



Clingendael

Netherlands Institute of International Relations

State or Private Protection against Maritime Piracy?

A Dutch Perspective

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Clingendael Report

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List of abbreviations

ADS	Advancing UK Aerospace, Defence, Security & Space Industries, Globally
AIV	Advisory Council on International Affairs (<i>Adviesraad Internationale Vraagstukken</i>)
BIMCO	Baltic and International Maritime Council
BMP	Best Management Practices (for Protection against Somali based Piracy)
ECHR	European Convention on Human Rights and Fundamental Rights
EESC	European Economic and Social Committee
EU	European Union
FCO	Foreign & Commonwealth Office
HRA	High Risk Area
IAMSP	The International Association of Maritime Security Professionals
ICCPR	International Covenant on Civil and Political Rights
ICoC	International Code of Conduct (for private security service providers)
ICRC	International Committee of the Red Cross
ICS	International Chamber of Shipping
IMO	International Maritime Organization
ISO	International Organization for Standardization
KVNR	Royal Association of Netherlands Shipowners (<i>Koninklijke Vereniging van Nederlandse Reders</i>)
MSC	Maritime Safety Committee
PCASP	Privately contracted armed security personnel
PMSC	Private Military and Security Company
PSC	Private Security Company
PVI	Protection Vessel International
SAMI	Security Association for the Maritime Industry
SCEG	Security in Complex Environments Group
UKAS	United Kingdom Accreditation Service
UNCLOS	United Nations Convention on the Law of the Sea
VPD	Vessel Protection Detachment

Executive summary

As the threat of piracy continues to be a problem for the commercial shipping industry, the debate on the legality of the use of private armed security guards provided by private security companies (PSCs) that provide the necessary protection during the passage of these ships through the High Risk Area (HRA) near the coast of Somalia keeps coming back to the political arena in the Netherlands. Dutch law does not allow the use of armed PSCs. The Dutch government is of the opinion that the monopoly on the use of force belongs with the government. Instead, shipping companies can apply for protection provided by Vessel Protection Detachments (VPDs) by the Ministry of Defence. However, not all ships apply for this form of protection because the costs are too high or the procedure takes too long, or because they do not meet the required criteria. Meanwhile, the shipping industry is in fierce competition with industry in other European countries. Developments in legislation in these countries are moving towards a legalisation of the use of armed PSCs if certain criteria, for instance, with regard to vetting procedures, are met. In this report, the regulation of and legislation on the use of armed PSCs in the United Kingdom, Norway and Denmark are elaborated upon.

The reflagging of vessels is one of the options available to Dutch shipping companies in order to retain a level playing field in their competition with foreign firms. However, the number of ships that have been reflagged to a foreign country for this particular reason seems very small. Another option is to illegally hire armed PSC. Dutch shipping companies that choose this approach most likely are unable to hire certified PSCs with a long track record and a good reputation, since these companies often refuse to provide armed protection on board of ships sailing under the flag of a state that prohibits the use of armed PSCs. As a consequence, the shipping companies that nevertheless want to hire an armed PSC are left with those that do not meet the same high standards needed to pass the recognized vetting procedures; a practice that is growing.

There is as yet no internationally recognised standard to regulate the use of armed PSCs on ships. Public international law does, however, set a minimum norm, through the absolute prohibition of the use of force except in the case of self-defence. In addition, the obligation on states to respect human rights such as the right to life, and the obligation to protect rights from interference by others implies that states need to have a legislative and administrative framework in place to regulate the use of armed PSCs if this is legal according to their legislation. Despite the lack of an internationally standardized legal framework, there are multiple ongoing developments in soft law regulation. These developments in soft law regulation as well as private sector regulations on the use of armed PSCs can provide a patchwork system of control for the chain of quality checks applicable to the security industry as such, the vetting procedures for specific deployment for a specific passage, the issuing of weapon permits, and the oversight of the actual use as such. This patchwork system might not offer a clear overview on the control exerted on the use of armed private security companies, but can at times result in multiple checks of companies because of an overlap in control systems and vetting procedures, thus in the end resulting in a more zealous system than one uniform system of control would offer.



The analysis of these soft law and private sector regulations provides a set of key aspects of regulation that should be addressed in case a government decides to legalise the use of armed PSCs. The seven key aspects are: weapons permits and permits for armed guards, the scope of application of the permit (geographically, and the type of vessel), a certification or vetting procedure, the threshold for the use of force, the role of the master, third party insurance and oversight and control in relation to responsibility and accountability.

After summarizing the pros and cons in the debate on the use of VPDs versus the use of PSCs, this report concludes that continuing the current Dutch policy without any adjustments is not desirable. In order to move ahead, policy adjustments should be made. The following are the three main options:

1. The use of PSCs remains illegal, but the requirements for VPD deployment should then be more flexible, the delivery time should be shorter, and the costs should be further reduced.
2. The practice of VPD deployment remains the backbone of Dutch policy, but in addition the use of PSCs (either insourced as a government task, or privately contracted) is admitted under strict criteria and oversight mechanisms.
3. The policy of VPD deployment is no longer practised. The use of PSCs (either insourced as a government task, or privately contracted) is made possible under strict criteria and oversight mechanisms.

Key findings

1. The majority of Dutch ships do not make use of the protection of VPDs. In fact only 8-10 % of the ships passing through the High Risk Areas of Somalia are both eligible and apply for VPD protection. More than 65% of the total number of ships do not even apply for VPD protection.
2. The main reasons for not applying for VPD protection include the high costs and the lack of flexibility of deployment and the long application procedures, which affect competitiveness.
3. Security companies that meet the highest quality standards are signatories to the international guidelines, such as the ICoC, and are certified or accredited according to government or industry-based systems such as the SAMI which checks on compliance with international guidelines. This includes aspects such as having a good track record and the capacity to make an adequate security assessment before deployment and not allowing to protection to be provided through the deployment of a team of security guards on board ships sailing under flags of states that do not allow the use of armed PSCs. As a consequence of this policy to protect the good reputation of the PSCs, shipping companies that decide to illegally hire a PSC can only turn to uncertified companies, which often do not meet the same high standards.



4. Data from recent years show that approximately 40-50 ships of the total Dutch fleet reflag each year. Since some ships reflag to the register of a state that also prohibits the use of armed PSCs, it is clear that not all reflagging is done out of frustration with the current Dutch prohibition on the use of armed PSCs. It is unknown how many go through the reflagging procedure for exactly the reason of being able to legally hire an armed PSC.
5. More and more European countries are moving towards the legalisation of the use of armed PSCs. Currently, in addition to the Netherlands, the only important European maritime countries that prohibit the use of armed PSCs are France and Germany. However, these countries are in the process of legalising the use of armed PSCs. 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.
6. There is not yet a uniform set of rules regulating the deployment and oversight over the use of armed PSCs by shipping companies. Public international law does however formulate the minimum norms of human rights and state responsibility applicable to the situation.
7. The kaleidoscope of soft law regulations, complemented with the codes of conduct developed in the private sector, provide for a patchwork of quality and control systems, that on occasion result in a more thorough system of checks than a uniform system would offer.
8. There are at least seven key aspects of regulation that need to be addressed in case a state moves towards legalising the use of armed PSCs. These key aspects are: weapons permits and permits for armed guards, the scope of application of the permit (geographically, and the type of vessel), a certification or vetting procedure, the threshold for the use of force, the role of the master, third party insurance and oversight and control in relation to responsibility and accountability.
9. When assessing the pros and cons of the use of VPDs versus the use of PSCs, it becomes clear that continuing the current Dutch policy of VPD deployment and the prohibition on the use of armed PSCs is not desirable.
10. In order to move ahead, three possible scenarios are relevant: (1) The use of PSCs remains illegal, but the requirements for VPD deployment should then be more flexible, the delivery time should be shorter, and the costs should be further reduced; (2) The practice of VPD deployment remains the backbone of Dutch policy, but in addition the use of PSCs (either insourced as a government task, or privately contracted) is admitted under strict criteria and oversight mechanisms; (3) The policy of VPD deployment is no longer practised. The use of PSCs (either insourced as a government task, or privately contracted) is made possible under strict criteria and oversight mechanisms.

