparison, the area devoted to one naval ship can be associated with one police car patrolling the whole of France.⁶⁰ The massive area dedicated per ship means that the naval efforts are not able to guarantee protection at all times for all ships sailing in the pirate prone areas. With the majority of pirate attacks not extending past 15 minutes, reaction time is an essential feature when safeguarding vessels. With PSCs being positioned onboard vessels, pirates face a direct deterrence which eliminates the error of reaction time. Even though the majority of the big shipping nations have accepted PSCs, this

⁵⁸ Singer, *Corporate Warriors*, 50-60

⁵⁹ Brown, *Pirates and Privateers*, 5

⁶⁰ Ibid.

statement is not reminiscent to all states, as some flag states have hired out their own military to provide the onboard security needed when sailing in pirate prone areas.⁶¹

An additional aspect Singer puts forward is that PSCs are profit driven units that neither operate according to goodwill nor honor.⁶² When conducting analysis on how PSCs are regulated within the anti-piracy fight, self-interests are important aspects to bear in mind as they are essential areas that the regulation's needs to monitor. During PSCs introduction to the anti-piracy fight, concerns were raised in relation to the increase of violence at sea, as well as the fear of companies cheating and reducing their operational standards in order to increase profits.⁶³ Self-interest is a distress to be taken serious within the anti-piracy fight, as there have already been raised concerns in regards to PSCs avoidance of reporting incidents in fear of facing prosecution.⁶⁴ Accordingly, good monitoring mechanisms capturing the actions driven by purely self-interest are important regulation mechanisms that need to be in place when securing a legitimate industry.

In order to effectively regulate the private security industry, Singer argues that a globalized responds is needed. In order to deal with the problem of insufficient regulations, he puts forward the idea of establishing an international regulatory task force where a body of international experts, as well as other stakeholders can create and lay out potential regulations, codes of conducts and evaluation tools.⁶⁵ An ideal outcome would be to turn the industry into a sanctioned business where independent observer teams control and monitor the quality and operational aspects related to PSCs.⁶⁶ Singers emphasize on a sanctioned business is of interest for the further study of the regulations governing PSCs in the anti-piracy fight. This is rooted in the maritime industry having put forward different self-regulative licensing systems which this thesis will argue are of importance within the forthcoming regulations governing PSCs in the anti-piracy fight.⁶⁷ These initiatives will be discussed in greater detail later on.

⁶¹ Bibi Ginkel and Frans-Paul Putten and Willem Molenaar, *State or Private Protection against Maritime Piracy? A Dutch Perspective*, Report from the Netherlands Institute of International Relations Clingendael, (Hague:Clingendael, 2013):21

⁶² Singer, *Corporate Warriors*, 50-60

⁶³ Singer, *Corporate Warriors*, 152-166

⁶⁴ Michelle Wiese Bockman, "Ships With Armed Guards Seen Not Reporting Somali Pirate Strikes," *Bloomberg BusinessWeek*, November 08, 2011, <http://www.businessweek.com/news/2011-11-08/somalia-piracy-spurs-private-navy-to-start-within-five-months.html> (Accessed: August 19, 2013).

⁶⁵ Singer, *Corporate Warriors*, 241

⁶⁶ Peter W. Singer, "War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law," *Columbia Journal of Transnational Law*, 42 no 2 (2004):546

⁶⁷ Cf. chapter 4 p. 37-39

In line with Singer, Kinsey also directs an emphasis on the importance of a licensing regime governing the operation of PSCs. With clients lacking the essential knowledge on doing background checks on PSCs quality, a licensing regime helps clients make informed decision.⁶⁸ Kinsey puts forward an additional regulative aspect of importance when analyzing the regulations governing PSCs in the anti-piracy fight, namely that the ultimate problem when establishing legal regulations is balancing the interest of the public with the commercial interests of PSCs. Accordingly, in order to effectively regulate the presence of PSCs, their business aspects needs to be respected as long as they are not violating international humanitarian law. Regulations not respecting the operational aim as well as the market dynamics of PSCs will hamper the future of the industry, as PSCs are placed in a difficult position where alternative solutions is sought for.⁶⁹ With the private security industry in the anti-piracy fight already having sought for alternative ways of operation because of obstructing regulations, Kinsey's argument raises a concern to be noticed for the further analysis.

In order to avoid Kinsey's concern of regulations not respecting the business interests of PSCs, one can argue that the inclusion of PSCs to the decision making process could be a solution. Unfortunately, such a solution can also lead to implications regarding the regulations governing PSCs. Accordingly, Leander emphasize that whose voice is heard plays an important role in regards to decision making of regulative outcomes.⁷⁰ With PSCs having been introduced to take part as "specialists on violence" when discussing security politics, they are no longer only technical experts, but they have also become experts shaping the understanding of different security aspects. In addition to participating in policy making as "specialists on violence", PSCs are gaining influence through other channels such as by lobbying and advertising their own interests.⁷¹ Leander's notification raises awareness towards the role PSCs possess in regards to shaping their own regulations. Understanding PSCs ability to influence the regulative outcomes is vital for the thoroughness of the examination of how PSCs are regulated within the anti-piracy fight.

⁶⁸ Kinsey, *Corporate Soldiers and International Security*, 135

⁶⁹ Ibid.

⁷⁰ Anna Leander, "Chapter 3 — Regulating the Role of PMCs in Shaping Security and Politics" in *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies*, edited by Simon Chesterman and Chia Lehnardt, (Oxford: Oxford University Press 2005):49-64

⁷¹ Ibid.

Leander additionally puts forward that the regulations governing PSCs are “*fragmentary, contradictory and incomplete*”.⁷² Resulting from states little interest in regulating the industry, it is difficult to enforce the multilayered aspects needed in order to regulate PSCs operations at the international arena. Leander argues that with the current systems lack of international definitions and binding conventions, followed up with states avoidance in creating overzealous regulations, we are not going to be faced with regulative changes.⁷³ Leander’s argument draws connections to up-to-date articles and publications circulated by risk management institutions within the anti-piracy fight, where warnings have been raised in relation to the lack of any international framework providing symmetry within current national regulations.⁷⁴ As will be described in greater detail later on, Leander’s concern in regards to the vagueness within regulations is highly relevant within the anti-piracy fight, as the transparency of the regulations has been affected by PSCs avoidance of varies formalities.⁷⁵

When discussing the regulative environment for the private security industry in general, Sarah Percy disputes that the current regulative arena is operating according to a system of catching-up instead of being at the forefront regulating the direction of the industry.⁷⁶ Accordingly, the main problem is that we are looking backwards instead of forwards when creating regulations. When examining the strength and scope of the regulations governing PSCs in the anti-piracy fight, Percy’s warning is an aspect to be aware off. By directing a focus towards areas in need of more regulations, one can avoid a regulative system which primarily responds to fatal incidents. Grasping the weaknesses within regulations today, can be an important mean helping secure the highest level of professionalism within forthcoming regulations.⁷⁷

In addition to the points mentioned above, one can draw similarities between PSCs in general and PSCs within the maritime sector when it comes to concerns related to the lack of transparency and accountability,⁷⁸ human right violations⁷⁹ and arbitrary shootings.⁸⁰ As

⁷² Anna Leander, *Eroding State Authority? Private Military Companies and the Legitimate Use of Force*, (Rome: Rubbettino Editore, 2006): 66-70.

⁷³ Ibid.

⁷⁴ Example: Bibi et al., *State or Private Protection*, 9 and; Geneva Academy, *Counter piracy under International Law, August 2012, Academy Briefing No. 1* (Geneva: Geneva Academy, 2012): 17-21

⁷⁵ Bradley Hope, “Firearms an odd casualty of piracy” *The Guardian*, February 06, 2011, <http://www.thenational.ae/business/firearms-an-odd-casualty-of-piracy?pageCount=0> (Accessed: June 24, 2013)

⁷⁶ Sarah Percy, “Regulating the private security industry: a story of regulating the last war” In *The International Review of the Red Cross* 11 (2013): 1-20

⁷⁷ Ibid.

⁷⁸ Elke Krahnmann, “Controlling Private Military Companies: The United Kingdom and Germany,” *International Studies Association Annual Convention*, February 25- March 1, 2003, Portland, Oregon, <http://isanet.ccit.arizona.edu/portlandarchive/krahmann.pdf> (Accessed: June 12, 2013).

demonstrated, one can see clear operational linkages and disputes embracing the whole private security industry in general. Nonetheless, one can still argue that there is a need for more case specific interpretations on how to regulate PSCs in the anti-piracy fight, as there currently is a lack of extensive and thorough interpretations of their specific operational field. The call for more case specific information and analysis is rooted in the fact that the operational arena on land and in a maritime context differs. Additionally, the introduction of PSCs in the anti-piracy fight has triggered new scenarios which are case-specific for the anti-piracy fight and therefore need to be dealt with accordingly.

Even though there is a lack of literature concerning the need for stronger and more uniform regulations for PSCs in the anti-piracy fight, direct concerns have been expressed. Dr Caroline Liss emphasizes that the current regulative system “...*demonstrate significant weaknesses and shortcomings in national and international maritime security governance*”.⁸¹ Whereas Anna Petrig stress that one should remember that PSCs in the anti-piracy fight does not operate in a legal vacuum and that we are currently faced with “... *a scattering of international laws and a meshwork of domestic legal orders...*”⁸² While Percy argues that the current regulative environment is unequipped to deal with the emerging scenarios rising from the presence of PSCs in the anti-piracy fight. Accordingly, she considers the current operational field within the anti-piracy fight as “*murky to the extreme.*”⁸³ The different concerns raised by these scholars highlight the need for more in-depth studies directed towards the regulation of PSCs operating within the anti-piracy fight.

Knowledge gap

Determining the current knowledge gap is of importance in order to direct the focus and need for more thorough documents embracing the regulations governing PSCs in the anti-piracy fight. Without knowing the operational arena of the PSCs in the anti-piracy fight, the strength of the current and future regulative system is hampered. Hence, this thesis will now look

⁷⁹ Amnesty International, Web site, <http://www.amnestyusa.org/our-work/issues/business-and-human-rights/private-military-and-security-companies> (Accessed: August 14, 2013).

⁸⁰ E. L. Gaston, “Mercenaries 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement,” *Harvard International Law Journal* 7 no.49 (2008): 229.

⁸¹ Liss, *Regulating Private Military and Security Companies at Sea*.

⁸² Petrig, *The use of force and firearms*, 667-701

⁸³ Percy, Regulating the private security industry, *The International Review of the Red Cross*:17

deeper into why one can claim that there is a knowledge gap within the literature of PSCs. This will help demonstrate the need of further study within the area.

Historically, states have engaged privateers through a letter of marque to attack enemies during wartime. According to Kinsey's definition, a privateer is "vessels belonging to private owners, and sailing under a commission of war empowering the person to whom it is granted to carry on all forms of hostility which is permissible at sea by the usage of war".⁸⁴ Since hiring private actors as a means of protection at sea is an ancient phenomenon, historical literature discussing their operational aspects does exist. Unfortunately, the existing literature is of little relevance for this research, as there are great operational differences between privateers and today's PSCs operating in the modern-day anti-piracy fight. What primarily distinguishes the two is their fundamental way of operation. For instance, privateers did not operate on a vessel as a protective means for the crew, but rather sailed on an armed ship, seizing their enemies.⁸⁵ The privateer's authority to seize a vessel, expected to be an enemy, is not an option for PSCs, as they are only allowed to operate according to the mandate of self-defense, making seizure a forbidden action.⁸⁶ Within the anti-piracy fight the operation of the privateers is more in thread with the naval forces than PSCs.⁸⁷ Some would even argue that the actions of privateers is solely reflected in the actions of modern-day pirates.⁸⁸

Secondly, another aspect strengthening the claim of the current knowledge gap is entrenched in the introduction of private actors operating under stately sanctions to a field previously dominated by the military, operating under UN-sanctioned missions.⁸⁹ Even though PSCs operating according to stately sanctions is common for PSCs in general, it is a newly introduced aspect within the anti-piracy fight. Therefore, although the current literature embraces PSCs working under stately sanctions in other contexts, there is a lack of literature grasping the same situation within the anti-piracy fight. Exemplified, the anti-piracy fight is now faced with an operational arena where many small private entities (vessels), sailing under different flags, are passing through different jurisdictions while boarded with a great variety of armed guards operating under different regulative mandates and frameworks. The

⁸⁴ Kinsey, *Corporate Soldiers and International Security*, 36

⁸⁵ Todd Emerson Hutchins, "Structuring a Sustainable Letters of Marque Regime: How Commissioning Privateers Can Defeat the Somali Pirates". *California Law Review* 99 (2011): 843-846

⁸⁶ Alice Priddy and Stuart Casey-Maslen, "Counter-piracy Operations by Private Maritime Security Contractors," *Journal of International Criminal Justice* 10 no. 4 (2012): 844-45

⁸⁷ Hutchins, *Structuring a Sustainable Letters of Marque Regime*, 844

⁸⁸ Manon Osseweijer and John Kleinen, *Pirates Ports, and Coasts in Asia: Historical and Contemporary Perspectives*, (Singapore: ISEAS Publishing, 2010): 15

⁸⁹ Small Arms Survey, *Chapter 6: Escalation at Sea*, 204

described complexity of PSCs operational arena in the anti-piracy fight differs from the traditional mandates of PSCs. First of all, even though PSCs work within multiple jurisdictions throughout the world,⁹⁰ it has not been a common trend for PSCs to move through as many jurisdictions as is the case in the anti-piracy fight. Secondly, due to the combination of a myriad of jurisdictions and the absence of any foundational international law, the current system becomes rather chaotic.⁹¹ Illustratively, the lack of any clear structure regarding who holds the responsibility for a crime has already initiated discussions between states regarding whether a crime was conducted at the high sea or in a state's territorial waters.⁹²

An additional problem rooted in the manifold of regulations governing the PSCs in the anti-piracy fight, is the risk of misinterpreting one of the many mandates one is bounded under. As one can become liable for prosecution when operating outside ones given mandate, the PSCs have at all times to be fully aware of the different regulations they are bounded under and the various matters each regulation puts forward.⁹³ Illustratively, a legally problematic area where PSCs have to act carefully and know the exact applicable laws governing their actions is when entering territorial waters with weapons. As the territorial states within the region where Somali pirates operate differ in how they regulate weapon carriage, PSCs have to be fully aware of which laws they are bound under at what time and when one jurisdiction ends and another begins.⁹⁴ The current lack of uniformity within regulations, especially those belonging to territorial states in pirate prone areas, are generating obstacles hampering the effectiveness and trustworthiness of the business. Even though there is literature embracing the overregulation of the industry in general, there is a lack of thoroughly documents discussing the even greater complexity within the anti-piracy fight.⁹⁵

Thirdly, there are different features within the major international documents and guidelines which are not adequately embracing the presence of PSCs in the anti-piracy fight. This is

⁹⁰ James Cockayne and Emily Speers Mears, "Private Military and Security Companies: A Framework for Regulation," *International Peace Institute*, http://psm.du.edu/media/documents/reports_and_stats/think_tanks/international_peace_institute_cockayne_pmcs_a_framework_for_regulation.pdf (Accessed: May 15, 2013): 10

⁹¹ Liss, *Regulating Private Military and Security Companies at sea*.

⁹² Italian military guards are accused of killing two Indian Fishermen. The situation have generated diplomatic disputed between India and Italy. Hari Shankar, "Jurisdictional and Immunity Issues in the Story of Enrica Lexie: A Case of Shoot & Scoot turns around!" *Ejil: Talk*, March 25, 2013, <http://www.ejiltalk.org/jurisdictional-and-immunity-issues-in-the-story-of-enrica-lexie-a-case-of-shoot-scoot-turns-around/> (Accessed: May 12, 2013).

⁹³ Priddy and Casey-Maslen, Counter-piracy, *Journal of International Criminal Justice*: 845-46

⁹⁴ Rickett, *Piracy fears over ships laden with weapons in international waters*.

⁹⁵ Leander, *Chapter 3*, 2

entrenched in the fact that thorough guidelines and documents, such as the Montreaux Document,⁹⁶ are not embracing the case specific aspects related to PSCs presence in the anti-piracy fight. The Montreaux document is a detailed document defining PSCs role according to international humanitarian law when operating in zones of conflict. The document is not legally binding, but it proficiently promotes that international law applies for PSCs when operating in an armed conflict.⁹⁷ With the Montreaux document being concerned with PSCs in armed conflicts and according to International Humanitarian Law,⁹⁸ there are missing units as piracy does not fall under these categories.⁹⁹ Although the Montreaux Document touches upon various important aspects in relations to responsibility, monitoring and securing the highest level of professionalism of PSCs, there is nevertheless a need for more case specific documents dealing explicitly with the presence of PSCs onboard vessels in the anti-piracy fight.

Caroline Holmquist, researcher at Stockholm International Peace Research Institute argues that the fragmented nature of the private security industry and the variety of operations and clients makes it unlikely that one instrument is able to capture all the different aspects.¹⁰⁰ The fact that one instrument cannot capture the whole spectrum of PSCs operations is effectively demonstrated by the presence of PSCs in the anti-piracy fight. With their having been a rise of case-specific scenarios such as the right to innocent passage, how to legally repel a pirate attack, floating armories etc. there is a need for regulations as well as literature solely dealing with these case-specific aspects. Fortunately, it has to be acknowledged that the maritime sector and international organisations has developed an increasing number of self-regulative guidelines dealing with PSCs presence in the anti-piracy fight the last couple of years (SAMI, BIMCO, IMO, RUF, ISO etc.).¹⁰¹ Even though initiatives have been launched, there is continuously a problem surrounding case-specific aspects. This puts forward that without fully understanding the root of the regulative arena of the anti-piracy fight, initiating change is difficult.

⁹⁶ICRC, "The Montreaux Document: On pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict," September 17, 2008. http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf, (Accessed: Jun 12. 2013).

⁹⁷ Ibid.

⁹⁸ Cameron, *International Humanitarian Law*, 2-3

⁹⁹ Treves, *Piracy*, 412

¹⁰⁰ Caroline Holmquist, "Private Security Companies: The Case for Regulation," *SIPRI Policy Paper* No.9 (2005):44.

¹⁰¹ Ginkel et. al, *State or Private Protection*, 27-30

The current lack of literature discussing the case-specific aspects within the anti-piracy fight is hampering the understanding of the regulative field of PSCs. In order to make strong and efficient regulations governing the operation of PSCs, there is a need of literature examining the case-specific aspects related to the anti-piracy fight. Without knowing what needs to be regulated, the chances of being faced with unfortunate outcomes increases. Additionally, one intensifies the risk of having a regulative industry which merely acts as a responds to actions, instead of being at the forefront guiding the direction of the industry. Consequently, with the myriad of PSCs operating in the anti-piracy fight not being effectively regulated, one can risk scenarios in line with Thomson's warning,¹⁰² where illegal actions conducted by PSCs can lead to diplomatic confrontations between states. Such scenarios are not just a warning, as confrontational disputes have already been raised among states evolved around the activities of PSCs.¹⁰³

Resolutely, as pointed out, the presence of PSCs in the anti-piracy fight is a new legal field, reflecting the need of further study. Following, the subsequent section will introduce the theory of interest, namely principal-agent theory. With it being noted that there is a lack of litterateur embracing how PSCs are regulated within the anti-piracy fight, principal-agent theory is an effective instrument bridging the understanding of the relationship between PSCs and the regulations governing them.

Principal-agent theory

With PSCs being a relatively new phenomenon in the modern day anti-piracy fight, one can argue that there currently is a gap between the adoption of policies and how it functions in reality. In order to effectively understand and fill this gap, the principal-agent theory will be applied. Principal-agent theory is an effective tool bridging an understanding between PSCs and the regulations governing them. When adapting principal-agent theory to the topic of this thesis, it is important to make clear what is meant by "principality" and "agency". Within this thesis, what categorizes a principal is the binding legal authority the principal exert in the relationship with the agent. This can be through a contract, license, regulations etc. Accordingly, the principal within this thesis resembles institutions such as legislatures and the policymaking part of governments, vessel companies as well as big international

¹⁰² Thomson, *Mercenaries, pirates and Sovereign*, 146-153

¹⁰³ Hari Sankar, *Jurisdictional and Immunity Issues*.

organisations. The agents on the other hand are the once the principal aims at controlling, namely the PSCs.¹⁰⁴

Principal-agent theory originates from economics where it seeks to explain the relationship between the seller (principal) and buyer (agent). Both are assumed to be rational actors, acting according to self-interests. The relationship between the principal and agent is therefore grounded in maximizing one's own interests instead of focusing on mutual beneficial outcomes.¹⁰⁵ The self-interests of the different actors make the theory of special interest when analyzing how PSCs are regulated within the anti-piracy fight. Through examining the different interests at stake, one grasps an understanding of how each actor influence the relationship and which mechanisms they use in order to improve their own outcomes.

When applying the principal-agent theory to the understanding of the regulations governing PSC in the anti-piracy fight, there are different aspects to be aware of. Ideally, the principal-agent theory is based on a hierarchic system where the principal delegates authority over the agent. While this is the ultimate outcome, is it not always the reality as agents will always try to maximize their own interests. A mechanism the agent has to increase its power position is to hide information from the principal. By creating an information asymmetry, the agent will increase their bargaining power providing them with a comparative advantage over the principal.¹⁰⁶ When an information asymmetry has paved the way for agents, one can risk situations where the equation is turned around and agents are operating according to private interests instead of in line with the principals' desires. In order to effectively understand the regulations governing the PSCs in the anti-piracy fight, awareness regarding PSCs ability to put forward their own desires is an important aspect to have in mind.

