The regulation and use of armed guards for protection of merchant vessels transitioning high risk areas

A comparative study of two Western European states' approach to the employment of armed security

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Foreword

This thesis is part of the political science program on democratic development assistance, which teaches different forms of intervention and involvement with transitional democracies, failed states or territories temporarily placed under international supervision. The linkages to democratic development assistance are found in why the use of force is sanctioned, how it is managed, and by whom *legitimate* force may be employed when facing a non-state actor operating from the sanctuary of a failed state.

As a serving Norwegian army officer I am schooled in the theories on military arts, including *raison d'état* and the inherent link between political objectives and military action as presented by Carl von Clausewitz in the work known as *On War*. Clausewitz himself was a product of the Westphalian concept of state legitimate monopoly on force, through his officer training and experience as a warfighter. The Military Academy (Krigsskolen) in Oslo, teaches the ideal of monopoly on use of force as a core function of and by the state, and that the use of military force should be limited to actions that supports a higher political goal. The authorization of, and legitimate use of force is also tied to our national values. When faced with the surge in piracy, Norway amended a national policy and legislation allowing for contracting of private armed security, and as such deviated from the until then prevailing norm and national policy for state monopoly on force. This change made me question the political leaderships' perception of those ideals. The above observation of change in national legislation and practice is the motivation for the thesis at hand. Throughout my work with this thesis, I have been cognizant of any normative effect my officer training may have introduced to my understanding of the principle of the state monopoly on violence. I have therefore strived to minimize any potential bias that this background may have imposed upon my work with this thesis.

1: Introduction

The state monopoly on legitimate use of force may be viewed as a benchmark for democracy. This especially points to transparency and accountability related to the use of force. Transparency and accountability is for a large part sought through political oversight and provision of guidance and objectives for use of armed force. It is also central to public understanding and acceptance of the necessity of society's use of force. Political oversight of why and by whom force is used has been an important mechanism in reducing and controlling the level of state violence.

Democratic rule is defined as *good governance*, and established democracies see democratic rule as *the only game in town.* This comprehension is why most established democracies are involved at some level in promoting democracy as the most suited form for governing a state. Democratic processes are based on checks and balances between the people and the political elite. Re-election and renewed trust is the only way to stay in government. An important sales strategy for promotion of democracy is its ability to create and maintain a safe and secure environment. Key to this sales strategy is the monopolization of legitimate use of force under the control of an elected leadership which seeks to reduce the level of violence within society. This is central to the *social contract*. When established democracies move away from the practice of direct (*de facto*) control on armed force to a legislative (*de jur*) control on use of force, authorizing commercial interests and private actors the right to bear arms and use armed force, a key element in the sales strategy for democracy may be seen as changing. The change from *de facto* control to *de jur* management and commercialization on use of force, allows for transition of economic power into military power.

Approximately 80 percent of global trade is transported by sea. Sea transportation is channeled via some strategic chokepoints due to the placement of major ports and harbors, but also due to length of routes and economy of transport. A lot of trade goods have expiry date deadlines, so longer transit routes with lower risks is not always an option for ships transporting such goods. Modern day piracy or armed robbery at sea affects global economy, safety at sea and the security of seafarers. Contemporary piracy off the coast of Somalia expanded from petty theft and plundering of goods aboard transitioning ships, to major crime and hijacking ships with crew and goods for ransom. The change in piracy efficiency and the increased risk to merchant fleet operations, for both goods and personnel forced the shipping industry, flag states and the international community to develop policies and countermeasures. One of the countermeasures is the use of armed guards. Armed security may roughly be

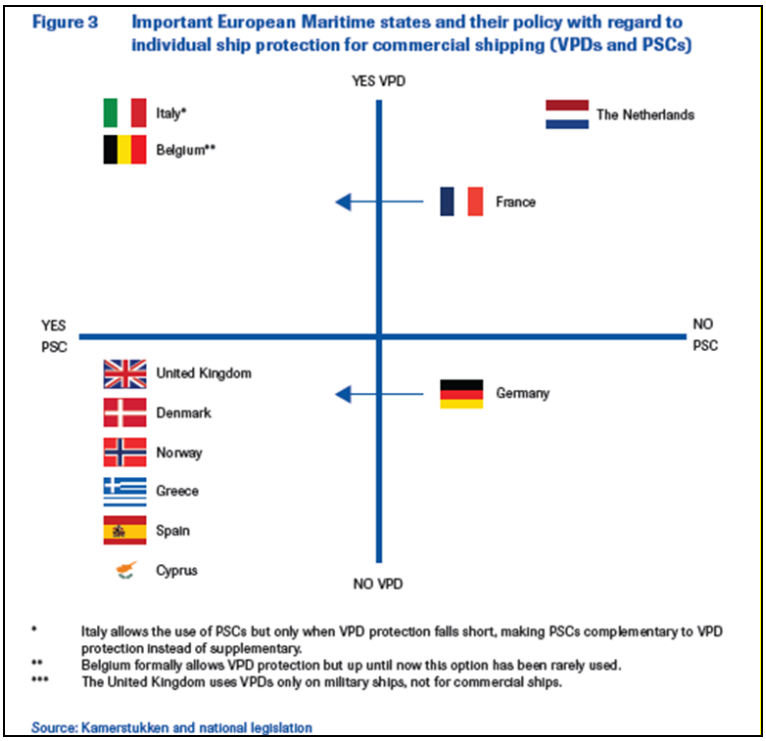
divided into two main categories: government provided Vessel Protection Detachments (VPDs) and commercial private armed security guards or Private Military Security Companies (PMSCs). As an alternative to trained armed security by either VPD or PMSC, some ship owners opted for arming the ships` crew itself, whilst others chose to follow military escorts when transiting high risk areas (HRA). Countermeasure policy and regulation is entirely the responsibility of the flag state in terms of which of the solutions the state allows or provides for. Either option will provide political, legal and operational challenges for the flag state, the armed security operator or the ship owner and ship's captain.

The above understanding and the questions this raised, initiated a search to identify how the different European states approached the use of private armed force in the maritime environment. The search unveiled which of the European states that practice a strict policy and a strict set of regulations, and which states that practice more liberal policies, but not necessarily regulations on the use of private armed force in maritime environment. The result showed that the Netherlands and Norway were at opposite ends of the chart. Additional searches on merchant fleet size and sailing patterns made the foundation for this comparative study.

This thesis will explore how the Netherlands and Norway decided and implemented an armed guard capability in response to the contemporary piracy surge.

Thesis

The different flag states' acceptance and regulation of armed guards for protection of its merchant fleet is displayed in the below figure (Ginkel, Putten, and Molenaar 2013). The basis for this thesis, as depicted in the figure, is that the Netherlands and Norway as Western European flag states, military allies and signatory partners to the same maritime treaties and regulations, have very different national policies and regulations for employment of armed guards aboard merchant ships. The research question is therefore: *which factors and leading arguments may explain the observed divide in policy and regulations between the two flag states?*



The thesis will examine theory on the state and state approaches to the principle of state monopoly of legitimate use of force. Subsequently, the thesis explores the national leading arguments or discourses, legislation and doctrine within the two flag states. The thesis will specifically be looking at which leading arguments that prevailed within the two flag states leading to two very different contemporary policies and regulatory solutions for maritime security.

Scope and disposition

The scope of this thesis is to explore and compare the basis (*truths* or interpretations) for state policy, regulation and practices on armed security at sea by two Western European states. The study will be limited to the period from 2007 to 2017. The time period covers the surge in piracy and the initial pressure placed on the flag states to develop policies and regulate measures aimed at protecting merchant vessels against modern piracy. The end-date for the time delineation is defined by the decline in the public debate, and the implementation of flag state (renewed) policies. Reports, records, academic works and books on contemporary piracy and private armed security including private military security companies (PMSCs) flourished at the outset of the debate across the Western world, but faded as changes to regulation and policies were in place, and measures materialized. The end of the time scope also coincides with the latest well-documented debate in the Netherlands on regulations for armed security.

As stated at the beginning of the outline of the scope, this thesis will only consider the use of force in the maritime environment as there are other international regulations applicable for operations in the land domain.

Deployment of warships patrolling high risk areas (e.g. EUFOR Operation Atalanta and NATO Operation Ocean Shield) will be included as part of the flag state's overall counter piracy strategy, but will not be covered in-depth as the focus of this thesis is on the use of force by embedded armed guards.

The thesis has four chapters. Chapter 1 introduces and outlines the research problem and scopes the thesis. Chapter 1 will also present methodology and provided definitions for terminology central to the thesis. Chapter 2 presents the theoretical framework, including theory on the state and state monopoly on legitimate use of force. The chapter covers both history and evolution on theory on state monopoly on use of force as well as contemporary views and understanding of the state monopoly on use of force. The comparative study and analysis of the two flag stats is covered in Chapter 3. Chapter 4 summarizes and provides a conclusion to the findings from the analysis, and will also offer recommendations for how state monopoly on legitimate use of force *may* be managed when employed beyond the reach of the states' appointed responsible institutions.

Methodology and literature

This thesis is a comparative case study of two subjects' (sovereign flag states') decision process for development of a policy and regulation of armed force against modern piracy (Andersen 2013). The methodology will be a qualitative study of available texts which will be subject to an analysis of discourse including leading arguments which have shaped decisions leading to a change in previous practice (Bratberg 2014). The analysis will also include process tracing. Process tracing is an analytical approach which utilizes the chronology of events to identify causal explanations for an observed practice internal to the case (Bratberg 2014, 149, Collier 2011, 823). Process tracing will support in the understanding of the evolution of discourses. Discourses are an institutionalized way of thinking, communicating, receiving and acting, and can be observed in both text and in social practice. The critical discourse analysis seeks to unveil how texts or communications are affected through perception, and how that discourse further affects society at large. Perceptions or interpretations are the variables in the study. The communication will contain both open and latent meanings. In part of the study the analysis will include a breakdown of specific

wording. The choice of wording is important for the understanding of the social structuring integral to communication (Halvorsen 2008).

Comparison of relevant variables follows the critical analysis of leading arguments, and encompasses the differences in perception and interpretation which have affected decisions. Identified factors which may unveil variables are: State history related countering acts of piracy, ships' exposure to piracy and state strategy for countering piracy beyond the flag state's own territorial waters, current regulation on use of armed force, and contemporary discourses on legitimate use of force. The analysis will apply Fairclough's three effects to establish how the discourse have affected the social practice (Bratberg 2014). The critical discourse analysis will be used to compare knowledge and understanding of surroundings in relations to the prevailing norm for state monopoly on legitimate use of force in the context of the modern surge in piracy, social relations between the state and commercial actors, and identity and self-awareness related to the legitimate use of force.

The theoretical foundation and contemporary views presented in chapter 2 will be used to support the analysis of the discourse. The theory will also aid in the analysis of the subjects interpretation of the norm for state monopoly on legitimate use of force by which the two states have developed its' policy, regulations and social practice. Comparison of variables should support the explanation of the causes for difference in decision and social practice between the two subjects.

The literature used for this study spans from academic research work by recognized scholars and institutes, theses and articles, government documents and legislations including legislative hearing notes, to journals and news chronicles. The literature and texts are mostly secondary sources, of which the majority is categorized as institutional sources. Primary sources are relatively few. Primary sources included the study encompass texts related to governmental documents including official responses to these (Halvorsen 2008). In addition, the thesis has included both states' maritime doctrines, which communicate the state's policy, ambition, *de facto* capability and interpretation of relating international treaties.

The process of obtaining information revealed a distinct difference between the two states. As opposed to the Netherlands, where the available documentation and academic works were plentiful, the situation in Norway uncovered a much lower degree of academic involvement. Besides Østensen (2013) and Berndtsson & Østensen (2015), established Norwegian academics and institutions have for the most been silent. Searches for information did provide

some theses on Norwegian and international legal aspects on the *de jur* practise for use of force (Candidate No 588 2011, Ahnefeld 2011, Williams 2014), but only one relating to the socio-political implications on the private use of armed force (Klinkenberg 2013). Studies on relating issues are equally scares and are for the most theses from the Norwegian Staff College. These relate to the employment of warships against modern pirates (Johansen 2010), the status of PMSCs during conflict (Sandborg 2009), and outsourcing of military tasks by the Norwegian Armed Forces (Olsen 2008).

The candidate was allowed access to the Royal Norwegian Navy's seminar on *Naval Coordination and Guidance for Shipping* (NCAGS). Participation at the seminar provided access to information not disclosed to the public, and both formal and informal dialogue with actors central to the change proposals in Norwegian policy and legislation. None of the verbal information provided through verbal dialog has been utilized without being verified through available literature. Except from the presentations, point papers and personal notes from the NCAGS seminar all the sources used are publicly available.

A challenge faced during the information queries was that many of the literary sources at first glance presented similar perceptions of the prevailing norm and equal skepticism towards private use of force. This first impression forced a revisit of all search-string combinations in order to ensure that there were no confirmations-biased words included in the searches. The re-visitation did not uncover any biased wording, which support the confidence in both the literature, and for the findings of this thesis.