1 Introduction

Since 2008, the international community has paid much attention to the threat of piracy off the coast of Somalia. With approximately 20,000 to 30,000 ships passing through the Gulf of Aden each year, transporting approximately 10-20% of the world's trade, the economic interests for trading countries in providing security for commercial shipping are substantial. The steep increase in piracy attacks in the Somali region in 2008 triggered a variety of counter-piracy initiatives. Most prominently, and best known to the public, are the naval operations in the area to protect food transports of the World Food Programme and commercial shipping. In addition, a large variety of counter-measures have been adopted and deployed, such as legal measures and legal capacity-building measures, security sector reform projects, good governance projects, and information-sharing mechanisms. Yet, a comprehensive approach to the piracy problem, which is more than just the sum of the different initiatives, is still lacking. What is missing is one body for coordination and leadership. Since all agree that the true solution to the problem of piracy is to be found on shore, and not at sea, the international community is still facing a substantial challenge in providing a sustainable solution to the problem.

Recent statistics show a decrease in the number of successful piracy attacks. According to military spokespersons, this decrease can be attributed to the success of the navy operations. However, other factors seem important as well, such as a better implementation of Best Management Practices (BMPs) by the commercial shipping industry to protect their ships, the presence of PSCs, the influence of the weather, and simply the ability of pirate communities to adapt to new circumstances, to regroup and await the next moment an opportunity presents itself. Without questioning the fact that the factors mentioned above, all in their own way, influence the piracy threat to some degree, the fact remains that even though the *success rate* is decreasing, the *absolute number* of piracy attacks is not decreasing with the same percentage, thus indicating that certainly programmes targeting the root causes of piracy have not been successful, and thus pirate communities have not given up altogether. As a consequence there is still a need for sustainable solutions targeted at the situation on shore as well as a need for the continuing protection of commercial shipping to limit the opportunity of hijackings as much as possible.

This report will especially focus on the debate in the Netherlands on how to organise the protection of commercial shipping. As mentioned above, it is not likely that the problem of piracy off the coast of Somalia will be eradicated anytime soon. In addition, other regions, such as the Gulf of Guinea, currently show an increase in incidents of armed robbery at sea, as well as piracy incidents. One can thus assume that in one way or another the need to protect commercial shipping and the debate on how this protection will be delivered will remain on the political agenda of seagoing nations. Regarding piracy at sea, the main question for the Dutch shipping industry and the Dutch government seems to be whether or not the use of armed PSCs to protect commercial shipping should be allowed. Whereas some states stick to the absolute prohibition of the use of force by persons other than the military, other European states are gradually moving towards a regime in which the use of PSCs becomes a possibility.

In order to better assess all factors that are relevant to take into account when balancing the pros and cons of allowing PSCs to provide protection to ships passing through high risk areas, this report will provide an overview of the problems and challenges with the VPD practice, the existing legal framework for PSCs and key regulatory aspects.

2 Current Dutch policies in the protection of commercial shipping against piracy

According to the Royal Association of Netherlands Shipowners (KVNR), the number of ships flying the Dutch flag that pass through the Gulf of Aden has dropped from 450 to 250-300 a year as a consequence of piracy.¹ Although the high security risk posed by pirates undeniably has an effect on the behaviour of shipping companies it is unclear to what extent the drop in transits through the Gulf of Aden is not also a consequence of the global economic crisis.² The security risk posed by piracy, however, undeniably plays an important role in deciding whether or not to transit the High Risk Area. This is illustrated by the shipping companies that have chosen to use alternative routes or reject orders as a consequence of a felt absence of adequate protection.

Since March 2011, the Dutch government provides VPDs on certain high-risk transits off the coast of Somalia and in the western Indian Ocean. The provision of VPDs for individual transits is a response to continued security threats posed by pirates in areas where naval protection is virtually absent and where self-protection measures do not provide solace. Prior to the decision to deploy VPDs, Dutch shipping companies could apply for a military escort during their transit. However, the requirements to qualify for this form of escort were very strict and only a very limited number of applications were successful. Hence most shipping companies were still facing high risks when transiting the area.

The decision to deploy VPDs followed a report from 2010 by the Dutch Advisory Council on International Affairs (AIV), which was requested to offer advice to the government on how to step up the fight against piracy and what the public and private responsibilities are in that respect. It noted that “the deployment of VPDs on board of very vulnerable ships on other transits than in the Somali Basin and the Indian Ocean is confronted with more operational limitations than in the Gulf of Aden and recommended the government in special cases to give the captain of a very vulnerable ship the capacity, under strict conditions, to deploy private armed security guards as a deterrent against pirates”³. It added that, before allowing this, the certification and regulation of the PSCs would be necessary and that Dutch shipowners and captains are only allowed to use the services of these certified PSCs for which it referred to the International Code of Conduct for Service Providers (ICoC) in a footnote.⁴ In order to make private armed protection possible, it would be necessary to make an amendment to the Arms and Ammunitions Act, which prohibits armed self-defence. In its response to the report, the government agreed that under certain circumstances the protection of individual transits was a government task but instead of allowing the use of PSCs, it would provide protection in the form of VPDs, based on article 97 of the Dutch

1 Royal Association of Netherlands Shipowners website > Piracy section. Available online at <http://www.kvnr.nl/CMS/showpage.aspx?id=433> (visited 4 January 2013).

2 Adviesraad Internationale Vraagstukken, *Piraterijbestrijding op Zee: Een herijking van publieke en private verantwoordelijkheden*. No. 72, December 2010.

3 *Ibid.*

4 Confederation Suisse. International Code of Conduct for Private Service Providers. 9 November 2012.



Constitution.⁵ It argued that the option of allowing private armed security on ships would breach the state's *monopoly on the use of force*, which it argued was of a fundamental nature and not opportune to breach, at least not until a further examination was conducted. A special commission under Professor De Wijkerslooth was asked to look into the option of deploying private armed security guards and how this relates to the state's monopoly on the use of force.

In its report, issued in September 2011, the commission indicated that there was a need for additional protection for ships sailing under a Dutch flag and that if the necessary protection could not be provided by the government itself, the government should create the possibility to make use of private armed security guards.⁶ The commission recommended that the security guards "may only be hired by the government and perform their security duties as soldiers under the full authority of the Ministry of Defence". The commission did not find it desirable that shipowners could enter into a contract with the PSCs themselves and added that "this should only be considered in case of special conditions". It substantiated its recommendation by arguing that the temporary "insourcing" of PSC in the existing defence structure to increase capacity through state contracts would have limited judicial and operational implications and would not need many adjustments to laws and regulations. This in contrast to the option permitting shipping companies to directly contract PSCs, which would mean "outsourcing" private armed security. This option, so the commission argued, would require more extensive adjustments to laws and regulations and would only provide solace in the short term.⁷ However, the commission did not rule out the latter option as a matter of principle. It argued that the monopoly on the use of force does not mean that only the government can apply force, but also that the government can decide who can exercise it and under what conditions.⁸

In its response to the report, the government endorsed the commission's view on the monopoly on the use of force, stating that allowing private armed security in either form would not necessarily breach the monopoly on the use of force.⁹ It added that allowing for private armed security was not at issue, however, at least not as long as the Ministry of Defence would be able to provide sufficient protection by providing VPDs on board of vulnerable ships. In case the military, after an expansion of their VPD capacity, would be unable to provide a sufficient level of protection, the government would make a decision on whether or not to allow private armed security guards. The conditions under which this would happen would require further examination. In addition, the government stated that still no consensus existed internationally with regard to allowing private armed security guards on board, but that it would keep an eye on the developments.¹⁰

5 Tweede Kamer der Staten Generaal. *Beveiliging zeevaartroutes tegen piraterij*. Kamerstuk 32706 Nr. 5 April 2011. Article 97 of the Dutch Constitution stipulates that the army is there to defend the Kingdom, protect the interest of the Kingdom and to maintain and promote the international legal order.

6 *Supra* note 2, at 41.

7 *Supra* note 2, at §100.

8 *Supra* note 2, at §102.

9 Tweede Kamer der Staten Generaal. *Beveiliging zeevaartroutes tegen piraterij*. Kamerstuk 32706 Nr. 9. Beleidskader. *Militaire Vessel Protection Detachment (VPD) ter bescherming van individueel zeetransport*. June 2011.

10 *Ibid.*, at 6-7.