According to Eisenhardt, there are two major problems within the principal-agent relationship. These two problems are 1) that the desires and goals of the principal and agent are conflicting and 2) that it is difficult or expensive for the principal to control the actions of

¹⁰⁴ Other ways to see the principal-agent theory within this context is that the PSCs are the principals as they are filling in a security gap where states monopoly on violence is not adequate. While this thesis focuses on states as the dominating principal, vessel companies can also be seen as the dominant principal as one can argue that state's role leans more towards regulating against externalities in the relationship between PSCs and the vessel companies

¹⁰⁵ Kathleen M. Eisenhardt, "Agency Theory: An Assessment and Review," *The Academy of Management Review*, 14 no. 1 (1989): 59

¹⁰⁶ James Cockayne, "Make or buy? Principal-agent theory and the regulation of private military companies," In *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* ed. Simon Chesterman and Chia Lehnardt (Oxford: Oxford University Press, 2007): 198

the agents.¹⁰⁷ Both these concerns are important to keep in mind when reaching an understanding of how PSCs within the anti-piracy fight are regulated. First of all, conflicting interest is likely to emerge as states focus on security, while PSCs are concerned with economic gains. With PSCs being market driven actors, it is of interest to grasp an understanding of how these interests combines with the regulations aim at providing security for seafarers. Secondly, understanding states ability to monitor PSCs in the anti-piracy fight raises an extra notice due to their operational arena. Not only is the operation of PSC in the anti-piracy fight situated far away from the principal, it is additionally in an environment where there are few oversight mechanisms observing their activity. The location of PSCs in the anti-piracy fight therefore generates extra implications for the principals' possibility to monitor the agent.

The fear of agents shirking

An important paradox within the principal-agent theory is how the principal can be sure that the agent is not shirking. According to Feaver, shirking is how the agents' behavior differs from the *functional* and *relational* goals made by the principal.¹⁰⁸ Feaver explains *functional* goals as; the agent's behavior in relation to what is demanded from the principal, if the agent is working to its full capacity and whether the agent holds the right component to conduct the mission. The *relational* goals are linked to areas of critical decision-making such as whether it is the principal who makes the policy decisions; whether the principals decisions are functional; does the principal control which decisions are open for the agent and lastly, whether the agent abstain from any behavior weakening the principal's authority.¹⁰⁹ If the agent is acting fully to the functional and relational goals, it is not shirking. On the other hand, if the agent does not comply with one or more of the goals, the agent is shirking.¹¹⁰

With the private security industry already being faced with a negative reputation from their presence in conflict areas,¹¹¹ it is of interest to see whether the international community has learned from previous mistakes by eliminating the chances of shirking within the anti-piracy

¹⁰⁷ Eisenhardt, *Agency Theory*, 57

¹⁰⁸ Peter D. Feaver, *Armed Servants: Agency, Oversight, and Civil-Military Relations*, (Harvard: Cambridge University Press, 2003): 60-61

¹⁰⁹ Ibid.

¹¹⁰ Ibid. 62

¹¹¹ Amnesty International, Web site, <http://www.amnestyusa.org/our-work/issues/business-and-human-rights/private-military-and-security-companies> (Accessed: August 14, 2013).

fight. If principals are not affectively regulating the agents, the maritime industry will be faced with a situation where the principals can become dependent on the agent. The outcome will then be an industry governed by the market and economic interests of PSCs. With PSCs being introduced to the anti-piracy fight because of their needed deterrent role, it is unfortunate if the economic aspects overrule the security aim of their presence.

The two main dilemmas related to the fear of shirking are *adverse selection* and *moral hazards*.¹¹² *Adverse selection* implies that the principal can never be sure of the capabilities and qualification of the agent. This is rooted in agents' ability to misrepresent themselves when signing a contract. *Moral hazards* on the other hand, refers to the activities of the agent after the contract is signed, implying that one can never be sure whether the agent is working or slacking.¹¹³ The best way to avoid shirking according to Feaver, is through efficient systems of monitoring and punishment.¹¹⁴ Monitoring is best achieved through contract incentives, institutional checks, police patrols and screening. Consequently, controlling the agent is not a straight forward process as the agent will always initiate actions weakening the principals' ability to monitor. This can effectively be done by establishing the previously mentioned information asymmetry. As the agents possess information about themselves and their operation, they can regain power by holding certain facts for themselves. By creating an information asymmetry, the agent will increase their bargaining power providing them with a comparative advantage over the principal.¹¹⁵ What becomes problematic in situations where there is a lack of efficient monitoring mechanisms is agents' ability to pursue their own institutional interest instead of operating according to the specificity of the principal.

In regards to punishing, mechanisms such as material disincentives, losing the right for future contracts and prosecutions will hinder the agent from acting according to their own interests.¹¹⁶ Within the anti-piracy fight, there have already been distressed difficulties in observing whether an agent is shirking. James Brown, Military fellow from the Lowy Institute for International Policy has, among others, raised serious concerns in relation to the quality of contractors by emphasizing that among the PSCs operating in the anti-piracy fight there currently is "*significant competence and quality variations...across the spectrum of*

¹¹² Francesco Ciliberti et al., "CSR codes and the principal-agent problem in supply chains: four case studies," *Journal of Cleaner Production* 19 no.18 (2009): 886

¹¹³ Ibid.

¹¹⁴ Feaver, *Armed Servants*, 86

¹¹⁵ Cockayne, *Make or buy?*, 198

¹¹⁶ Ibid. 94

contractors.”¹¹⁷ Caroline Liss, prolongs the argument by stressing the current lack of transparency and public oversight of the business.¹¹⁸ The fear of adverse selection and moral hazards are therefore two important aspects to bear in mind within the forthcoming analysis of the regulations governing PSCs in the anti-piracy fight.

Multiple principals

When applying the principal-agent theory to the understanding of the regulations governing PSCs in the anti-piracy fight, it is of importance to recognize that the arena consist of multiple principals governing the agents. Within a multidimensional relationship the role of the agent becomes more dynamic and strategic. Instead of being in a position where they either respond or reject the outcomes of the principals, the agents can set the multiple principals up against each other in order to increase their own interests.¹¹⁹ Accordingly, with PSCs operating in the anti-piracy fight being bounded under more than one principal, they can turn the multiple principals into their favor by enlarging their freedom of operation. The possibility of PSCs to adopt the different principals into their own favor is an unfortunate outcome for the overall regulation of the industry. Strong and effective principals governing the operational mandates of PSCs is of specific importance within the anti-piracy fight as their operational mandate is grounded in the permission to use lethal force when deterring a pirate attack in self-defense. Without effective principals governing the operation of PSCs, illegitimate use of lethal force has a room of maneuver.

Accordingly, in order to avoid implications when being faced with multiple principals, it is significant that each contract between the agents and the principal is strong and indicate the principal’s hierarchic position. The best way to secure that agents act with conformity to the principals regulations is, according to Jan Støber, secured when the following essential conditions are in place: (1) Functional legal institutions creating binding rules and norms; (2) Effective markets with competition; (3) the contracts are specific and fixed and (4) there

¹¹⁷ Brown, *Pirates and Privateers*, 11.

¹¹⁸ Carolin Liss. Private, Military and Security Companies in the Fight against Maritime Piracy, n.d. <https://www.cimicweb.org/cmo/Piracy/Documents/LissPrivateMilitaryandSecurityCompaniestheFighagainstMaritimePiracy.pdf> (Accessed at: July 04, 2013): 3

¹¹⁹Richard W. Waterman, Amelia Rouse and Robert Wright, “The Venues of Influence: A New Theory of Political Control of the Bureaucracy,” *Journal of Public Administration Research and Theory* 8, no 1 (1998): 5

exists a functioning monitoring system.¹²⁰ When examining how PSCs are regulated within the anti-piracy fight, understanding PSCs flexibility to maneuver within the multiple principals is an essential aspect. Støbers' conditions for an effective principal-agent relationship can therefore be a useful tool within the further analysis of the thesis.

¹²⁰ Jan Støber, "Contracting in the Fog of War...Private Security Providers in Iraq. A Principal-Agent Analysis" *In Private Military and Security Companies*, ed. Thomas Jäger and Gerhard Kümmels (Wiesbaden:VS Verlag für Sozialwissenschaften, 2007): 123

Chapter 4: PSCs and “soft laws”

Introduction

As revealed in the previous chapter, one can argue that there is a need of more systematic and substantive information embracing the regulations governing the presence of PSCs in the anti-piracy fight. Hence, the current knowledge gap is a concern to be taken serious, as when regulating PSCs, awareness regarding their manifold operational aspects is essential. In order to effectively examine how PSCs are regulated within anti-piracy fight, this chapter will embrace how the maritime industry has responded to the presence of PSCs. In order to achieve a thorough set of analysis, it is important to include the different actors' influencing the regulations governing PSCs in the anti-piracy fight.

In contrast to the lack of any overriding international law, the maritime industry has developed more than a handful of non-binding guidelines aiming at regulating different aspects related to PSCs in the anti-piracy fight. With a great spectrum of self-regulative initiatives, this thesis will only include the “soft laws” which is considered to have an influential role on the regulations governing PSCs. Influential, in this sense interpreted as “soft laws” that are either broadly recognized by the maritime actors or plays an influential role directly or indirectly within the binding-regulations. Even though the ultimate outcome is a set of binding regulations effectively regulating PSCs in the anti-piracy fight, one cannot forget to shed light on the different “soft laws” within the industry as they play an important role in raising awareness as well as initiating regulative change. The relevance of the maritime sectors “soft laws” increase in significance as the current binding regulations has been characterized as “murky to the extreme”.¹²¹ Accordingly, the self-regulative initiatives can be an important instrument in regards to initiating stronger binding-regulations.

The self-regulative initiatives to be highlighted are the ones belonging to the International Maritime Organisation (IMO), International Organisation for Standardization (ISO) and the Rules for the use of Force (RUF). While the IMO guidelines have already played a vital role within the current binding regulations, the RUF and ISO standards are newly launched. The

¹²¹Percy, Regulating the private security industry, *The International Review of the Red Cross*: 17

reason why RUF and the ISO standards are included within this thesis is grounded in the fact that in addition of having received international recognition, their operational aim embraces vital aspects in need of improvement within the current regulative arena. Accordingly, the RUF and ISO standards can be of significance in order to secure the highest level of professionalism related to PSCs continues presence within the anti-piracy fight.

The International Maritime Organisation

IMO's slogan at the World Maritime Day in 2011, "*Piracy - IMO orchestrating the response*"¹²² precisely and accurately describes IMO's role within the regulation of PSCs. The slogan is descriptive as IMO elaborates a minimum set of recommendations without confronting legally binding agreements regulating the sector. The guidelines developed by IMO fall under the categorization of "soft laws" as they are not enforceable but rather an instrument to soften the industry.¹²³ Acknowledging that there are many actors to address when introducing PSCs to the anti-piracy fight, IMO has created guidelines therein, targeting flag states, coastal states, PSCs and ship owners. Even though IMO's guidelines are a step in the right direction, they are in need of further improvement as their thoroughness and strength is not a satisfactory regulative contribution in the long run.

What makes the IMO guidelines of special interest within this thesis is that they have a reciprocal relationship with flag states' regulations. This is exemplified by the guidelines repeatedly confirming that PSCs must always respect and operate according to national regulations, while the guidelines on the other hand, are acknowledged within states' regulations.¹²⁴ Accordingly, the reciprocal relationship between IMO and national regulations puts IMO in an important influential position, where their guidelines can, if used to its' fully, be a vital counterpart when strengthening and harmonizing the policies and laws governing PSCs operation at the national and international level. Therefore, even though the IMO guidelines are "soft laws", they are in a position where their guidelines can have an important impact on how PSCs are regulated.

¹²² IMO, "World Maritime Day 2011 - Piracy: orchestrating the response," September 29, 2011 <http://www.imo.org/MediaCentre/PressBriefings/Pages/49-WMD-2011.aspx> (Accessed: Jun 17, 2013)

¹²³ Holmqvist, Private Security Companies The Case for Regulation, *SIPRI Policy Paper*, 5.

¹²⁴ IMO, *Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area*, IMO Doc. MSC.1/Circ.1443 (London: IMO, 2012): Annex 1.3

The IMO regulations MSC.1/Circ.1443¹²⁵ directed towards PSCs operating at ships in the anti-piracy fight are by far the most thorough set of guidelines, as they provide specific requirements within a great variety of aspects such as operational competencies, training, command and control. The same can be said about the guidelines MSC.1/Circ.1405/Rev2¹²⁶ dealing with the ship owners, ship operators and shipmasters, as they also provides a detailed set of operational recommendations. With states getting inspiration from the IMO guidelines when making their own regulations, the thoroughness and clear operational recommendations within the IMOs guidelines is of importance as it is an influential manual widely used.

In contrast, the guidelines aiming at flag states are in need of improvement as they do not provide any concise or clear set of recommendations. It is unfortunate that the guidelines for the flag states are weak, as flag states are one of the central actors implementing the regulation's governing PSCs. Instead of providing a set of recommendations with sufficient and detailed procedures on what and to which degree different aspects should be regulated, the guidelines rather urges states to establish a "*policy which may include, inter alia*":¹²⁷

- *the minimum criteria or minimum requirements with which PCASP¹²⁸ should comply*
- *a process for authorizing the use of PCASP which have been found to meet minimum requirements for ships flying its flag*
- *a process by which shipowners, ship operators or shipping companies may be authorized to use PCASP¹²⁹*

First of all, using words such as "may include" makes the document lose strength and influence as it clearly puts foreword that states are free to interpret the recommendations according to what favors them. Even though the guidelines correctly mention that states possess the power to both accept and determine the lawful and appropriate actions determining PSCs way of operation, it should be recognized that strong guidelines can help guide states into a manner of improving the current regulative system. With flag states referring directly to as well as uses the IMO guidelines as a manual when making their own regulations, the wording of the IMO guidelines is a vital aspect in regards to how PSCs are

¹²⁵ IMO, *IMO Doc. MSC.1/Circ.1443*, Annex 1.

¹²⁶ IMO, *Revised Interim Guidance to Ship owners, Ship Operators and Ship Masters on the use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area*, IMO Doc. MSC.1/Circ.1405/Rev2 (London: IMO, 2012).

¹²⁷ IMO, *Revised Interim Guidance for Flag States Regarding the use of Privately Contracted Armed Security Personnel on board Ships in the High Risk Area*, IMO Doc. MSC.1/Circ.1406/Rev.2 (London:IMO, 2012): Annex 5.

¹²⁸ Privately Contracted Armed Security Personal (PCASP) is equivalent to what the thesis refers to as PSC.

¹²⁹ IMO, *MSC.1/Circ.1406/Rev.2*, Annex 5

regulated within the anti-piracy fight. Putting forward a clear and concise voice within the IMO guidelines helps set an adequate standard for how flag states should proceed within their own regulations.

Secondly, the guidelines emphasize different minimum aspects that should be adopted, without giving any clear interpretation to what these requirements should entail. Even though the IMO guidelines mentions that flag states regulation's governing PSCs in the anti-piracy fight should have "*direct reference to national legislations regarding carriage of firearms, the category assigned PSCs and the relationship between the master and PSCs;*"¹³⁰ it does not put forward what these requirements should enquire in order to effectively regulate the PSCs. Without putting forward what can be considered to be a minimum within the different contexts, the guidelines are not to its fully ensuring that the regulations governing PSCs in the anti-piracy fight are holding the standards needed in order to adequately regulate their operations.

Not only could a set of detailed guidelines regarding PSCs recommended mandates improve the strength of current regulations, it could also be an important mean in order to reach more harmonization between states regulations. With flag states holding the chief role concerning determining the operational procedures of PSCs in the anti-piracy fight, the IMO guidelines should target the role of the flag state and their regulations more precisely and thoroughly. Even though one are not allowed under international law to force upon states to accept international guidelines, stronger wording and more precise recommendations in the IMO guidelines is an important indirect source strengthening the current regulative arena governing PSCs in the anti-piracy fight. An improvement within the content of IMOs regulations is therefore a vital step in order to secure a higher level of professionalism within the future regulations governing PSCs in the anti-piracy fight.

In a United Nations Security Council Report made by the UN Monitoring Group on Somalia and Eritrea, IMO was recognized for their efforts in producing guidelines and recommendations. However, the report raised a concern that "*the expansion of PMC activities has outpaced these tentative regulatory efforts, and although guidance and recommendations have led to some improvement, their armed operations remain unmonitored and largely unregulated.*"¹³¹ With IMO being an important arena when it comes to discussing ships safety

¹³⁰ Ibid. Annex 5.5

¹³¹ UN Security Council, *Report of the Monitoring Group on Somalia and Eritrea*

and issues related to piracy, it can also be an important contributor initiating forums and working groups discussing improvements of the current regulations governing the PSCs in the anti-piracy fight. Coming together and making guidelines with more concise and direct wording would diminish the chance of states interpreting the guidelines differently, initiating a more harmonized and legitimized set of regulations controlling the actions of PSCs in the anti-piracy fight. As piracy as well as the security industry being dynamic, one has to act accordingly. IMO therefore needs to grasp their influential role by securing that their input into the system backs up a future structure where all their guidelines adequately and effectively influence the binding regulations governing PSCs in the anti-piracy fight.

International Organisation for Standardisation

In December 2012 the International Organisation for Standardization (ISO) submitted a set of guidelines named ISO/PAS 28007:2012¹³² dedicated to “*Private Maritime Security Companies (PMSC) providing privately contracted armed security personnel (PCASP) on board ships.*”¹³³ The guidelines saw daylight as a response to IMO’s call for stronger regulations of the private security industry in the anti-piracy fight and the need to steer away from the current practices related to self-regulation and self-certification. With ISO holding a position as the world’s largest developer of voluntary international standards created through global consensus, they were entrusted by the IMO to fulfill their appeal for stronger regulations within the field.¹³⁴ The IMO Secretary-General, Koji Sekimizu, welcomed the completed work of ISO and recognized their “*contribution to the development of international minimum standards for the shipboard deployment of armed security guards which will be particularly useful to flag States.*”¹³⁵ The overall aim of the newly developed ISO standards is to strengthen the guarantee that PSCs operating in the anti-piracy fight are responsible, professional and effective actors.¹³⁶ Putting in place a system which can secure a high level of

Pursuant to Security Council resolution 2002 (2011). S/2012/544 (New York: UN Security Council, 2012): Annex 5.4.

¹³² Hereinafter the ISO/PAS 28007:2012 is shortened to the ISO standards.

¹³³ Maria Lazarte, “Fighting piracy - ISO guidelines for armed maritime guards,” March 14, 2013, http://www.iso.org/iso/home/news_index/news_archive/news.htm?refid=Ref1717 (Accessed: August 12, 2013).

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ ISO/PAS 28007, *Ships and marine technology — Guidelines for Private Maritime Security Companies (PMSC) providing privately contracted armed security personnel (PCASP) on board ships (and pro forma contract)*, (Geneva: ISO, 2013).

professionalism among PSCs operating within the sector is an important contributing factor strengthening the adequacy of how PSCs are regulated within the anti-piracy fight.

The ISO standard is a thorough document covering crucial information for both the work and procedures of PSCs and vessels seeking protection. The guidelines address a variety of topics such as resilience, communication, training and awareness.¹³⁷ The document has, among others, been endorsed by Interpol, the European commission and the Contact Group established by the UN Security Council Resolution 1851.¹³⁸ With an international acceptance, the ISO standards aims at ensuring that the same high standards of certification will be upheld among the majority of countries permitting the use of PSCs in the anti-piracy fight. So far, the guidelines have been welcomed to various degrees with currently 10 states having decided to include the ISO standards in their national legislative requirements.¹³⁹ Even though states pursues the right to define their own legislative requirements, Robin Townsend, project leader of the ISO standards, did not find this problematic as he believe that in the future “*The standard sets the correct international level of needing to identify all the legal requirements including any additional ones of flag states, transit states and domicile states,*”¹⁴⁰

The ISO standards are of importance when analyzing the second part of my research question, regarding what can be done to secure the highest level of professionalism related to the future presence of PSCs in the anti-piracy fight. Even though the ISO guideline does not directly address stats regulations, it is, as Townsend confirmed, an important contribution as it provides a risk based quality system which can help set a proficient uniformed quality level for companies operating in the anti-piracy fight. What is of special importance with the ISO standards, is that the ISOs system of certification helps lift the professionalism and legitimacy of the industry as unprofessional and irrespective “cowboy” companies are outcompeted.¹⁴¹ Accordingly, when PSCs have managed to fulfill the requirements of the ISO standards they can demonstrate a high level of professionalism and prove to ship-owners their compliance with the requirements conducted in the guidelines. The ISO standard is therefore an essential regulative aspect currently missing within the binding-regulations. Including stricter systems of monitoring the quality of PSCs is a vital aspect increasing the validity of the current

¹³⁷ Ibid.

¹³⁸ Lazarte, *Fighting piracy - ISO guidelines for armed maritime guards*,

¹³⁹ Liz McMaphon, “Owners must still vet internationally accredited armed guards,” May 07, 2013, <http://www.lloydslist.com/ll/sector/regulation/article422206.ece> (Accessed : September 04, 2013).

¹⁴⁰ Ibid.

¹⁴¹ Maritime Security Review, “ISO 28007 “May 09, 2013, <http://www.marsecreview.com/2013/05/lrqa-and-irss-to-certify-maritime-security-companies/> (Accessed: September 01, 2013).

binding-regulations. A positive remark is that important assessment companies such as the Lloyd's Register Quality Assurance (LRQA) and the specialist risk and management consultancy, Integrated Risk & Security Solutions (IRSS) have gladly welcomed the regulations and have announced an upcoming collaborative approach helping companies meet the requirements.¹⁴²

The ISO standard is not the only self-regulative initiative putting forward a certification system ensuring the quality of PSCs within the maritime industry. Another self-regulative initiative of importance is put forward by the Security Association for the Maritime Industry (SAMI). In 2012 SAMI developed an accreditation system for private maritime security providers.¹⁴³ The accreditation system is a 3 stage process of thorough checks and onsite visits. In addition to the program being managed by SAMI, a third part, named the National Security Inspectorate (NSI), participates in the accreditation process. In addition to the accreditation system belonging to SAMI and the ISO, the Norwegian Hull club and Norwegian War Risk Association have developed a vetting system named Safegage.¹⁴⁴ When looking at the different vetting systems initiated by different actors within the maritime sector, one can stress the maritime industries appeal of getting in place a vetting system within the anti-piracy fight. Accordingly, the maritime industries call for stronger quality checks of PSCs operating in the anti-piracy fight is a call to be taken serious in order to improve the highest level of professionalism within forthcoming regulations.

Rules for the use of Force

Although there is uniformity within the binding-regulations regarding PSCs permission to use force according to self-defense, there is a lack of harmonization in regards to how one may act according to self-defense. In order to deal with the complexity regarding the use of force in an anti-piracy context, there has been developed a non-binding set of Rules for the Use of Force

¹⁴²Ibid.