The above outline of the literature speaks to the evaluation of validity and reliability. In terms of validity, the literary sources that have been sought out are both general to the topic, and specific to the two flag states. A large number of the references used in the acquired literature were pursued in order to obtain more details. This urge for more and supporting data ensured that the initial information was validated by supplementary sources. Evaluation of reliability of the sources followed much the same approach. Reliability speaks to the precision and objectivity of the data. As the literature, or data used in this thesis are based on previous academic works, published material and legislative texts the level of reliability has been established through several of the sources' access and use of these same primary data.

The thesis is written in English in order include non-Norwegian readers, as both of the states analyzed are proficient in the English language. In addition, the majority of sources utilized are only available in English and any translation may serve as a filter which may alter the

originally communicated information. Misspellings in citations are primarily due to the authors' use of *United States English* versus *British English*. Misspellings in citations have not been corrected.

Definitions and codification efforts

In order to provide a common understanding the following paragraphs will elaborate, define and where possible reference legal codifications of terms central to this thesis. Codification efforts for both pirates and private armed security guards are important for the understanding of any political dilemmas either of the two options imposes. In addition, Vessel Protection Details (VPDs) are defined in order to provide the reader with an understanding of VPDs as a capability. Private armed security and VPDs are equally complicating as the various port states, flag states and coastal states all have a responsibility in regulating the use of armed force, and all have varying approaches to state monopoly on legitimate use of force.

Definition and codification efforts on piracy

Piracy is defined as any illegal act of violence or detention, or any act of depredation, committed for private ends against a ship or against persons or property on board ships on the high seas outside the jurisdiction of any state. This definition is a compilation of the piracy definition provided in Article 101(a) of UNCLOS (UN 1973, 60). Piracy has since its appearance presented a political and international challenge due to the intricate difficulties of national, international or coastal state jurisdiction (Campbell et al. 2010, 207, Geiß and Petrig 2011, 4). A key reason for why piracy is viewed as more severe than similar acts on land, is the vulnerable state of the victims, which are confined aboard a vessel, surrounded by an environment in which mankind has limited ability for flight and survival. Piracy is also viewed as one of the foundational threats that shaped the development of European navies in the 17th century (Sjøforsvarsstaben 2015, 27). The threat of piracy attacks impacts the unilaterally agreed freedom of navigation and as such impacts functions of society far beyond the direct victim. This impact has prompted that any state can prosecute and punish any actors involved in piracy (Kelly 2014, 27-28).

The contemporary understanding of piracy and the impact it has on society is a continuous process. Piracy was viewed as a problem of the past without relevance to modern treaties. Efforts to establish sufficient means to effectively prosecute and thereby suppress modern piracy was hampered by a shortcoming in the understanding of piracy as a threat to society, and by opposing national interests by some of the states affected by the phenomena (Geiß

and Petrig 2011, 52). Piracy as observed in the 21st century have made an international impact, but is for the most confined to some specific areas in the Indian Ocean, specifically the Gulf of Aden and the Somali basin, the Gulf of Guinea outside West Africa, the South China Sea, and the Strait of Malacca (Marley 2011, 40-43, Murphy 2010, 93). In the Gulf of Aden, piracy developed from around 1995 when armed local fishermen boarded foreign fishery vessels claiming financial compensation or unauthorized tax (Campbell et al. 2010, 211, Marley 2011, 56-60). Piracy in its modern form has well organized structures, consisting of leadership functions, intelligence network, logistics, armed action groups and ransom brokers. Acts of piracy are organized and executed from both shore and larger vessels. Larger vessels providing longer operational reach and endurance at sea as the larger vessels function as floating operating bases from which smaller boats are launched. Pirated ships are moved and anchored in territorial waters of non-functional states, whereby both ship and crew are guarded until a settlement has been made (Geiß and Petrig 2011, 10-12, Campbell et al. 2010, 212).

"Throughout the 20th century, codification efforts relating to piracy were largely determined by the perception that piracy amounts to an historical phenomenon hardly in need of elaborate codification, rather than an imminent problem of the modern world. To some extent, piracy was not even perceived as being worthy of any specific codification at all and, accordingly, the rules that ultimately found their way into UNCLOS' piracy regime, were never the subject of any in-depth discussions. For the most part, the rules relating to piracy were simply imported from previous draft conventions or earlier treaties, with all their intricacies and loopholes." (Geiß and Petrig 2011, 51,52)

The lack of appropriate codification of piracy, beyond that which was inherited from earlier drafts of UNCLOS, makes it hard to develop a coherent and effective international counter strategy.

Definition and codification efforts on private armed security

Private armed security guards are defined as *"Private contractors employed to provide Security Personnel, both armed and unarmed, on board for protection against piracy."* (IMO 2011a, Annex page 1). The International Maritime Organization (IMO) uses the word *maritime* instead of *military* in its definition of PMSCs. Armed security operations in general require a certain degree of security related proficiency, and often beyond the level of policing tasks, therefore the word *military* is likely more descriptive. The International Committee of

the Red Cross (ICRC) uses a more elaborate definition, where PMSCs are categorized as commercial businesses that provide military or security services (ICRC 2008, 9).

There is not sufficient granularity in the above definitions to understand the full range of differences in private armed security. Non-state or private armed security guards are defined as personnel bearing arms to protect life, ship and goods, but are not part of the state's organized monopoly on violence. This definition covers the range from *ad hoc* armed merchant sailors with very limited or no training, in the lawful use of firearms, to a team of private armed security guards. Arming of individual sailors and ship crews, who are laymen in the use of armed force, is the lowest level for armed security for countering acts of piracy. The level of training among private armed guards, range from *some* training and up to proficiency acquired through years of military experience. Protection of merchant ships in pirate infested areas have employed or utilized armed security spanning this entire range. The definition of PMSCs provided by ICRC covers most of the alternatives for hired embedded security. Private *Military* Security Companies (PMSC) is the term that will be used throughout this thesis when there describing private armed security in the corporate form, whereas private armed guard or private armed security guard will be the term used for describing the phenomenon, concept or function.

The status for codification of private armed guards is in no better shape than that of piracy. The codification of private armed security is often blurred by misconceptions of what private armed security *is,* together with biased historic images of mercenaries. Fortunately, there are protocols which can support the codification, but even these require interpretation.

The Maritime Security Committee (MSC) of the IMO was equally in need of a definition and regulation for embarked private armed security guards, which manifested itself with a guidance for ship owners, -operators and -masters (IMO 2011a) and a recommendations for flag states on the use of privately contracted armed security personnel (IMO 2011b). The IMO documents provide clear requirements for the employment of embedded private armed security (Pitney Jr. and Levin 2014, 38). IMO is careful to not dictate the employment of embarked armed security as *the* solution and remarks that the employment of security measures remains at the digression of the flag state and the constraints of national law. IMO did not provide a codification of private armed security guards, but declared that capability needed to be regulated under the flag state's domestic law.

In order to move beyond the misconception that private armed security, contracted with the protection of merchant ships, are mercenaries, elimination of that option should serve as a starting point. Protocol I of the Geneva conventions identifies two criteria which define a mercenary. The same two criteria are included in the set of criteria which are used to define a mercenary contained within the UN Mercenary Convention which entered into force in 2001. Provided private armed security guards are limited to protective duties, they do not fall under the definition for mercenaries (Pitney Jr. and Levin 2014, 96). The above conclusion coincides with analysis done in other studies. A 2009 study into the legal status of private military security companies (PMSCs) who provide security during operations in the land domain concluded that armed security guards were operating in a legal grey zone, and should be codified as *unprivileged belligerents* leaving them without the privileges specific for combatants (Sandborg 2009, 4). The study was specific to armed security guards on land, and did not consider the legal status of armed security at sea.

The absence of a definite codification of private armed security guards made the Venice Commission initiate a study to problem. The Venice Commission is the Council of Europe's advisory body on constitutional matters, and is tasked to provide legal advice in support of member nations (2014). The Venice Commission did not reach an agreement on the status of private armed security guards, and chose instead to reference the Montreux Document, which will covered in-depth under contemporary approaches to use of force, reaffirmed the international obligations of states in relation to employment of private armed guards (Cameron 2009, 5, 19). Another study, which also discarded the mercenary codification since private armed guards cannot be held accountable in accordance with the Geneva Conventions, concluded that armed security guards should be codified as *civilians*, which is in line with the recommendations in the Montreux Document (ICRC 2008, 14-15). Codifying private armed guards as *civilians* will leave them subject to normal criminal investigation (Østensen 2014, 19). Until there is a concluding codification effort, private armed security guards should be treated as *civilians*.

A PMSCs operator throws his weapon overboard prior to entering sovereign territorial waters. Photo: Unknown / Undisclosed.

The Montreux Document has so far provided the best clarification of private armed security guards' legal status. A lack of transparency in the employment and use of force of private armed security contractors has been core to often voiced caution against the industry in many studies on the subject. Building on the Montreux Document the private security community itself produced the *International Code of Conduct* (ICoC), which will be covered in-depth later, is a branch standard for private armed security actors (ICoCA 2010). The provision of a state supported branch standard also helped in distancing the security industry from being tagged as mercenaries.

Definition of military vessel protection detail

The Royal Netherlands Navy defines VPDs as military armed supplements to other protective measures for civilian ships. The Dutch definition details a very defensive posture for VPD operations (Royal Netherlands Navy 2014, 347).

"VPDs are unique in the maritime security paradigm, as they introduce military personnel, equipment, and activities—including military-specific command and control hierarchies—directly into the commercial maritime sector, aboard private vessels. This infuses sovereign state military operations into commercial activities." (Oceans Beyond Piracy 2017, 1)

Descriptions of VPDs encountered in the literature do not specify the nationality of VPD in relation to flag state or ship registry. There are records of VPDs supplied by states other than the judicial flag state of which the use of force has been controversial (Oceans Beyond Piracy 2017, 1). One of the controversies was related to absence of regulations for third party use of force operated and delivered from aboard a Norwegian registered ship (Prestegård 2013). For the purpose of this thesis it will be assumed that VPDs are provided by the flag state in which the ship is registered. Vessel Protection Details (VPD) as defined is an embedded armed unit derived from the flag states military force.

There is no specific codification for vessel protection details (VPDs) as these are regular combatants and therefore are protected under the Geneva Conventions. As regular combatants, the use of force will be subject to interstate agreements which offer a different complexity.

2: State monopoly on legitimate use of force

This chapter will set the theoretical foundation, and will serve the purpose of identifying both the prevailing historical *norm* and some theoretical perspectives on the evolution of the state and the state monopoly on legitimate use of force. The chapter will end off with a short introduction to contemporary best management practice for the employment of armed force for countering acts of piracy.

Establishing a legitimate monopoly on the use of force

The origins of the concept of state sovereignty can be traced back to the treaty of Westphalia in 1648. (Kissinger 2014, 25-26). The principle or norm that states should have a monopoly on legitimate use of force has evolved over time, starting with the Treaty of Westphalia. Among the concepts that were conceived in or after Westphalia was the way of organizing the diversity of socio-political regimes into states and regulating the use of force between these entities. On the regulation on the use of force, the Treaty of Westphalia limited the legitimate right to stand up an army to that of the state. The treaty aimed for the cessation of private military entrepreneurs as independent actors, and sought to ensure that the *state* took command of the use of armed force, by claiming all private armies as unlawful (Høiback 2014, 67). The intent behind the treaty has been identified as a wish to avoid the shed of blood through regulating the right to mount armed force over disputes. The intent captured within the treaty has laid the foundation for concepts that still apply (Avalon 2008). The establishment of standing armies forced the development of permanent infrastructure which led to a new set of dynamics leading up to the modern administration and fiscal constructs (Høiback 2014, 67). The abolishment of private armies, and the establishment of standing militaries as a function, both challenged and solved issues related to the *king's dilemma*. The *king's dilemma* is the balance of maintaining a standing military force, at the ready and in large numbers in the absence of an imminent threat (Smith 2005, 20). The new challenge was the financing of such a large standing force, whilst the former issue of loyalty to a large extent was solved. The monopoly on legitimate use of force as prescribed in the treaty is an early version of how the concept is understood in the modern sense.

The understating of *state* as a construct has changed over time, from being geographically focused to becoming a geographical and functional based entity. Functions of the *state* include certain responsibilities to which the governing regime will be held accountable both internally and externally. A widely used understanding of *state* is the ideas presented by Max Weber, which encompassed the existence of an administrative apparatus with a successful

claim to monopoly on *legitimate* use of force within its territorial boarders (Weiss 2012, 17, Ghani and Lockhart 2008, 116). State in the modern sense is based on Max Weber's theory on the power of imposing one actor's will on another, supplemented by Hobbes' *social contract* theory. Hobbes' *social contract* entails the power of collective cooperation towards a common goal, where the governing body's legitimacy is based on consent by subjects of the state (Ghani and Lockhart 2008, 116-117). Thomas Hobbes' ideals were presented in the book *The Leviathan* through the assumption that conflict was best resolved, and could only occur if subjects of the state were prohibited from using force in pursuit of individual interests. Hobbes' ideas of individual subordination to central authority have influenced the origins of the modern norm on state monopoly on violence (Krahmann 2009, 2). Hobbes' view on man's nature was thus opposed by Rousseau and Locke (Fukuyama 2012, 26-28) who offered less violent views on the nature of man. Locke argued for man's rights, whilst Rousseau argued that man was more disposed to flight rather than fight in the presence of imminent violence, and as such claimed that the outset of man was more peacefully oriented. He state was also defined through its legitimate monopoly to claim taxes within its territory, as presented by Joseph Schumpeter (Løkke 2018). Taxation has historically been key to the state's ability to provide security and funding of military campaigns (Fukuyama 2012, 113). The legitimacy provided to the governing body by the governed is, and was never static. Legitimacy is monitored, reaffirmed and challenged through the electoral processes. This include policy and the legislative approach to monopolization of rights held by the state which by no means are set (Ghani and Lockhart 2008, 117-118).