3 Dutch practice regarding the deployment of VPDs

From the first deployment of VPDs in March 2011 up until November 2012 a total of 144 requests for VPD assistance had reached the Ministry of Defence. Of these, 33 requests were withdrawn early, another 58 requests were turned down and 53 were accepted. Of the 53 that were accepted, another 13 withdrew at a later stage. The total number of VPD deployments is therefore 40 (figure 1). Until November 2012, 33 VPDs have actually been deployed with the other 7 VPDs being scheduled for deployment after the 1st of November.¹¹

According to the KVNR, the ships on which the VPDs have been placed have not included general cargo, container, tanker or bulkships.¹² Instead, mainly heavy load ships, oilrigs being towed and windmill-construction ships were protected through VPDs. The data from the Ministry of Defence show that the majority of VPDs have been deployed on ships operated by three Dutch shipping companies: Dockwise (22), which specialises in exceptional transports of large and heavy structures, Van Oord (5), a dredging firm, and Vroon (4), which operates a diverse group of vessels.¹³

To put the number of applications for VPDs (144) and those that have been accepted (40) into perspective, it is important to understand that according to the KVNR around 250 to 300 ships sailing under a Dutch flag pass through the HRA each year.¹⁴ In a 20-month period, this would amount to roughly 415 to 500 transits. This means that around 270 to 360 (65%) does not even apply for VPD-protection. The flow chart presented in figure 2 shows how the formal applications received by the Ministry of Defence break down and what options there are for ships that do not apply or receive VPD-assistance.

The flow chart has its limitations, however, as it only shows the applications formally received by the Ministry of Defence and how they break-down in the course of the application process. It does not show the number of ships that do not formally apply for VPDs despite being in need of armed assistance. This means that the actual group that does apply does not represent the group that actually needs armed protection. Despite attempts by the Ministry of Defence to make them more visible, the size of the group is unknown. The existence of this group is explained by the fact that some shipping companies estimate or know from experience that the chances of them receiving a VPD for a certain ship are slim or that they know that the current conditions under which the VPDs are provided (e.g. the timeframe or costs) are not suitable for their security needs and therefore they anticipate this by not formally applying for the VPD.

11 Ministry of Defence. *Brede evaluatie inzet Vessel Protection Detachments*. 24 October 2012, p 9-10.

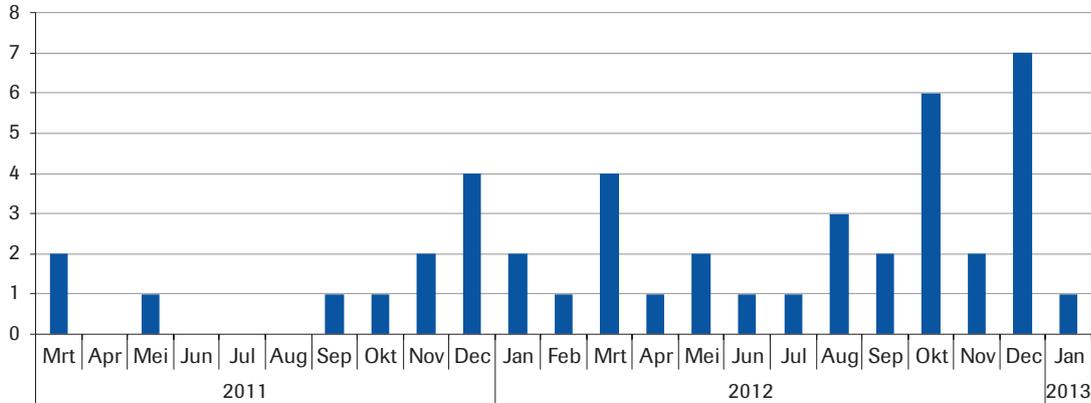
12 Royal Association of Netherlands Shipowners. *Factsheet Nautische partners*. December 2012. Available online at <http://www.kvnr.nl/cms/showpage.aspx?id=183> (Visited 14-01-2013).

13 Ministry of Defence website > Section *Beveiliging schepen*. Available online at http://www.defensie.nl/missies/somalie/beveiligingsteams_schepen (Visited 14-01-2013).

14 For the HRA ; see Annex I.



Figure 1 Number of VPDs deployed between March 2011 and January 2013 (based on moment of boarding the ship)



Source: Ministry of Defence.

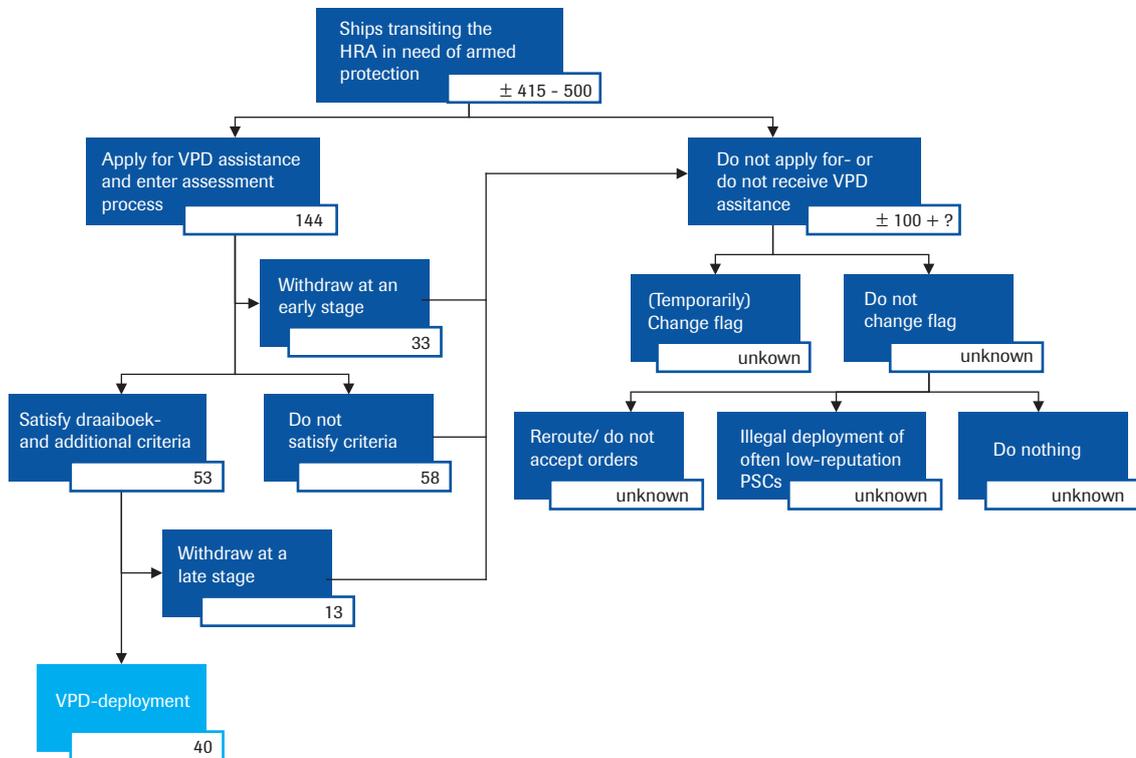
This group of non-applicants falls in the second branch of the figure, where we also find a little over 100 ships that have formally applied for a VPD but have either withdrawn their application or did not satisfy the criteria. Without VPD-protection, this group has roughly three options in order to mitigate their security problem; (I) reflag the ship to a register of a country that allows the use of private armed security guards, (II) continue to fly the Dutch flag and decline orders or reroute or (III) continue to fly the Dutch flag and illegally hire private armed security guards. There is also the option of doing nothing which would mean taking the risk of facing pirates without protection in the form of armed security. Although this could be mitigated to a certain extent by the (full) implementation of the BMP-principles, a threat still exists for a group of vulnerable transits.

With regard to reflagging, the data on mutations of the Dutch fleet book show that in 2010 and 2011 around 40-50 Dutch ships were reflagged to other registers annually.¹⁵ Because we do not have the figures for the period between March 2011 and November 2012, it is hard to draw any conclusions as to the period concerned here. But even if this data was available, it would come with limitations because shipping companies are not required to indicate the reason for reflagging. This does not mean, however, that all reflagging happens because shipping companies themselves want to. According to the KVNR, sometimes this is demanded by the client. We can however say that the number of ships that have been reflagged in 2011 for the reason that the Dutch government did not allow private armed security guards on board of ships flying the Dutch flag is considerably smaller than the 50 that were reflagged that year. This is due, apart from the fact that the ships reflagged in the first two months should be excluded, to the fact that a considerable portion of the reflagged ships were reflagged to states that did not permit the use of private armed guards at that time.

¹⁵ Ministry of Infrastructure and the Environment. *Fleetbook database 2010 and 2011*. Available online at <http://www.ilent.nl/onderwerpen/transport/koopvaardij/publicaties/vlootboeken/> (Visited 15-01-2013).