¹⁴³ SAMI, "Private Maritime Security Accreditations Launch" February 1, 2011, <http://dev.seasecurity.org/mediacentre/private-maritime-security-accreditations-launch/> (Accessed: September 13, 2013).

¹⁴⁴ Norwegian Hull Club, "SafeGage™ Vetting of Private Maritime Security Companies (PMSC)," Web site, <http://www.norclub.no/safegage-vetting-of-private-maritime-security-companies-pmsc/> (Accessed: September 14, 2013).

(RUF), named the 100 series rules.¹⁴⁵ The RUF aims at alleviating uncertainty and provides a clear set of legal rules regarding how to lawfully repel a pirate attack with lethal means.¹⁴⁶ The RUF is designed for the worldwide use of PSCs in a maritime context and sets a standard for circumstances under which the use of force may be used in accordance to self-defense. The document is made in order to help a great variety of actors as its aim is to benefit shipmaster, ship owner, insurer, underwriters, PSCs and interested third parties.¹⁴⁷ The objective of the RUF is twofold as it intends to provide guidance as to how to act with a gradual response to a pirate attack and how to reduce the risk of potential criminal charges related to illegal use of force. The aim of the RUF is an important mean which needs to be incorporated better within the regulations governing PSCs in the anti-piracy fight. With PSCs holding the permission to use lethal force in self-defense, it is important that states adequately regulate how PSCs may use force.

The RUF can be an important tool in order to secure that the regulative mandates governing the operation of PSCs holds a universal set of minimum standards regarding the use of force. In contrast to the IMO guidelines being criticized for not adequately embracing what “minimum” is, the thoroughness of the RUF clearly puts forth a minimum set of standards adequately embracing the needed requirements. The thoroughness of the RUF is reflected in them only putting forward four concise rules with explanatory remarks; 1) the master should always be warned before the PSCs attend to use force, 2) non-kinetic warnings may be used where there is reason to believe a vessel is having a threatening behavior, 3) warning shots may be used when there is reason to believe that a warning shot can prevent an attack and 4) when an attack is imminent, reasonable and necessary use of force may be used in self-defense.¹⁴⁸ These four concise rules and their explanatory remarks are important “soft laws” which can be a vital tool harmonizing what state initiate as minimum standards within their own regulations. If widely incorporated, RUF can be a significant instrument securing that PSCs use of force is adequately regulated and that their mandates hold a high level of professionalism in the future.

Even though aim of the 100 Series Rules can be argued to be exactly what the industry needs, it is problematic that the RUF is a self-regulative initiative, and not a binding convention.

¹⁴⁵ 100 Series, “The 100 Series Rules: An International Model Set of Maritime Rules for the Use of Force (RUF),” https://100seriesrules.com/uploads/20130503-100_Series_Rules_for_the_Use_of_Force.pdf (Accessed: October 14 2013).

¹⁴⁶ Tunda, Web site, <http://www.tundragroup.ca/news/100-series-rules-released/> (Accessed : October 14, 2013).

¹⁴⁷ 100 Series, *The 100 Series Rules*. 2

¹⁴⁸ 100 Series, *The 100 Series Rules*. 5-6

Accordingly, the RUF is therefore only applicable as long as states agree and create their regulations according to it. With the RUF embracing aspects which states have already touched upon to various degrees within their own binding-regulations, the RUF might be deemed as unnecessary as it is already regulated within flag states regulations. This is unfortunate as the quality of how states regulate the rules for the use of force within their own regulations differs in quality. Consequently, without states welcoming the RUF, there will be an unfortunate continuity of the lack of inconsistency among regulations in regards to the use of force. Even though the aim of the RUF is vital in order to secure that PSCs are adequately regulated within the anti-piracy fight, the strength of the RUF in its current form is mainly dependent on states welcoming it within their own binding-regulations.

Chapter 5: PSCs and regional states regulations

Introduction

As previously mentioned, the introduction of PSCs to the anti-piracy fight can be deemed as a positive contribution. First of all, they have been a successful deterrent actor, exemplified by their so far high success rate. Additionally, the presence of PSCs have made the journey less excruciating and stressful for both crewmembers, as well as for their families waiting back home.¹⁴⁹ But even though the PSCs have played a contributing role, it is important to make sure that their success is based on legitimate actions. With the previous chapter looking at important self-regulative initiatives which can have an influential say on how PSCs are regulated, this chapter will embrace the binding regulations directly regulating the operation of PSCs. As this chapter and the forthcoming chapters will reveal, the presence of PSCs in the anti-piracy fight is not a one-sided cheerful story, as humbling scenarios affecting the legitimacy and efficiency of the industry has emerged. The unfortunate scenarios are a result of the introduction of PSCs to an arena where fundamental regulative aspects were not adequately in place at a national, regional and global level. With the presence of PSCs in the anti-piracy fight creating new juridical implications, it is essential to grasp an understanding of the current regulative arena in order to secure the legitimacy of the business in the future.

As the aim of this thesis is to examine how PSCs are regulated within the anti-piracy fight, it is essential to grasp an understanding of the correlation between the regulations and the once they intend to regulate, namely PSCs. This chapter will therefore provide the reader with a deeper understanding of one of the many scenarios and debates having found a breeding ground within the anti-piracy fight, namely how the territorial states have responded to the presence of PSCs. Territorial states are an important regulative principal in relation to the operation of PSCs. This is grounded in the laws of territorial states being applicable for PSCs when entering into a state's territorial waters.

As a start, this chapter will introduce the core aspects related to the relationship between PSCs and how territorial states have responded to their increasing presence in the region. Following, a case specific scenario that has emerged as a result from territorial states unwelcoming

¹⁴⁹ Cf. Interview 2013c

regulations, namely floating armouries, will be presented. After having presented the floating armouries and their role and implications in the anti-piracy fight, the United Nations Convention of the Law of the Sea (UNCLOS) and how it deals with the right of innocent passage in territorial waters will be presented. With UNCLOS being the only international convention dealing with the right of innocent passage, it can, if used to its fullest, play a vital role in regards to putting in place an international convention eradicating the current troublesome relationship between PSCs operational mandates and the regulations belonging to territorial states. Putting in place an international agreement within UNCLOS can be an important measure securing a higher legitimacy of the industry within future operations.

PSCs and the right to innocent passage within territorial sea

A new debate originating from the increased presence of PSCs within the anti-piracy fight is the interpretation of whether or not PSCs infringes on ship's right to innocent passage when entering territorial sea. Why there has been a rise in vessels carrying armed guards in other states territorial sea, is mainly rooted in areas condemned as High Risk Areas¹⁵⁰ also covering national waters. With vessels deeming it as essential to sail with PSCs in High Risk Areas, questions related to the right of innocent passage and whether coastal states can prohibit the right of innocent-passage are inquiries of great importance when analyzing how PSCs are regulated within the anti-piracy fight. First of all, when entering territorial sea, the laws of the territorial states have to be respected. Exemplified, if the territorial states prohibit guns, PSCs are not allowed to enter into the territorial sea with guns. The contradicting laws between flag states and territorial states can therefore generate a "legal" headache for the operational mandates of PSCs. Secondly, the "legal" headache has a say for the efficiency and legitimacy of PSCs operation as heavy bureaucratic and unwelcoming laws hampers the effectiveness of PSCs operations.

The current laws obstructing PSCs passage through territorial sea falls within what Kinsey warns as the ultimate problem when making legal regulations, namely balancing the interests of the public with the commercial interests of PSCs.¹⁵¹ As will be demonstrated, the regulations put forward by territorial states clearly determines that they have not paid respect

¹⁵⁰ BMP, *Best Management practices for Protection Against Somali Based Piracy*, Version 4-August 2011, ed., <http://www.icc-ccs.org/piracy-reporting-centre/prone-areas-and-warnings> (Accessed: Jun 02, 2013):4

¹⁵¹ Kinsey, *Corporate Soldiers and International Security*, 135

to the operational interest of PSCs. Kinsey continues arguing that without balancing the interests of PSCs within regulations, the sector will be faced with unfortunate outcomes hampering the effectiveness of the industry as PSCs will seek alternative ways of operation.¹⁵² This is also an outcome of relevance within the anti-piracy fight, as floating armouries have emerged as a response to the unwelcoming regulations of territorial states.¹⁵³ With territorial states regulations being an essential mean when analyzing the regulative field of PSCs in the anti-piracy fight, the following section will shed light on the important relationship between innocent passage, PSCs and states regulations.

IMO puts forward in their guidelines that states neighboring the Indian Ocean, Gulf of Aden and the Arabian Sea should put in place relevant policies which “*facilitate the movement of PSC and their firearms and security-related equipment*”.¹⁵⁴ So far, as is soon to be demonstrated, the majority of regulations originating from coastal states within piracy-prone areas have not followed IMO’s encouragement, but rather established heavy bureaucratic and unwelcoming laws. As in relations to the points made above, these unwelcoming regulations are currently an obstacle within how PSCs are regulated in the anti-piracy fight as they hamper the operational mandate of the industry. An example of unwelcoming laws is reflected in Yemen and Saudi Arabia having fully banned the carriage of armed PSCs when sailing in their territorial waters.¹⁵⁵ Other states on the other hand have not fully banned the right to innocent passage, but rather created strict laws hampering the efficiency of the business.¹⁵⁶

Resulting from the current manifold of regulations dealing both with the right of innocent passage as well as with embarkation and disembarkation, vessels have to be fully updated at all times as to which laws are applicable and what they entail. Illustratively, in some jurisdictions, carrying arms can be considered smuggling, while in other places one are allowed to hold arms when entering a port but not when disembarking.¹⁵⁷ In addition, states also vary greatly when it comes to requirements in relation to the storage, reporting and types

¹⁵² Ibid.

¹⁵³ Rickett, *Piracy fears over ships laden with weapons in international waters*.

¹⁵⁴ IMO, *Interim Recommendations for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area*, IMO Doc. MSC.1/Circ.1408 (London: IMO, 2011): Annex 1.

¹⁵⁵ Ramola Talwar Badam, “UAE coastguard detains floating weapons arsenal off Fujairah,” *The National*, October 17, 2012, <http://www.thenational.ae/news/uae-news/uae-coastguard-detains-floating-weapons-arsenal-off-fujairah#ixzz2k3Rpi95K> (Accessed: Jun 12, 2013).

¹⁵⁶ Ibid.

¹⁵⁷ Rickett, *Piracy fears over ships laden with weapons in international waters*.

of arms on can hold.¹⁵⁸ In the Seychelles for example, the police come onboard and lock the armory, while in Mauritius the weapons must be taken off the ship and stored with the police.¹⁵⁹ Therefore, PSCs have to be at the forefront at all times, fully updated on which jurisdiction they are entering and what their regulations entail, as well as when they exit, which are the next applicable laws in line. The major problem with how territorial states have responded to the increasing presence of PSCs in the anti-piracy fight is not entrenched in states prohibiting PSCs in general, but that they have established strict laws regarding their most important mean of protection, namely arms. With PSCs being faced with various heavy and unwelcoming bureaucratic laws restricting the carriage of arms, knowing once operational mandate and how to act, can turn into a legal minefield.¹⁶⁰

The unwelcoming and diversifying regulations from territorial states have not generated an effectively regulated industry, but rather initiated illegitimate ways of dealing with the problems. Consequently, in order to avoid the different state's myriad of cumbersome and heavy bureaucratic procedures, a growing practice among the PSCs has been to throw weapons overboard before entering territorial sea.¹⁶¹ Richard Skinner, the director of the PSC Orchid Group, confirms that companies are throwing their weapons overboard on a daily basis. Skinner followed up by saying "*I suspect there are literally thousands of semi-automatic and automatic weapons down there at the bottom of the Red Sea for fish to swim around.*"¹⁶² Unfortunately, throwing weapons overboard is not the only scenario having emerged as a result of the cumbersome regional regulations governing the operation of PSCs in the anti-piracy fight. Another illustrative example is the increasing presence of depot ships, such as floating armouries. With PSCs looking for alternative ways of operation in order to avoid territorial states bureaucratic regulations, one can argue that, the current regulation needs to be modernized in order to effectively regulate and embrace the presence of PSCs within the anti-piracy fight in a sufficient and sustainable manner.¹⁶³

¹⁵⁸ Ibid.

¹⁵⁹ Mark Lowe, "Floating Armouries", *Maritime Security Review*, March 23, 2012, <http://www.marsecreview.com/2012/03/floating-armouries/> (Accessed: June 23, 2013).

¹⁶⁰ Rickett, *Piracy fears over ships laden with weapons in international waters*.

¹⁶¹ Hope, *Firearms an odd casualty of piracy*.

¹⁶² Ibid.

¹⁶³ Rickett, *Piracy fears over ships laden with weapons in international waters*.

Floating armouries

A concrete outcome of the unwelcoming regulations originating from territorial states is a phenomenon known as floating armouries. Even though floating armouries are playing an increasing role within the anti-piracy fight, few people are aware of their existence as they have received little publicity outside the shipping industry's inner circles. Concisely explained, floating armouries are boats where PSCs can store their arms when sailing from the high sea and into territorial waters. At present, there is a great spectrum regarding the quality of the floating armouries as well as who's in charge.¹⁶⁴ Some are governed by states while others are under the control of private companies. Currently there are approximately 20 ships operating as floating armouries, stocking rifles, small arms, ammunition, body armour, night vision goggles, etc., belonging to PSCs.¹⁶⁵ Floating armouries are included within this thesis as it demonstrates that the current regulations have not balanced the interests of PSCs within their regulations as new operational maneuvers have been sought for. Additionally, the floating armouries reveals that the current regulations are not effectively governing the operation of PSCs as they have the possibility to shirk and put forward alternative ways of operation.

Even though floating armouries have been a positive contribution eliminating questions regarding innocent-passage, their presence is also of a worrying character initiating concerns and debates among experts within the field. The major debates are related to their legal status and the lack of laws controlling their way of operation.¹⁶⁶ According to a UN Security Council Report, the currently unregulated floating armouries will be “...posing additional legal and security challenges for all parties involved”.¹⁶⁷ Mr. Askins, a prominent lawyer within the maritime security sector criticizes the floating armouries further, naming them a “real mess” which the international community does not know how to handle.¹⁶⁸ As floating armouries are situated on the high sea, the jurisdiction of the flag of the vessel governs. With few, if any, states having regulations dealing explicitly with the use of floating armouries, the

¹⁶⁴ Avant Garde Maritime Services, Web site, <http://www.artsrn.ualberta.ca/claypool/courses/art301-2009/301%20PDF%20files/Chicago%20copy.pdf> (Accessed: June 30, 2013).

¹⁶⁵ Rickett, *Piracy fears over ships laden with weapons in international waters*.

¹⁶⁶ Ibid.

¹⁶⁷ UN Security Council, *Report of the Monitoring Group on Somalia and Eritrea Pursuant to Security Council resolution 2002 (2011). S/2012/544*, (New York: UN Security Council, 2012), Annex 5.4.

¹⁶⁸ Liz McMahon, “Consistent global standard for armed guards will be hard to achieve,” *Lloyds List Intelligence*, October 10, 2011, <http://www.lloydslist.com/ll/sector/regulation/article409185.ece> (Accessed: May 09, 2013).

current operation is said to be a “legal grey area” where international regulations are highly needed.¹⁶⁹

The emergence of floating armouries is a direct consequence of the lack of international cooperation and agreements when it comes to national, regional and international regulations governing the presence of PSCs in the anti-piracy fight. Resulting from there not having been in place fundamental regulations effectively governing the role and function of PSCs from the start, alternative operational scenarios have emerged. The presence of floating armouries is a clear example of Percy’s warning about an industry where regulations are created as a respond to action instead of being at the forefront guiding the industry.¹⁷⁰ With floating armouries being characterized as a “legal grey area” emerging out of PSCs own interests, it demonstrates that PSCs have established their own direction of the industry which now needs to be addressed and regulated. Hence, the emergence of floating armouries clearly determines that the current regulations governing PSCs in the anti-piracy fight, is not efficient. Accordingly, there is a need to streamline the regulations governing the operation of PSCs better, in order to eliminate the possibility to find alternative operational ways.

Britain, one of the leading nations within the maritime security industry, has taken the emergence of floating armouries seriously by addressing complexity of their jurisdictional and security challenges.¹⁷¹ While the UK has been strict and demanded that companies need to obtain licenses before using floating armouries (up to 50 licenses have been given out so far),¹⁷² New Zealand has given them out more freely. Mr Crook, leader of a private security company registered in New Zealand sees floating armouries as the best thing that has happened to the industry. He argues that “*Due to the many countries and jurisdictions we deal with, and the multitude of differing rules and regulations we face — not to mention the changes to those rules and regulations at the drop of a hat — at least with the floating armouries we find generally a consistency in service and operational regulations,*”.¹⁷³ Mr. Crook’s statements grasp the complexity of the current problem issue. While he pays tribute to the rise of floating armouries, he also acknowledges that the problem is rooted within the

¹⁶⁹ UN Security Council, S/2012/544, Annex 5.4.

¹⁷⁰ Percy, Regulating the private security industry, *The International Review of the Red Cross*:1-20

¹⁷¹ Liz McMahon, “Hammond denies failure to support private maritime security firms” *Lloyds List Intelligence*, May 16, 2013, <http://www.lloydslist.com/ll/sector/regulation/article422812.ece?src=SearchAlert> (Accessed: June 12, 2013).

¹⁷² Liz McMahon, “UK gives go ahead for floating armouries,” *Lloyds List Intelligence*, August 08, 2013, <http://www.lloydslist.com/ll/sector/regulation/article427433.ece> (Accessed: September 04, 2013).

¹⁷³ Liz McMahon, “UK holds fire on floating armouries,” *Lloyds List Intelligence*, March 28, 2013 <http://www.lloydslist.com/ll/sector/regulation/article420044.ece> (Accessed: September 04, 2013).

multitude of regulations hampering the business. Seeking alternative ways of operation to avoid dealing with the root of the problem is not a long lasting solution if the sector wants a legitimate industry.

Adjoa Anyimadu, a piracy expert at the British Think Tank Chatham House argues that the root of the problem with the regulations governing the PSCs in the anti-piracy fight is that legislations have "*simply not kept pace with the rapid growth of the maritime private security industry*,"¹⁷⁴ leading to unfortunate outcomes, such as floating armouries. Demonstratively, the rise of floating armouries is a clear signal that the current myriad of regulations governing the PSCs in the anti-piracy fight is not sufficient in its current form. While territorial states need to create more welcoming laws enshrining the operational interests of PSCs, flag states need to ensure through efficient monitoring mechanism that the PSCs hired does not pose a threat to a state when entering their territorial sea. An option for the future, which is now to be analyzed, is to reach a universal agreement through an international institution. The rest of this chapter will therefore analyze the role of UNCLOS¹⁷⁵ and the link between the right of innocent passage and PSCs.

United Nations Convention on the Law of the Sea

Currently, there is no international law dealing explicitly with the presence of PSCs in the anti-piracy fight, meaning that there is no international law clearly stating whether or not PSCs working under a mandate of protecting vessels against pirates should be provided or condemned with the right of innocent passage. Had there on the other hand been in place a set of international agreed laws determining PSCs right of innocent passage, the current complexity within how states respond to the presence of PSCs within territorial sea could be eliminated. Additionally, problems related to alternative ways of operation, such as floating armouries would be abolished. Including UNCLOS within this thesis helps raise an understanding of the room of maneuver when it comes to putting in place international regulations related to PSCs operation in the anti-piracy fight. In order to secure the highest level of professionalism in regards to PSCs future presence within the field, establishing a set of internationally agreed laws is a desired outcome. Establishing universal laws will help

¹⁷⁴ Houreld, *APNews Break: Piracy Fighters use Floating Armouries*.

¹⁷⁵ UNCLOS, *United Nations Convention on the Law of the Sea*.

eliminate regulations not adequately regulating PSCs, as well as it will eradicate the current complexity among the various regulative principals.

The lack of any international law controlling the actions of PSCs does not mean that the world's oceans are an unregulated field where one can do as one like. The majority of laws overruling the maritime sector are embodied in UNCLOS.¹⁷⁶ Unfortunately, there are limitations within UNCLOS when adapting it to the right of innocent passage for armed PSCs. As will soon be displayed, UNCLOS can be interpreted as both providing PSCs with the right of innocent passage, as well as providing states with the right to condemn the right of innocent passage. With UNCLOS already embracing questions related to the right of innocent passage, it can be considered as an important arena where one can reach universal agreements eradicating the current regulative problems governing the relations between PSCs and territorial states regulations. The following discussion of how PSCs are interpreted within UNCLOS provides an understanding of the future possibility of regulating PSCs right to innocent passage through a set of universally agreed laws.

According to UNCLOS, every ship holds the right of innocent passage when sailing in territorial sea. The innocent passage includes traversing the territorial sea without entering into a state's internal waters.¹⁷⁷ Innocent passage is defined by UNCLOS as all actions that cannot be deemed as prejudicial to the "*peace, good order and security of the coastal state*".¹⁷⁸ When interpreting UNCLOS' definition of innocent passage, one can argue that vessels boarded with PSCs embrace the right to innocent passage as they do not inflict the peace, good order or the security of coastal states. Hence, with the aim and operational mandate of PSCs being solely to protect against pirates under the right of self-defense, one can argue that PSCs operating according to their mandate should not be deemed as a threat to the coastal states when sailing in their territorial sea.

This statement is backed up by Article 19(2) of UNCLOS, listing a set of activities violating the right of innocent passage of a vessel.¹⁷⁹ When breaking the laws of innocent passage in territorial waters one can be diverted from the sea or taken to the port for legal proceedings. One of the mentioned activities infringing the innocent passage cited in article 19(2)(a) is "*any threat or use of force against the sovereignty, territorial integrity or political*

¹⁷⁶ UNCLOS, *United Nations Convention on the Law of the Sea*.

¹⁷⁷ UNCLOS, *United Nations Convention on the Law of the Sea*, Article 17 to 32

¹⁷⁸ Ibid. Article 19.

¹⁷⁹ Ibid. Article 19 (2)

independence of the coastal State, or in any other manner in violation of the principals of the international law embodied in Charter of the United Nations”¹⁸⁰. The wording in this article, one can argue, does not embrace the use of PSCs in the anti-piracy fight. This is imbedded in the fact that 3-6 private security guards onboard a vessel do not pose or infringe a threat to a state’s sovereignty, territorial integrity, or political independence.