State monopoly on legitimate use of force should be viewed against the following aspects in order to be recognized as legitimate in the sense provided in the theoretical norm:

"Firstly, it determines <u>who</u> is permitted to use force, namely the democratic state and its agencies. Second, it involves an agreement on what is considered the <u>legitimate</u> use of violence and on what basis, such as outlawing of torture and the proportionality of force. Finally, the definition proscribes under which <u>circumstances</u> and for what <u>purposes</u> state actors may employ force, including public security and national defence. The issue of who is permitted to use force is of central importance. " (Krahmann 2009, 2)

Other concepts that originate from the conferences in Westphalia are *raison d'état* and *national interest.* These two concepts were intended to rationalise and limit the use of force (Kissinger 2014, 30). *Raison d'état* and *national interest* should both be viewed as supplements to the states' claim to legitimate use of force, as both concepts provide some

form of predictability of the conditions that are likely to trigger the use of force. The use of force is legitimate when executed as a function of the state, is directed to fulfil a national political objective and executed in a manner not challenging to universal human rights. This presumption is recognizable within the two concepts, hence force should be utilized for specific purposes and only in the interest of the state. *Raison d'état* refers to that structure of the state which purpose is to employ legitimate force on behalf of the state in order secure the states interests. The concept of national interest must be understood and adapted to situations where the state or its proxies employ force beyond the jurisdiction of the state's own territory (Kissinger 2014, 3).

The following paragraphs will cover the early implementation and proliferation of the concepts for state, and state legitimate monopoly on use of force beyond the European continent.

From a European order to a world order

In the era of European expansion and colonialism, states and government institutions in Europe were established in accordance with the early interpretations of the Treaty of Westphalia. The Westphalian principles are a core foundation for the existing world order. The Westphalian principles were spread and literally missioned outside the European continent, as the European influence spread.

"The Westphalian system spread around the world as the framework for a state-based international order spanning multiple civilizations and regions because, as the European nations expanded, they carried the blueprint of their international order with them." (Kissinger 2014, 6)

The *blueprint* referred to also incorporated the state's monopolization of legitimate use of force (Høiback 2014, 293).

From the initial period of expansion into new territories and to the return to self-rule for colonized countries in the 20th century, there was fluctuation in the level of state approach monopoly on legitimate use of armed force. Some of the major commercial entrepreneurs, who pioneered and funded the explorations into new territories, stood up their own private armies for protective purposes. The need for enhanced security arose as private and commercial adventures challenged local governance, and indigenous peoples' way of life. Enhanced security measures undertaken by private armies were also in part due to the European states' approach of limiting state regulations to the use of force to within its

European territories, and for state's own armed forces (Pitney Jr. and Levin 2014, ix, 8, 107). The states' limited regulation on the use of force beyond the European continent parred with the lack of available military capability made the rise and use of private armies *acceptable* up to a certain degree (Britannica).

In more recent times, the Charter of the United Nations, or UN Charter affirms the state as the *only* legal entity in the supranational or global context (UN 1945, 3). The UN Charter as such reaffirms the evolved concept and definition of state as first addressed in the Treaty of Westphalia. The UN does so by proclaiming that the state is *the only* sovereign entity. The UN Charter repeats that a key function of the state is the provision of peace and security: hence the state should monopolize the use of force within its sovereign territory, and serve as the legal and accountable provider of legitimate force in matters of interstate dealings. This responsibility is essential to the *social contract* between the state and its subjects. Subjects of the state encompass own citizens, and those who temporarily resides within the state's sovereign territory. An important tool related to the keeping of peace and maintaining the collective security, is the existence of a common understanding of why and how force may be applied under different conditions. There is a distinct difference in the use of force internally and externally. Most states communicate the distinction on use of force internally and externally through law and specific jurisdiction and responsibility of the enforcing agencies. Legitimate use of force within the sovereign territory is governed by internal policies, while legitimate use of force against external threats are legitimized externally (Leander 2004, 9).

As identified in the above paragraphs, the consensus of the state as the sovereign entity in interstate dealings has been proliferated and evolved over time. The state's legitimate monopoly on the use of force has been equally proliferated, interpreted, evolved and implemented to the point of global acknowledgement. The next paragraphs will elaborate on the *ideal* followed by contemporary views on the states legitimate use of force.

Regulating the use of force – The norm

The ability to rule is inherently linked to the capability of exercising command and control, and to employ violence purposefully, both internally and externally. The link between ruler and the security apparatus exists in order to claim and maintain sovereign rights, impose a rule of law, and protect the state, including its resources and subjects (Smith 2005, 10-12). Throughout history rulers have financed a security apparatus, sometimes through the contracting of a mercenary force. A challenge associated with employing a mercenary force is loyalty, which essentially is linked to payment (or the right to plunder) in exchange for the

services provided. As presented earlier, the Treaty of Westphalia sought to outlaw mercenary armies, and over time the nation states replaced mercenaries with conscripted citizen armies or in some instances professional armies (Smith 2005, 30, Kissinger 2014, 46-47, Høiback 2014, 67, Bailes, Schneckener, and Wulf 2007, 21). The private use of force should be seen as a challenge the sustainable political solution to any conflict, and to the state's claim to legitimate use of force (Jarstad and Sisk 2008, Chapter 5).

Being part of a state's military force is a profession and not an occupation. The difference is that a profession requires special knowledge and set of skills to exercise a specific function of society. A profession is further recognizable through expertise, responsibility, unity and identity (Brunborg 2008). Members of the state's military are also required to be loyal. The state's demand for loyalty from its military professionals provides the group and individual with a special social status. That status comes at the cost of individual rights like for instance the freedom of speech (Klemet 2016).

"The restrictive interpretation of what role of private actors should play in owning and allocating the means of coercion developed progressively in the course of the 18th and 19th Centuries to become dominant only in the 20th." (Leander 2004, 13) Starting in the 1640s and with a shift in pace in the 18th Century, the move towards state owned conscripted or professional armies provided several benefits. Its basis was the need for a loyal force in high volume which shared a common goal with the ruling elite and citizens of the state. These requirements also strengthened the *social contract*, as the subjects give up the right to use force for private ends and pay tax in exchange for the ruler's provision of security, both internally and externally (Smith 2005, 7-12). Just as state monopoly on legitimate use of force became dominant in 20th Century, it was observed that the level of monopoly reached *"…its peak in the 1960s."* (Krahmann 2009, 15). The choice of words implies that the application of monopoly on legitimate use of force either stalled at the 1960s-level, or diminished thereafter.

The link between the state and the employment of force also serve a more practical, than moral function, as identified in the works by Carl von Clausewitz. Clausewitz was a Prussian officer who served in a military culture developed on the very principles of the Westphalian treaties. Clausewitz has been viewed as a pioneer in bridging military means and actions with political goals and objectives. The bridging of the two ensured the prioritized and appropriate strategic effects for use of force. Carl von Clausewitz identified the Treaty of Westphalia as a turning point (Clausewitz 1993, 394). The turning point occurred as states started to organize and monopolize the use of force, whilst abolishing the practice of private armies. *"War is*

merely the continuation of policy by other means" (Clausewitz 1993, 99) is often cited in order to explain the relationship between politics and the utilization of *military* force. That statement is often used in an expanded or extrapolated version to define or justify the use of military force beyond interstate conflicts, which was the focus of Clausewitz's theories.

Summarizing the theoretical ideals presented above, it seems clear that state monopoly on legitimate use of force was never fully implemented in line with the original treaties and views. The original intent, views and theories are however still a guiding norm and general direction contained within international charters (Krahmann 2009, 23). There has been fluctuation and development in the practice of state monopoly on violence throughout history. The development of view interpretation and practice will continue, as will be elaborated in the following paragraphs.

Regulating the use of force – Contemporary perspectives

As identified above, the implementation and application of the norm for monopoly on legitimate use of force has fluctuated over time. Contemporary perspectives on use of force are shaped by the prevailing interpretation of the norm and the level of adaptation of those same norms or ideals. There are two main directions for management of the monopoly on use force - *de jur* versus *de facto.* On deciding between the two directions, the state's approach does not need to be an absolute (Weiss 2012, 17). The implication of accepting Clausewitz's view, that the use of force is limited to be a continuation of politics implies that only political goals and state authorities are entitled to authorize the use of force to resolve a conflict of interest. The linkage of force and politics, where force supplies the means to reach political goals, requires the inherent capability to both *control* and *direct* the use of force to that end. Controlling and directing use of force has to be understood in parallel with the two main directions for monopolizing use of force. The following may support the understanding of the difference between controlling and directing the use of force. Controlling is a passive approach and entails provision of a framework (e.g. law) and if needed investigating wrongful employment of force reactively. Whereas directing is an active approach and requires a capability for political insight and authorization of force through the provision of goals, objectives, and a clearly defined purpose or desired end-state (e.g. issue rules of engagement, validate and approve targets, or restrict the use of force through provision of caveats (Egeberg 2017, 60)). This implication correlates with Krahmann's earlier presented perspective on the aspects required to legitimatize the use of force. A central aspect for employing force is related to the state's *purpose* for choosing to resort to use of force (Krahmann 2009, 2).

Contemporary studies have questioned what the word *monopoly* entails. What capacity is contained within the word *monopoly*, is it a strict *de facto* approach or is it a *de jur* capability (Leander 2004, 13). Does the norm prescribe the need to *direct* force, or is *controlling* force sufficient. The identified ambiguity related to the concept of *monopoly* is as much a product of an increasingly globalized world. The nature of globalization across the sovereignty claims of the state in general, has become a driving factor in the transformation of the state's claim to monopoly on legitimate use of violence. Legitimate use of force is increasingly becoming an international or intergovernmental regulation, and is increasingly including the private sector in the evolution of regulations on legitimate use of force (Leander 2004, 2-3). Krahman's observation and analysis of when in time the state's claim to monopoly on legitimate use of force peaked, merged with the challenging nature of globalism, and the increasing authority or leverage held by the security industry, is moving towards a redefinition for the norm on monopoly on legitimate use of force.

The contemporary view that state monopoly on use of force is under pressure or even broken, is amplified through different initiatives on self-regulation of and by the security industry (Klinkenberg 2013). Two of the prominent initiatives are the Montreux Document and the International Code of Conduct (ICoC). The Montreux Document was the first work which reaffirmed legal obligations held by the state in regulating private military security companies (PMSCs). The work related to the Montreux Document was established at the initiative of the International Committee of the Red Cross (ICRC) and the Swiss government, and was initially joined by 17 nations (ICRC 2008). As of late 2019, there were 56 signatory nations. While the Montreux Document provided guidance for states, the International Code of Conduct (ICoC) provided a branch standard for the security industry. The ICoC was produced in 2010, at the initiative of the industry itself with support from the Swiss government. The intent with ICoC is to ensure respect for human rights and international humanitarian law. ICoC have incorporated two distinct branch oversight mechanisms. Firstly a company self-assessment, and secondly a centralized evaluation and complaints function (ICoCA 2010). ICoC as a standard aims at regulating the security industry, which also has the effect of minimizing the states' regulatory role (Østensen 2013, 5).

Contemporary studies and articles on changes in the security environment offer alternative views and interpretations which redefine the states *monopoly* on legitimate use of force. Leading arguments have focused on the regulatory role – or tried to (re)define the state's responsibilities. *De jur* and *de facto* as presented earlier, constitute two very generic directions

for state management of the legitimate use of force, and other contemporaries have presented more nuanced alternatives. A Geneva Centre for the Democratic Control of Armed Forces (DCAF) study provided a more in-depth view on how the state could uphold its claim to monopoly on legitimate use of force which also included private PSMCs. The alternative models range from full monopolization (state control *and* ownership) to an open market (state regulation) approach. The most extreme model included the private security industry as an equal partner in the development of armed security regulation mechanisms. Inclusion of PMSCs would be through consultation, dialogue and cooperation. The study underlined that the models did not include civil society, an important stakeholder in the transformation of legitimate use of force. The *social contract* as such was not considered, which arguably presents a challenge for such an open market alternative (Bailes, Schneckener, and Wulf 2007, 6-9). The study concluded that the open market approach would be feasible due to the availability of retired military personnel. The study, however cautioned that the open marked model would turn economic power into military power much quicker than earlier in history (Bailes, Schneckener, and Wulf 2007, 19). Contemporary changes in regards to the norm are as much a choice of governments, as it is an external challenge of the norm for monopoly by private security actors (Bailes, Schneckener, and Wulf 2007, 1).