Figure 2 Flowchart of requests for VPDs made by shipping companies and other options to mitigate the security threat. Concerning the period March 2011 – 1st of November 2012



Source: Ministry of Defence

Choosing to avoid the risk, by rerouting or declining orders, would mean increased costs, facing other risks in terms of weather conditions or a lower turnover, which, at the end of the day, would be at the cost of the competitive position of the company and ultimately at the cost of the competitive position of the shipping industry.

Another option would be to continue to fly under a Dutch flag and hire private armed security guards, which would be in violation of the Arms and Ammunitions Act. In addition, this would mean hiring low-reputation PSCs because those who are qualified and certified generally do not want to risk losing their costly reputation by providing an illegal service.¹⁶

Finally, the option of doing nothing would mean using existing authorized measures such as those enumerated in the BMP guidelines or apply for naval protection. This would essentially mean taking the risk of facing pirates in the HRA without armed protection.

16 Interview with a representative of a large PSC.

4 Qualifying for VPD protection: Requirements

In order to assess whether ships should be able to rely on military assistance, the government developed a document in 2006: “Behandeling bijstandsaanvragen bij piraterij en gewapende overvallen op zee” or “draaiboek” (protocol). Since 2008, the *draaiboek* provides for a specific procedure for the handling of formal requests for assistance which qualifies the request either positively or negatively. Although the *draaiboek* originating from 2006 is a classified document and is therefore not accessible to the public, a public letter provides for an idea of what principles are used.¹⁷ These are; first, that the request for assistance can be made both before and during the voyage. Second, that the shipping company is first responsible for protecting itself against piracy. This includes making a risk analysis and considering alternative routes and possibly declining orders. Third, if a request for assistance does not meet the criteria of the *draaiboek*, other (political, strategic etc.) interests can be considered. In addition, the *draaiboek* looks at whether the ship is registered in the Netherlands, whether the shipping company has done enough to live up to its task as being first responsible, whether there is an existing defence operation in the area and, finally, whether the ship is sailing on the high seas or in territorial waters.

When an application meets the criteria of the “draaiboek”, it is in “rare cases” additionally tested. According to the policy framework (“beleidskader”) the following points are taken into consideration.¹⁸

- The ship sails under the Kingdom’s flag
- Other, demonstrable ties with the Kingdom.
- Ship-owners have to apply the BMP principles to the fullest extent possible for the specific sea transport for which the application is made.
- The sea transport (the ship, the load, the seafarers) can be considered very vulnerable.
- The sea transport follows a route with which (collective) protection from other military operations is not possible and with which there exists, according to international threat appreciation, a piracy risk.
- The application is submitted at least 6 weeks before the requested protection is needed.

¹⁷ *Supra* note 9.

¹⁸ *Supra* note 9.

5 Problems and challenges of the use of VPDs

The deployment of VPDs comes with a number of (mainly) technical problems and challenges. To deal with these problems a working group has been set up in which every two months, since June 2011, representatives of the Ministry of Defence and the shipping companies meet to discuss the practical matters with regard to VPDs.¹⁹ It has led to a number of modifications with regard to VPD deployment but it still seems to be dealing with some unresolved practical issues. A list of the problems and challenges relating to VPD deployment is set out below.

From the perspective of the shipping companies, the most often heard problem associated with VPDs is the cost. Up until April 2012, Dutch shipping companies were required to pay a sum of €150,000 as a basic tariff with an additional €25,000 per week per deployment. Since then, contributions have gone down to €5,000 per day.²⁰ For an average 3-week deployment this means a drop in contributions from €225,000 to €105,000.²¹ But despite these downward adjustments, VPD prices still vary significantly compared to private security providers who ask for prices between €11,000 and €75,000, depending on factors such as the number of guards, the duration of the voyage and the ship size.²² Some of the shipping companies have argued that the current policy in which the shipping companies cannot make use of these PSCs, and are therefore forced to pay around 1.5 times higher prices for additional protection, compromises their competitive position with respect to companies registered in countries where private armed security is allowed. This level playing field problem felt by shipping companies is exacerbated by the current economic climate and, as a consequence, decreasing profit margins.

A second problem for the shipping companies is the delivery time associated with the deployment of VPDs. Between March 2011 and November 2012, 25 applications for VPDs had been turned down because the time between demand and deployment was too short.²³ In addition, there is a group of shipping companies that withdrew at an early (33) and late stage (13). It is possible that among these 46 there are also shipping companies that have withdrawn because of delivery time. Although delivery time has been reduced from 6 weeks to an average of 10 working days,²⁴ it still falls short of the expectations of some shipping companies that operate in dynamic markets in which cargo is traded online and destinations can change at short notice.²⁵ The average of 10 working days required to deliver a VPD stands in contrast to the 3 to 5 days that is generally required for PSCs to deliver their security teams.²⁶

¹⁹ The working group has existed since June 2011 and meets every 2 months. Up until the 1st of November 2012 the working group had met on 12 occasions, *supra* note 9.

²⁰ *Supra* note 9.

²¹ Tweede Kamer der Staten Generaal. *Beveiliging zeevaartroutes tegen piraterij*. Kamerstuk 32706 Nr. 33. July 2012.

²² C. Spearin, *Private Military and Security Companies v. International Naval Endeavours v. Somali Pirates. A Security Studies Perspective*, *Journal of International Criminal Justice*, Vol. 10, no. 4, 2012, pp. 823-837.

²³ *Supra* note 9.

²⁴ Tweede Kamer der Staten Generaal. *Beveiliging zeevaartroutes tegen piraterij*. Kamerstuk 32706 Nr. 28. April 2012.

²⁵ Tweede Kamer der Staten Generaal. *Beveiliging zeevaartroutes tegen piraterij*. Kamerstuk 32706 Nr. 29. May 2012.

²⁶ *Supra* 16.



Third, the assessment criteria. This is a much more complex issue to weigh because the principal document with which the applications are judged, the *draaiboek* (protocol), is confidential.²⁷ In the 10-month period from September 2011 to June 2012, 85 requests reached Defence of which 3 did not pass the *draaiboek* test. One did not pass because the ship did not sail under the Dutch flag and two others because the route did not fall within the risk area. Of the 69 that were additionally tested, a total of 29 did not meet the criteria because either the time between the application for a VPD and the deployment was too short or the transport was not considered “vulnerable”. This vulnerability requirement has been considered to be too strict by the KVNR, which prefers a broader and more moderate approach with regard to assessing the vulnerability of a ship.²⁸

A fourth practical problem relates to the size of VPD teams. VPD teams comprise up to 11 to 15 men,²⁹ depending on tactical considerations and the size of the ship. Especially for smaller ships with limited space to facilitate the security teams, this forms a practical problem as well as a security problem. From March 2011 to November 2012 this occurred on one occasion.³⁰

Another issue is the capacity or availability of VPDs. In the evaluation report on VPDs by the Ministry of Defence,³¹ it is stated that personnel capacity is sufficient, but material capacity is critical and has been a limiting factor for the allocation of VPDs. Between March 2011 and November 2012, 15 applications for VPDs were refused because there was no available capacity time to place on the ship. In 2012, 100 VPDs were made available. For 2013, Defence has foreseen an increase in the deployment of 175 VPDs, which is in anticipation of the expected security need.

As a result of some or all of these issues, a number of shipping companies have reflagged (some of) their ships (temporarily) to other registers. Although reflagging has been mentioned by the KVNR as a problem for the (maritime) economy and the national budget, it is hard to quantify let alone determine whether there is a trend emerging. This is because the annual fleetbook of the Ministry of Infrastructure and the Environment does not indicate the reasons behind reflagging. What is known, however, is that in 2010 and 2011, 51 and 42 ships have respectively left the Dutch register and that most of them have been reflagged to Cyprus, Liberia, Antigua & Barbuda and Panama; so-called open register states. On top of that the practice of other governments allowing for private armed security is relatively new, which makes it difficult to compare statistics.

²⁷ *Supra* 9 at 5 §2.

²⁸ Royal Association of Netherlands Shipowners. *Position paper KVNR, Nautilus Int.* available online at <http://www.kvnr.nl/cms/showpage.aspx?id=183> (Visited 14-01-2013).

²⁹ *Supra* note 9.

³⁰ *Supra* note 9.

³¹ *Supra* note 9.