Additionally, PSCs can also be exempted from violating the right of innocent passage within article 19(2)(b), stating that innocent passage is violated through “*any exercise or practice of weapons of any kind*”.¹⁸¹ As previously mentioned, PSCs are private actors holding the sole permission to act in situations of self-defense. The right to self-defense during an armed attack is enshrined in article 51 of the UN Charter expressing that all people have the right to use force when it comes to the protection of life.¹⁸² The reason for why one can interpret the use of weapons in self-defense as not falling under the categorization of article 19 (2)(b) is rooted in the wording of paragraphs (a) to (g) where situations affecting innocent passage can be condemned as hostile activities where weapons are used in an aggressive and threatening manner.¹⁸³ When PSCs are using arms according to the right of self-defense, it is, if operating according to the law, a response to a threat and not a trigger to one. Another reason for why PSCs are exempted from this paragraph is rooted in the wording of “exercise” and “practice” which one can condemn as being activities when drawing connections to the introductory sentence in article 19(2), stating that prejudicial action is linked to the “*...following activities*”.¹⁸⁴ As PSCs are only allowed to use weapons in self-defense and are not an aggressive armed force, one can conclude that they are not embraced under this paragraph either.

When reading UNCLOS in relation to the above mentioned aspects, one can interpret PSCs as holding the right of innocent passage. UNLCOS provision of PSCs with the right of innocent passage can be a solution to the current problematic regulative aspects related to territorial states unwelcoming laws and the rise of floating armories. But unfortunately, this is not the case, as UNCLOS can be considered as having a Janus face. This is rooted in UNCLOS both providing as well as eliminating PSCs with the right to innocent passage. With UNCLOS providing states with the right to condemn what they consider to be an innocent passage,

¹⁸⁰ Ibid. Article 19 (2) (a).

¹⁸¹ Ibid. Article 19 (2) (b).

¹⁸² UN, “Charter of the United Nations,” Web site, <http://www.un.org/en/documents/charter/chapter7.shtml> (Accessed: May 01, 2013):_Article 51.

¹⁸³ UNCLOS, *United Nations Convention on the Law of the Sea*, Article 19 (a) to (g)

¹⁸⁴ Ibid. Article 19

states have the option to legally take away a vessel's right to innocent passage if PSCs are on board. The authorities of territorial states to determine the right to innocent passage is highlighted in article 21 (1) of UNCLOS.¹⁸⁵ This article provides states with the right to make laws and regulations to the innocent passage in territorial sea as long as it does not violate the rules of UNCLOS or any other international law.

As demonstrated, UNCLOS can be interpreted as both providing as well as eliminating PSCs right of innocent passage. The inconsistency within UNCLOS is the reason of why it has been notified within this thesis. This is grounded in the fact that UNCLOS is not strictly opposing the chance of reaching a universal agreement, but rather providing flexibility towards reaching one. This generates a hope that one can reach an international set of regulations improving and benefiting the whole industry in the future. The possibility of reaching a universal agreed standard in the future is emphasized in the same articles that provide states with the right to prohibit innocent passage. As article 21(1) express, states can make laws as long as they do not violate international regulations. This puts forward that if making international regulations governing the right of innocent passage for vessels boarded with armed PSCs, the current implications regarding innocent passage can be removed. Hence, an international agreed set of laws will not only harmonize and eradicate hampering regulations, it can also be an arena initiating international laws governing other aspects related to the presence of PSCs in the anti-piracy fight. Reaching an international agreed set of laws within UNCLOS would play an important role in securing the future professionalism and legitimacy of the sector.

According to article 23 of UNCLOS, vessels boarded with nuclear and other inherently dangerous or noxious substances are given the permission to innocent passage in territorial sea.¹⁸⁶ The permission is granted as long as vessels can provide the right documentations, according to internationally agreed measures, as well as respect their given operational mandate. It can be hard to understand why states can reject vessels boarded with armed guards the right to innocent passage, while a vessel boarded with dangerous nuclear weapons is not. If it is all rooted in whether or not an internationally agreed system of monitoring is in place, a similar system should be transferred to the private security industry operating in the anti-piracy fight. If institutional change is not initiated nationally, regionally or globally, the industry will continuously be faced with a complex set of regulations. Therefore, reaching an

¹⁸⁵ Ibid. Article 21

¹⁸⁶ Ibid. Article 23.

international set of regulations enshrined in UNLCOS would be an important aspect towards a better regulated industry securing the highest level of professionalism in the future.

Chapter 6: PSCs and the legal use of force in self-defense

Introduction

With the previous chapter analyzing the relationship between PSCs and the regulations belonging to regional states, this chapter will shift the focus towards regulations belonging to flag states. Flag states are one of the major principals governing the operational mandates of PSCs. This is rooted in the fact that the flag of a vessel determines the jurisdictions of the vessel and the crew onboard.¹⁸⁷ In this regards, the aim of this chapter is to embrace how flag states have regulated the legal use of force when preventing a pirate attack. As PSCs holds a permission to use lethal force according to self-defense, how states have regulated the use of force raises an additional interest. As force, especially lethal force, can have dreadful outcomes, this is an area which needs to be efficiently regulated. This chapter will start off by introducing how the right to self-defense is a universally understood concept, but that states differ when it comes to how one may act according to self-defense. Following, in order to demonstrate the complexity of the current regulations, the chapter will look at how states have approached the legal use of force according to self-defense. The chapter will then continue with looking at distances at sea. Distance is an important feature in order to avoid errors in relation to misinterpretation of threats initiating force. Following the study of misinterpretations, the next topic to be analyzed is how states respond when illegitimate action has been conducted at sea. That illegal action is faced with prosecution is an important aspect in relation to the dominance regulations possess over PSCs.

In order to effectively illustrate the complexity within how PSCs are regulated today, this chapter and the forthcoming chapter will include the regulations belonging to four flag states. The regulations belonging to the USA, UK, Norway and Denmark are implemented within this thesis as they provide case studies effectively illustrating and demonstrating the complexity within the current regulative arena. This chapter will therefore start off with a small introduction regarding as to why the four flag states have decided to introduce PSCs to the anti-piracy fight. Already in the decision making of whether or not to provide authorization for the operation of PSCs, states were not unanimous.

¹⁸⁷ UNCLOS, *United Nations Convention on the Law of the Sea*, Article 94

USA, UK, Norway and Denmark’s authorization of PSC in the anti-piracy fight:

As PSCs on board vessels have to be endorsed by the flag state before they can operate legally, flag states pursue an important regulative power when governing the presence and operational mandate of PSCs.¹⁸⁸ Within this thesis, the regulations belonging to the USA, UK, Norway and Denmark will be used in order to efficiently demonstrate the differences, strengths and weaknesses within the current regulations.

The United States was the first of the four states to support the idea of using armed guards when sailing in pirate prone areas. With the USA having a historical relationship of hiring PSCs, it did not come as a surprise that they were at the forefront accepting the use of armed guards in 2009.¹⁸⁹ Not only did they accept the use of PSCs, they also encouraged other states to do the same.¹⁹⁰ Two years later, the UK Prime Minister followed in the footsteps of the USA by recognizing the use of armed guards on merchant vessels as protection against pirates. In contradiction to the US guidelines restricting the operation of armed guards to High Risk Areas,¹⁹¹ the UK was more careful in their approach, limiting the use of armed guards to situations of exceptional circumstances.¹⁹² What is perceived as falling under UKs “exceptional circumstances” are situations when (1) transiting the High Risk Area (2) all the BMP measures are fully followed, but one can still demonstrate the need for more protection and (3) the presence of armed guards reduces the risk of the lives and wellbeing of the crew.¹⁹³

As with the UK, Denmark’s government agreed in 2011 to open up for the use of armed guards on board merchant vessels, but the permission is limited to situations where the need can be considered a necessity.¹⁹⁴ Prior to the agreement, the Danish government was heavily

¹⁸⁸ Ginkel et al., *State or Private Protection against Maritime Piracy*, 9

¹⁸⁹ US Coast Guard and Department of Homeland Security. *Guidance on Self-defense or Defense of Others by U.S. Flagged Commercial Vessels Operating In High Risk Waters*, Port Security Advisory (3-09), [Hereinafter Port Security Advisory (3-09)]United States Coast Guard, 2009.

¹⁹⁰ Andrew J. Shapiro, “Expanding Private Sector Partnerships Against Piracy: Remarks to the U.S. Chamber of Commerce Washington, DC” March 13, 2012, <http://www.state.gov/t/pm/rls/rm/185697.htm> (Accessed: July 09, 2013).

¹⁹¹ US Coast Guard, *Port Security Advisory (3-09)*.

¹⁹² Department of Transport, “*Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances*,” Version 1.2, (Updated May 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/204123/use-of-armed-guards-to-defend-against-piracy.pdf (Accessed: July 10, 2013).

¹⁹³ Ibid. 14.

¹⁹⁴ Ministry of Foreign Affairs, Ministry of Justice, Ministry of Defense of Economics and Business Affairs, “*Strategy for the Danish Counter-Piracy effort 2011-2014*” (Copenhagen: Minister of Foreign Affairs, 2011):25

reluctant to the idea. The hesitancy was rooted in authorizing civilian to use guns in self-defense and the fear that introducing armed guards would escalate violence at sea.¹⁹⁵ What made Denmark change their objection is rooted in pirates increasing their operational arena, making Denmark acknowledge that the naval fleets were inadequate in efficiently safeguarding vessels.¹⁹⁶

Like Denmark, Norway has also been holding a strong position against permitting civilians to use armed force in situations of self-defense.¹⁹⁷ Even though Norway amended its regulation towards allowing armed guards in July 2011, they argued in line with Denmark that the use of armed security should be the last option and that the Norwegian government by no means encourages the use of armed guards. The acceptance of armed guards on Norwegian flagged vessels is merely to secure the safety of Norwegian ships and their crew when highly needed.¹⁹⁸

PSCs and self-defense

When analyzing the current regulative field governing the operation of PSCs in the anti-piracy fight, questions related to self-defense constitute an essential operational aspect. As PSCs are defined as private actors providing one-on-one protection, they are not allowed, under international law, to go after or conduct offensive actions against Somali pirates.¹⁹⁹ The reason is rooted within the laws of UNCLOS where states alone have the permission to act offensively. This can be read in article 100 which states that “*all states shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place in the jurisdiction of any state*”.²⁰⁰ The responsibility of states is further taken up in article 105 reflecting that “*on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board....*”²⁰¹ As PSCs are private actors, not operating for the state but for a vessel company, they do not hold the

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Skuld, “National Regulations on the use of armed guards: Piracy,” Web site, <https://extranet.skuld.com/Insight/Piracy/Armed-Guards/National-regulations-on-the-use-of-armed-guards/> (Accessed: May 14, 2013).

¹⁹⁸ Ibid.

¹⁹⁹ Priddy and Casey-Maslen, Counter-piracy, *Journal of International Criminal Justice*:844-45

²⁰⁰ UNCLOS, *United Nations Convention on the Law of the Sea*, Article 100

²⁰¹ UNCLOS, *United Nations Convention on the Law of the Sea*, Article 105.

right to conduct pirate hunting or any other form of offensive action in relation to the anti-piracy fight.

With it being entrenched in international law that it is only stately actors that are permitted to go after and seize pirates, there is little ambiguity among the various regulations that PSCs are only provided with the operational mandate of acting according to self-defense. On the other hand, an area in need for more uniform interpretation is how flag states have approached how one may act according to self-defense.²⁰² With self-defense being the root of the ability of PSCs to protect, understanding how regulations interpret the right of self-defense is of special importance when analyzing the regulations governing the PSCs in the anti-piracy fight. The spectrum of definitions and interpretations within the various regulations regarding when, how and under what circumstances one may act, creates vagueness regarding the operational mandate of PSCs. In order to effectively demonstrate how flag states have approached the right to act according to self-defense, the subsequent section will shed a light on how the USA, UK, Norway and Denmark have interpreted the subject within their regulations.

How one may act according to self-defense within the US regulations is put forward in the Port Security Advisory (3-09).²⁰³ The document comments that it does not create new standards concerning the right to self-defense, but it rather illustrates how self-defense can be applied in situations of piracy. In addition to the right of self-defense, the crew on a vessel has the right, according to paragraph 33 U.S.C. § 383 of the US code to “... *oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel*”.²⁰⁴ When operating in self-defense of oneself or others one can use all available means, including deadly force when it may be deemed a necessity.

The laws belonging to the UK and Norway direct a stronger focus than the USA that force used according to self-defense should always be a last resort. In the UK regulations, vessels are allowed to use force in the purpose of self-defense when it is to protect the crew and hinder the boarding of a vessel. In situations where force is applied, the armed guards are

²⁰² Lindsay Cameron, “Private military companies: their status under international humanitarian law and its impact on their regulation,” *International Review of the Red Cross* 88 no. 863 (2006):589

²⁰³ US Coast Guard and Department of Homeland Security, *Minimum Guidelines for Contracted Security Services in High Risk Waters*. Port Security Advisory (5-09) (REV-1), United States Coast Guard, 2009. [Hereinafter Port Security Advisory 5-09 (REV-1)],

²⁰⁴ US Code, “Paragraph 383 - Sec. 383 Resistance of pirates by merchant vessels” *Title 33: Navigation and Navigable Waters*, <http://us-code.vlex.com/vid/resistance-pirates-merchant-vessels-19224311> (Accessed: July 09, 2013).

obliged to use the minimum amount of force necessary to protect the vessel.²⁰⁵ According to the Norwegian Ship and Safety Act, force may be used in situations where it is considered “necessary, justifiable and proportionate”.²⁰⁶ The use of firearms may only be deployed in situations that are unavoidable and where the threat is immediate and direct. The use of force should be avoided whenever possible, meaning that all other types of measures should be deployed first.²⁰⁷ Denmark, on the other hand, provides the smallest set of regulations regarding self-defense. Denmark gives PSCs the right to act in self-defense, but does not provide a definition of self-defense in a piracy context or how to interpret a situation of self-defense when facing a pirate attack.²⁰⁸

As the regulations belonging to the four flag states demonstrate, there are differences with regards to how one may act according to self-defense. While the US guidelines permit all types of protection, even deadly force, the Norwegian regulations proclaim that lethal force may only be used when the threat is immediate and direct and when all other appropriate non-lethal means have been deployed. What differentiates the regulations even more is that in addition to the US regulations being more open for the use of force, they additionally include a broader definition of when force can be used. This is rooted in the US guidelines putting forward that defense (without defining what type of defense), is even permitted in situations regarding restraining and searching a vessel.

Without a universal set of minimum standards regarding how PSCs may act according to self-defense when facing a pirate attack, states are free to set their own “minimum” standards as long as it is not violating international law. As demonstrated within the four regulations, this has resulted in state differing in how strict and thorough self-defense is embraced within the regulations. Among the four states evaluated, Denmark goes out as the worst case. With the Danish regulations not providing any specific guidelines in relation to how to act according to self-defense, the regulations are not effectively controlling one of the most vital aspects within PSCs operational mandates. What Denmark on the other hand does, is to refer to the various IMO circulars.²⁰⁹ However, even though IMO circulars provide various guidelines on how to regulate PSCs in general, they do not provide any clear definition of self-defense in a piracy context.

²⁰⁵ Department for Transport, *Interim Guidance to UK Flagged Shipping*, 37.

²⁰⁶ Norwegian Maritime Affairs, *Provisional guidelines – use of armed guards on board Norwegian ships*, 11.

²⁰⁷ *Ibid.* 12.

²⁰⁸ Ministry of Foreign Affairs, *Strategy for the Danish Counter-Piracy effort 2011-2014*, 25.

²⁰⁹ *Ibid.* 28.

Even though one can argue that flag states have made regulations governing how to act according to self-defense, one can put forward that they are not adequately regulating PSCs mandates in line with self-defense. The lack of uniformity and thoroughness can impede operational problems today and in the future. With self-defense being a fundamental building block in PSCs operational mandates, not adequately embracing how to act according to self-defense replicates further implications. This is effectively demonstrated in how one may follow up an action of self-defense with lethal force.

PSCs and the lawful use of force

The important deterrent role PSCs provide within the anti-piracy fight is rooted in their permission to use lethal force when repelling a pirate attack. Therefore, when analyzing how PSCs are regulated within the anti-piracy fight, grasping an understanding of how states have approached the legal use of force evoked an interest. As lethal force can initiate dreadful outcomes, it is an area that needs to be effectively regulated. With it already having been made clear that there is a lack of harmonization according to how flag states interpret how to act according to self-defense, it is of interest to examine if the same trend is apparent within the legal use of force.

With a lack of any overriding international law dealing explicitly with ones right to repel a pirate attack, the right to use lethal force is bound under the previously mentioned rules of self-defense and the defense of others. The current lack of clarity both within and between states in how one may act according to self-defense replicates problems for how to regulate the rules for the use of force. Without concretely knowing how to act according to self-defense, initiating legitimate force becomes tricky. For example, if interpreting ones right to self-defense wrongly, the use of force will be illegitimate. This clearly demonstrates the linkage within the regulations and how one weak regulative aspect affects the overall strength of how PSCs are regulated within the anti-piracy fight. The previously mentioned “soft laws” initiated by RUF is an important step towards eliminating the current problems related to regulations approach to the use of force.²¹⁰ With the RUF putting forward a clear set of rules regarding how to gradually respond to a pirate attack, confusion within and between laws can be eliminated. But as mentioned before, the RUF is a non-binding initiative, meaning that it does not have the power by itself to enforce a change. Therefore, without international

²¹⁰ Cf. chapter 4, p. 39-41

pressure or clear set of binding-international laws grasping the importance of RUF, the current regulations are likely to continue within the same path,

How to repel a pirate attack and how one may use force according to self-defense, varies greatly between states. This is effectively demonstrated when drawing connections between the regulations belonging to the USA, UK, Norway and Denmark. The US has the least strict interpretation when it comes to the use of force. Deadly force, according to the US guidelines, is legitimized in situations where it is reasonable to believe that there is an imminent danger of death.²¹¹ This implies that in situations reflecting imminent danger, PSCs are given the permission by law to fire directly onto an assumed pirate vessel. By using words such as “reasonable belief”, the law determines that situations of imminent danger require a fact-specific inquiry where one must conduct an examination of whether the danger may cause great harm or injury leading to death. An imminent danger is described to include, but is not limited to, the aiming or firing of weapons towards a US vessel.²¹² Whether a situation is considered imminent or not is therefore up to the vessel’s master to conclude, as the master holds the command and authority over the vessel, and therefore implicitly also over the use of deadly force.²¹³ In situations where the use of force is deemed as necessary, the crew is not required to retreat in order to avoid the situation. The same refers to warning signals to prevent an attack, as the crew is not required to fire off warning shots before a lethal attack is initiated.²¹⁴

As with the US law concerning imminent danger, UK guidelines specify that one does not have to wait for the attacker to strike the first blow. In line with US’s vague definitions of what an imminent danger is, the UK follows up in their regulations with not giving any good description of what can be categorized as imminent danger.²¹⁵ Without any clear definition, it’s up to oneself to evaluate what can be considered imminent. The lack of clear operational mandates within the US and UK regulations weakens the strength of the regulations as it leaves room for self-interpretations. Not only does this provide PSCs with an important power to self-determine their actions, but it also poses an additional threat to other seafarers as PSCs may authorize lethal action based on wrong interpretation. The weak wording within regulations can be further demonstrated in the UK regulations as they embrace that one is

²¹¹ US Coast Guard, *Port Security Advisory (3-09)*.

²¹² Ibid

²¹³ Ibid.

²¹⁴ Ibid

²¹⁵ Department for Transport, *Interim Guidance to UK Flagged Shipping* 35

allowed to use lethal force considered reasonable and proportionate against a crime in progress.²¹⁶ Again, the wording in the document lacks a clear definition, leaving it up to the actor to judge what can be considered a reasonable and proportionate use of force within the different situations. The only restriction put forward, is that PSCs should provide a gradual response, which does not escalate violence.²¹⁷ Accordingly, what is appropriate and how to respond gradually, is up to oneself to interpret. The lack of strict rules guiding and controlling the operation of PSCs negatively affects the overall interpretation of how PSCs are regulated within the anti-piracy fight.

In contrast to the US and UK regulations, the Norwegian regulations demand that a suspicious vessel should always, if the circumstances permit, be warned by light signals and warning shots before one use lethal means in order to protect.²¹⁸ Hence, if PSCs were to be bound under the Norwegian and UK/US regulations at once or shifting between the two, balancing how to act in relation to taking the first move can create legal implications. With a pirate attacking being a stressful scenario, having to balance ones thoughts according to imprecise jurisdictional mandates makes the whole situation even more demanding. Leaving PSCs with the job of interpreting state regulations does not increase the chance of a legitimate industry where PSCs fully act according to the regulations put forward. The lack of harmonization between and within regulations is unfortunate for an effective principal-agent relationship where the principal governs the actions of the agent. This is rooted in the possibility of the PSCs in putting the different principals up against each other in order to legitimize their own actions. Not only does this weaken the principals' power to govern the agent, it additionally demonstrates clear weaknesses within how PSCs are regulated within the anti-piracy fight.

As with all the other regulations, the Norwegian regulations express that PSCs are liable to prosecution when in operation.²¹⁹ As the use of force according to both US, UK and Norwegian law is situation dependent, guards deeming a situation as in need of excessive force may be liable for prosecution if the state deems it as contrary to the law.²²⁰ If taking it to the extreme, PSCs misinterpreting their operational mandate, can end up in situations where their actions can be connected to UNCLOS' definition of piracy; "*...any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or*

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Norwegian Maritime Affairs, *Provisional guidelines – use of armed guards on board Norwegian ships*, 13

²¹⁹ Ibid.

²²⁰ Ibid.

the passengers of a private ship or a private aircraft....”.²²¹ This strengthens the need for concise and clear regulations eradicating the risk of PSCs misinterpreting their mandates both intentionally and unintentionally. Denmark is an effective example illustrating the need for stronger regulations both nationally and globally. As in line with Denmark’s definition of self-defense, Denmark also lacks a clear set of regulations governing the right to use lethal force when repelling a pirate attack.²²² With Denmark again turning towards the IMO circulars and guidelines, the Danish state removes the obligation and responsibility away from their domain.