Many of the above observations are shared by other contemporaries. What differentiates the contemporary studies are the analysis of why, and the degree of impact contemporary trends will bring on the existing norm. Earlier it has been stated that state monopoly on legitimate use of force peaked halfway into the 20th Century, which also indicated a decline thereafter. From that peak in state monopoly of force, most Western states have witnessed and accepted a shift in power on the employment of force, whilst others have actively pursued and supported this shift (Krahmann 2009, 26). Not all studies related to the potential shift in the norm are in agreement whether or not the new norm for legitimate use of force will seek to empower the private security industry at the cost of the state. Anna Leander's research offered a less absolute outcome of the potential shift to the norm. The research references other sectors where former state ownership was transformed into a regulated business model. In these other sector transformations, the state assumed the role as contracting business partner, and transferred the role of service provider to commercial actors. Such sector reform is not a challenge to the default monopoly on legitimate use of force, it is a transformation of the state's function which will not *end* state control on the use of force (Leander 2004, 8 and 16). A sector reform where the state only retains the policy and legislative capability in relations to

monopoly on legitimate use of force, and outsources the functions of enforcing agencies, will most likely only work within consolidated states (Bailes, Schneckener, and Wulf 2007, 6, Krahmann 2009, 27-28)

A change in norm, policy, legislation and practice does not appear in and by itself. A change requires acceptance and approval provided through the social contract. In the study by DCAF, civil society's view on a change in the norm was not included, but other studies have looked at civil society's view on a shift in the norm (Krahmann 2009). A 2009 study into the influx of the private armed security industry in the United States and the United Kingdom provided two distinct observations. The first observation was that the state monopoly on legitimate use of force was declining and that the abolishment of armed private security was never completed. The second observation was a shift in acceptance for private armed security, paralleled by the publics' fading view on the police. The shift in public acceptance was partly due to increased open presence of private armed security personnel along with less visible police presence. The shift was boosted by a reduction in military spending and structure, whilst the public perceived need for security was increasing. According to the study, reductions in the militaries have provided the armed security industry with a solid and qualified mass for recruitment (Krahmann 2009, 15-16).

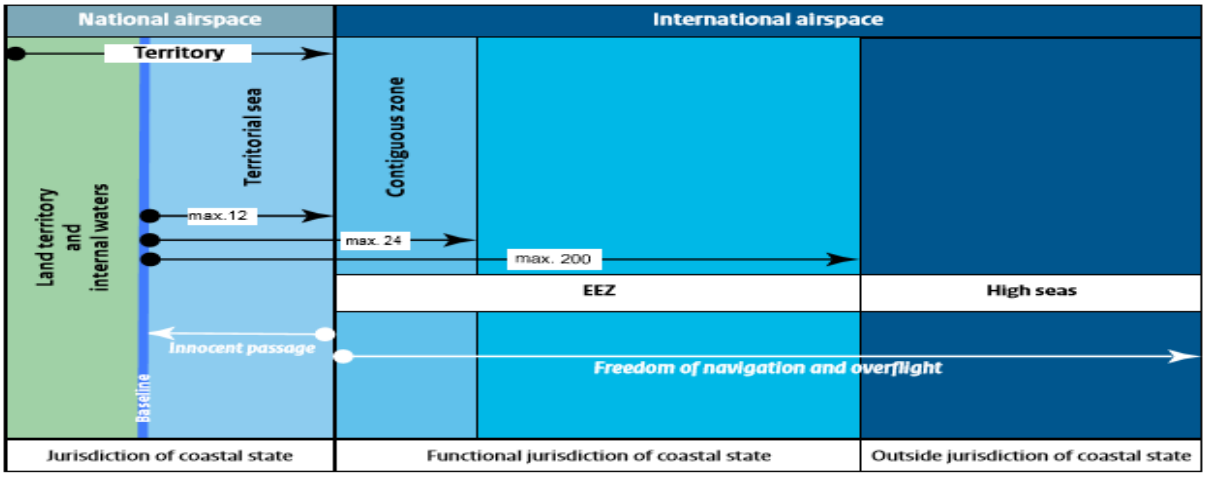
It is clear that there is pressure on the norm for state monopoly on legitimate use of force that has prevailed for centuries. However contemporary scholars are not in agreement as to whether the pressure is a challenge to the concept of state monopoly or merely a change to the management model of that monopoly. Real world politics may be somewhere between a *de jur* and a *de facto* approach, as the political solution is often driven by economy, available capacity and geopolitical interest. The contemporary perspectives may serve as guidance to the analysis of how Norway and the Netherlands may have interpreted state monopoly on legitimate use of force when shaping the respective policies and legislation on the use of armed security onboard merchant ships. As those interpretations are manifested in legal approaches, the following paragraphs will elaborate on international regulations specific for the maritime environment.

Regulations in the maritime environment

This part will provide an overview of relevant regulations for the maritime environment, ranging from the overall agreements for freedom on the high seas, to the specific intergovernmental steps to uphold the unilaterally expected freedom of navigation in the face of modern piracy. Studying international treaties, laws and regulations pertaining to travel at

sea makes it evident that there are three main areas relevant to this thesis. Firstly, treaties covering the right to innocent passage at sea Secondly, treaties covering acts of piracy. And thirdly, treaties on countering the piracy threat by force. Treaties for passage at sea have limited direct impact on the focus of this thesis beyond that of identifying the complexity related to involved authorities sovereign rights and obligations. Authorities with real or functional jurisdiction are obligated to suppress acts of piracy, and have the right to regulate different actors, including private armed guards' actions during passage.

The most recent Dutch maritime doctrine offers an historic description of the initial ideas that still govern the law of the sea which can be traced back to 1609 (Royal Netherlands Navy 2014, 41). The initial ideas on how the maritime environment should be sectioned between national and international jurisdiction, still affect the choice of route for travel and the obligations to suppress unlawful acts. Maritime passage involves a myriad of directly or indirectly involved authorities, all of who carry a degree of responsibility, obligations and jurisdiction. Involved authorities span from the flag state, via *all* encountered harbor authorities and coastal states with either real jurisdiction or functional jurisdiction of the water body. The below figure depicts the geographically delineated regulatory complexity for sea (and air) passage (Royal Netherlands Navy 2014, 43). Each geographical zone has its specific legal status, integrity and jurisdiction. This includes the right and obligation to legitimately enforce the law by means of armed response. The figure does not cover the functional jurisdiction of the flag state, the ship owner or the shipmaster operating in the different zones. The obligations of the ship owner, shipmaster and the flag state in relation to the employment of armed guards at sea, will be covered in the below paragraph on best management practice, which supplements the earlier provided presentation of the Montreux Document.



High risk area

In addition to the historically defined judicial zones of the sea, there are areas of increased risk which are tagged as a high risk area (HRA). HRA is a geographically specified area in which increased risk of violence to ship, goods or crew may be encountered.

High risk areas are assessed and geographically specified by the International Maritime Organization's (IMO) and published through the Best Management Practice (BMP) on safety at sea, or by separate evaluation by the flag state (IMO 2011a, Annex page 1). HRA is also defined as *"A geographical area of higher or specific risk to merchant ships."* (NATO 2006, 2-1).

The definitions for HRA do not specify or limit the threat to piracy alone, but covers all types of threats from robbery at sea to interstate armed conflict and war.

Contemporary best management practice

As presented in the above paragraphs, the IMO and related work provides the contemporary best management practice on safety at sea. Use of force in the maritime environment is the fine balance of sovereign rights and obligations, a vacuum of enforcement and investigative capability, and the vulnerability of passage in potentially high risk or hostile waters. The lack of unity of interest in codifying modern acts of piracy and private armed security guards ensures continued lack of a coherent global strategy to both phenomena. Only the pirates benefit for the lack of a coherent contemporary strategy. Given the summarized challenges, the international community in general and flag states especially are left with few options other than promoting the contemporary BMP for endorsement by affected port and costal states, hoping this will provide sufficient legal coverage for private armed security guards aboard the merchant fleet.

Summary of the theory on state's monopoly of legitimate use of force and regulations in the maritime environment

Chapter 2 has focused on the theoretical foundation and evolution of the prevailing norm for state and state monopoly on legitimate use of force, including supporting concepts. The norm for the state's claim on legitimate use of force peaked halfway through the 20th Century, whereby the norm thereafter was placed under pressure, partly by the security industry, and in part at some states' own choice. Contemporary research of any potential impact the recognized pressure has brought on, and will continue to bring onto the states monopoly on legitimate use of force, mostly follow the same extrapolated direction. The extrapolated

direction starts at the recognized peak and looks to explain the change or decline in monopoly on use of force. The differences in opinion, among contemporary scholars relates to whether or not the monopoly will cease to be the norm versus remain as a norm with a transformed management model. The latter part of the chapter focused on regulations for use of armed security in the maritime environment, including best management practices. The theoretical foundation presented will support in the analysis of the chosen approaches in the case study in the following chapter.

3: Analysis of how two Western European states ended up with different solutions for protecting merchant vessels against Piracy

This chapter will firstly review relevant history and experiences for the two flag states, before looking at policy for of state monopoly on legitimate use of force. The chapter will also provide a metric comparison of merchant fleet potential exposure to acts of piracy, and a metric comparison of relevant military capabilities from 2011 when both states' were in search of an armed security option. In the two last parts of the chapter, the two states' regulations for armed security will be outlined, and lastly, the discourses that shaped contemporary decisions will be presented and analyzed.

History and historic experiences related to employment of armed private security

Awareness of the state's collective history and historic experiences on the use of force as a means to mitigate specific threats will likely inform, affect and shape contemporary perceptions, decisions and policy on comparable matters in the future. Historic experiences of a negative nature will sometimes affect future decisions without considering the evolution of either threat, or means of force to counter the specific threat. Norway and the Netherlands are comparable in many aspects, but have very different histories and experiences in relation to the use of force externally. The following paragraphs on history and historic experiences is limited to two states' history on merchant fleet exposure to piracy, and state experience in fighting piracy and protecting national interests beyond the confines of own territorial waters. Relevant experiences date back to the 17th century, just prior to the conferences in Westphalia.

Norway became a sovereign state in 1905 when independence from Sweden was negotiated. Prior to its independence in 1905, Norway was a puppet state subordinate to the rule of either

Danish or Swedish monarchs. Norwegian subordination to neighboring states' goes back to the 14th century (Orning 2015). In the early 17th century, including during the Westphalian conferences, Norway was subordinate to Danish rule. Consequentially, the Kingdom of Norway was not an independent political or militarily entity with sovereign participation in early development of a state norm and of state monopoly on use of force. In the post-Westphalian era it was the Danish envoy and acting head of state, Hannibal Sehested who imposed the transition of the Norwegian army. By 1660 Sehested had replaced the Norwegian private contracted armies with a state controlled conscription army in line with the new norm for state monopolization of legitimate use of force (Hjardar et al. 2016, 178-216). As a puppet state Norway had very limited rights to establish and employ an independent foreign policy. The restrictions imposed during the Danish rule endured until October 1905, several months after independence was granted (Utenriksdepartementet 2015b). A result of the restrictions for an independent foreign political engagement is the lack of direct linkage and history with proceeds and treaties developed prior to 1905. Norway as an independent state and political entity has not been forced to deal with neither pirates nor the employment of private armed guards at the legislative level until the surge in modern piracy in the 21st century.

Historic accounts on countering piracy, records that Norwegian warships were dispatched to counter piracy in support of the merchant fleet as early as 1828 (Sjøforsvarsstaben 2015, 27) (Hjardar et al. 2016, 515). In more recent history, the state of Norway has on several occasions responded to the international call for employment of military force against modern pirates. The Norwegian navy, air force and Special Forces have all contributed with force elements in EU's Operation Atalanta and NATO's Operation Oscan Shield. Operations mandated to prevent or target acts of piracy off the Horn of Africa.

Norway has also employed a Vessel Protection Detail (VDP) capability aboard a merchant ship. During Operation RECSYR, which was the multinational effort to remove chemical weapons and chemical agents from the Syrian regime, a mixed team drafted from the Norwegian Coastal Ranger Command (Kystjegerkommandoen)

Norwegian Coastal Rangers Command Operators providing armed security aboard "Taiko" as part of OP RECSYR. Photo: Lars Magne Hovtun/Norwegian Armed Forces.

and the Norwegian Navy EOD Command (Minedykkerkommandoen) was employed as an embedded military security detachment aboard M/V "Taiko"[1] (Brendefur Unknown year). However there is a distinction between a VPD as defined earlier in this thesis and the VPD aboard M/V "Taiko". M/V "Taiko" was commissioned *by* the Norwegian government as a cargo ship for chemical weapons and agents. As a commissioned and temporarily military commanded vessel, M/V "Taiko" was provided with enhanced security measures while operating in Syrian territorial waters. The enhanced security measures included a naval shipmaster (captain), a VPD and an escorting Norwegian navy warship (Ege 2015, Brendefur Unknown year). The temporarily commissioning and embedding of a naval shipmaster provided MV "Taiko" with a legal status normally not privy to merchant ships. The political and military experience with providing a VPD aboard M/V "Taiko" proved the ability and utility of the Royal Norwegian Navy, even though the solution has not been explored to the fullest, or in a volume required to support the merchant fleet requirements for armed security.