6 Europe and the move towards allowing private armed protection

Over the last two years opinions and practices in the international community with regard to the use of private armed security guards on board of ships have changed a great deal. Whilst five or so years ago most, if not all, important European maritime states prohibited the use of private armed security on ships, today a large number of these states either allow their use or are in the process of changing their legislation. The group of countries that allows PSCs comprises, among others, the UK and Norway which changed their legislation in 2011 and Denmark, Greece, Cyprus and Italy, which gave the green light for private armed security in 2012.³² Germany and Sweden, and possibly France, will follow suit sometime this year.³³ As a consequence the position of the Netherlands is increasingly isolated in the European context.

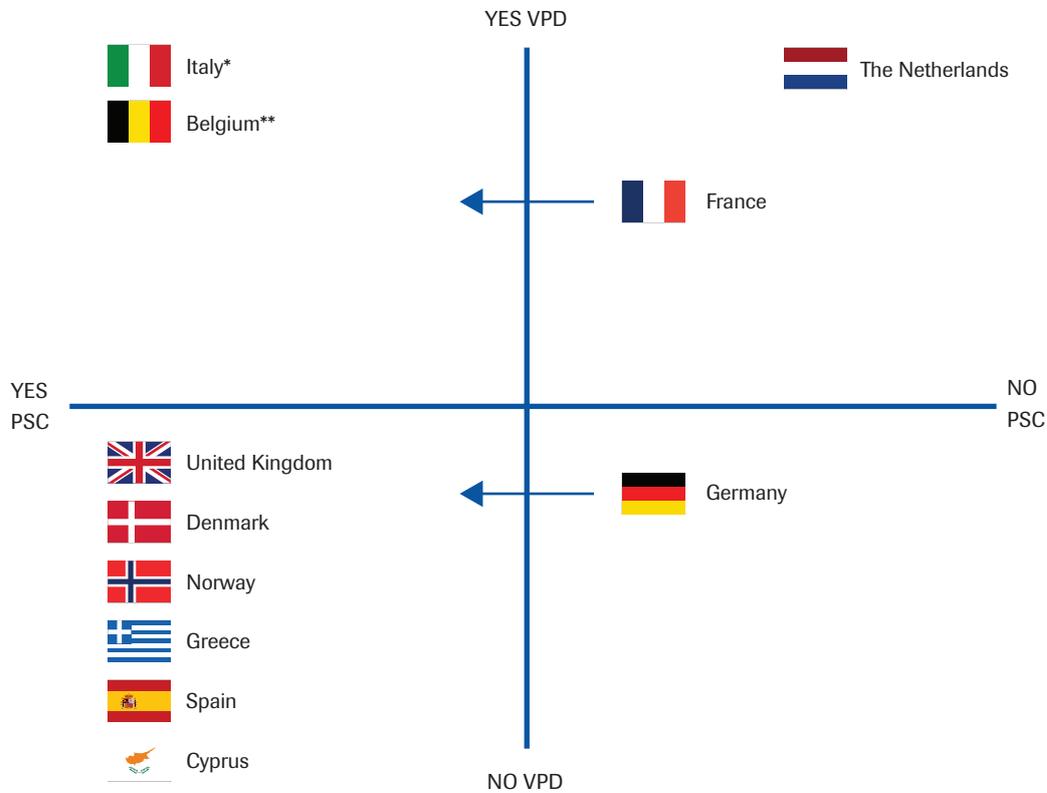
The axis diagram in Figure 3 below illustrates the positions of important (European) flag states on PSC and VPDs. It clearly shows that the majority of European maritime countries are located in the bottom-left quadrant of not providing VPDs while allowing PSCs. In the upper-right quadrant we find countries that provide for VPD protection while at the same time prohibiting private armed security. This quadrant, which is chiefly made up of countries that have strong ideas on the “monopoly on force” has been emptying possibly as a consequence of the shifting priorities of the military and decreasing state budgets, followed by a trend in privatization, but also because of changing ideas on state-private responsibilities. The upper-left corner shows a third option of regulating VPDs and PSCs. Namely, by using the different types of protection complementarily.

32 International Maritime Organization. Maritime Knowledge Centre. *Current Awareness Bulletin Volume XXIV* – No. 8. Available online at <http://www.imo.org/knowledgecentre/currentawarenessbulletin/Pages/Default.aspx>. (Visited 10-12-2012). August 2012.

33 International Maritime Organization. Maritime Knowledge Centre. *Current Awareness Bulletin Volume XXIV* – No.11, Available online at <http://www.imo.org/knowledgecentre/currentawarenessbulletin/Pages/Default.aspx> (Visited 11-12-2012). November 2012.



Figure 3 Important European Maritime states and their policy with regard to individual ship protection for commercial shipping (VPDs and PSCs)



* Italy allows the use of PSCs but only when VPD protection falls short, making PSCs complementary to VPD protection instead of supplementary.

** Belgium formally allows VPD protection but up until now this option has been rarely used.

*** The United Kingdom uses VPDs only on military ships, not for commercial ships.

Source: Kamerstukken and national legislation

7 Regulating the use of PSCs: The case of the UK, Norway and Denmark

The United Kingdom (UK) is an important player when it comes to counter-piracy and private maritime security company-regulatory initiatives. Whilst the number of British flagged ships sailing through the Gulf of Aden is relatively low compared to other nations, the UK plays a major role in maritime security for it is home to both a large number of active PSCs and an important number of insurance companies. It has also played an important role in developing the ICoC which came out in June 2010, prior to the announcement on the 30th of October of 2011 by the UK Prime Minister to allow private armed security guards on board of British-flagged shipping.

In the following month, the government released two documents; a guidance on measures to counter piracy and a guidance on the use of armed guards.³⁴ The former covers a general advice and recommended practices to deter an attack; the latter includes more specific guidance on the use of armed guards. It includes recommendations on the selection of a PSC, its size and composition, the equipment of the security team, the Master's authority, storage and handling and the use of firearms, the rules of force and post-incident reporting. The government did not explicitly recognize an accreditation process, however, thereby leaving the responsibility to choose and vet PSCs to the shipping companies.³⁵

Nevertheless, after a stakeholder consultation the government initiated an open bidding process for the regulation and accreditation of private security providers, which was won in June 2011 by the Security in Complex Environments Group (SCEG), a special interest group within the ADS, the biggest trade association occupied with advancing UK Aerospace, Defence, Security and the Space industries.³⁶ In December 2012, the Foreign and Commonwealth Office issued a ministerial statement³⁷ that the British Government intends to adopt the ASIS PSC.1-2012 as the standard for UK-based PSCs working in complex environments on *land* overseas.³⁸ The ASIS PSC.1 establishes an auditable mechanism for Private Security Service Providers to provide demonstrable commitment, conformance, and accountability to the principles outlined in the International Code of Conduct (ICoC) for Private Security Service Providers and the best practices of the Montreux Document (see more elaborately on the ICoC and the Montreux Document the next section). Independent third party auditors, accredited by the UK Accreditation Service (UKAS), would carry out

³⁴ Department for Transport (UK). *Guidance to UK Flagged Shipping on Measures to Counter Piracy, Armed Robbery and Other Acts of Violence Against Merchant Shipping*. November 2011 and *Guidance to UK flagged shipping on the use of armed guards to defend against the threat of piracy in exceptional circumstances*. Updated version (1.1) of June 2012.

³⁵ *Supra* 35. See *Guidance to UK Flagged Shipping on the use of armed guards* § 1.8.

³⁶ Foreign & Commonwealth Office. *Promoting High Standards in the Private Military and Security Company Industry*. Written Ministerial Statement. 21 June 2011.

³⁷ Foreign & Commonwealth Office. *Private Security Companies*. Written Ministerial Statement. 17 December 2012.

³⁸ ASIS International. *Management System for Quality of Private Security Company Operations-Requirements with Guidance*. ANSI/ASIS PSC.1-2012. 5 March 2012.



the auditing. This would later be displaced by the ISO standard for which the UK pledged its support early this year. The government is also contributing to an international drafting process under the ISO for an equivalent professional standard for PSCs working in the maritime sector.³⁹ It is however important to note that such an accreditation process is not obligatory under U.K. law and will most likely not become so.