Not only can one reveal from the different guidelines that there is a lack of uniformity in regards to the thoroughness of the regulations, but there are also variations in how the regulations emphasize the use of force. While the USA puts forward within their guidelines that deadly force may be applied,²²³ Norway places a greater emphasis on the process beforehand, stating that all other types of non-lethal means should be applied first, illustratively by stressing the importance of warning shots.²²⁴ There is a great range between regulation setting forward a permission to use deadly force, to regulations that don’t mention the word “deadly”, but rather direct the focus to the period before lethal force is initiated. When analyzing how the PSCs within the anti-piracy fight are regulated today, one can reveal that the lack of uniformity and states not articulating clear rules can have an impact on PSCs knowing what is expected of them when in operation.

An overall missing aspect within the regulations in resemblance to the use of force is what to do when a ceasefire has ended. According to international law, as put forward in article 98 of UNCLOS, ships on the high seas have a duty to “*render assistance*” and “*rescue . . . persons in distress.*”²²⁵ Accordingly, if a vessel leaves a pirate skiff in distress, they can be prosecuted for murder. When authorizing PSCs within the anti-piracy fight, the regulations governing their operation should cover their whole mandate and not just focus on the aspects up to a ceasefire. Even though helping people in distress are the obligation of the vessel and not only PSCs, it is an aspect where PSC should be at the forefront as it involves security for both the crew members and pirates. Although it is downplayed in international law that one has to assist people in distress, it is an aspect which should be clearly stated within the regulations as

²²¹UNCLOS, *United Nations Convention on the Law of the Sea*, Annex 101.

²²² Ministry of Foreign Affairs, *Strategy for the Danish Counter-Piracy effort 2011-2014*, 25.

²²³ US Coast Guard, *Port Security Advisory (3-09)*.

²²⁴ Norwegian Maritime Affairs, *Provisional guidelines – use of armed guards on board Norwegian ships*, 13

²²⁵ UNCLOS, *United Nations Convention on the Law of the Sea*, article 98

it raises awareness as well as avoids confusions if incidents are to take place. Within the four regulations examined, Norway is the only state mentioning the duty to help pirates in distress after a ceasefire has ended.²²⁶ As a general rule, judging a pirate skiff in distress as a threat to the safety of the crew is rare.²²⁷ If not helping seafarers, including pirates in distress, one can risk being held liable for manslaughter.

The use of force and distances at sea

An important aspect related to the use force in response to self-defense is the distance between the victim and the attacker. Within the four regulations under investigation, only the Norwegian regulations include distance as a feature when interpreting whether an attack is imminent or not. According to the Norwegian regulations, the master is authorized to conclude that a pirate attack is imminent at a distance off up to 2 kilometers away from the vessel.²²⁸ When interpreting how PSCs are regulated within the anti-piracy fight, distance is an important aspect. This is rooted in the fact that interpreting whether a boat is boarded with pirates or innocent fishermen at a long distance is difficult. With only Norway integrating distance within their regulations, one can argue that distance is a general missing unit within the current regulations governing PSCs. The following section will demonstrate why distance is an important aspect to be included within regulations in order to secure the highest level of professionalism in the future.

At a conference held by Bergen Risk Solution (19th of June, 2013), Stein Are Hansen gave a useful descriptive insight to distances at sea. According to Hansen, a distance of 1 km between a vessel and a pirate skiff resembles the same dimensions as standing 16m away from a Lego man which is 3 cm tall sitting in a boat equivalent to its size.²²⁹ Through a demo he had made, it was impossible, even with binoculars to determine whether it was pirates or fishermen sitting in the boat. When drawing connections between Hansen's example and the distances PSCs have reported that they have either observed or felt threatened by a vessel, one can argue that distance should be regulated in relation to PSCs right to self-defense.

Exemplified in the IMBs 2012 annual report, there were reported incidents where PSCs had

²²⁶ Norwegian Maritime Affairs, *Provisional guidelines – use of armed guards on board Norwegian ships*, 13

²²⁷ Ibid. 4

²²⁸ Ibid.12

²²⁹ Through a demo, Hansen demonstrated distances booth practically and through pictures. Pictures of the demo and his presentation can be seen at: <http://www.norclub.no/assets/Uploads/SA-Hansen-NHC.-War-Risk-Insurance..pdf>

fired at what they believed were pirates at a distance of 1 km and one nautical mile, equivalent to 1.8 km.²³⁰ Additionally, there were numerous cases where vessels had reported that they felt threatened by or had observed what they believed were pirate skiffs at a range from 2 nautical mile and all the way up to 6 nautical miles away from the vessel.²³¹ When drawing connections between Hansen's demo and the distances of reported threats, one becomes suspicious in regards to PSCs being too hasty in determining what is a threat and not.²³²

The concern that there are situations rooted in wrong interpretations that have resulted in excessive use of force is further strengthened through a governmental letter from India, where India raises a warning that there have been incidents where fishermen have been mistaken as pirates.²³³ According to India, the warning is rooted in the actions of fishermen being wrongly interpreted as threatening. Illustratively, India declares that when a vessel is sailing in the direction of a set of fishing nets, it is common that the fishermen raise alarm and sail towards the merchant ships to attract attention. The action from the fishermen can be perceived as hostile, resulting in a deterrent response from PSCs. Accordingly, with India raising the concern that innocent lives are being lost, these misinterpretations need to be effectively dealt with within flag states' regulations in order to eliminate the continuation of these errors into the future. One can therefore argue that distance is a currently missing unit within the regulations governing PSCs in the anti-piracy fight. Including distance within the future regulations can thus be an important aspect towards securing a higher level of professionalism.

A newly developing trend, which can be linked to PSCs misinterpretations, was revealed by Anders T. Løvik from the NATO Shipping Center at a conference held by the Norwegian Hull Club (19th of June, 2013).²³⁴ According to Løvik, Nato has received a growing number of reports of suspicious vessels the last months (up until the 19th of June).²³⁵ Out of the 25 last reported vessels, only 1 was confirmed by NATO as being a pirate skiff while the rest were categorized as fishing vessels. In order to ratify whether a reported vessel was boarded with pirates or not, NATO had deployed their own vessels as well as helicopters to investigate the

²³⁰ ICC International Maritime Report, *Piracy and Armed Robbery against Ship Annual Report 2012*, 60-96.

²³¹ Ibid.

²³² Bockmann, *Shooting to Kill Pirates Risk Blackwater Moment*.

²³³ Cf. Appendix 4.

²³⁴ As this is a relatively new, trend it was not possible to find sources backing up the claim. The statement is therefore built on Løviks presentation and a conversation with him afterword's. This is link to his PowerPoint presentation: <http://www.norclub.no/assets/Uploads/Bergen-Maritime-Security-Seminar-Anders-Loevik.pdf>

²³⁵ Ibid.

area of concern.²³⁶ Løvik did not know what lies behind the new trend of over reporting, as the drastic increase in misinterpretations from PSCs is a relatively new phenomenon in the eyes of NATO. On the other hand, one can speculate that what NATO today concludes as a drastic increase in misinterpretations by PSCs, is just an increase in the awareness of PSCs wrongly interpreting threats. With the IMB 2012 report demonstrating that reports of suspicious vessels are based on long distances, one can speculate that the misinterpretations are not a new phenomenon, but rather something that has been present for some time.

When assessing why there has been an increase in misinterpretations by PSCs, there are various factors that can have played a role in addition to the discussed features related to distance. First of all, it can be rooted in a lack of professionalism among the PSCs ability to interpret what is a threat and not. Secondly, one can take to a mean that the new rise in misinterpretations from PSCs is rooted in a desire from PSCs to frighten vessel companies by exaggerating the continuous need for armed guards. In any case, the misinterpretation needs to be addressed as it clearly states that the current regulations are not effectively providing clear lines in how to determine a threat and how to respond accordingly. States therefore need to grasp their important responsibility in creating regulations that eliminate all chances of actions being conducted on wrong interpretations. The inclusion of distance within the regulations can therefore be an important feature improving the level of professionalism within the future presence of PSCs in the anti-piracy fight. As one can never completely eliminate the changes of misinterpretation taking place, states need to make sure that those committing a crime face prosecution for their wrongdoings. This is now to be discussed in the following subsection.

PSCs and states responsibility of prosecution

With flag states being the sole actors permitting the role of PSCs in the anti-piracy fight, they also have a responsibility to follow up actions where PSCs have not operated according to the legal use of force when repelling a pirate attack. According to the principal-agent theory, an important aspect eliminating the chance of PSCs shirking is that the regulations governing their operations effectively monitor their business and secure that they are punished for illegal action. Without PSCs facing consequences for their illegitimate actions, there are no threats within the system hindering them from shirking. According to Feaver inadequate punishing

²³⁶ Ibid.

mechanism has a negative effect on the principals' power balance over the agents.²³⁷ Without effective punishment mechanisms making PSCs face consequences for their crimes, the relationship between PSCs and the principals will become in favor of the PSCs. This will lead to an industry built upon the market interest of PSCs and not an industry governed under national and international regulations which ideally promotes security for all.

Unfortunately, within the anti-piracy fight states are not withholding their responsibility to a satisfying degree in regards to investigating actions where PSCs have operated above their mandate. An incident demonstrating the lack of action is verified when drawing connections to a YouTube video from the Indian Ocean the 25th of March 2011.²³⁸ In the YouTube video one can see a sequence of a private security team from the Trident Group boarded on a vessel from the Eagle Bulk, firing at what is assumed to be a pirate skiff.²³⁹ While the Trident Group argues that they acted according to the law of self-defense, others argue it to be a massive burst of gunfire, questioning their legitimate use of force.²⁴⁰ When watching the video, one can assume that the captain in one of the two skiffs is killed as the skiff crashes into the side of the vessel, seemingly out of control. At the end of the shooting an unknown number of pirates may have been killed and injured. Even though the video was released on YouTube and is accessible to the public, no one has taken responsibility for the actions and no investigation has been initiated.²⁴¹

The Trident Groups use of force within the YouTube video has raised attention as there seems to be no time between the warning shots and the shots directed straight into the pirate skiffs. Additionally, the shooting continues even after the shooting from the pirate skiffs has stopped. The excessive use of force the guards apply is argued to not have been in response to neither the legal use of force nor what can be categorized as self-defense. When the president of the Trident Group, Tom Rothrauff, was questioned about their use of force, he stated that " ... *Our team acted with poise, and used every rule for the use of force as prescribed by the US Coast Guard in PSA 3-09.*"²⁴² It is true that Trident Group acted in response to the US Coast Guard

²³⁷ Feaver. *Armed Servants*, 60-61

²³⁸ YouTube, Web site, <http://www.youtube.com/watch?v=RVnpY8HhTwU> (Accessed: May 01, 2013).

²³⁹ Michelle Wiese Bockmann & Alan Katz, "Shooting to Kill Pirates Risk Blackwater Moment" *Bloomberg*, May 09, 2012 <http://www.bloomberg.com/news/2012-05-08/shooting-to-kill-pirates-risks-blackwater-moment.html> (Accessed: July 04, 2013).

²⁴⁰ Maritiem Connector, "Trident Group and Eagle Bulk Shipping recognized in a shooting video," May 12, 2012, <http://maritime-connector.com/news/security-and-piracy/trident-group-and-eagle-bulk-shipping-recognised-in-a-shooting-video/> (Accessed: May 01.2013).

²⁴¹ *Ibid.*

²⁴² Maritiem Connector, *Trident Group and Eagle Bulk Shipping recognized in a shooting video.*

PSA3-09, but the PSA3-09 document only provides guidelines recommending ways of operation which are both vague and inconsistent in their wording. This is exemplified through phrasings such as “*The examples provided herein are included merely to illustrate how the outlined principles could apply to the issue of piracy...*”.²⁴³ The room to manipulate and interpret the document to fit one's case is highly possible. Fragile laws, such as the US Coast Guard's PSA 3-09, are unfortunate for the future of the industry, as it has been demonstrated that weak laws make self-interpretation an important mechanism to legitimize one's actions. Therefore, one can argue that the major concerns within the YouTube video is not the discussion regarding the guards' use of force, but that the aggressive use of force they apply can be legitimized within the law governing their operational mandate. Regulations not fully controlling the operations of PSCs pose a risk of turning the sea into a crime scene, where PSCs are not just killing pirates, but also posing a threat towards other seafarers in general.

Even though the YouTube video has generated debates concerning the intensive use of force, the case has not been taken to court. The International Association of Maritime Security Professionals (IAMSP) condemned the guards for using questionable use of force and started an investigation of the case.²⁴⁴ After collecting information, IAMSP concluded that the case was not to be led through an administrative investigation, but rather one to be conducted by the flag state. With Trident Group being registered in the US, and Eagle Bulk on the Marshall Islands, it would have been a case for either nation. John Ramag, chief operating officer of the Marshall Islands, responded when confronted about prosecution that they had no intention of investigating the incident further.²⁴⁵ Consequently, without their being any form of international pressure, there is the possibility for states to avoid taking on the responsibility of investigating incidents. This is unfortunate for the current regulative system governing PSCs in the anti-piracy fight. With states being the sole actor holding the right to follow up with a prosecution, both the lack of commitment from the state of concern and the lack of international pressure, is of a worrying character. The lack of states grasping their important juridical responsibility within the current regulations leaves room for the PSCs to operate as they want, as there are no control mechanisms governing their use of force. With lethal force being an important and powerful mean within the anti-piracy fight, making sure that it is effectively regulated and monitored is essential for the further legitimacy of the industry.

²⁴³US Coast Guard, *Port Security Advisory (3-09)*.

²⁴⁴ Maritiem Connector, *Trident Group and Eagle Bulk Shipping recognized in a shooting video*.

²⁴⁵*Ibid*.

With the leader of the Trident Group and the operating officer of the Eagle Bulk Shipping in the Marshall Islands expressing that “... *the video should never had become public*” and “*we are not in the business of counting injuries*” one becomes suspicious about the legitimacy of the industry.²⁴⁶ Without the video being released, this situation would have been one of maybe many other unknown incidents. The word “maybe” is applied as one does not know the total number of pirates injured or killed in clashes with PSCs. The fear that there are many unknown incidents regarding reckless use of force against pirates is rooted in there not being in place any official reporting system determining the number of Somali pirates killed or injured at sea.²⁴⁷ Without concrete numbers demonstrating the abuse of force against pirates, there are few systems raising awareness regarding incidents of reckless use of force. Within the relationship between PSCs and the principals governing their actions, the lack of any efficient reporting system will favor the PSCs. Without incidents being reported, PSCs can create an information asymmetry by holding back information to the principal about what happens at sea. This is an unfortunate regulative aspect, as PSCs can avoid being faced with punishment for their actions, making the power balance in favor of PSCs.

Through stronger and more uniform regulations one can generate a more transparent industry where these situations can be avoided, or in cases where violations occur, the offenders will face charges for their actions. Askins argues that we do not need more laws within the anti-piracy fight, as we cannot even follow the ones already in place.²⁴⁸ What we need, on the other hand, is more uniform laws that clearly state and effectively control PSCs operational mandates. Kristina Siig, lawyer at the University of Odense in Denmark, agrees by arguing that the current system of manifold laws gives PSCs the ability to hide their actions behind different laws, affecting the power balance between the PSCs and the regulations controlling them.²⁴⁹ Demonstratively, the current system is in need of regulative changes in order to secure that the continued presence of PSCs in the anti-piracy fight is based on legitimate procedures.

²⁴⁶ Bockmann, *Shooting to Kill Pirates Risk Blackwater Moment*.

²⁴⁷ Hurlburt, *The Human Costs of Somali Piracy*, 2011, 11

²⁴⁸ See Interview 2013i

²⁴⁹ See interview 2013l

Chapter 7: Monitoring of PSCs

Introduction

As revealed in the previous chapters, there are different limitations within the regulations governing PSCs in the anti-piracy fight. Shortly summarized, the limitations are rooted in a lack of harmonization, imprecise wording, lack of comprehensiveness, and a need for states to take on responsibility by investigating illegal actions. Building on the limitations from the previous chapters, the topic of this chapter, namely analyzing the industry's monitoring mechanisms, increases in relevance. One can argue that through an efficient set of monitoring mechanisms governing the quality, operation and mandates of PSCs, the root of many of the mentioned regulative errors within the current regulations will dissolve. With a proficient system of monitoring, states can secure high operational standards as well as professionalism of PSCs hired within the anti-piracy fight. Hence, without a proficient system of monitoring, PSCs are more or less free to operate as they like, meaning that the regulations lose validity and ability to govern the actions of PSCs. This chapter will examine different aspects demonstrating to which extent PSCs are monitored within the current regulations. This will be done by evaluating how the regulations are monitoring the quality of PSCs and the weapons in circulation. In addition, the chapter will include a case study demonstrating the current lack of efficient monitoring mechanisms.

Monitoring of PSCs actions

With actions at sea being placed far from the watchful eyes of the media and other corporate oversight mechanisms, illegal actions can easily occur without being noticed.²⁵⁰ In view of this, it is essential that PSCs are regulated and monitored in order to secure that only guards holding the needed qualifications are permitted a license to protect vessels in the anti-piracy fight. Otherwise, with states not taking on the responsibility of monitoring PSCs compliance to the given regulations, one may risk “cowboy” companies entering the field, creating more harm than good. Feaver argues that the best way to avoid shirking within a principal-agent

²⁵⁰ Priddy and Casey-Maslen, Counter-piracy Operations, *Journal of International Criminal Justice*: 839-856

relationship is to make sure that the activities of the agents are efficiently monitored. Monitoring is best achieved through contract incentives, institutional checks, police patrols and screening. Without an efficient system that monitors the actions of agents, the power balance between the principal and agent is affected in favor of the agents. Within the case of this thesis, the lack of monitoring mechanism would provide PSCs with an ability to operate according to what favors their market interests and not in line with the intentional security aspects. As previously mentioned, this will lead to a scenario where one can argue that PSCs are not regulated by the state, but rather by the market and their own economic interests. With monitoring being such an essential aspect within the principal's governance over PSCs, it is vital to reach an understanding of how PSCs are monitored when examining the validity of the regulations governing their actions.

One can argue that today's regulations governing the anti-piracy fight lack adequate monitoring mechanisms. This has effectively been demonstrated throughout this thesis as it has been verified that various regulative aspects related to the use of lethal force, weapon carriage etc., have not been effectively met. An additional aspect, demonstrating that there currently are weaknesses in the monitoring mechanisms of states is verified through notifications of concern not only having been raised by India,²⁵¹ but also by Oman and Yemen.²⁵² The notification stresses the belief that there have been various incidents where the use of excessive force against innocent fishermen has taken place. Concerns have been raised, but so far, to the best of my knowledge no investigation has been revealed where PSCs are accused of wounding or killing innocent fishermen. On the other hand, a couple of incidents have been revealed where military guards, operating in line with the mandate of PSCs, are accused of killing peaceful seafarers. A known example is an incident where Italian military guards on board the Italian vessel, *Enrica Lexie*,²⁵³ are accused of killing two innocent Indian fishermen.²⁵⁴ The fact that prosecution has only been raised against well trained military personnel and not PSCs is an interesting aspect. Does it mean that PSCs have higher professionalism? That the concerns raised from Yemen, India and Oman only embrace military guards? Or, that there are many hidden numbers related to the operation of PSCs?

²⁵¹ See Appendix 4.

²⁵² Kaija Hurlburt, "The Human Costs of Maritime Piracy 2012," *Working Paper, Oceans Beyond Piracy*, <http://oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report.pdf> (Accessed: August 14, 2013): 32

²⁵³ Hari Sankar, *Jurisdictional and Immunity Issues*.

²⁵⁴ The shoots were fired by Italian military guards and not a PSC. This might have had a say in regards to why it was initiated an investigation leading to prosecution. This can be rooted in better monitoring system for military guards than PSC.

What is the truly answer is not known, but with concerns of illegal actions having been raised from regional states, in addition to PSCs legal use of force having been questioned, one may assume that there is an uncertainty regarding incidents. The fear of hidden numbers is backed up within the 2012 annual report of Oceans Beyond Piracy, where the problem of underreporting is linked to incidents being reported through internal communication channels and not to the public.²⁵⁵ Without states having efficient monitoring mechanisms revealing the transparency of the actions within the industry, the regulations governing the actions of PSCs lose strength. Deprived of efficient monitoring mechanisms, states lose an important power to make sure that PSCs are not shirking within their principal-agent relationship.

Of course, one cannot exclude that investigations might have been initiated which have not become public. However, if this is the case, it is interesting that these investigations are unknown, as a case of murder often is captured by the media and attracts public attention. Nevertheless, with no internationally initiated monitoring mechanisms of PSCs in the anti-piracy fight, this thesis will through analyzing the regulations belonging to the USA, UK, Norway and Denmark, reach an understanding as to how flag states have taken on their important responsibility of monitoring the actions of PSCs within the anti-piracy fight. Without states demonstrating that they are effectively monitoring the actions of PSCs in the anti-piracy fight, the strength of the current regulations los legitimacy.

States role in monitoring

There are various reasons why states should take on their role and secure that the industry is properly regulated and monitored. An important feature is that through an effective system of monitoring, states can protect themselves against 1) adverse selection regarding the quality of PSCs and 2) moral hazards, such as agents shirking.²⁵⁶ Through effective regulations monitoring the risk of adverse selection and moral hazards, entrance of unprofessional companies will be reduced. This is of great importance for the legitimacy of the industry, as the presence of “cowboy” companies can damage the sector at both a national, regional and global level as they pose a threat to the safety of innocent seafarers, can create diplomatic confrontations and may escalate the use of violence at sea. Unfortunately, when analyzing the regulations belonging to the four flag states, the comparison reveals that PSCs are not

²⁵⁵ Hurlburt, *The Human Costs of Maritime Piracy 2012*, 33

²⁵⁶ Feaver. *Armed Servants*, 60-61

effectively monitored within the anti-piracy fight. PSCs freedom is rooted in states not initiating important regulations benefitting the monitoring of the industry. This is effectively demonstrated through how states have responded within their regulations in order to avoid adverse selection. Without putting in place effective systems securing the highest level of professionalism, the risk of being faced with moral hazards also increases. As is now to be revealed, states are creating regulations which are gaining PSCs influence within the sector.