The Dutch history and experiences as a sovereign state is much longer than Norway's. Dutch history includes participation in the development of the functional state and the state's monopoly of legitimate use of force, all the way back to the conferences in Westphalia (Kissinger 2014, 26). The Dutch history and experience with regulations for and employment of private armed security, including private militaries on a corporate level is also very long. The Netherlands as an emerging state made use of proxy forces in its efforts to obtain independence in the sixteenth Century. The proxy force was made up of *privateers* (Scott-Smith and Janssen 2014, 55). Privateers may be defined as private armed personnel commissioned by the state to fulfill the function of a military, and therefore also enjoy the privileges of a regular force. In addition to the state's own employment of private armed personnel during the 8o years of conflict with Spain, the Dutch also have the historic experience with the private armed force of the Dutch East-India Company. In the era of the Dutch East-India Company, starting in 1602 and lasting until 1799 the company was granted monopoly of trade and the right to muster and sustain a private armed force in order to expand the influence of the Dutch Crown. In the 17th and 18th Centuries, just short of the Dutch constitution of 1815, the Dutch crown allowed for extensive use of private militaries. Private armed militaries were contracted for the protection of Dutch trade, and for securing sea lines of communication as the Dutch interests ventured to India (Kissinger 2014, 18). The history also entails how the company's private armed forces grew in size and strength, to the point

[1] The Royal Norwegian Navy contingent book for OP RECSYR uses the term "*TAIKO Vessel Protection Detachement"* in describing the task, capability and effort by the embedded security detail.

where it was capable of defeating the British fleet and chase off the Portuguese (Britannica). The Dutch East-India Company was disbanded in 1799 after the company exceeded its initial grants by the Dutch Crown. The history and experience with the Dutch East-India Company's right to sustain a private armed force and how that capability evolved into an irregular military capability, clearly made a political impact on the Dutch of the time. *"The post-Napoleonic constitution of 1815 codified the state's claim to the monopoly of violence, and since then the state has maintained its primary position as security provider."* (Scott-Smith and Janssen 2014, 55). The first Dutch constitution with explicit claims to monopoly on use of force, was written in 1815, even though the Dutch ratified the initial concept and norm on state monopoly on legitimate use of force in the first half of the 17th century (Kissinger 2014, 26).

The private armed force of the Dutch East-India Company differs from that of the modern private military security company (PMSC) on some key aspects. *"The Dutch East India Company has even been referred to as "the first private military company," although this may be overstated."* (Scott-Smith and Janssen 2014, 55). Tagging the private armed force of the Dutch Eat-India Company as a private military security company (PMSC), is not an overstatement, but an incorrect statement, if 21st Century codification and definitions are applied. The private armed force of the Dutch East-India Company took an active part in hostilities, and should therefore be defined as a mercenary outfit.

Compliance and implementation of the prevailing norm for state monopoly on legitimate use of force

State interpretation and implementation of monopoly on legitimate the use of force, supplemented by the states' approach to the concept of national interest is central to understanding contemporary decisions in regards to regulation of armed security. As noted earlier, the prevailing norm for monopoly on legitimate use of force is under pressure by commercial interests and the encouragement of some governments. The pressure is to a large extent facilitated by globalization. Globalization has extended the range of *national interest* beyond the boundaries of the state's own jurisdiction. The commercial global reach of the flag state's merchant fleet had to accounted into the state's understanding *national interest*, as in the case in the Netherlands (Scott-Smith and Janssen 2014, 58). Commercial actors pressure for an almost globally available armed security capability for the protection of ships, goods and crew, is why it is necessary to establish a comprehension of the state's approach to monopoly on legitimate use of armed force.

In order to compare the interpretation and practice of state monopoly on the legitimate use of armed force between Norway and the Netherlands, the theoretical norm that prevailed until recent shall be used as a point of reference. As both subjects for this study are established and consolidated democracies, there are no identified reports of abuse of armed force by entities subordinate to either state. As such, comparison of governmental documents which include the states' interpretations of international regulations and treaties will be the primary tool for establishing the interpretation and practice of state monopoly on legitimate use of force.

The following category of documents is a part of the state's strategic messaging, and will therefore support the comprehension of the two states' view on legitimate use of force in the maritime environment. In the 2014 edition of the Dutch military's maritime doctrine (Royal Netherlands Navy 2014, 67) it was clearly stated that abiding by, and promoting international law is central to the national security strategy. The Dutch maritime doctrine references Article 90 of the Dutch Constitution where compliance to international treaties is included. The Dutch Constitution of 1815 did, as identified in outline of the history of the Netherlands, codify that the legitimate use of force was a primary function of the state (Scott-Smith and Janssen 2014, 55). The Dutch interpretation dating back to that codification was and still is a *de facto* monopoly on legitimate use of (armed) force.

Norway shares this approach to international treaties, and in part how compliance to international treaties is communicated. The current Norwegian military doctrine for maritime operations includes an equally worded statement on its strategy. The Norwegian strategy for the maritime environment covers a national commitment to, and promotion of a functioning international order for operations at sea, governed by the rule of law (Sjøforsvarsstaben 2015, 16-17). The Norwegian strategy is reaffirmed in the Ministry of Foreign Affairs' report on global threats to national areas of interest (Utenriksdepartementet 2015a, 52). The report describes challenges to international trade in general, and for Norwegian national interests especially posed by contemporary acts of piracy. Both documents provided background for the Norwegian choice of strategy. The specifics of the Norwegian strategy will be covered in a later paragraph, but in short, the strategy has three focus areas, where contracting of private armed guards is one of them. The conscious choice of strategy was, and still is based on the understanding that smaller states' activities and interests are very vulnerable in the absence of unilateral compliance to international regulations and order. This understanding is not unique to Norway. The strategy of own compliance and dependency on other flag states to follow

due, should be fairly common among states with national interests beyond the physical protection of the (flag) state's own jurisdiction and capabilities.

The study of military doctrine is relevant for understanding contemporary political ambition on use of military force. Both states' military maritime doctrine describe the state's merchant fleet's position and role in the national economy, which in both cases are quite formidable. Both doctrines' also reflect the political ambitions for use of force in the maritime environment. The most current Dutch doctrine (2014) included and detailed the Vessel Protection Details (VPD) concept and mission, as tasked by the government in addition to the roles and tasks for conventional Navy warships (The Royal Netherlands Ministry of Defence 2016, 280). The Royal Norwegian Navy was never tasked to provide embedded armed security by the government, as such the doctrinal description of the navy's role and responsibilities in relation to protection of the merchant fleet only detailed the use of warships (Sjøforsvarsstaben 2015, 58-59, 71 and 99-100).

National compliance and promotion of international treaties are a priority and integral to both states' foreign policy. Both states' also depend on other states' compliance as they service large merchant fleets which operate globally and beyond the state's own jurisdiction and enforcing capability. There are no clear statements pertaining to a *de facto* or a *de jur* preference in the texts, but the Dutch clearly indicate a preference through its doctrinal review and inclusion of the VPD concept, that the interpretation of state monopoly favors a *de facto* approach. The *de facto* approach is confirmed through practice. Norway on the other hand may indicate a preference for private armed security, as the task of embedded armed security is kept out of the concepts covered in doctrine, but is included as a focus area in the report outlining the state's strategy for countering acts of piracy. The Norwegian maritime doctrine indicates a preference for a *de facto* monopoly on force, but the Ministry of Foreign Affairs report clearly shows an acceptance for a *de jur* approach.

Exposure to modern piracy and governing mitigation measures

In order to compare the two states' basis for a decision on the use of private armed security, it is important to understand the underlying metrics for merchant fleet potential exposure to acts of piracy, merged with the metrics for the states' own ability to provide adequate protection. The intent with the following use of metrics is to establish an understanding of whether or not the state, with its existing functions and structures would be able to protect its national

interests. The results will support further analysis of these metrics may have affected political decisions when facing a surge in modern piracy.

In the 2012 Review of Maritime Transportation, UNCTAD lists Norway as the eight largest flag state in the world, with 851 registered ships, and the Netherlands as the 23rd largest with 576 registered ships (UNCTAD 2012, 41 (Table)). Not all of the vessels included in the numbers are operated in a pirate infested or high risk area (HRA). There are no exact recordings or register for ships transitioning pirate infested waters available for either of the two flag states, but there are estimates. In 2012 the number of HRA transitions for merchant ships flying the Dutch flag was estimated to approximately 250-350 (Ginkel, Putten, and Molenaar 2013, 13, KVNR 2014, 2, Scott-Smith and Janssen 2014, 59). There are no equal estimates for 2012 and Norwegian ships transition, but the numbers of Norwegian flag ships sailing through the HRA is estimated to around 1000 on an annual basis for any given year (Utenriksdepartementet 2015a, 52, Giske 2011). Given the numbers of transitions through pirate infested waters the ratio, being the estimated transitions divided on number of registered ships, for the two nations, puts Norway at 1.2 transitions per ship as opposed to 0.6 transitions per ship for the Netherlands. The transition per ship ratio is very rough, as it entails the total number within the flag state's ship registry, and does not account for ships which have multiple transitions versus those that never pass through the HRA. However, the ratio provides an indication of which of the two merchant fleets that endure the largest exposure to the pirate threat.

The primary mitigation measures available at the outset of the piracy surge in the Gulf of Aden (GoA), was the fleet of conventional warships with embedded marines or Special Forces. Both, Norway and the Netherlands have deployed warships in support of the international efforts to suppress acts of piracy. In August 2009 Norway deployed a warship as part of EU's Operation Atalanta in support of merchant ship transitions in the Gulf of Aden and surrounding waters (Johansen 2010, 7). Patrolling the HRA with large warships was costly and did not provide the coverage required to quell pirate activities. In order to share the economic burden the European navies operated on a rotational basis.

By 2012 Norway had changed its legislation in favor of contracting private armed security guards onboard ships transitioning the GoA HRA (Pitney Jr. and Levin 2014, 38). The Norwegian government never opted for an embedded military solution. Political awareness of the following metrics would necessarily have been a part of why an embedded military option

was not conceivable. In the Netherlands the employment of private armed security remained prohibited. Dutch policy and law only permitted employment of armed security when, and if such capability was provided by the Dutch military (Smallengage Lawyers 2015). Utilizing elements from the military did not require changes to the legislation. The VPD option was therefore both politically and *legislatively* available at the beginning of the surge in contemporary piracy.

The availability of the military, including knowledge and flexibility to mount VPDs was also a key factor. Relevant military forces capable of operating as VPDs were limited. Relevant forces between the two flag states amounted to the Dutch Royal Marines and the Norwegian Coastal Ranger Command. The Dutch Royal Marines is a conventional amphibious force of approximately 2300 marines (The Royal Netherlands Ministry of Defence 2016), trained and capable of operating in smaller teams during combat or combat like situations. The Norwegian Costal Ranger Command (Kystjegerkommandoen) is also a conventional amphibious force, but with only approximately 90 soldiers (Melgård 2010) and equal in capacity. A numeric comparison of the militaries show that the Dutch were in a far better position to deliver a military contributed VPD option. Indeed the Dutch could muster 25.5 Marines per 1 Norwegian Coastal Ranger Command operator. The share numeric comparison does not provide the correct picture even though it reveals a large difference in capability. In addition to the identified force numbers, the availability in the specific period must be considered. At the specific time when the two flag states were seeking a solution to protect national interests against the increasing threat of piracy, the NATO operation in Afghanistan remained a military focus and was the main force drainage for the majority of the NATO members. In 2011 the Norwegian Costal Rangers still maintained a percentagewise large contingent in Afghanistan, whereas the Netherlands had withdrawn all of its troops from Afghanistan by mid-2010 (Fox 2010). The redeployment from Afghanistan did not free all the Dutch Royal Marines as the Marines maintain a military presence in the Dutch protectorates in the Caribbean. A further application of the numeric approach, and without accounting for any other military commitments, gives the following relevant force to transitioning ship ratio. The capability of Norway was 0.09 operators per ship of the estimated 1000 transitions, whilst the Dutch would manage to muster 6.5 Marines per ship for its 350 annual transitions. The metrics used are based on a 1oo percent availability of the previously reported force numbers, and does not account for training rotations or other qualified leave of absence. From this very

rough analysis of numbers it is clear that by 2011 the Dutch had a potential military option, whilst Norway did not.

Even though the Dutch numbers indicate availability of qualified military personnel, the material required to operate VPDs were limited (Ginkel, Putten, and Molenaar 2013, 20). Lack of appropriate materiel was negatively affecting the efficiency, sustainability and flexibility of the VPD option. Independent of the numeric analysis above, both states are reported to suffer from a national security deficit specifically related to military capability to secure and protect the states maritime interests. In the Netherlands the deficit was identified as a lack in capability for global employment (Scott-Smith and Janssen 2014, 57), whilst in Norway there the deficit was identified as the imbalance between the states maritime interests and the ability to protect these by military means (Sjøforsvarsstaben 2015, 13). The Dutch Ministry of Defence produced an estimate on the expected amount of VPDs it would need in support of Dutch registered ships for 2012. The 2012 estimate amounted to 175 deployed VPDs (Ginkel, Putten, and Molenaar 2013, 20). There were no similar assessments for annual requirements for embedded protection for Norwegian registered ships.