In Norway, the decision to regulate the use of armed PSCs was made by means of changing existing regulations.⁴⁰ The amendments entered into force on the 1st of July 2011 and were soon followed by explanatory comments issued by the Norwegian Maritime Directorate.⁴¹ The amendments have introduced a set of rules under which armed guards may be deployed. Pre-deployment requirements for PSCs have been set up, consisting of a risk assessment and a number of documents in which the shipping company explains both the need for the armed guards and an assessment of the suitability of the PSC and the guards. This suitability check is done in accordance with the guidelines developed by the IMO. The Norwegian Maritime Directorate exerts control by deciding whether or not the company is permitted to use the company in question.⁴² On top of that it rules on the use of force and the storage and use of firearms. When deploying armed guards, PSCs have to apply for general, temporary firearms licences and with regard to the use of force the decision falls under the Master's authority.⁴³ In case of a situation where force has been used, the incident has to be reported to the Norwegian Maritime Directorate within 72 hours.

In June 2012, the Ministry of Justice of Denmark issued an order on the use of civilian armed guards on Danish cargo ships.⁴⁴ It indicates that the Minister of Justice may grant shipping companies a general permit to use civilian armed guards for self-defence on board cargo ships sailing under the Danish flag.⁴⁵ Based on an application, the shipping companies have the possibility to obtain a firearms certificate for using armed guards on Danish ships, provided that a general threat assessment for the area and the specifics of the case thereby require. The formal application procedure includes an identification of the need for armed guards and their suitability,⁴⁶ weapons licences and preventive measures taken. It also foresees in a formal reporting procedure.

39 International Maritime Organization. Maritime Knowledge Centre. *Current Awareness Bulletin Volume XXV – No.1* Available online at <http://www.imo.org/knowledgecentre/currentawarenessbulletin/Pages/Default.aspx> (Visited 10-02-2013). January 2013.

40 Regulations of 22 June 2004 No. 972 concerning security, anti-terrorism and anti-piracy measures and the use of force on board ships and mobile offshore drilling units (the Security Regulations) and the Regulations of 25 June 2009 No. 904 concerning firearms, firearms parts and ammunition, etc. (the Firearms Regulations).

41 Norwegian Maritime Directorate. *Provisional guidelines- use of armed guards on board Norwegian Ships*. July 2012.

42 See the Security Regulations *supra* 41 section 20 (4).

43 See the Firearms Regulations *supra* 41 article 23a and Security Regulations section 17 (1).

44 Danish Ministry of Justice. Order no.698 of 27 June 2012. Section 1.

45 *Ibid.*

46 *Supra* 45, section 7.

8 The public international law-framework

In addition to the question whether PSC personnel on board of ships can legally carry arms, one of the most discussed aspects of PSCs and their personnel is that of the laws that apply to them and their conduct. This is especially true in the field of international law, in which, to date, few binding norms exist to regulate their conduct or the responsibilities for states to regulate their obligation to ensure that their conduct is regulated. Although no internationally standardized regulation exists, it does not mean that there is no regulation whatsoever. On the contrary, a patchwork of soft law regulations, as well as private sector codes of conduct, present an opaque yet potentially over-regulated sector.

In order to establish what rules apply to the conduct of PSC personnel that operate on ships in the HRA off Somalia or in other regions, it is first important to establish that they do not operate in an armed conflict situation within the meaning of the Geneva Conventions on humanitarian law. Clearly, PSC personnel operating on ships are qualified as civilians without a licence to kill. The only force they are allowed to use, according to both international law and, most likely, national criminal codes, is force in defence of their own life and the lives of others. Force used beyond this threshold makes PSC personnel liable to criminal prosecution. Which state will execute its criminal jurisdiction depends inter alia on the question where the illegal use of force took place and whether there was any damage to another ship, or injuries or fatalities as a result of the use of force. Criminal jurisdiction can be exercised by the law of the vessel's flag state, the law of the nationality of the PSC personnel, or the law of the territorial state in the territorial waters of which the incident took place. Henceforth, more than one state can claim criminal jurisdiction to prosecute, each applying their own national standards also to the extent to which a situation qualifies as one to allow the use of force in self-defence. There are national differences in the interpretation of the extent to which a situation qualifies as one to allow the use of force in self-defence. According to some legislations, the firing of warning shots is not even considered to qualify as the use of force in self-defence, and is thus not scrutinized in the same way as other forms of (lethal) use of force. But even though differences exist across national legislation, the basic rule which is applicable to all seafarers is the following: the intentional use of lethal force may only take place when this is strictly unavoidable in order to protect life.⁴⁷ The difficulties lie in the questions related to the type and degree of force. Priddy and Stuart-Maslen thus pose the questions: 'Can shots be fired across the bow of a suspected pirate vessel in warning? Can PSC personnel even lawfully fire warning shots? Can they seek to immobilise the suspected pirate ship by firing into the engine block? If so, in what situation and at what point can such actions be taken?'⁴⁸ According to some national legislations, the shipmaster can order the non-lethal use of force to protect against theft or damage of the ship and the cargo. Clearly, in order to respect the principles of necessity and proportionality, a gradual response might be needed to stay within the limits of a lawful use of lethal force, but we agree with Priddy

⁴⁷ Principle 9 of the 1990 Basic Principles on the Use of Force or Firearms. See more elaborately on this issue Alice Priddy and Stuart Casey-Maslen, 'Counter-piracy Operations by Private Maritime Security Contractors; Key Legal issues and challenges', in: *Journal of International Criminal Justice*, Vol. 10, no. 4, 2012, pp. 839-856.

⁴⁸ See Priddy and Casey-Maslen, *op cit.*, p. 847.



and Stuart-Maslen when they call for ‘greater harmony of laws across national jurisdictions and better transparency in this area’.⁴⁹

With respect to combating piracy at sea, the United Nations Law of the Sea Convention (UNCLOS) provides for a number of rights and obligations for states. This includes the obligation to fight piracy with all means necessary and, in accordance with that duty, a number of rights, such as the right to interdict, detain and arrest pirates. PSCs that operate on board of commercial ships, however, do not enjoy these rights as they generally do not provide a government service with the accompanied authorization.

The fact that PSCs are not incorporated into the military structure and thereby are not part of the state does not mean, however, that they are less bound by international human rights law. This mainly stems from the fact that according to human rights law, states are obliged not only to respect human rights but also to protect rights from interference by others, including private companies. Rights of particular importance include those laid down in the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights and Fundamental Freedoms (ECHR), such as the right to life; freedom from torture and other cruel, inhuman or degrading treatment or punishment; freedom from arbitrary deprivation of liberty; and security.

A breach of the human rights obligations might trigger state responsibility. Clearly, this does not imply that the state is responsible for the lethal use of force by personnel of a PSC which is hired by a commercial shipping company. This is different when the state is the hiring party.

From this fundamental rule of state responsibility thus follows the legal obligation for states to protect against any human right abuse also by third parties, meaning illegal use of force by PSCs, by having in place a legislative and administrative framework to regulate the activities of PSCs as well as any accountability for abuse. This implies that it should be clear if armed PSCs can be deployed, and if so, with which weapons, when and how these weapons can be lawfully used, and under which circumstances. There should also be a mechanism of oversight in place. This conclusion was already drawn in the advisory report of the Advisory Council on International Affairs, entitled ‘Employing private military companies; A Question of responsibility’, in December 2007.⁵⁰

⁴⁹ See Priddy and Casey-Maslen, *op cit.*, p. 848.

⁵⁰ Adviesraad Internationale Vraagstukken, *De inhuur van privaat militaire bedrijven: Een kwestie van verantwoordelijkheid*, no. 59, December 2007, p. 22.

9 Soft law and private sector regulations

The limited number of “hard law” norms regulating PMSC stands in stark contrast to the large and growing body of soft law that has been developed over the last five years. This set of generally non-enforceable standards mainly seeks to provide principles by which companies, their personnel and contractors (e.g. shipping companies or governments) should operate and can thus be instrumental in better monitoring the activities of PSCs and prevent abuse.

One of the criticisms is that they are mainly self-regulatory instruments and therefore depend too much on the responsibility of the companies themselves and the idea that a fear of reputation loss would keep companies from breaching their promises. It is argued that their success very much depends on the quality of control & monitoring mechanisms.

On the other hand, these standards can inspire states in their efforts to better regulate and control the activities of PSCs. It might also have pushed the EU to take a step in regulating the practice of PSCs on board of commercial ships, since the European Commission recently announced that it might suggest common EU standards for the employment of PSCs on ships. The European Economic and Social Committee (EESC) calls on member states to allow the use of private armed guards “subject to a strict legal framework which makes the training of guards, inter alia, the responsibility of the member state of their establishment and lays down the terms of the master’s responsibility, particularly in the event of shots being fired”. How the EU’s ambition corresponds or competes with some of the other international tracks as laid out below, remains to be seen.