Within the regulations from the four flag states, it is revealed that all the regulations set out requirements with regards to the qualitative aspects of PSCs. A condition that recurs within all the four regulations is that guards need to hold a certain level of training in relation to weapon carriage, weapon safety and how to use force in situations of self-defense.²⁵⁷ In addition to these particular similar conditions, the four regulations embrace various requirements that they find essential that the PSCs possess. A brief set of differing requirements within the regulations is for instance that the US regulation wants all the hired guards to be fluent in English in order to correctly understand the Vessels Security Plan (VSP).²⁵⁸ The UK puts forward that testimonials from previous clients are of importance.²⁵⁹ Whereas Denmark²⁶⁰ demands a certain type of ammunition and Norway requires that all the guards hired are above 18 years of age.²⁶¹

It is positive that the regulations governing the PSCs in the anti-piracy fight put forward various criteria with regards to the quality and professionalism of the PSCs one are allowed to hire. On the other hand, the requirements lose significance as states are not embracing their current role as monitors to ensure that the requirements are withheld. This is effectively demonstrated within all the regulations, as states give the vessel companies the responsibility of hiring and assuring the quality of PSCs. Accordingly, this implies that vessel companies without any knowledge or experience in how to conduct background checks are in charge of securing that the guards they hire meet the minimum requirements put forward within the

²⁵⁷ **USA:** US Coast Guard, *Port Security Advisory 5-09 (REV-1)* **UK :** Department for Transport, *Interim Guidance to UK Flagged Shipping*, 22 **Norway :** Norwegian Maritime Affairs, *Provisional guidelines – use of armed guards on board Norwegian ships*, 8. **Denmark:** Morten Bødskov, “ Bekendtgørelse om brug af civile, bevæbnede vagter på danske lastskibe” [Order on the use of civilians, armed guards on Danish cargo ship] June 27, 12 <https://www.retsinformation.dk/forms/R0710.aspx?id=142224> (Accessed: May 15, 2013).

²⁵⁸ US Coast Guard, *Port Security Advisory 5-09 (REV-1)*

²⁵⁹ Department for Transport, *Interim Guidance to UK Flagged Shipping*, 19

²⁶⁰ Bødskov, *Bekendtgørelse om brug af civile*.

²⁶¹ Skuld, “Regulations concerning amendments to the Regulation of 22 June 2004 No. 972 concerning protective security measures on board ships and mobile offshore drilling units,” http://www.skuld.com/upload/News%20and%20Publications/Publications/Piracy/Regulations_concerning_amendments_to_the_Regulation_of_22_June_2004_nr.972.pdf (Accessed: June 12, 2013).

regulations. This is illustratively demonstrated within the Norwegian regulations, as the regulations clearly put forward that the state has no responsibility in conducting a quality check of the different companies and will only disqualify a team when they have information showing that the PSC is clearly unsuitable for the given duty.²⁶²

With states clearly stating that they hold no responsibility in quality checking the companies hired, they are providing PSCs with an important asset within the system. This is rooted in PSCs' own persuasion and marketing techniques becoming a vital aspect in regards to the procedures of hiring, which leads to an information asymmetry favoring the PSCs. This is grounded in an uneven balance between vessel companies whom are not experts at quality checking, while PSCs are market driven actors with knowledge in selling their own services. Regulations not effectively embracing the process of hiring PSCs will therefore affect the principal's governance over the agent. With adverse selection being one of two dilemmas increasing the chance of shirking, monitoring is an aspect that states need to adequately embrace in order to successfully regulate the industry.

Another clear example demonstrating how states fail to monitor PSCs is rooted in how they have addressed the duration of a license a PSC may possess. While Norway only permits licenses of up to 6 months for guards to carry weapons,²⁶³ the UK is at the other end of the spectrum as they do not have an expiry date on their Open General Trade License, unless there are changes in government policies.²⁶⁴ With a non-expiring license, the state has no insurance that companies provided with a license hold the needed quality in forthcoming years. Even though it is confirmed that licenses might be liable for controls and checkups, this is not a routinely control, but rather a possibility one can be faced with. Therefore, after having obtained a license from the state, it is more or less up to the vessel companies to secure that the PSCs maintain their professionalism into the future. With states not grasping the responsibility of quality checking PSCs, the vetting systems initiated by the ISO, SAMI and Norwegian Hull club and Norwegian War Risk Association increase with importance.²⁶⁵ These systems are essential mechanisms which eliminate adverse selection and fills in the missing units within states regulations. Including and acknowledging these initiatives within states regulations is an important step towards ensuring a higher level of professionalism in the future regulations of PSCs in the anti-piracy fight.

²⁶² Norwegian Maritime Affairs, *Provisional guidelines – use of armed guards on board Norwegian ships*, 10.

²⁶³ Norwegian Maritime Affairs, *Provisional guidelines – use of armed guards on board Norwegian ships*, 6.

²⁶⁴ Department for Transport, *Interim Guidance to UK Flagged Shipping*, 48

²⁶⁵ Cf. Chapter 4, p. 37-39

Instead of passing on the responsibility to vessel companies, states need to secure that the hired companies are well trained and qualified for the duty and mission they have undertaken. First of all, monitoring the quality of PSCs is of importance for the safety of all seafarers, and secondly, states cannot operate in isolation from PSCs, as they have a direct responsibility for actions conducted on their flagged ships. With PSCs being introduced in order to safeguard the sea, it is rather multifaceted that this desire is not replicated with regards to ensuring that PSCs are not posing new threats. As the safety of the sea is of international interest, ensuring regulations which sufficiently monitor PSCs should be a universally desired outcome.

Monitoring of weapons

When analyzing the various aspects related to how PSCs are regulated within the antipiracy fight; a consistently mentioned facet has been the role of firearms. Therefore, with weapons being such an important tool within PSCs mandate in the anti-piracy fight, it is of interest to examine how states monitor their presence within the current regulations. Ideally, an efficient set of regulations governing the role of firearms, followed by proficient monitoring mechanisms, could eradicate the current negative connotations between arms and the legal use of force. This is rooted in the fact that effective monitoring mechanisms open up awareness regarding illegitimate actions.

Unfortunately, as will soon be revealed, states are not taking on their important responsibility to monitor the use and presence of arms in the anti-piracy fight. A good example of states not taking on their monitoring role is demonstrated within the US guidelines. According to US regulations, PSCs need to obtain a license from the International Traffic and Arms Regulations (ITAR) where different requirements have to be met, such as being classified as a US citizen in accordance with 22 C.F.R. 120.15.²⁶⁶ Even though the ITAR puts forward various restrictions with regards to qualifications and arms one may retain, the ITAR license limits itself by not covering weapons bought for personal use in foreign ports and stored on board the vessel. The only requirement the ITAR puts forward when buying weapons abroad, is that if they are used, one has to be sure to act according to the laws of the applicable foreign

²⁶⁶International Traffic in Arms Regulations. “22 C.F.R. 120.15.” SUBCHAPTER M—INTERNATIONAL TRAFFIC IN ARMS REGULATIONS” <http://www.gpo.gov/fdsys/pkg/CFR-2011-title22-vol1/pdf/CFR-2011-title22-vol1-chapI-subchapM.pdf> (Accessed: July 05, 2013).

country.²⁶⁷ Without controlling the weapons obtained abroad, the regulations in their current form diminish the USA's possibility to monitor the weapons in circulation. In addition to eradicating the ability to monitor weapons in circulation, it also obviates issues related to the types of weapons in circulation and how they can be obtained. Regulations' not monitoring the circulation of weapons is unfortunate for the industry. Not only does it affect the control of firearms PSCs possess, it additionally removes states ability to collect proof when investigating illegal actions. This can be exemplified through drawing linkages between the weapons PSCs possess and the injuries on the victim, such as whether or not the bullets match.

Another illustrative example demonstrating the lack of monitoring mechanisms, originates from Norway's regulations. According to Norwegian law, a vessel has to apply for a permit in order to legally carry arms.²⁶⁸ What is deemed as problematic is that an application can be sent and accepted, even though one has not documented which PSCs one will hire. Accordingly, a vessel can be given the right to carry arms without knowing who will use the arms.²⁶⁹ As the two cases demonstrate, the states' own regulations are not fruitfully supporting their possibility to monitor the PSCs. Therefore, improvements are needed in order to enforce states to put in place regulations that effectively support their own monitoring mechanisms of PSCs and the weapons they possess. In order to improve the legitimacy and secure the highest level of professionalism of the industry in the future, it is essential that more focus is directed towards states making regulations supporting their ability to monitor PSCs.

Efficient systems of regulations favoring the monitoring of the industry helps eradicate ambiguities regarding armory size and how and when arms have been used. This is of special importance in situations where concerns are raised regarding illegitimate actions. In this respect, Denmark is a good example. Even though Denmark's regulations could be more specific, they have put in place mechanisms making it possible to monitor the weapons in circulation on board vessels. This is rooted in PSCs weapon license being only valid for 1 year, as well as Denmark restrict the types and amount of weapons and ammunition one may

²⁶⁷US Coast Guard, *Port Security Advisory (4-09) (REV-4)*.

²⁶⁸Norwegian Maritime Affairs, *Provisional guidelines – use of armed guards on board Norwegian ships*, 7

²⁶⁹Ibid.

possess.²⁷⁰ Demonstratively, Denmark's regulative system makes it possible for the state to at least monitor the amount of weapons and ammunition in circulation within the anti-piracy fight. Even though the regulations could be tightened in, it is a step in the right direction improving the regulations governing PSCs in the anti-piracy fight.

The rest of the chapter will now provide a descriptive insight to an incident having taken place in the anti-piracy fight. The case study connects to various aspects related to monitoring which have been touched upon within this chapter. But most of all, the case study demonstrates that there is a need for better monitoring and cooperation at a national, regional and global level regarding PSCs presence in the anti-piracy fight.

The problem of a monitoring system rooted in “words against word”

An illustrative case demonstrating the complexity within the current regulations and what can be argued to be a lack of monitoring is a situation that took place outside the coast of Yemen the 3rd of August 2011.²⁷¹ The root of the incident was that a Yemenite fisherman was presumably killed by Russian military guards on board a Norwegian tanker. The word “presumed” is applied as the case has not been up for investigation to determine whether or not a life was lost.²⁷² Even though the case consists of military personnel instead of a PSC involved in the dispute, the case is of interest as it demonstrates the same problematic aspects related to the monitoring of PSCs within the anti-piracy fight. Additionally, the case-study is included within this thesis as it provides the reader with an understanding of why there might have been a lack of investigations responding to the previously mentioned notifications of concern raised by India, Yemen and Oman.

Briefly described, the incident in Yemen is grounded in a problem of “words against words” and “states against states” as there is a manifold of actors and jurisdiction involved demonstrating the complexity of the situation. Yemen police argue that a Yemenite fisherman was killed on a dhow while preparing supper for the rest of the crew.²⁷³ The Russian military

²⁷⁰ Justisministeriet, “Ansøgning om generel våbentilladelse til brug af civile, bevæbnede vagte,” [Application for general firearms license for use of civilians, armed quail] n.d., <https://www.retsinformation.dk/forms/R0710.aspx?id=142224> (Accessed: July 15, 2013).

²⁷¹ Katz, *Fighting Piracy Goes Awry With Killings of Fishermen*

²⁷² Øyvind Bye Skille, “Skjød og drepte fisker fra norsk tankskip Utenfor Yemen,” [Shoot and killed a fisherman from Norwegian tanker outside the coast of Yemen] NRK, September 09, 2012, http://www.nrk.no/verden/_drepte-fisker-fra-norsk-tankskip-1.8326607 (Accessed: May 01, 2013).

²⁷³ Katz, *Fighting Piracy Goes Awry With Killings of Fishermen* and; See Appendix 2

who had deployed guards on the Norwegian tanker said that the military had never had any incidents at sea. But when asked directly about the shooting and death of the Yemenite fisherman, the military vice admiral replied without any further comment “*I’m not sure they were peaceful civilians.*”²⁷⁴ The owner of the Norwegian tanker from where the shooting took place was unaware that such an incident had taken place when confronted by a journalist from the news agent Bloomberg.²⁷⁵ It can be noted after having personally investigated the case further and gathered information from the Norwegian Ministries through the “freedom of information act”, that the captain of the vessel had sent a report to the Norwegian maritime authorities three days after the incident. Therefore, it becomes rather suspicious that the owner of the Norwegian Tanker did not know about the incident.²⁷⁶ On the other hand, if it is true that the owner did not know about the incident when Bloomberg contacted him, there is yet another good example of the industry being in need of better monitoring mechanism as the owner of a vessel company should be informed when their own ships are accused of being involved in deadly disputes.

As the incident happened in international waters, it is the law of the flag states that governs.²⁷⁷ When the fishermen returned to Yemen with the dead body, the Yemen Interior Minister started an investigation of the case.²⁷⁸ The result was a letter sent from Yemen to Norway, where Yemen requested an investigation of the death of a Yemen fisherman.²⁷⁹ Norway replied to Yemen by confirming that the case had been conveyed to the Norwegian police authority, but on the background of the information given, they had decided to not open a police investigation of the case.²⁸⁰ When I personally asked the Norwegian chief prosecutor in charge directly about why the case was not opened, the answer revealed was that according to the underlying circumstances it was not deemed as a case in need of further investigation.²⁸¹ She further specified in our correspondence that it was confirmed that warning shots were fired, but there is no proof clearly determining whether a life was lost or not. When I interviewed Alan Katz, a journalist in Bloomberg who had been to Yemen and talked to the widow, witnesses and police in charge, he was sure that it was a case of murder where all

²⁷⁴ Katz, *Fighting Piracy Goes Awry With Killings of Fishermen*.

²⁷⁵ *Ibid.*

²⁷⁶ Cf. Appendix 5.

²⁷⁷ UNCLOS, *United Nations Convention on the Law of the Sea*, Article 94.

²⁷⁸ Skille, *Skjød og drepte fisker fra norsk tankskip Utenfor Yemen*.

²⁷⁹ Cf. Appendix 2

²⁸⁰ Cf. Appendix 3.

²⁸¹ Cf Interview 2013h

parts claim their innocence in order to avoid prosecution.²⁸² When I confronted him as to how he could be so sure, he said that he found it unrealistic after having seen the police reports, the death certificate and talked to the widow, that the whole scenario is a plot initiated just for the sake of money. In either case, this whole incident, whether it was a killing or not, demonstrates that there are weaknesses within the regulations in regards to putting forward efficient monitoring mechanisms. Accordingly, within the current system, PSCs are more or less free to operate as they want and get away with it. This is unfortunate for the overall validity of the regulations governing PSCs as the chance of companies shirking increase in line with the lack of efficient systems of monitoring and punishment. The regulations suffer by not effectively controlling the action of PSCs.

A couple of months after I had closed my investigations of the case, one of Norway's leading news agents brought up the incident in an in-depth article expanding over 5 pages.²⁸³ The journalists had conducted a detailed investigation from both Yemen and Norway in order to get a step closer to the truth. What was of special interest within this article was a link to a video recorded on the Nordic tanker where shots were fired at two boats at a long distance. Even though there are no records stating the circumstances before the video was started, the shooting from the Nordic Tanker can be characterized as reckless and not according to the right of self-defense.²⁸⁴ This is rooted in there being no sign of aggressive maneuvers from the two boats before the warning shots were fired. As the use of force according to Norwegian law is restricted to situations where the threat is unavoidable and all other types of means have been deployed, the use of warning shots can be categorized as not proportionate according to the circumstances.²⁸⁵ What makes the video even more interesting, is that according to the report sent from the captain of the Nordic tanker there were fired 9 shots, while the video demonstrates that there were fired at least 11 shots.²⁸⁶ The reason for the difference in the total number of shots is according to a crewmember that the video demonstrates a situation which took place 2-3 hours before the presumed killing of a Yemenite fisherman. If this is the case, the situation becomes even more suspicious and confusing, as the Nordic Tanker has only sent in one report conforming the firing of shots

²⁸² Cf. interview 2013k.

²⁸³The article was published the day before I was to submit my thesis. I did therefore not have the time to conduct further investigations based on the findings of the article. Per Anders Johansen and Mohammed Duhmer, "Hva skjedde egentlig da det ble skutt fra et norsk tankskip og den jemenittiske fiskeren Mohammed falt død om i båten sin?" [What is the reality behind the day when there were fired shots from a Norwegian Tanker and the Yemenite fisherman Mohammed died?] *Aftenposten*, December 14, 2013, p. 21-26

²⁸⁴Ibid.

²⁸⁵ Norwegian Maritime Affairs, *Provisional guidelines – use of armed guards on board Norwegian ships*, 12

²⁸⁶ Johansen and Duhmer, *Hva skjedde egentlig da det ble skutt fra et norsk tankski*.21-26

against suspicious vessels. With Norwegian flagged vessels being obliged according to Norwegian law to report all use of force within 72 hours to the Norwegian Maritime Directorate, the missing report is a violation according to Norwegian law.²⁸⁷ Therefore, without touching upon whether or not a person was killed, the whole incident strengthens the fear that the monitoring of armed guards in the anti-piracy fight is not adequately in place.

Even though the Norwegian prosecutors deemed it a closed case, which they have the right to do according to Norwegian law, it is, at the same time a little suspicious that they closed the case before sending any representatives to Yemen to talk to the presumed victims and other witnesses.²⁸⁸ One can therefore speculate as to whether there are underlying reasons for why the case was closed without any investigation. Speculations of underlying causes can be rooted in 1) a prosecution being deemed as time-consuming and costly as proof is difficult to collect, 2) that Norway does not want to raise a trial and risk weakening their diplomatic relations with Russia or, 3) that Norway does not feel the responsibility to take the case further as they do not have any strict laws or international pressure pushing them to do so.

The happening in Yemen is included within this thesis as it is one of few clashes between armed guards and seafarers which have been made known to the public. In addition to the case in Yemen, there is the previously named video on YouTube as well as there have been raised notifications of similar incidents. One example is the killing of an Indian fisherman outside the coast of Dubai, who was killed by bullets from the US vessel USNS Rappahannock.²⁸⁹ Both the US and India investigated the incidents, but as far as have been made known, there has been no trials. Furthermore, fishermen themselves have raised concerns that innocent seafarers are falling victims to PSCs reckless use of weapons at sea.²⁹⁰

One can argue that there is a current lack of solid proofs stating PSCs involvement in disputes, setting forward that the regulations governing PSCs actions is proficient in its current form. But even though there is a lack of proofs, there is, on the other hand different

²⁸⁷ Ibid.13

²⁸⁸ Cf. Interview 2013k

²⁸⁹ Barbara Starr, "U.S. Navy ship fires at small boat in Persian Gulf," *CNN*, July 17, 2012, <http://edition.cnn.com/2012/07/16/world/meast/persian-gulf-shooting/> (Accessed: November 12, 2013). And, Alan Katz, "Brother Shot Dead Fishing Tests Armed Guards' Accountability," *Bloomberg*, November 28, 2012, <http://www.businessweek.com/news/2012-11-28/brother-shot-dead-fishing-tests-armed-guards-accountability> (Accessed: November 12, 2013).

²⁹⁰ BAIRD Maritime, "Illegal trawlers drive out Somali fishermen," http://www.bairdmaritime.com/index.php?option=com_content&view=article&id=10580:illegal-trawlers-drive-out-somali-fishermen-&catid=115:fisheries-and-aquaculture&Itemid=210 (Accessed: November 12, 2013) and, IZN/ETH Zurich, "Pirates vs Private Security," April 14, 2010, <http://www.isn.ethz.ch/Digital-Library/Articles/Detail/?id=114981> (Accessed: November 12, 2013).

features put forward within the sector strengthening the believe that the sector is currently faced with hidden numbers regarding incidents. Primarily, the claim that there are hidden numbers is rooted in concerns having been raised in regards to underreporting within the industry.²⁹¹ When there in addition have been raised notifications of concern from regional states regarding reckless shooting as well as one can argue that the current regulations lack strength in its current form, one becomes suspicious. Therefore, based on the different findings put forward throughout this thesis, there is reason to believe that the regulations governing PSCs in the anti-piracy fight lacks efficient monitoring systems which again makes it less likely that PSCs will be faced with punishment for illegal actions. Without having regulations effectively monitoring the actions of PSC, states los an important regulative feature within their relationship to PSCs.

²⁹¹ Hurlburt, *The Human Costs of Maritime Piracy*, 2012, 33

Chapter 8: Options for better regulations- Findings and Discussion

Introduction

The importance of analyzing the regulations governing PSCs in the anti-piracy fight is backed up by Kristina Siig,²⁹² emphasizing that we are currently faced with a new legal field in need of further study.²⁹³ The rise of the private security industry needs to be recognized as we are confronted with a steady shift where PSCs are progressively taking over an arena previously dominated by UN sanctioned vessels and national military vessels.²⁹⁴ Not only is it important to understand PSCs presence in the anti-piracy fight, it is also essential that their operational mandates are built upon legitimate commands effectively regulating and monitoring the industry. The need for strong and concise regulations adequately embracing PSCs presence in the anti-piracy fight is an essential foundational aspect when securing the legitimacy of the industry today and in its future operations. On this basis, the aim of this research has been to reach an understanding of what has been characterized as a new legal field. This has been done through examining how PSCs are regulated within the anti-piracy fight, and what can be done to secure the highest level of professionalism within future regulations.

So far, this thesis has looked at various aspects related to the regulations governing PSCs in the anti-piracy fight. Some of the areas examined have been in relation to “soft laws”, innocent passage, floating armouries, self-defense, legal use of force, distances at sea and monitoring mechanisms. By conducting a study embracing the operational mandates of PSCs and the various jurisdictions governing their operations, the thesis has provided a comprehensive interpretation of the various aspects determining the relationship between PSCs and the regulations governing their operation.