Norwegian governments have been cautious of publicly sharing details on decisions related to the employment of force. The Stoltenberg II government which served at the time, was a coalition government who's decisions on use of force have since been publicly criticized ((NTB) 2019). It has later been revealed that the coalition government strongly disagreed internally in most matters related to use of military force (Egeberg 2017, 446-475). The combination of an internally disputed operation in Afghanistan, an inadequate volume in force and a contemporary Western trend for outsourcing of security operations to PMSCs, probably made the outsourcing of armed security for merchant fleets transitions east of Africa an easy decision. A bonus of outsourcing was that the decision served the function of an intra-governmental compromise, mitigating a lack of political will for more military deployments. Mitigating a deficit in the states capability through a legislative change in favour of contracting private armed security, moving towards a *de jur* approach on state monopoly on legitimate use of force became main stream, and was not unique to Norway (Bailes, Schneckener, and Wulf 2007, 26).

Summarizing the comparison on merchant fleet exposure and initial flag state mitigation strategies and options available in the early period of the piracy surge, reveal large differences in fleet exposure. On the use of conventional navy warships the two states' align on capability

and approach, whilst the capability to provide merchant fleet embedded protection measures differentiates severely. The rough metric analysis revealed a severe deficit in force volume for Norway. The revealed deficit was so clear that it must have played a part in shaping the decision by Norway to not provide military VPDs, but to build a strategy around the private hiring of armed security guards. The following chapters will study national framework and contemporary discourses.

Regulations and framework

Building on the above identified national exposure and mitigation strategies, this next part will go into the specifics of national regulations in the period 2011-2017.

Norwegian regulations and legal framework

Norwegian regulations differentiate between the employment of private armed security on land, and the employment of private armed security in the maritime environment. The employment of armed security for maritime protection is permitted through the *Norwegian Ship Safety and Security Act* ("Skipssikkerhetsloven") (2007), the *Norwegian Firearms and Ammunitions Act* ("Våpenloven") (1961), whilst the general employment of private security in general is regulated by the *Norwegian Security Guard Act* ("Vaktvirksomhetsloven") (2001). The employment of private armed security guards is therefore regulated through a cluster of legislations, and not through a single Act (Østensen 2014, 6). In 2011, shortly after the IMO published its recommendation for flag states on the use of private contracted armed security personnel, Norway changed its legislation for employment of private armed security. The imposed changes affected both the *Norwegian Ship Safety and Security Act* and the *Norwegian Firearms and Ammunitions Act*, but had no implications for the *Norwegian Security Guard Act*. This approach ensured that the changes for the employment of private armed security only were applicable for merchant ships operating in international waters or defined HRAs. Norwegian authorities viewed the legislative changes as *minor* in scope, and decided that the entire process of legislative re-wording and legislative hearing could be delegated to the Ministry of Trade and Industry. The amendments to the legislation were never subject to a parliamentary debate. The legislative and regulatory endorsement for employment of private armed security aboard Norwegian registered ships may therefore be viewed as a purely bureaucratic process and not an informed political decision (Berndtsson and Østensen 2015, 9).

"The government of Norway gave an influential boost to the acceptance of private security with changes to its maritime security and firearms laws that went into force on July 1, 2011. The Norwegians stressed that the intent of this legislation was not to encourage use of private security, but rather to ensure its responsible regulation." (Pitney Jr. and Levin 2014, 38)

The changes to the *Norwegian Firearms and Ammunitions Act* place Norway among the very few states which allow the use of 12,7mm semi-automatic long barrel weapons. The permission to acquire a 12,7mm high-power rifle provides the user with a capability for long range engagements, and destruction of hardened materials (Oceans Beyond Piracy 2017, 3). This change to the *Norwegian Firearms and Ammunitions Act* challenges the common perception of protection against a proximal threat versus the preemptive ability for engagement of a *potential* threat at stand-off distance. The majority of European states set the weapons caliber limit at 11,25mm which is caliber intended for semi-automatic pistols (.45 ACP). Additional changes to the *Norwegian Firearms and Ammunitions Act* included grants for private security guards to acquire fully automatic assault rifles, which typically are explicit for law enforcement and military purposes. The updates to the *Norwegian Firearms and Ammunitions Act* are thus very liberal compared to other European countries (Berndtsson and Østensen 2015, 14). The *Norwegian Firearms and Ammunitions Act* is not an easy read and require technical knowledge of weapons and munitions. As a consequence, the Norwegian Maritime Authority (NMA) has listed specifications for authorized weapons (2011, 6).

Observing the specifics of the changes to the Norwegian legislation, Pitney and Levine comments:

"On July 1, Norway issued exemptions to its domestic firearms laws, permitting shipping companies threatened by piracy to use armed guards on Norwegian-flagged vessels. The rule change required shippers to provide documentation of the vetting and training of security personnel to the Norwegian Maritime Directorate[2]*. They would additionally need to apply for a firearm permit from local police, which would authorize carriage of automatic weapons up to 7,62 mm, or semi-automatic weapons up to 12,7 mm."* (Pitney Jr. and Levin 2014, 97).

The Norwegian Maritime Authority (NMA) is the responsible directorate on matters related to employment of private armed security guards aboard Norwegian registered ships (Ginkel,

[2] The Norwegian Maritime Directorate is renamed the Norwegian Maritime Authority.

Putten, and Molenaar 2013, 24). The responsibilities of the NMA are detailed in the preamble to the *Norwegian Ship Safety and Security Act*, and in the guidance provided by NMA (Sjøfartsdirektoratet 2012). At a *Naval Coordination and Guidance for Shipping* (NCAGS) seminar[3] held in April 2016 in Norway, NMA as the appointed authority summarized its experiences with Norwegian employment of private armed security guards aboard Norwegian ships. In the period from July 1st 2011 until April 20th 2016, there were 2773 reported instances of Norwegian flagged vessels utilizing the services of armed security guards while transitioning the HRA off the coast of Somalia (Lofthus 2016, 29). The number constitutes approximately 25-30 percent of Norwegian ships transitioning through the GoA HRA in the reported period. NMA shared experiences on observed compliance with flag state policy and regulations for the employment of armed guards, referencing the reporting requirements stated in the national regulations.

Experiences with a *de jur* approach to employment of armed security guards were that the guards fulfill their protective function, but are beyond Norwegian authorities' oversight and inspection ability (Enersen and Fife 2011, 1, Lofthus 2016). Bottom line for the Norwegian experience with authority oversight of contracting of private armed security guards was summarized by the NMA as *"lack of"* compliance to regulations and guidance, and limited capability for oversight by the appointed directorate. NMA stated that there is *a lack* of reporting from ships on procedures for employing and contracting armed guards. There is *a lack* on declaration of firearms and munition permits obtained by the armed guards, and lastly there is *a lack* of reporting on completed HRA transitions which include embarked armed guards. The vetting and reporting of private armed security guards has been adequate in identifying companies and operators, but unsatisfactory for qualifications and conduct. Vetting of private armed security companies and guards is the responsibility of the ship owner, as stated in both the legislation and NMA guidance (Sjøfartsdirektoratet 2012).

The experiences presented by the NMA are in stark contrast to a statement by Norwegian authorities that the legislative changes would ensure the responsible regulation of private armed security (Pitney Jr. and Levin 2014, 38). Stating that the change would endure a responsible regulation communicate a capability to properly maintain oversight and if required investigate wrongful actions by private armed guards in accordance with the national legislation and international treaties. However, as clearly expressed by the appointed

[3] The candidate participated at the NCAGS event and all information referenced is identifiable through the written material that was made available via the Norwegian Navy`s NACAGS office.

responsible authority, the perception is that there is a lack of compliance, a lack sanctions for non-compliance, and also a lack of capability to investigate incidents. The non-compliance option available is to tag unqualified security companies as unwanted on Norwegian ships (Lofthus 2016, 32). The above experiences coincide with the claim concerning the reporting regime being unfavorable in the eyes of both ship owner and the armed security provider (Østensen 2014, 21). The claim is that neither ship captain nor security guard will necessarily be interested in reporting incidents to Norwegian authorities, as that potentially may spur negative reactions and impact the prospects for future contracts. Negative reporting may even result in a change or reversal of the existing liberal regulation.

In short, in 2012 Norway chose a legislative (*de jur*) approach to state monopoly on legitimate use of force at sea, by permitting employment of private armed security to safe guard certain private and commercial interests. The Norwegian legislation limits the employment of private armed security to international waters and defined HRAs away from own territorial waters. The geographical constraint on employment of private armed guards limits the national capacity for maintaining oversight on employment and capability to investigate and prosecute wrongful actions. The experience of non-compliance and lack of reporting on vetting, employment, and services provided by private armed security guards, along with limited state capability for oversight and investigation can only be viewed as an immature attempt of a *de jur* approach on state monopoly on use of force by private actors limited to the maritime environment.

The Dutch regulations and legal framework

The Dutch legislation both prior to, and during the surge in modern piracy, ensured that the Netherlands was among the few European countries that prohibited the use of private armed security guards. *"This leaves the Netherlands as one of the only countries in Europe to adhere to a strict interpretation of the state's need to keep a monopoly on force."* (Ginkel, Putten, and Molenaar 2013, 11). As the Dutch Constitution was written in 1815 there was a need for a contemporary policy on how to approach this strict *de facto* approach.

An outline of the development on the Dutch policy on protection against contemporary piracy, started in 2006 with the issue of the Dutch government's first comprehensive policy for protection against pirate attacks and armed robbery at sea (Zwanenburg 2012, 98-100). The challenge with this policy was that it was classified making it generally inaccessible. In 2008, the Dutch government provided another classified document, which covers the basis for the Dutch flag state's provision of security assistance to Dutch-flagged ships. The Dutch

Constitution of 1815 ensured a strict adherence to state monopoly on legitimate use of force. The constitutional *de facto* approach necessitated that the Dutch military would be the only legitimate provider of armed security. The chosen military solution would consist of small force elements that would be identified as *Vessel Protection Detachments* (VPD). VPDs would embark on Dutch-flagged merchant ships in order to provide armed protection services. The part of the 2008 policy document that were released to the Dutch Parliament was the list of criteria which the ship owner or ship were required to meet in order to qualify for state provided military VPD. The approach for granting VPD support was restrictive and required that all criteria's were met, including the implementation of IMO's *Best Management Practice* (BMP) (IMO 2011b) (IMO 2011a). Due to the strict policy, a very limited number of Dutch registered vessels qualified for VPD protection in the period. The restrictive approach raised discontent within the Dutch shipping industry, and were publicly questioned by academia (Ginkel, Putten, and Molenaar 2013, 9).

Not all Dutch-flagged ships are registered in the Netherlands, this added to the difficulties of qualifying for a VPD. Ships registered in the island state of Curacao were also flying the Dutch flag, but were not entitled to state provide protection when transitioning the GoA HRA. *"Consequently, when speaking of a ship flying the flag of the Netherlands, this can be either a ship registered in the Netherlands or a ship registered in Curacao."* (Zwanenburg 2012, 99) For the purpose of simplicity, this study will only consider ships registered in the Netherlands (proper), and therefore eligible for Dutch flag state provided embedded armed security.

An additional regulation in 2011, and the subsequent employment of VPDs, were based on two existing governing documents, one national – the Dutch Constitution, and one intergovernmental – the *Safety of Life at Sea* (SOLAS) convention (Ginkel, Putten, and Molenaar 2013, 13-14, Scott-Smith and Janssen 2014, 60). The 2011 regulation stated that: *"Indeed, Article 97(1) provides that "[t]here shall be armed forces for the defense and protection of the interests of the Kingdom, and in order to maintain and promote the international legal order"* (Zwanenburg 2012, 104). As a supplement to the two baseline documents, the Dutch penal code acknowledged the use of force as legitimate for self-defense, including for the protection of goods. The Dutch inclusion of goods under the inherent right to self-defense is unique in Europe (Zwanenburg 2012, 106). Like with Norway, the Dutch legislation for employment of armed security is complex and regulations are the product of several legislative works. In addition to the Dutch Constitution, which dictates a *de facto* monopoly of legitimate use of force, the Dutch *Weapons and Munitions*

Law (WML) prohibits the use of firearms by private security guards within the Netherlands, but has exemptions for temporary weapon permits acquired for self-defense aboard Dutch ships (Scott-Smith and Janssen 2014, 55).

The Dutch decision to employ military VPDs in accordance with the existing *de jur* approach in the Dutch Constitution and other regulations provided a transparent solution, as VPDs are drafted from the state's regular forces. The decided on solution encompassed elements from an existing military force subordinate to the national military command and control apparatus, an established military investigative and prosecution mechanism, and existing political oversight (e.g. budgeting). The VPD solution was therefore also in full compliance with IMO requirements for oversight and control. VPDs as a *de facto* function of the state was privileged to the state's rights (and obligations) to interdict, detain and arrest pirates in accordance with UNCLOS (Ginkel, Putten, and Molenaar 2013, 26). As such the VPD option offered a more flexible approach as the available tool set was more comprehensive than that of a private armed security guard.

Despite the legislative anchoring of the VPD option, Dutch authorities decided to seek advice through several research studies on the subject of embedded armed security. The studies on embarked armed security will be covered in the following paragraphs as these studies became part of the contemporary discourses on state approach to monopoly on legitimate use of force.