In the following sections, some important developments in the drafting of soft law codes are highlighted. The first four standards of conduct were initiated by international (non-) governmental organisations, mostly in cooperation with states. The private sector, in addition, has also developed several codes of conduct, and certification and vetting systems. The soft law and private sector regulations presented in the following section give an idea but do not present an exhaustive list.

Initiatives of international (non-)governmental organisations and states:

- The Montreaux document is the first international document to describe international law as it applies to the activities of Private Military Companies (PMCs) and PSCs in the context of an armed conflict. The initiative was taken up by the International Committee of the Red Cross (ICRC) and the Swiss government which published it in September 2008. It is a two-fold document recalling both the international legal obligations of States, Private Military and Security Companies (PMSCs) and their personnel and identifying good practices to help States take national measures to implement their obligations. Although the document was developed for situations of armed conflict, it also has value in situations outside of this context. On top of that it has a large number of important signatory states, including France, Germany, the UK, the USA, China and Denmark. With regard to states that come into contract with PSCs (or insource them) it provides for guidelines for procedures and criteria for the selection of PMSCs, contract terms and monitoring compliance. For states that are home to PSCs, good practices are identified for procedures and criteria for the authorization of PMSCs and monitoring compliance and ensuring accountability.



- In November 2010, the Swiss government, together with the Government of the UK & US, issued an International Code of Conduct (ICoC) aimed at both clarifying international standards for armed PSCs operating in complex environments and improving the oversight and accountability of these companies. The ICoC builds on the Montreaux document and the Ruggie framework and aims to provide standards for the private security industry.⁵¹ These include that security service providers are to uphold certain rules for the use of force, prevent human rights violations, how to select and vet personnel and subcontractors and report incidents. PSCs can commit themselves by signing the code, making it a form of self-regulation. As of 1st December 2012 over 550 companies have signed the code, most of them (190) coming from the U.K. The ICoC mandated the development of objective and measurable standards and the establishment of external independent mechanism for governance and oversight to members, including the certification of signatory companies' compliance. In January 2012, it was complemented by a draft for an independent governance and oversight mechanism. Although the code has merit, its limitations are that the code is written in the context of land-based security companies and is therefore not fully applicable to the situation of PSCs on merchant ships in Somalia. Nevertheless, it still provides an important standard for PSCs.
- Following the 89th session of the IMO MSC in May 2011, a set of guidelines on the use of privately contracted armed security personnel on board ships in the HRA were released. One providing for guidance to flag states and the other for shipowners, ship operators and shipmasters.⁵² The guidance for ship owners includes sections on: the selection criteria of private maritime security companies, insurance cover, team size, composition and equipment, command and control on board a vessel, the management of firearms and ammunition, rules for the use of force and reporting. The guidance for flag states mainly recommends that governments should provide clarity and establish a policy on whether private security will be authorized and under what conditions. In order to keep up with the current reality the guidelines have been updated, most recently in May 2012 when an additional guideline has been produced specifically addressing private maritime security companies operating in the HRA. This guidance covers PMSC certification, PMSC company requirements, management and deployment considerations.
- Following the 90th session, the MSC has given the International Organization for Standardization (ISO) a mandate to provide international standards for PMSCs providing privately contracted armed security personnel (PCASP) on board ships. The ISO standard was published in 2013 and establishes a set of criteria that PMSCs will need to demonstrate that they conform therewith order to be certified.⁵³ This covers everything from client engagement and risk perception through service delivery and post-incident management. The standard is an attempt to create an international vetting standard, which the MSC agreed that the ISO "would be in the best place to develop".⁵⁴ By many it is hoped

51 Human Rights Council. *Promotion and Protection of all Human rights, civil, political, economic, social and cultural including the right to development*. "Protect, Respect and Remedy: a Framework for Business and Human Rights. A/HRC/8/5. 7 April 2008.

52 IMO MSC.1/Circ.1406. Interim recommendations for flag states regarding the use of privately contracted armed security personnel on board ships in the high risk area (Rev.2 on 25 May 2012) and IMO MSC.1/Circ. 1405. Interim guidance to shipowners, ship operators, and ship masters on the use of privately contracted armed security personnel (PCASP) on board ships in the high risk area. (Rev.2 on 25 May 2012).

53 ISO/ PAS 28007: 2012.

54 IMO Guidance for private maritime security companies agreed by IMO's Maritime Safety Committee. MSC 90th session. Available online at <http://www.imo.org/MediaCentre/PressBriefings/Pages/17-msc-90-piracy.aspx> (Accessed 12 December 2012). May 2012.



to become a first step towards an international harmonized vetting system for PSCs. The formal auditing process for PSCs will start in March 2013 and individual audits will take up to 4 months to complete.

By the security industry

- The Security Association for the Maritime Industry (SAMI), which encompasses over 180 maritime security members, in 2012 developed standards for private maritime security company accreditation. This accreditation programme is intended to enable potential contractors to assess the suitability of a PMSC and its security personnel to perform security operations in the HRA. The accreditation process, which consists of 3 stages, has already been partially completed by 30 PSCs.
- The American Security Industry Society (ASIS), an international society of security professionals counting over 38,000 members and accredited by the American National Standards Institute (ANSI), has developed a set of standards and guidelines for security professionals. With the PSC.1 the ASIS has developed a standard based on the Montreux Document and the ICOC for PSCs operating on land overseas. In addition, it has created PSC.4, which will be released in July 2013, and is a guideline for implementing ANSI/ASIS PSC.1-2012 in the *maritime* environment. The former has already been recognized by the UK which has announced that PSC.1 will be the standard for all its future private security contracts.
- The International Association of Maritime Security Professionals (IAMSP) published a guidance for PSCs in June 2012. The document is set up so as to provide guidance to companies that intend to (or are) delivering armed security services on board vessels.

By the shipping industry

- BIMCO, ICS, INTERCARGO, INTERTANKO, OCIMF, and the International Group of P&I Clubs released a set of guidelines for the use of PMSCs in May 2011. Although less comprehensive than existing guidelines, it provides some guidelines on PMSC selection criteria, insurance, command & control, the management of weapons, the rules for the use of force and reporting.
- In an effort to create an industry standard for the employment of Security Guards on Vessels, in 2012 the Baltic and International Maritime Council (BIMCO) released a standard contract (GUARDCON) for the employment of security Guards on Vessels. It gives shipowners and PMSCs guidance with respect to standards to which the contractor (PMSC) must conform in terms of insurance cover and permits and licences for weapons, liability and indemnity provisions and the master's responsibility.

By insurance companies

- The insurance companies Norwegian War Risk Association (DNK) and Norwegian Hull Club have together developed a third party vetting system for private maritime security companies. The vetting system, called the Safegage system, completed the pilot phase in late May 2012 by vetting Aegis and Protection Vessel International (PVI) according to the standard. It is stated to be a guide until the new ISO standard is fully developed and implemented.

10 Key aspects of regulations

Although on the international level the limited number of binding rules is complemented by a large and growing body of soft law which provides for additional guidance on the use of PSC and armed guards, still most of the regulation comes from the national level. European governments that allow private armed security have set different conditions for the deployment of PSCs and private armed guards that operate on ships flying their flag, which illustrates their different view on the matter.

By comparing the different “models” of Denmark, Norway and the UK, all three of which are states that allow private armed security as protection against Somali piracy, more insight is obtained on what choices are made and how governments can arrange a regime that they consider to be the most appropriate. It obviously all starts with the basic decision in general to allow the use of armed PSCs to protect commercial ships against maritime piracy. Whether permission is granted to a shipping company for a specific ship for a specific transit clearly depends on various circumstances. We therefore suggest that 7 key aspects play a central role in the approaches taken by these three countries. Taken together, they form a basic regime on the use of PSCs and armed guards. The aim here is therefore not to be exhaustive concerning all available options or all aspects where a regulatory choice is made, but rather to provide a broad idea of how governments can tweak on some of the important regulatory aspects. The relevant articles of the specific regulations in Denmark, Norway and the UK can be found in Annex II. These 7 aspects for regulations are:

- Weapon permits and permits for armed guards
- Scope of application of the permit (geographically, and type of vessel)
- Certification or vetting procedure
- Threshold for the use of force
- Role of the master
- Third-party insurance
- Oversight and control in relation to responsibility and accountability

A basic regulatory question for governments relates to the question of how to arrange a system of weapon permits and permits for armed guards. In Denmark, when shipping companies want to use armed guards on cargo ships flying the Danish flag they can submit an application for a permit with the Ministry of Justice containing information on the shipping company, the precaution measures taken and why there is a need for private armed security.⁵⁵ If granted, the company receives a one-year general permit to use private armed guards for self-defence purposes. Norway has a comparable model, requiring the shipping company to apply for a firearms permit with the police, which can be granted for up to six months.⁵⁶ In the UK system, the government is less implicated in the decision to use armed guards, which essentially means that the decision to use armed guards falls on the shipping company and the ship’s master, but the Department for Transport (DfT) should be informed of this decision. Instead of the shipping company applying for licences, here the PSC should provide the shipping company with proof of relevant UK licences and authorisations with

⁵⁵ *Supra* note 45.