As has been demonstrated throughout the study, the regulations governing PSCs in the anti-piracy fight are in need of improvement. This is rooted in lack of interests among states in

²⁹² Lawyer at the University of Odense in Denmark

²⁹³ See interview 2013l and You Tube, “is it okay to kill pirates,” web site, http://www.youtube.com/watch?feature=youtu.be&v=WHwETtLA_V8&desktop_uri=%2Fwatch%3Fv%3DWHwETtLA_V8%26feature%3Dyoutu.be&app=desktop (Accessed: November 20, 2013)

²⁹⁴ Small Arms Survey, *Chapter 6: Escalation at Sea*, 204

creating fundamental regulations which support as well as control the operation of PSCs. Accordingly, there is a need for institutional change where stronger and more uniform regulations are initiated at the national and international level. Hence, this chapter is dedicated to the discussions of the various findings made throughout the study. The discussion will highlight that the presence of PSCs in the anti-piracy fight does not operate in a legal vacuum, indicating that they need to be dealt with accordingly.

Major findings

The relevance of analyzing PSCs in the anti-piracy fight has been recognized through the findings of this thesis, revealing that there are various case specific scenarios that need to be understood in order to effectively regulate the industry. Exemplified, these case specific scenarios are concerned with innocent passage, how to legally repel a pirate attack, the rise of floating armouries etc. These scenarios are case-specific for the anti-piracy fight, meaning that they are not embraced by the general literature related to PSCs. This backs up the statements that even though there are various well written documents and guidelines, such as the Montreaux Document embracing the role of PSCs in armed conflict,²⁹⁵ the current documents and guidelines do not adequately support PSCs within all the various areas of operation. With the Montreaux document aiming at PSC in armed conflict, case specific questions related to the anti-piracy fight are not encompassed. This demonstrate that there currently is a knowledge gap enshrining Holmquist's statement that one regulative instrument are unlikely to capture the various aspects within the numerous operational arenas of PSCs.²⁹⁶ The documented need for case-specific research, raises an alarm that more attention needs to be directed towards the regulations governing PSCs in the anti-piracy fight. With the industry already being faced with unexpected outcomes due to the current regulations, one has to secure that in the future the principals are at the forefront regulating the direction of the industry, and not making regulations that generate new scenarios in need of even more regulations. Accordingly, as in line with Percy argument, regulations should not be initiated as a response to PSCs actions, but rather be at the forefront guiding the direction of the sector.²⁹⁷

²⁹⁵ ICRC, *The Montreaux Document*.

²⁹⁶ Holmquist, Private Security Companies, *SIPRI Policy Paper* :44.

²⁹⁷ Percy, Regulating the private security industry, *The International Review of the Red Cross*: 1-20

According to the principal-agent theory, multiple principals make the role of the agent more dynamic and strategic. Instead of agents being in a position where they either respond or shirk to regulations, they are provided with the ability to put principals up against each other in order to increase their own dominance.²⁹⁸ Even though the multiple principals have provided PSCs with a room of maneuver, one can argue that the findings of the thesis reveal that the major implication with multiple principals in the anti-piracy fight is the legal implications they cause. With no international convention putting forward a legally binding set of regulations, the sector now encompass a myriad of regulations differing in thoroughness and embracement. The myriad of regulations has turned the industry into a legal headache, not only for the PSCs, but for the whole industry in general as there is a lack of fundamental laws effectively putting in place a concise set of operational mandates. Therefore, multiple principals governing the mandates of PSC in the anti-piracy fight does not only provide PSCs with an advantage of setting principals up against each other, it additional pose a risk to PSCs being faced with prosecution due to misinterpretation of their mandates. The current inconsistency within and between regulations, one can argue, is one of the most essential problems originating from the multiple principals governing PSCs operational mandates. Currently, the inconsistency is reflected in how regulations interpret PSCs weapon carriage, the right of innocent passage, jurisdictional rights, and how to act according to self-defense when facing a pirate threat.²⁹⁹

Even though it has been put forward that there are a variety of actors regulating the operation of PSCs, a finding revealed from the various analyses, is that flag states possess the most vital role among the various regulative actors. With flag states sitting on the final word as to authorizing the use of PSCs on board their flagged vessels, they also directly and indirectly possess the duty to make sure that the presence of PSCs in the anti-piracy fight is effectively regulated and does not create more harm than good. As demonstrated throughout the thesis, flag states are currently not taking on their important regulative role, as the findings reveal that the majority of regulations do not satisfactorily embrace the presence of PSCs in the anti-piracy fight. Without states grasping their responsibility and providing an efficient set of regulations governing the industry, the consequence is a sector dominated by untrained “trigger-happy” guards generating potential risks for innocent seafarers.

²⁹⁸ Waterman et al., *The Venues of Influence, Journal of Public Administration Research and Theory*:5

²⁹⁹ Cf. Chapter 5 and 6.

Concerns related to the anti-piracy fight being faced with a sector of unqualified guards can no longer be overlooked. A clear warning signal has been sent out, as we have already been faced with incidents at sea as well as there has been raised notifications of concern from territorial states with regards to innocent seafarers becoming victims of PSCs reckless shooting.³⁰⁰ Here again, the findings of the thesis reveal that due to the lack of interest of states in producing regulations effectively controlling the various aspects related to PSCs operations, PSCs actions are not effectively monitored within the anti-piracy fight. Without states knowing what is happening at sea, PSCs are provided with the room to maneuver as they like. Not being able to ensure that PSCs are not shirking is unfortunate for a principal-agent relationship where the state is successfully regulating PSCs. Without effective monitoring mechanisms the agents' ability to pursue their own institutional interest increase, meaning that the sector is governed by PSCs market interest instead of security aspects being at the forefront. With the actions of PSCs in the anti-piracy fight being placed far away from the watchful eyes of the media and other corporate oversight mechanisms, monitoring is an essential means in order to ensure that the companies hired are not posing a threat to innocent seafarers, but that they protect commercial vessels in an efficient and legitimate manner.³⁰¹

Consequently, there is a vital need for institutional change among the flag states towards a more responsible and consistent set of regulations which effectively regulate and monitor the presence of PSCs in the anti-piracy fight. With states holding a responsibility to both regulate as well as follow up on illegal actions conducted on board their flagged vessels in international waters, they can't continue avoiding their responsibility. This is in line with Thompson's argument declaring that states cannot shirk their responsibility for nonstate violence conducted for private means.³⁰² If states are not changing tactics and effectively regulating the private security industry themselves, states can end up in unfortunate disputes over PSCs actions. If PSCs continues to be recognized for their important deterrent role in the anti-piracy fight, the regulation governing their operations should clarify that the success of the PSCs is built upon legitimate ways of operation.

This thesis has demonstrated that the anti-piracy fight should not be fought single-handedly. With piracy being an international crime, the means to eradicate the presence of pirates should

³⁰⁰ Katz, *Fighting Piracy Goes Awry With Killings of Fishermen*.

³⁰¹ Priddy and Casey-Maslen, Counter-piracy Operations, *Journal of International Criminal Justice*, 839-856

³⁰² Thomson, *Mercenaries, pirates and Sovereign*, 146-153

be solved at the international level.³⁰³ Currently, there has not been any international cooperation with regards to putting in place binding regulations governing the presence of PSCs in the anti-piracy fight. This is unfortunate as the majority of problems governing the anti-piracy fight can be eradicated if states come together to create an international convention embracing topics such as monitoring, legal use of force and weapon carriage. Reaching an international set of agreements would not just eradicate the inconsistency between and within the current regulations; it would additionally lift the whole industry as the various concerns and implications surrounding the presence of PSCs in the anti-piracy fight are interlinked. The linkages within the sector is reflected in Støbers previously mentioned four vital criteria's for an effective principal- agent relationship; 1) Functional legal institutions creating binding rules and norms; (2) Effective markets with competition; (3) the contracts are specific and fixed and (4) there exists a functioning monitoring system.³⁰⁴ Illustratively, with the current regulations governing PSCs in the anti-piracy fight being blamed for not respecting the market interest of PSCs they are not functional to a satisfying degree. Their functionality is negatively affected by the lack of specific and fixed contracts which in turn hampers the regulations possibility to monitor the actions of PSCs. This negative spiral can easily be changed as initiating improvements within one area will replicate positive connotations to the rest of the regulative aspects.

Even though one can argue that reaching an international agreement can be a solution to the majority of problems raised within the findings of this thesis regarding how PSCs are regulated within the anti-piracy fight, it has to be reckoned that reaching an international agreement is a time consuming process. Hence, in the meantime, flag states can still do a much better job mitigating the current risks exposed through the current inadequate regulations. Without an international agreement in place, the regulations belonging to flag states will continue to be the root of the problem. The following section will highlight various aspects revealed throughout the study, which demonstrate the importance of putting pressure on the flag states when initiating regulative changes. The findings soon to be revealed play a role for further analyzes, discussions and the understanding of the regulations governing the PSCs in the anti-piracy fight.

³⁰³ Oceans & Law of the Sea United Nations, Web site, <http://www.un.org/depts/los/piracy/piracy.htm> (Accessed: November 12, 2013).

³⁰⁴ Støber, *Contracting in the Fog of War*, 123

Who governs who?

The thesis has through various case studies effectively put forward that the relationship between PSCs and the principals governing their actions is not in an ideal position. With PSCs finding alternative ways of dealing with the various regulations governing their mandates, there is misconduct between PSCs and the principals governing their operation. According to Feaver, there is always a risk of shirking responsibility within a principal-agent relationship.³⁰⁵ The rise of floating armories clearly demonstrates that shirking already occurs among the PSCs, as there are clear signs of weaknesses within the functional and rational goals. In regards to the functional goals, such as agent's behavior in relation to the principals' mandates, the floating armories demonstrate that agents are able to avoid the regulations by creating their own more convenient ways of operation. In regards to rational goals, such as whether the principals' decisions are functional or not, the floating armories effectively demonstrate that they are not. With areas condemned as High Risk Areas also grasping states territorial sea, laws hindering vessels carrying PSCs with the right of innocent passage hampers the effectiveness of the industry.

Weaknesses within rational aspects are put forward by Kinsey as problematic when regulating the private security industry. Kinsey argues that in order to effectively regulate PSCs, the business aspects of PSCs needs to be respected.³⁰⁶ Accordingly, there needs to be a balance between the interests of the principal and the agent, in order of the principal being able to maintain its regulative dominance. With floating armories being an initiative put forward in order to effectives PSCs business by eliminating the chance of being faced with states heavy bureaucratic and unwelcoming laws, one can argue that the agents interests is not effectively reflected within the current regulations. Eisenhardt backs up Kinsey's argument, as she believes that conflicting interests between the principal and agent is one of the biggest problems within an efficient principal-agent relationship. With territorial states and PSCs having different interest when it comes to the right of innocent-passage, there are tensions over conflicting interest within their relationship.

Another aspect uncovered within the thesis which makes it unclear who governs who, is rooted in flag states putting the responsibility in the hands of vessel companies when it comes

³⁰⁵ Feaver. *Armed Servants*, 60-61

³⁰⁶ Kinsey, *Corporate Soldiers and International Security*, 135

to the procedures of quality checking and hiring PSCs.³⁰⁷ With flag states not knowing who is operating on their flagged vessel with a mandate to use lethal force, they are not only eroding their own ability to monitor the actions of PSCs, they are also jeopardizing the safety of innocent seafarers sailing in the pirate prone areas. Consequently, this is a problem that needs to be taken seriously by the flag states as illegitimate actions of PSCs can and demonstratively will, lead to diplomatic confrontations.³⁰⁸ Additionally, flag states' own regulations of providing vessel companies with the responsibility of vetting PSCs favors the already growing dominance PSCs possess within the field. As put forward in the principal-agent theory, agents will always try to increase their dominance by creating an information asymmetry.³⁰⁹ Within the anti-piracy fight, PSCs have the possibility to create an information asymmetry when signing contracts. This is rooted in PSCs' own persuasion and marketing techniques playing a vital role in regards to the procedures of hiring. If states regulations continue in the same path, PSCs will continue to hold an important power position, making it unclear who governs who. Such a system leads to an unfortunate principal-agent relationship as the agent regains power over the principal.

Weak wording:

The wording of the various regulations has been demonstrated within the thesis to be an important aspect when evaluating the strength of the current regulations.³¹⁰ As it has been put forward, the wording within the regulations should be improved in order to avoid confusion and misinterpretations. An important step towards eliminating the current loopholes within the regulations is to reach an internationally agreed standard for the operational mandates of PSCs. Through strong and concise international regulations, one can avoid situations where PSCs legitimize their own actions through self-interpretations of the regulations. This is exemplified in the UK and US guidelines where PSCs are given the right to use lethal force when a situation is deemed as posing an imminent danger.³¹¹ Without effectively determining what an imminent danger is in a piracy context, the guidelines provide room for the PSCs to self-interpret what can be characterized as imminent. Not only is this weakening the authority

³⁰⁷ Cf. Chapter 7, p. 70-73

³⁰⁸ Shankar, *Jurisdictional and Immunity Issues in the Story of Enrica Lexie*.

³⁰⁹ Cockayne, *Make or buy*, 198

³¹⁰ Cf. Chapter 6 p. 69-60, 66

³¹¹ USA: US Coast Guard, *Port Security Advisory (3-09)*, UK: Department for Transport, *Interim Guidance to UK Flagged Shipping* 35

of states, it also generates a human concern as a self-interpretation of the right to use lethal force can have dramatic outcomes if not correctly initiated.

As in relation with the concerns having been raised in regards to multiple principals, where agents can set the different principals up against each other in order to increase their power, one can argue that the same is reflected internally when regulations have weak wording. In situations where the wording of the regulations lacks strength and accuracy, the agents have the possibility to use the wording within the document to favor their own interests and legitimize their actions. Consequently, inconsistency and weak insubstantial wording leads to a “war” built around words against words, as both parties can interpret the regulations into legitimizing their own actions. From the findings of this thesis one may argue that the current flaws within the wording of regulations have been in favor of the PSCs as they can use the wording of the documents to operate more freely

Territorial states

It can be deemed as evident that it is the territorial states’ regulations that are the root of the problem when discussing the obstructing scenarios related to innocent passage. But as revealed throughout this study, the decision of territorial states to be careful with permitting weapons into their own territory can be grounded in what is seen as a needed protective measure. With their demonstratively being a lack of substantive regulations evolving from flag states, one can presume that territorial states find it necessary for the safety of their own seafarers that their borders are unwelcome for foreign vessels sailing with PSCs. With states such as Yemen, Oman and India already having raised notifications of concern regarding the safety of their own seafarers, the unwelcoming territorial regulations one can argue are there for a reason.³¹² Hence, one can therefore put forward that territorial states are not the only ones to blame for the unwelcoming laws and the rise of floating armouries. Accordingly, if the unwelcoming laws of territorial states are a result of flag states lack of encompassing regulations, the responsibility is multilayered. This reflects that the solution to the problem needs to be dealt with through collaboration at a regional or international level.

Cooperation through an internationally agreed set of laws does not seem unreachable. First of all, when looking at what UNCLOS determines as eliminating ones right of innocent passage,

³¹² Cf. Chapter 7

the operation of PSCs is not embraced.³¹³ The only ability states possess to eliminate the right of innocent passage is provided in paragraph 19 (2) of UNCLOS,³¹⁴ where states hold the right to make laws as long as they do not violate international law. Accordingly, if UNLCOS include PSCs with the right of innocent passage within their laws, territorial states no longer withholds the right to eliminate PSCs right of innocent passage. Secondly, reaching an international agreement does not seem impossible as similar agreements have already been made previously. This is exemplified through the agreements within the laws of UNCLOS providing vessels carrying nuclear weapons the right of innocent passage as long as they follow international requirements.³¹⁵ If one manages to implement such a system in relation to the private security industry, one can erode problems originating from the lack of uniformity between states regulations. Not only does it help eliminate hampering regulations initiating illegitimate actions, it also improves the operational quality, as companies are bound under an international set of laws holding internationally agreed minimum standards. In any case, the need for a solution in regards to PSCs right to innocent passage is highly needed, as the floating armouries are a ticking bomb which needs to be addressed.

Self- defense

With self-defense being the root of the operational mandate of PSCs in the anti-piracy fight, it is rather shocking that flag states have not articulated clear rules regarding how to legally respond to a pirate attack. Not only is it problematic that flag states are not articulating clear rules, the additional lack of uniformity between regulations makes the whole industry become more imprecise.³¹⁶ The legal complexity is effectually demonstrated as PSCs can be hired by one state, operate on a vessel from another state, and repel a pirate attack in a third state, where the offenders are from an additional state. Leander's characterization of the regulations governing PSCs as being "*fragmentary, contradictory and incomplete*" seems to be of relevance within the regulations governing PSCs in the anti-piracy fight. With the anti-piracy fight being rooted in an international context, the lack of uniformity generates legal implications for the PSCs and their operational mandates. Illustratively, there is a clear operational difference between the US guidelines stating that deadly force may be used when

³¹³ Cf. Chapter 5, page 58-57

³¹⁴ UNCLOS, *United Nations Convention on the Law of the Sea*, Article 19

³¹⁵ *Ibid.* Article 23

³¹⁶ Cf. Chapter 6.

there is reason to believe that there is an imminent danger,³¹⁷ to the Norwegian guidelines putting forward that the use of force should be avoided whenever possible and that firing shots at a person is only permitted when there is no other alternative.³¹⁸ With it being universal agreed that PSCs are only permitted to act according to self-defense, there should also be initiated an universal minimum standard for how to repeal a pirate attack according to self-defense.

What raises an additional concern is that the US, which has a long history of using PSCs and has encouraged flag states to introduce PSCs to the anti-piracy fight, has not dedicated a greater emphasis to its own regulations.³¹⁹ Accordingly, the USA with its important hegemonic and influential power should not just encourage the use of PSCs within the anti-piracy fight without thinking about the fundamental aspects securing an efficient and legitimate business. This claim is not only applicable for the USA, as the other flag states have also provided PSCs with the right to act according to self-defense, without effectively regulating what is meant by self-defense. This contradiction is demonstrated within the Norwegian and Danish regulations. Even though both states were reluctant to the idea of introducing PSCs to the anti-piracy fight as they were afraid of an increase in violence, the fear seems to have disappeared, as they have both authorized the presence of PSCs without effectively following up their concern within their own regulations.³²⁰ With the international community already faced with scenarios where armed guards have acted questionably, a warning light has been given that even though the actions take place far away from ones territory, one cannot avoid dealing with it. With the myriad of jurisdiction present in the anti-piracy fight, the need to increase the cooperation and uniformity between the various regulations is of great importance, especially when it comes to fundamental aspects such as defining the core of PSCs operational mandate, namely how to repel a pirate attack according to self-defense.

Weapon carriage

An important aspect related to the role of PSCs has been demonstrated within this study to be rooted in their permission to use weapons in self-defense. Therefore, it is of high significance

³¹⁷ US Coast Guard, *Port Security Advisory (3-09)*.

³¹⁸ Norwegian Maritime Affairs, *Provisional guidelines – use of armed guards on board Norwegian ships, 13*

³¹⁹ Shapiro, *Expanding Private Sector Partnerships Against Piracy*.

³²⁰ Cf. Chapter 6, p. 54-55

that flag states effectively regulate weapons within the anti-piracy fight as weapons are the source to many of the previously discussed findings. This is exemplified within the findings related to the right of innocent passage, floating armouries and questions concerning the legitimate use of force when repelling a pirate attack. Accordingly, through efficient and uniformly agreed laws governing the carriage of weapons, one can eradicate the root of many of the other concerns originating from the current regulations governing PSCs in the anti-piracy fight. This explicitly means that regulations, such as the ones belonging to the USA, where arms obtained abroad are not bound under the regulations of weapon carriage, need to be removed.³²¹ Consequently, when states clearly state that they do not regulate weapons obtained abroad, they directly lose an important monitoring mechanism affecting their control over PSCs. In order for states to maintain their dominance over the PSCs, it is imperative that states take on the lead role and work together towards developing clear and concrete rules regarding weapon carriage when sailing in the anti-piracy fight. Putting in place a regulative system where vessels register and identify the different weapons used on board, will help improve states' own monitoring mechanisms which in turn increase the legitimacy of the industry in the future.

Prosecution

As the findings of the study has exposed, the current system does not only lack mechanisms to grasp the legal use of force in self-defense, there is also a need for improvements concerning jurisdictional aspects. This amplifies the concern that the principals are not effectively regulating the agents within the anti-piracy fight. As Feaver argues, the best way to avoid shirking is through efficient systems of monitoring and punishment.³²² With the principals in the anti-piracy fight demonstratively not having any of these regulative means fully in place, the regulations dominance over the PSCs is negatively affected. The flaws within the current regulations governing PSCs have been exemplified through the incident in Yemen and the YouTube video.³²³ Not only do these case-studies demonstrate the lack of interest by states in what is happening far away from their borders, it also puts forward that the current monitoring mechanism is not adequately in place. Had states possessed good monitoring mechanisms

³²¹ US Coast Guard, *Port Security Advisory (4-09) (REV-4)*

³²² Feaver, *Armed Servants*, 60-61

³²³ Katz, *Fighting Piracy Goes Awry With Killings of Fishermen*. And: Maritime Connector, *Trident Group and Eagle Bulk Shipping recognized in a shooting video*.

within their regulations making it easy to follow the actions of PSCs, incidents would not just end up being based on words against words.

It has to be reckoned that there have been cases, such as the *Enrica Lexie* where armed guards have faced legal proceedings for their actions of killing two innocent Indian fishermen. The incident demonstrates that shooting based on wrong interpretations can face punishment.³²⁴ Even though the *Enrica Lexie* case brings hope that wrongdoings at sea will not continue being overseen, one can argue that the regulations still have some way to go. With the demonstrated weaknesses within the current regulations, it is more likely that the *Enrica Lexie* is of the rarity than the new common trend. Nevertheless, the *Enrica Lexie* has been a positive contribution towards raising awareness for strengthening the current regulations governing PSCs in the anti-piracy fight for two reasons. First of all, it has raised awareness about the presence of armed guards in the anti-piracy fight and the importance of efficient regulations embracing their operational mandates. Secondly, with their having been heavy disputes between India and Italia regarding jurisdictional rights rooted in disagreements of whether the incidents took place at the high sea or in territorial waters, the case has demonstrated the need for more focus at the international arena towards embracing the new legal field of PSCs in the anti-piracy fight.