Discourses on state monopoly on legitimate use of force

Contemporary discourses provide a means to understand which perceptions that shapes the evolution of the state of affairs for a specific subject. Legislation and opinion may change as new information is made available either through internal or external input. The modern surge in piracy and the inherent increase in risk that specific phenomenon imposed on international trade routes, functioned as an external input to perception and the evolution of state of affairs for security at sea in general and the state of affairs for management of legitimate use of force especially.

Norwegian discourses on legitimate use of force against acts of piracy

The contemporary debate on the subject of armed security employed for protection of Norwegian flagged vessels was limited. In 2010-2011 there was some public debate on the subject, but a major debate never materialized. This was likely due to how changes to legislation was delegated to the Ministry of Trade and Industry and primarily managed the bureaucratic level. The 2011 changes to legislation succeeded a legislative hearing which

officially involved potential communities of concern. The legislative hearing only drew a few responses (Heldre 2011, Enersen and Fife 2011, Vervik and Prytz 2013, Meland 2011)[4]. Respondents primarily fit into one of two categories, namely bureaucratic responses from governmental bodies, ministries and directorates, and user responses from ship owners associations and maritime labor unions. The responses were for the most general in nature, stating that legislative provision for contracting of private armed security would challenge the state's legitimate monopoly on the use of force. The general and repeated opinion was that armed security should remain as a function of the state. The Ministry of Foreign Affairs (Utenriksdepartementet) cautioned against armed guards in general and urged for *all* other means to be explored prior to the use of armed force. However, the Norwegian Maritime Authority (NMA) emphasized the effect of embarked armed security and embraced the armed security option, as none of the ships protected by armed guards had been hijacked (Heldre 2011, 1). There was a general call for an oversight mechanism for private use of force at sea.

The call for oversight was accompanied by latent communicated expectations of compliance by all involved parties. All available responses concluded in a positive way for a legislative change in favor of a private armed security option. None of the responses were openly positive, but the conclusions were formulated in a way that seemingly provided acceptance. The general lack of negative feedback to *private* armed guards is likely due to the choice of wording in the legislative hearing. The hearing requested "*principle views on the employment of armed security guards"* (Heldre 2011), implying *private* armed security guards, but not clearly differentiating between private and military guards. The hearing request also invited input on alternatives solutions. The only respondent that brought up embedding a military capability was the Ministry of Foreign Affairs. The Ministry of Foreign Affairs presented the VPD option as an *alternative of necessity*, indicating that the VPD option was not an eligible option (Enersen and Fife 2011, 3). Prior to providing a response, the Ministry of Foreign Affairs met with representatives of the Norwegian Shipowners' Association (Rederiforbundet) who briefed on the associations' work on vetting and contracting private armed security, along with a presentation of what seemingly was the International Code of Conduct (ICoC) (Enersen and Fife 2011, 4 and 14).

There was limited open political debate on the legislative changes in favor of a private armed security option. There was also limited debate in the media, other than a news chronical by

[4] The public record of responses and comments to the official hearing on armed security on board Norwegian registered ships display a very limited interest in the topic.

Sosialistisk Venstreparti (SV) (Holmelid 2011). The chronical reaffirmed SV's general opposition for employment of armed force. A statement in the chronical indicated that it was a political decision, rather than an increase in acts of piracy that bolstered the requirement for additional countermeasures (Holmelid 2011). The 2011 spring edition of MARLOGG, a Norwegian shipping journal, presented a survey on maritime security (Brubakk and Jørgensen 2011, 2). The survey was undertaken by the Maritime Officers' Association (Sjøoffisersforbundet) and showed that 90 percent of the respondents, all Norwegian mariners wanted armed security *on board* as an addition to other physical countermeasures. The majority had a preference for military VPDs, but understood the existing challenge of available and qualified military capabilities. The survey in MARLOGG 2/2011 is the only identifiable record in which the Norwegian maritime industry discusses a military VPD option.

As identified in chapter 1 on the paragraph on sources, the Norwegian academia's participation in the debate on a potential shift in the states management model of monopoly on legitimate use of force was limited to a few individuals and papers, of which none were at the request or initiative of Norwegian authorities.

A 2016 Norwegian Ministry of Foreign Affairs report on *"Global security challenges in Norway's foreign policy"* addressed the issue of contemporary acts of piracy and how that threat potentially impacted and increased risk levels for the merchant fleet (Utenriksdepartementet 2015a)[5]. The report also described the proliferation and fluctuation in pirate tactics and geography. The Ministry of Foreign Affairs complimented the Norwegian counter-piracy strategy, which followed three separate, but complementary focus areas. The focus areas were the continued private contracting of private armed security guards, participation with military capabilities in multinational counter-piracy operations – primarily warships, Special Forces and maritime patrol aircrafts (MPAs), and thirdly financial contributions to regional efforts like the Contact Group on Piracy off the Coast of Somalia (CGPCS) (Utenriksdepartementet 2015a, 23-25 and 51-53). The report offers little in the form critical review including concerns of the decided counter-piracy efforts in general and for the use of private armed security especially. The uncritical view on the existing strategy eludes any changes including reviewing options for embarked armed security.

Concluding on the Norwegian debate and discourse on a national strategy for countering contemporary acts of piracy, it is notable that the debate has been limited. The limited debate

[5] Note that the English version is an abstract of the 66 pages in Norwegian.

is partly due to the bureaucratic, rather than political management of legislative changes and a changed policy on state monopoly on use legitimate use of force. The suggested changes to legislation and wording in the legislative hearing documents may unconsciously have steered inputs towards a positive response on a *de jur* management on monopoly on use of armed force. In the hearing response by the Ministry of Foreign Affairs it is revealed that the legislative change was initiated at the request of the Norwegian Shipowners' Association. Academic advice on changes to state monopoly on legitimate use of force was never specifically requested as part of the process. Communication of the changes to national legislation and policy was very scarce. The information provided by NMA on lack of compliance and oversight was given in a closed forum and is therefore unknown to the general public, academia and other communities of interest. Norway had no real open debate on the changes made, and there has been no follow-up debate on the level of compliance or effects of the changed legislation and policy. The change in Norwegian legislation and policy on state monopoly on legitimate use of force was in response to the initiative by the Norwegian Shipowners' Association. The changes show that the principles for state monopoly on legitimate use of force that had prevailed up until the initiative was formalized were set aside in favour of the shipping industry's interests and in the interest of international trade. The perceptions that inform the texts in the Norwegian discourse are pro-*de facto*, whilst the conclusions are lenient towards *de jur*. The practice is a change for a *de jur* approach, thus limited to the maritime environment.

Dutch discourses on legitimate use of force against acts of piracy

The contemporary debate and discourses in the Netherlands were very different form that in Norway. The debate on armed security aboard Dutch flagged ships was well documented and contextualized by academia. The contemporary debate in the Netherlands on the use of force against pirates was shaped by the constitutional requirement of maintaining a *de facto* state monopoly on the legitimate use of force. A summary of the Dutch debate on the subject states that:

> *"Between 2007 and 2011 the two AIV reports and the de Wijkerslooth Committee had opened up the political debate on the use of PMSCs. The general wish of the government, Parliament, and the armed forces was to maintain as far as possible the monopoly of violence."* (Scott-Smith and Janssen 2014, 62).

The de Wijkerslooth Committee refers to the government appointed *Advisory Committee on Armed Private Security against Piracy*, in 2011 (Ginkel, Putten, and Molenaar 2013, 14), which will be covered in-depth later.

In a 2007 report by the Dutch Advisory Council for International Issues (AIV), it was stated that the employment of private armed security would entail an *accountability gap* as their legal status was unclear. The Dutch state would therefore become liable for actions by private armed security guards (Scott-Smith and Janssen 2014, 56). At the outset of the surge in piracy, the Dutch ship owners' association (KVNR) requested that the flag state provide protection without specifying a preferred solution. The initial response to the KVNR request was limited to protective escort by naval warships, as described earlier. Escort by naval warships rested on two factors. The factors were deployment of Dutch warships to the HRA, and that the warship was in proximity of the requesting merchant ship.

After the hijacking of "M/V Marathon" in 2009, both the Dutch Parliament and KVNR pushed for embedded state provided armed security guards. The pressure for a change in policy led to a tasking of the Dutch Ministry of Defense to examine a military option. The 2009 study on embedded military protection details concluded that the employment of VPDs was not without risk, and there would be legal and operational limitations for the VPD option. Based on the research the government stuck to its existing policy of escort by naval warships. Pirate activity and the risk for Dutch ships transitioning the GoA HRA increased, as did the pressure for a change in Dutch policy. Still under pressure, the Dutch government requested a new study of viable measures for countering acts of piracy, including employment of military VPDs. This time the task was passed to AIV. The task did not specify a study on private armed security, but this was included at AIV's own initiative.

The report which was completed at the end of 2010, presented a decline in transitions of the GoA HRA by Dutch ships. Analysis of the decline in transitions pointed in part to acts of piracy, but considered the main reason to be a negative trend in international trade. The AIV report acknowledged that piracy was affecting the national economy and should therefore be considered a matter of national security (Scott-Smith and Janssen 2014, 58). The conclusion on decline in merchant fleet transitions did not fare well with KVNR. KVNR responded to the AIV report and claimed the decline was a direct consequence to acts of piracy. As part of the research AIV conducted interviews of representatives from the shipping industry. Some of those interviewed stated that if the government did not change its policy, they would illegally

contract private armed security guards. AIV therefore included a recommendation for a change to policy and a mechanism for certifying and regulating employment of private armed security. The AIV pointed out that this approach would challenge the existing state of affairs for state monopoly on legitimate use of force.

The AIV's recommendation that piracy should be acknowledged as a national security challenge prompted a demand, rather than just a request for military VPDs, and shortly thereafter there were rumors of a growing practice of contracting private armed security aboard Dutch ships. By late 2010, the Parliament motioned the government to consider the provision of military VPDs, should a naval warship escort be unavailable. Within the time span of four months the military VPD option was amended, and by early 2011 the first military VPDs were deployed to the Gulf of Aden (GoA). The financing of military VPDs was to be covered by the ship owners like any other countermeasure, this decision effectively commercialized military protection (Chapsos 2013). The military VPD solution was supported by the majority of Parliament (Zwanenburg 2012, 100).

As the AIV report recommended a change to the existing strict approach to private armed security, the Dutch government requested a specific study on legal aspects for private armed security. This time the task was given to a special committee on private armed security for countering acts of piracy (Ginkel, Putten, and Molenaar 2013, 14).

"The central question from the government was to the point: "What is your advice in relation to the eventual undermining of the monopoly of violence with the deployment of armed private security guards, in order to provide an adequate protection of Dutch-registered vessels against piracy?" (Scott-Smith and Janssen 2014, 61).

The specific wording in the task to the de Wijkerslooth Committee implied an overt skepticism towards a change in state monopoly on legitimate use of force. The de Wijkerslooth Committee report responded accordingly by *"delving into Max Weber and claiming that private citizens may use violence if it is both sanctioned by and in the interests of the state."* (Scott-Smith and Janssen 2014, 61-62). The committee also challenges the AIV's recommendation for acknowledging piracy as a threat to national interests. The report pointed out that there was little coverage to claims of piracy being a challenge to the Dutch state's ability to sufficiently fulfill its obligations to protect national interests, including merchant ships. The committee report aligns closely to the theoretical ideal on state monopoly on legitimate use of force. After having consulted with AIV, the committee chose not to

investigate details on the illicit practice of contracting private armed security guards. The de Wijkerslooth Committee report stated that: *"...state action was essential to prevent "its citizens from resorting to the use of weapons or to individuals or companies that are able to offer the required protection, thereby leading to a possible escalation of violence and certainly losing democratic checks on the use of weapons.""* (Scott-Smith and Janssen 2014, 61). As a recommendation to the above statement the report introduced the option of *insourcing* private armed security companies. Insourcing would provide private armed security operators with a temporary military (legal) status allowing the government to exercise a *de facto* control on the use of arms. The Dutch government did not see the insourcing of private armed security operators as appropriate, and stated that the provision of military VPDs would be a substantial enough change to existing policy. Triggered by the release of the committee report, the following response by the government, and the shortness of available military VPDs, ship owners publically voiced their intent to contract and employ private armed guards. The ship owners argued that protecting employees was more important than complying with a Dutch law that was seemingly inadequate in dealing with modern acts of piracy (Scott-Smith and Janssen 2014, 62).

The Dutch debate on the possibility to contract private armed security guards changed around 2013. The change came when Cliengendael, an independent research institute challenged the Dutch government's ability to adequately protect its merchant fleet (Ginkel, Putten, and Molenaar 2013). The Clingendael-report pointed to the lack of available military VPDs, and critiqued Dutch authorities for pursuing a too strict approach to monopoly on legitimate use of force. The report argued that the strict approach of prohibiting use of private armed security guards could lead to an illicit practice of contracting private armed guards (Scott-Smith and Janssen 2014, 63, Ginkel, Putten, and Molenaar 2013, 34). The critique incited the engagement of a Dutch based private military security company (PMSC) into the debate. The Dutch PMSC had a solid record in regards to branch standard compliance. Despite of the PMSC's support for a change in the Dutch policy, employees of the company, mostly Dutch ex-military, expressed support for the authoritie's current position. The entry of PMSCs into the debate served as a boost for those lobbying for a *de jur* solution on private armed security. The pro-private armed security lobby consisted of the Royal Society for Merchant Captains (KVKK), KNVR and some private security companies.

KVKK entry into the pro-private armed security lobby was a turning point, as KVKK had been very supportive of the *de facto* state monopoly on legitimate use of armed force, and the

VPD option (Scott-Smith and Janssen 2014, 66). In 2013 requests for VPDs surpassed the capability of the military. The Ministry of Defense was forced to inform the Dutch Parliament and included a recommendation for a new study of the private armed security option. By the end of 2015 the Dutch government issued a statement to Parliament on the continued support for the *de facto* approach, but indicating a will for exempts to policy should VPDs not be available. A draft for a new *Protection of Merchant Shipping Act*[6] was forwarded to Parliament in early 2017. The draft considered the low availability of military VPDs, and opted for the employment of private armed security in certain instances (Mevis and Eckhardt 2019).

The conclusion on the debate in the Netherlands is that it did engage across the political landscape, the military, academia, the shipping industry, and the private security community. Leading arguments showed how strongly state monopoly on legitimate use of force was rooted in the Dutch society and political environment. The inclusion of early theory on *state* in order to argue a *de facto* state monopoly on use of force, points to a high expectation on compliance and accountability. From approximately 2012 and onwards the two distinct leading arguments in the debate were: the strict *de facto* view on state monopoly on legitimate use of force, and the resourcing including financing, high cost and availability of military VPDs versus that of a private armed guards. High cost and low availability for military VPDs was one of the most prominent pro-private armed security arguments. The argument was strengthened by the unveiling of an existing illicit practice of contracting private armed guards. Additionally there was a third latent argument in the discourse. That argument was *fear*.

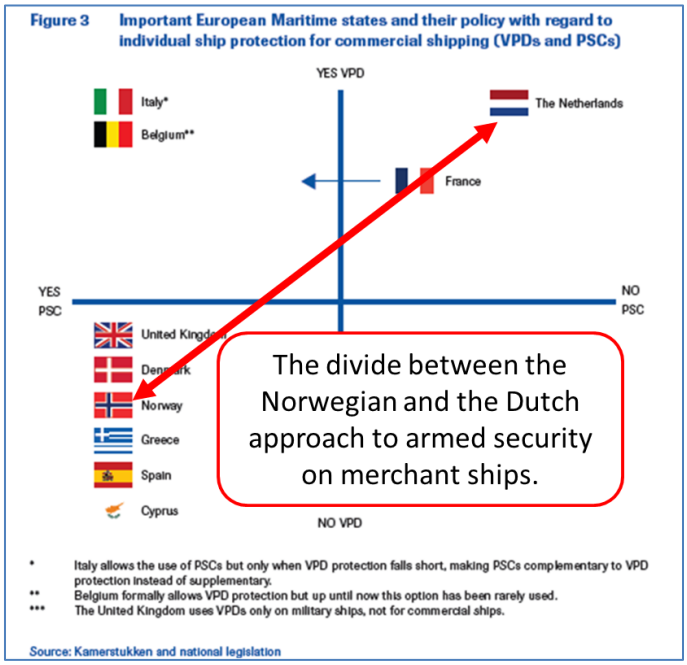
Fear was used as a latent rhetorical aid to promote and underline other arguments, and to gain public sympathy for the primary argument. Fear of piracy attacks, fear of high VPD costs negatively affecting the Dutch competition in the international market. Fear is arguably what

[6] The following information is outside the timeframe scoped for this thesis. In the first quarter of 2018 the Dutch House of Representatives processed the Merchant Navy Protection Act-proposal. The purpose of the proposal was to allow for private contracting of private armed security guards in the event of unavailability of military VPDs. The proposed Act restricts the contracting of private armed security to the waters off the coast of Somalia (KVNR 2018). The Merchant Navy Protection Act was not amended. In 2019 a former initiative – The Merchant Shipping Protection Act was amended changing the Dutch policy towards acceptance of private contracting of armed guards (Buitendijk 2019).

lifted the contemporary threat of piracy up to the level of national interest. Fear as a latent argument observed in Dutch debate was not recognizable in the Norwegian debate. In Norway the debate was never as public, and therefore there was no need for rhetorical aids in support of main arguments. The national debate on use of private armed security in the Netherlands, unarguably challenged the perception of the state's role as *the only* provider of security. The discourse was heavily rooted in the century's long perception that the state is *the only legitimate* provider of armed security. The prevailing perception is clearly presented in text and practice, by all parties. The differences in the communications are the uses of rhetorical aids. However, the perception of the state being the only provider remained prevalent in the debate.

Summary of the analysis on the differences in approach to state monopoly on legitimate use of force in countering contemporary acts of piracy

In the introduction in chapter 1, there is a figure which displays differences for flag state policy on legitimate use of force, and acceptance for private use of force in countering modern piracy (Ginkel, Putten, and Molenaar 2013). The below figure expands the original version by displaying the gap that the research question seeks to answer: *which factors and leading arguments may explain the observed divide in policy and regulations between the two flag states?*



The comparison of the two subjects has revealed that there was a major difference as to how armed security measures against acts of piracy was managed at government level. The difference relates to whether it was a political or bureaucratic led process and decision. As such this is likely core to the above visualized difference. In both states the processes of reviewing existing policy and legislation was initiated through external initiatives by the shipping industry. In Norway the process within the government apparatus was bureaucratically driven under the lead of the Ministry of Trade and Industry. The process was to a large extent contained within a small community, with very limited public debate and insight to the changes in state monopoly on legitimate use of force. In the Netherlands, the process was more politically driven within the government apparatus, with a public debate which included input from across the political landscape, academia, shipping industry and the private armed security community. Evolution of Dutch policy was based on informed decisions through a reasonable use of academic support, an approach not observed in the case of Norway. History and the states' differences in experience in employment and regulation of private use of armed force have clearly made an impact on contemporary perceptions and practices. In the Netherlands the negative experiences related to former state regulations of, and actions by the mercenary army of the Dutch East-India Company, thus not comparable to contemporary PMSCs, was included in the arguments for maintaining the strict interpretation and practice of a *de facto* state monopoly on use of force. The perceptions of need for strict control with armed force prevailed and continued as foundation for the Dutch state's practice.

The analysis of potential exposure to acts of piracy weighed against eligible and available options for countering modern piracy within the existing functions of the state showed that whilst the Netherlands, through its Royal Marines had a fairly suited option, Norway did not. This awareness has likely shaped the policy and practice. In the Netherlands this may have reinforced the current discourse positively, whilst in Norway this perception was never communicated in an open debate. It is therefore only possible to assume that the metric argument was used internally in shaping a new policy and practice.

A last key finding is the political ownership to treaties on the abolishment of private use of armed force. There difference between Norway and the Netherlands in respect to this point is quite large. The functional state's development and implementation of independent security- and foreign policy, and international interactions in which those policies were tested, separates the Netherlands and Norway with roughly 250 years. That difference incorporates the direct and privileged access to the evolution of what became the prevailing norm for state

monopoly on use of force by the Netherlands, and not by Norway. This key finding may be a central cause to the difference in contemporary management of the processes and especially which level of government that was in lead – the political level or the bureaucratic level. As already identified, the Dutch made an informed decision based on several sources from across society, whereas in Norway the change was bureaucratically driven and seemingly short of a wider politically informed decision. The Norwegian changes placed Norway among the most liberal states on use of private armed security aboard its' merchant fleet. The very liberal approach combined with the shortcomings in the capability to check levels of regulatory compliance, points towards a political system swayed by the shipping industry. It was the considerations for the shipping industry that prevailed in the current change towards a *de jur* approach in the Norwegian policy for employment of legitimate use of force in the maritime environment. The changes to the Norwegian policy deviated from the normal principles on which Norway generally approaches legitimate use of force, as such a further change towards a wider *de jur* approach is not expected.

4: Conclusion

Ashraf Ghani and Clare Lockhart (Ghani and Lockhart 2008, 5) observed that the first impulse is to use force in order to resolve a new problem. Even though it is a first impulse it may not be the first countermeasure. However, in relation to countering contemporary acts of piracy, the use of force was introduced very early and thus summarizes the findings in general. This *first impulse* on need for armed security is what initiated the process for policy and legislative change. The process in both states took years before reaching a decision on whether to changes policy or not. In the meantime that *first impuls*e also manifested itself through the illicit private contracting of private armed security by ship owners in both Norway and the Netherlands. Specific findings show that while the Dutch government chose to utilize a tool from its' existing toolbox, the Norwegian government ended up with opting for a new tool. Sir Rupert Smith's description on the *king's dilemma* still proves valid as governing bodies struggle to maintain a relevant and available force as required. This is due to the financial burden and the absence of an immediate threat to the state itself. As threats to national interests are numerous, exposure and imminence is dynamic, it is the government's task to prioritize importance of both threats and countermeasures. In light of how contemporary piracy has evolved and proliferated, the immanency for a solution is no longer a pressing matter, and as such the *ad hoc* initiatives and solutions should be re-evaluated.

Contemporary political choices are the result of the state's political currency which is based on state history, state regulatory experience and state ownership to international treaties. Even though the Dutch government decided to continue its strict *de facto* approach to the state monopoly on use of force and task it's military to provide the necessary capabilities, the decided upon solution has in part commercialized armed security. The near-commercialization effort was prompted by pushing the cost coverage responsibility for the service of armed security onto the ship owner. The cost for military armed security came on top of normal taxation. As such the solution is governed by the economic ability of the ship owner. In Norway this was never an issue, as the military was never tasked. However, the contracting of private armed security by the ship owner is also governed by his/her economic ability, and as such the Dutch solution levels the playing field between merchant fleets subordinate to either a *de jur* or a *de facto* solution for state monopoly on legitimate use of force.

To answer the research question in short, the decided upon solutions are the result of process. While the process in the Netherlands was very open, the process in Norway was closed. The processes were also informed differently. In the Netherlands the debate and changed practice did not have to consider a force deficiency at the same level Norway seemingly was forced to. This ensured that the debate in the Netherlands could focus on the level and principles of use of armed security, whilst Norway was driven towards an alternative for practical reasons, which may explain the lack of an open debate.

As the thesis shows, oversight mechanisms for private armed security guards is an issue that needs to be more thoroughly addressed by states that practice a *de jur* monopoly on legitimate use of force. The need is for more robustness within that part of the state appointed to oversee or supervise vetting, certification, permits and contracting of private armed security. In addition there is a need to review state requirements to private armed security guards, which can replace or reduce the burden of cumbersome investigative responsibilities. The Norwegian regulations for private armed security should include requirements for better recording of incidents where firearms are employed. Available technology used among military and law enforcement agencies for documentation of own actions should be a flag state requirement for private armed guards. Already available technologies include helmet, body or weapons camera, communications recordings (e.g. sealed voice recorder like on airplanes), state provided sealed ammunition which is traceable by the make, caliber and type (e.g. LOT-numbers), and individual geographical tracking devises (e.g. blue-force-tracker) for

movement visualization and recording during skirmishes. The use of body camera has been the benefit of both reducing excessive use of force, while documenting the scenario including perpetrator actions (Jonsson 2019). On the subject of state provided ammunition, there are ammunition types that are engineered for operations in a vulnerable environment like oil or gas tankers. The projectile will fragment on impact and therefore reduce any damage to ship and goods. This specific type of ammunition is often only available to government agencies. If the flag state assumes responsibility for ammunition logistics for private armed guards, this type of damage reducing munitions could be made available. A requirement to use the above technologies by private armed security guards will increase the oversight ability, ease investigations efforts, document acts of piracy, and increase the level of transparency for embedded armed security.

The contemporary studies and views referenced in chapter 2 arguably follow an extrapolated curve which started at the peak in application of the prevailing norm for state monopoly on legitimate use of force. As such none of the above studies have looked at a counter-pendulum move. If a shift of the norm goes too far, will there be a repercussion that seeks to integrate the security industry into the states own security structure? History has shown that this is a feasible action. Should the counter-pendulum move require that the state once again needs to *insource* all aspects of legitimate use of force, and apply a strict (re)definition of monopoly on use of force, PMSCs could be included into the states security structure to be *made* legal (Smith 2005, 7). Integration into the state's own security structure is what happened with the private navy of the British East-India Company as it was absorbed into the Royal Navy (Pitney Jr. and Levin 2014, Introduction x).

This thesis provides knowledge on some aspects of Dutch and Norwegian contemporary approaches to state monopoly on legitimate use of force for countering modern acts of piracy in the maritime environment. As the work on this thesis progressed, related questions were revealed. The most relevant questions being:

- Will there be a reversal of legislations followed by the abolishment of private use of force in the maritime environment?
- Will the NATO members strengthen their budgets and include embedded protection of the merchant fleet to its military tasks and replace private armed security?

- Will outsourcing of tasks short of war continue and proliferate into other domains, based on the experiences from contracting of private armed security in the maritime environment?

The above questions belong to the future.

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