The punishment of the wrongdoings of PSCs is not all rooted in lack of monitoring as one can also argue that the current lack of interest among states to raise trials against PSCs is rooted in the current blurriness of who holds the right and obligation of investigating a case. In order to avoid scenarios in the future where PSCs actions can lead to diplomatic confrontations according to disputes over who has the right to prosecute and who should take on the duty to prosecute, one can put in place an international set of agreements defining states' obligations. Such a system has already been put in place on land, as states have entered into Status of Force Agreements (SOFA).³²⁵ A SOFA agreement varies, but in general it is a treaty between two states where states have agreed that crimes committed by their own military forces in a foreign country will be held liable for prosecution within the military's home state.³²⁶ For example, US military guards operating in Afghanistan will face legal proceedings in the US for their actions committed in Afghanistan. So far, the SOFA agreement has only been subject

³²⁴ Hari Sankar, *Jurisdictional and Immunity Issues*.

³²⁵ R. Chuck Mason, *Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?*, Congressional Research Service. CRS Report for Congress, USA
<http://www.fas.org/sgp/crs/natsec/RL34531.pdf> (Accessed: November 10, 2013).

³²⁶ *Ibid.*

to military personnel acting for the state, meaning that currently, PSCs who are condemned as private citizens are not subject to this legislation. Even though PSCs are private actors, putting in place similar agreements in the anti-piracy fight can be an important means as it eliminates situations where no state takes on the responsibility of investigating a case. Even though the implementation of a SOFA agreements does not eliminate that there will continue to be hidden numbers regarding reckless shooting, it will, on the other hand help legitimate the industry as states have a clearer responsibility to ensure that guards will be held accountable for their actions. A SOFA agreement, or even better, an international agreement concerning both the use of force in self-defense and jurisdictional rights, should be a strong pull-factor initiating more cooperation.

“Soft Laws”

The non-binding guidelines, such as the ones belonging to IMO have demonstrated to have an influence within how PSCs are regulated. This is effectively demonstrated through how the Danish government has mainly relied on the various IMO guidelines when it comes to regulating the operational mandates of PSCs.³²⁷ With the IMO having a reciprocal relationship with a variety of flag states regulations, one need to recognize their role within the sector as it can be a source leading to more uniformity.³²⁸ But at the same time, if IMO is going to have an overall positive contribution it is in need of institutional change. First of all, the various guidelines put forward needs to be stricter and not provide room for flag states to maneuver according to their own preferences. If the IMO is going to be a source eliminating the current inconsistency, it can't continue emphasizing state self-interpretations, but rather guide states effectively into the same path. Secondly, with IMO being a well-recognized maritime organisation, it can be an important arena initiating international cooperation and meetings where the different actors can meet and discuss the current regulative issues. Conferences and working groups are important arenas for dialogue and raising awareness in regards to the need for stronger and more uniform regulations governing the PSCs in the anti-piracy fight.³²⁹

³²⁷ Ministry of Foreign Affairs, *Strategy for the Danish Counter-Piracy effort 2011-2014*, 28

³²⁸ Cf. Chapter 4, p. 34-37

³²⁹ Singer, *Corporate Warriors*, 241and

The Rules for the Use of Force (RUF)³³⁰ and the ISO³³¹ standards are both relatively new within the field, revealing that it is too early to interpret their strength in regards to initiating change. On the other hand, the topics the ISO standards and the RUF touch upon have throughout the thesis been demonstrated as areas in drastic need of improvement. While the RUF does not have much power in its current form, as its impact is fully dependent on flag states acknowledgment, the ISO standards on the other hand possess a stronger position. This is rooted in the ISO standards being built upon a system of accreditation directed towards the PSCs and not mainly the flag state as the RUF does. With PSCs operating at the global market facing competition from other companies, meeting the ISO standards is an important trademark highlighting the chances of survival. Not only will the implementation of ISO standards be an important trademark for the PSCs, it is additional a vital aspect needed within states regulations. If the regulations demand that the hired guards need to meet the ISO standards, they can eliminate the presence of “cowboy” companies which in turn decrease the chances of companies shirking. With PSCs working towards meeting the ISO standards, the vessel companies will no longer have to conduct quality checks as it has already been conducted by professionals.

With a lack of states encompassing their important regulative role governing PSCs in the anti-piracy fight, one can argue that what the sector needs to fill in the missing unit is the inclusion of a vetting system. According to Singer and Kinsey, a vetting system is an ideal source helping lift the regulations governing PSCs.³³² Building on the concept of the ISO standards, the notion of including a vetting system conducted by third parties can help secure the overall strength of the regulations governing PSCs. Examples of companies that can be introduced as third parties are insurance companies and risk consulting companies. The vetting procedures does not have to restrict itself to only conduct quality checks of companies, it can additionally be an important contributor towards controlling aspects such as the contracts between PSCs and vessel companies and ensure that the vessels hold the needed standards for carrying PSCs. In addition, they can keep records, establish datasets and collect information regarding companies as well as happenings at sea which has a direct link to the operation of PSCs. The inclusions of professional third parties can be an important source helping legitimate the binding-regulations governing PSCs in the anti-piracy fight as they invoke a more transparent

³³⁰ Cf. Chapter 4, page 39-41

³³¹ Cf. Chapter 4, page 37-39

³³² Kinsey, *Corporate Soldiers and International Security*, 135 and, Singer, *War, Profits, and the Vacuum of Law*, *Columbia Journal of Transnational Law*: 546

sector where at least the problems rooted within shirking is eliminated. Even though including a vetting system is not a solution to all the problems within the current regulations governing PSCs in the anti-piracy fight, it is an important measure in the right direction. Despite the fact that the introduction of privately hired third parties affects state's role as the major principal within the regulative relationship with PSCs, it can be argued as a highly needed security measure until states grasp their role and effectively regulate and monitor the PSCs through their own mechanisms.

Chapter 7: Conclusion

Introduction

The overall aim of the research has been to advance an understanding of the presence of PSC in the anti-piracy fight. This has been done by identifying and exploring different outcomes and scenarios originating from the multitude of regulations governing the operational arena of PSC on board vessels. In order to deepen the understanding of the problem statement, different case studies have been included throughout this thesis. This is exemplified by the examinations of the regulations belonging to four flag states that have accepted the presence of PSCs on board their flagged vessels. With the previous chapter having discussed the different findings of this thesis, it is now time to revisit the research objective, summarize the findings and provide concluding remarks based on the findings. The structure of this chapter intends to reflect whether the objectives of the study have been met.

Research objectives: summary of findings and conclusions

By having analyzed the regulations governing PSCs from different perspectives, such as through “soft laws”, territorial states, flag states and UNCLOS the findings of this thesis reveal that today, PSCs are not effectively regulated within the anti-piracy fight. With PSCs being an important actor in deterring pirate attacks, this is unfortunate for the further legitimacy of the industry. With their currently being weaknesses within states own regulations as well as lack of harmonization between states regulations, the current industry consist of a complex network where the principal is not efficiently controlling the agent. Without states regulations effectively being reflected in how PSCs operate, states los one of their most important regulative aspects, namely the ability to monitor the industry. Therefore, if one is about to fallow the same track where state sits on the responsibility of regulating PSCs, there is a need of institutional change where states acknowledge their important role of regulating the PSCs in the anti-piracy fight. Without states embracing their important responsibility by clearly and effectively regulating and monitoring PSCs, the outcome will backfire on the international community. Unfortunately, this is not just a warning as PSCs are

currently not only safeguarding ships against pirates; they are also posing an additional threat to the safety of innocent seafarers.

The introduction of PSC to the anti-piracy fight has demonstrated to be a worthy one, as they provide an immediate deterrence when facing a pirate attack. Unfortunately, the positive contribution can easily be reversed as states are not grasping their responsibility in acquiring that the companies hired are qualified and act lawfully. With currently no system securing the quality of companies taking on missions in the anti-piracy fight, the positivism related to the industry will suffer. In order to effectively and functionally regulate the PSCs, it has been demonstrated that it is of high relevance to know the case-specific aspects related to the field one intend to regulate. With the presence of PSCs in the anti-piracy fight being bound under regulations obstructing their operational mandates, the industry has seen the rise of unfortunate scenarios such as floating armouries. Floating armouries does not only demonstrate weakness within the current regulations due to PSCs ability to avoid regulations, it additionally demonstrates the current knowledge gap within the sector as there is a mismatch in awareness between those making regulations and the actual arena they intend to regulate.

As piracy is an international concern, it should be fought through international coordination. In the case of the presence of PSCs in the anti-piracy fight, this implies that their deterrent role should be regulated through an adequate set of standards defining their mandates. Already existing institutions such as IMO and UNCLOS holds a suitable position for hosting and initiating coordinative efforts within the sector. As demonstrated throughout the study, continuing in the same path where states create their own rules is not a legitimate and efficient way of regulating the industry. This is rooted in states not fully withholding their regulative dominance within their relationship with PSCs. Without state putting forward regulations that are thorough, as well as support their own chances of monitoring and punishing, they are providing the PSCs with the ability to shirk and increase their own power position. Even though reaching an international agreement is difficult and time-consuming, small steps towards an agreement are of great importance for the whole sector. Illustratively, as the different case-specific aspects discussed throughout the thesis are interlinked, sufficient international agreements within one area will replicate a positive contribution to the overall business.

Even though an international set of agreements is desired, it has to be reckoned that it is a time consuming process. Accordingly, another contributor of significance which can help improve the current regulations governing the PSCs in the anti-piracy fight is including third parties which can conduct different quality checks within the industry. By outsourcing duties such as quality checking PSCs etc., to insurance companies or risk consulting companies the industry can improve and legitimize the presence of PSCs in the anti-piracy fight. For states, this would be an important contributor helping ensure that the PSCs in operation hold the needed qualifications. Eliminating the presence of “cowboy” companies will increase the legitimization of the industry and increase the chance of a sector built around sincere actions.

With the presence of international naval fleets currently only holding an operational mandate to the end of December 2014,³³³ the role of PSCs is likely to increase in significance. If we are to face a rise in piracy originating from Somalia after 2014, seeking protection from PSCs is an immediate obtained protective measure compared to the prolonged procedure related to putting in place international mandated naval fleets. Therefore, with PSCs likely continuation within the field depending on the frequency of pirate attacks, establishing solid regulations governing the operation of PSC today, will help set a higher level of professionalism favoring future generations. It should be notified as a concluding remark, that PSCs are not a long term solution eliminating the source initiating piracy. With the real problems of piracy being rooted within the borders of Somalia, PSC are only a deterrent actor and not an answer to the origin of the problem.

³³³ Nato Operation Ocean Shield, Web site, <http://www.mc.nato.int/ops/Pages/OOS.aspx>; EUNavfor, Web site, <http://eunavfor.eu/home/about-us> (Both accessed: November 15, 2013).

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List of informants:

Interviews:

Interview 2013a, Norwegian Foreign Affairs, Oslo, Spring 2013.

Interview 2013b, Norwegian Ship Owners Association, Oslo, Spring 2013.

E-mail interviews:

Interview 2013c, Captain of a ship sailing in pirate prone areas. Experience with using PSCs, Oslo, Spring 2013.

Interview 2013d, Crewmember on a vessel in pirate prone areas. Experience with sailing with PSCs, Oslo, Spring 2013.

Interview 2013e, Crewmember on a vessel. No personal experience with PSC, Oslo, Spring 2013.

Interview 2013f, Professor at the University of Oslo, Scandinavian Institute of Maritime Law, Oslo, Spring 2013.

Interview 2103g, Professor at the University of Oslo, Scandinavian Institute of Maritime Law, Oslo, Spring 2013.

Interview 2013h, Siri S. Frigaard, Chief Public Prosecutor at National Authority for prosecution of organized crime and other serious crimes (Norway), Oslo, Spring 2013.

Interview 2013i, Stephen Askins, Pirate expert at Ince&Co, Oslo, Spring 2013.

Telephone interview:

Interview 2013j, Bestia Risk Consulting, Oslo, Spring 2013.

Interview 2013k, Katz, Alan, Journalist in the Newsagent Bloomberg, Oslo, Spring 2013.

Interview 2013l, Kristina Siig. Associate Professor, Dr. Juris at University of Southern Denmark, Oslo, Spring 2013.

Interview 2013m, Norwegian Maritime Authority, Oslo, Spring 2013

Interview 2013n, Norwegian Hull Club, Marine Insurance Company, Oslo, Spring 2013.

Conference:

- Norwegian Hull Club and Bergen Risk Solutions hosted an international full day seminar on Global Maritime Security. 84 people attended the conference. Even though the main focus was on piracy threats on the west coast of Africa, there were many debates and people of interest. Bergen, June 19, 2013. The speakers were:
 - Cyrus Mody, Manager in the International Maritime Bureau
 - Anders Løvik from Nato Shipping Centre
 - Arild Nodland, CEO of Bergen Risk Solutions
 - Eirik Østensvik, a Vessel Manager of CGG
 - Mr. Stein Are Hansen, Assistant Director of Norwegian Hull Club's Client Services department
 - Robert G. Ward, the Security Manager of Prestige Cruise Services (Europe) Ltd.,
 - Stephen Askins, a Solicitor Piracy Expert from Ince & Co Solicitors in London
- Information about the conference and Power Point presentations can be found at: <http://www.norclub.no/global-maritime-security/>

Appendix 1: Interview Guide

The subsequent section is a list of the general topic of the questions asked. They were all adapted according to the interview object.

1. Do you mind telling me about your experience/knowledge/work with PSCs in the anti-piracy fight?
2. How would you describe the current regulations governing the PSCs in the anti-piracy fight?
3. How is the current cooperation/partnership between states/other vessels/maritime industries in regards to effectively regulating the PSCs?
4. Do you consider the presence of PSC as a potential threat for the safety of other seafarers/pirates?
5. What is your opinion on the industries self-regulative initiatives (ISO, RUF, IMO, etc)?
6. Do you have personal experience /possess any knowledge about floating armouries?
7. Do you have/know of any specific rules/procedures you follow before and during a journey with PSCs?
8. How would you characterize states ability to monitor PSCs actions at sea?
9. What is your experience/knowledge of introducing more weapons to the anti-piracy fight?

Appendix 2: Letter from Yemen

14/09/2011 11:14 9100000012

**Embassy of
The Republic of Yemen**

Nassaulaan 2a - 2514 JS The Hague
Tel 070-365 39 36/7
Fax 070-356 33 12
yemenembassy@planet.nl
www.yemenembassy.nl

Ref : 88 /2011

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ



سفارة
الجمهورية اليمنية
لاهائي

The Embassy of the Republic of Yemen in The Hague presents its compliments to The Ministry of Foreign Affairs in the Kingdom of Norway, and would like to inform the esteemed Ministry about the shooting incident occurred against some of the Yemeni innocent fishing boats by the security crew members of the Norwegian Commercial Vessel [REDACTED], on August 2011, at Al-Mandab Gate, (Bab el-Mandab), on the Red Sea.

[REDACTED] Yemeni citizen, lost his life because of that shooting incident.

Therefore, the Government of the Republic of Yemen would like to express its **DEEPEST PROTEST** and requests for investigations by the Norwegian Government about the above mentioned incident and informs the Yemeni Government about the results of the investigations.

Meanwhile, we expect that the family of the innocent victim would have the legal compensations.

The Embassy of the Republic of Yemen in The Hague avails itself of this opportunity to renew to the Ministry of Foreign Affairs in The Kingdom of Norway the assurances of its highest consideration.

The Hague, 14 September 2011



To: Ministry of Foreign Affairs, Oslo ..

Appendix 3: Letter from Norway

The Royal Ministry of Foreign Affairs presents its compliments to the Embassy of the Republic of Yemen and, with reference to the latter's verbal notes 88/2011 of 14 September 2011 and 89/2011 of 15 September 2011, has the honour to inform the Embassy that its request for an investigation into an alleged maritime incident was immediately conveyed to the Norwegian police authority concerned. In this connection the police authority concerned has also received all the reports from Norwegian vessels in the area that could be of relevance for the case in question. On the basis of careful consideration of these documents, the Norwegian police authority concerned has concluded that the available information does not provide grounds for opening a formal criminal investigation of this case. The Norwegian police authorities would, however, appreciate the receipt of any further information that the Yemeni authorities possess that could shed more light on the case in question.

The Royal Ministry of Foreign Affairs avails itself of this opportunity to renew to the Embassy of Yemen the assurance of its highest consideration.

Friday, 11 November 2011

Embassy of the Republic of Yemen
Oslo

Appendix 4: Notification of concern India



भारत सरकार / GOVERNMENT OF INDIA
पोत परिवहन, मंत्रालय
MINISTRY OF SHIPPING,
नौवहन महानिदेशालय / DIRECTORATE GENERAL OF SHIPPING
"जहाज भवन" / "JAHAZ BHAVAN"
वाल्चंद क्षेत्रवाचंद मार्ग / W. H. MARG,
मुंबई / MUMBAI - 400 001

टेलिफोन: 22613651-54
फैक्स : 91-22-22613655
E-Mail: dgship@dgshipping.com

Tele: 22613651-54
Fax: 91-22-22613655
Web: www.dgshipping.com

सं./ No :

दिनांक / Dated:

File. No. 35-NT(4)/2012

7th March 2012

MS Notice No. 7 of 2012


Sub: Navigation off the Indian coast - transgressing of fishing nets - mistaking fishing boats with pirate skiffs

1. Shipping traffic closer to western Indian coast has been observed to be steadily increasing during recent times as merchant ships appear to prefer planning their passage closer to Indian coast as against the straight courses across the Arabian seas.
2. There are over 300,000 fishing boats in operations off the Indian coast. Fishing off the coast of state of Kerala and Karnataka is particularly intense during post South West monsoon and extends up to 50 NM from the coastline. Generally in these waters, FRP Fishing boats with 04-05 crew with outboard motors operate and engage in fishing activity with long lines and purseine gear.
3. Increasing shipping traffic closer to the Indian coast causes the merchant ships to, at times, transgress the fishing nets. On observing the approaching merchant vessel onto their fishing nets/gear, it is common for the fishing boats to raise alarm and to 'sail towards' the merchant ship to attract attention so as to avoid damage to their nets.
4. Reports are being received where merchant ships have mistaken the fishing boats to be 'pirate skiffs' In one such recent incident off the coast of West coast of India, Kerala, a merchant ship fired on the fishermen, killing two of the fishermen. The ship's security guards had assumed the innocent fishermen to be the pirates. In addition, there has been report of another report of firing of warning shots on Indian fishermen.

5. In another case, a merchant ship collided with a fishing boat. This resulted in sinking of the boat and loss of life of three fishermen while two of the fishermen are still missing. These unfortunate accidents have resulted in the detention of the suspected vessels and their crew members/security guards involved. In addition to these two instances, there have been numerous reporting of near miss collisions of fishing vessels with merchant ships off the west coast of India.
6. It has been reported that merchant ships are transiting very close to the coast to avoid the High Risk Area (HRA) which starts at 12 NM from the Indian coast. When the merchant ships navigate close to the coast, they do have close encounters with the fishermen. This interface may result in either a collision with the fishing vessels or at times merchant ships mistaking the fishermen to be pirates, fire upon the innocent fishermen. Such close encounters may result in the adverse consequences for the fishing vessels as well as the merchant ships.
7. While the ships are advised to maintain best management practices as per the advice of IMO, while navigating in the high risk area, it is clarified that continuing heightened vigil of Indian Navy and Indian Coast Guard has ensured that no cases of incidents of piracy have occurred in the Indian EEZ (up-to 200 NM from the Indian coast) since June 2011.
8. Therefore, all merchant vessels are advised;
- a) to take note of dense fishing traffic on Indian coast, the possibility that they may be approached by these boats for safeguarding their nets / lines and should not mistake these fishing boats for 'pirate skiffs' or PAGs and navigate with extreme caution when approaching up-to 50 NM from the Indian coast, and,
 - b) to take cognizance of IMO Circular MSC.1/1334 dated 23 Jun 2009 with regard to appreciating sufficient grounds for suspecting the fishing vessel to be a Pirate Action Group (PAG).
 - c) to report sightings of any suspicious craft within Indian EEZ to Indian Coast Guard on contact details mentioned under para 7 below.
9. All merchant ships are further advised to report the presence of armed Guards on board to Indian Navy (email: wncmocmb-navy@nic.in; fax: +91 22 22661702) / Indian Coast Guard (email: mrcc-west@indiancoastguard.nic.in or indsar@vsnl.net, or icgmrcc_mumbai@mtnl.net ; Telephone: + 91 22 24388065,

24316558, Fax: +91 22 24316558, +91 22 24333727) in compliance to para 3.8 of IMO circular MSC. 1/Circ 1405/Rev.1 dated 16 Sept. 2011 and para 7.6 of Ministry of Shipping, Govt. of India Circular F. No. SR-13020/6/2009-MG (pt) dated 29 Aug 2011.

10. This is issued with approval of Director General of Shipping.



(Capt. Harish Khatri)

(Dy. Director General of Shipping (Tech))

Appendix 5: Report of incident in Yemen, Norwegian Maritime Authorities



Vår dato
26.09.2011
Deres referanse

VEDLEGG 5
Vår referanse og arkivkode
201126825
Vår saksbehandler / Direkte telefon
Morten A. Lossius

[REDACTED]

Unntatt offentlighet iht.
offentlighetsloven § 15,
første ledd

[REDACTED] transitt gjennom High Risk Area i August 2011.

Sjøfartsdirektoratet mottok 21.09.2011 en note fra Yemens Ambassade i Haag hvor det ble angitt at en fisker fra Yemen var blitt skutt og drept etter ildgivning fra et norsk fartøy. I noten fra Yemen ble IMO nummer til skipet angitt samt at den som angivelig var blitt skutt var navngitt.

Etter forskriftsendring av 1. Juli 2011 skal skip som har benyttet maktmidler varsle Sjøfartsdirektoratet innen 72 timer.

Sjøfartsdirektoratet mottok 6. August, 2011, en rapport fra overnevnte skip om at varselsskudd var løsnet fra skipet i forbindelse med en hendelse som ble vurdert som et angrep fra pirater.

Nærings- og handelsdepartementet bestemte at noten fra Yemen, inklusiv de rapporter Sjøfartsdirektoratet hadde mottatt fra skip hvor maktmidler var anvendt skulle oversendes Kriminalpolitisen for en vurdering av en eventuell etterforskning av hendelsen. I dette materialet er rapporten fra [REDACTED] vedlagt i oversendelsen.

Dette til orientering

Med hilsen

Nora Olsen Sund e.f.
-Avdelingsdirektør-

Morten Ålsaker Lossius
- Senior rådgiver -