⁵⁶ *Supra* note 41. Section 2 and Section 23a of the Firearms regulations.



respect to the possession, carriage and movement of firearms, ammunition and other military and paramilitary equipment.⁵⁷

Another basic question concerns the area and type of ships of private armed operation. Its importance lies in the fact that it determines the basic scope of application of any permission granted to the shipping company and the private armed security providers operating on the ship of the flag state concerned. The different models of the UK, Denmark and Norway show that there is a range of regulatory options. With regard to the geographical scope of private armed guards, the UK limits the use of armed guards on UK flagged ships to the HRA, whilst Norway refers to areas with alert level 2 or 3 and south of 30 degrees north latitude, which is an area considerably greater than the HRA.⁵⁸ With respect to the type of ships that can qualify for PSC protection there are some differences as well. Whilst all models allow private armed security at least on cargo ships of 500 gross tonnage and above, the UK and Norway allow them also on passenger ships and in the case of Norway also offshore drilling units are included.

Thirdly, there is the aspect of certification and vetting. This concerns the question of what procedures are in place to check the suitability of armed guards and PSCs as well as who is responsible to make that choice. The importance lies in the fact that it determines the balance between government control and responsibility, on the one hand, and that of private parties on the other. The three case studies show that the primary responsibility for making sure that the PSC and armed guards are suitable lies with the owner of the ship, which is usually a shipping company. The owner can make use of its respective national guidelines and regulations which in turn are to a large extent based on the IMO guidelines. This includes procedures for selecting and vetting by using background checks, insurance checks, licence checks and checks on their training. Although the models are broadly comparable, Norway puts more emphasis on the suitability of the guards themselves instead of the PSC and has an in-built safety valve in the form of the Norwegian Maritime Directorate, which can decide that companies may not use a particular firm if it receives “credible information indicating that the firm in question is clearly unsuitable”.⁵⁹ But apart from that, none of the states has recognized a full accreditation regime for PSCs operating on ships flying their flag in the maritime environment. This means that it is up to the shipping companies to choose and vet PSCs and armed guards, using the selection and vetting criteria set up in national and referred to-IMO guidelines, in order to decide what PSC is most suitable. Whilst there are no government (approved) accreditation systems, the private security sector provides for a variety of certification systems. A well-known example is that of the SAMI.⁶⁰

A fourth key aspect concerns the threshold for the use of force. As a starting point, the three states recognize that guards may use force for self-defence against an imminent threat to life. This contains the condition that it should only be used when necessary and reasonably proportionate. However, apart from the similarity on this point, the specific circumstances permitting the use of force differ. In Denmark, force can be used in self-defence and the defence of others against an imminent threat to life, mobility or ship. Norway states that force can be used to protect, but also to prevent acts of piracy when the threat is direct,

⁵⁷ *Supra* 35 See Interim Guidance to UK flagged Shipping on the Use of Armed Guard to Defend Against the Threat of Piracy in Exceptional Circumstances. November 2011 (v. 1.1).

⁵⁸ See the Security Regulations *supra* note 41 at section 2. Definitions. This level 2 risk includes the HRA.

⁵⁹ *Supra* note 42 at section 20 §4.

⁶⁰ Security Association for the Maritime Industry. > Membership > PMSC Certification section. Available online at <http://www.seasecurity.org/sami-certification-for-pmscs/> (Visited 6 February 2013).



imminent, significant and otherwise unavoidable.⁶¹ It adds that firing aimed shots with the objective of rendering a person harmless can be used as a last resort. In the UK the use of force is considerably broader and can be used for the purpose of self-defence, the defence of others, the defence of property and the prevention of crime. This includes the possible use of lethal force, including through the use of legally held firearms. In addition, it can be employed to prevent a crime that is in progress. It should be emphasized, however, that if an incident would occur in the territorial waters of a coastal state in the HRA, those involved are also subject to the jurisdiction of that state, meaning that the state can claim territorial responsibility in case of an accident. It would therefore be wise to also take into consideration the standards used in the national legislation of the states from the region of the HRA.

Another key aspect is the role of the master, because he is responsible according to maritime law for the safety and security of the ship. The government should decide how far his responsibility goes and what implications this would have with respect to criminal liability. In the three case studies, it is clear that considerable responsibility is given to the master. The UK model, for example, gives the master the authority to decide whether or not armed guards are used on a particular voyage. It also gives him or her control over the armed guards and the responsibility for determining and exhausting all available options before recommending potential armed intervention to overcome a piracy threat. This is laid down in a contractual agreement between the shipping company and the PSC.⁶² The Danish model establishes comparable overall master responsibility but does not indicate its own detailed rules or guidelines on the position of the master. It does however refer to the IMO guidelines which indicate that the master has overall authority, and that only with his approval can weapons be taken out of storage. In the Norwegian model the master also has considerable responsibility. Armed guards are employed in consultation with the master and fall under his command; the master shall be permitted to decide to employ force when necessary to prevent or protect against piracy. The provisional guidelines on armed guards, however, show that the master may exercise significant discretion when faced with an unclear and apparently precarious situation.⁶³ For the sake of clarity, this does not impair the right of the individuals on the ship to defend themselves when their lives are in imminent danger.

Third-party insurance arrangements relate to what guarantees or insurances exist in case of third-party injury, damage or loss. Predefined, clear and specific third-party insurances reduce the risk that unsuspected claims or costs arise from incidents which can put third parties in a vulnerable position. The UK has regulated this by stating that the shipowner should verify that the PSC holds suitable insurance cover for itself, its personnel and third-party liability including a responsibility for the PSC to insure its personnel for accidents, injuries and damages. Norway states that companies should know whether the PSC is insured and mainly refers to the IMO guidelines for further details and Denmark similarly refers to the IMO guidelines.

Some of the human rights treaties which bind states require them to take measures to ensure that an individual has the opportunity to obtain entitlements to that right. This is true for the maritime environment as in any other situation where violations of human rights can occur. However, the particularities of the maritime context is that little conventional monitoring and control exists and much evidence can become lost, which makes a bigger

⁶¹ See the Security Regulations *supra* note 41 at section 17.

⁶² *Supra* note 59 at 3.11.

⁶³ *Supra* note 42.



appeal for flag states to take their responsibility to regulate the documentation of actions and rules on the ship, for example by obliging parties to write down the Rules of Force, the command structures, the equipment present and the actions taken. All of these aspects can later help to attribute legal responsibility and accountability. The Danish regulations, for example, provide for clear rules with regard to keeping up a weapons log-book and reporting attacks. It provides for a 72-hour time limit to report an attack to the Ministry of Justice, including a description of the incident, information about those involved and the use of force and which firearms have been used. If there is reason to believe that the use of force has resulted in personal injury or death, the police in the district where the company is established shall be notified. Ideally also sound, video footage or photography are included to describe the situation.⁶⁴ Norway has a comparable model with 72-hour post-incident reporting. This includes a description of the persons involved and the use of force, including the use of firearms. The firearms register, however, seems to provide for a more limited documentation than the weapon log-book of Denmark.⁶⁵ The guidelines state that sound and video recordings are optional for the shipping company. The UK, on the other hand, requires that a report of the incident should be submitted within 6 hours to UKMTO and MSCHOA in accordance with BMP. Other than the broad guidelines which Denmark and Norway set out, the UK provides for a more accurate and extensive list of elements that should be included in the post-incident report. This includes details of events leading up to the incident, written statements from those involved, photographs, lessons learned from the incident, recommended procedures and a firearms incident report. Similarly it provides for a reporting procedure when a crime has occurred on a UK ship.

⁶⁴ *Supra* note 45 §8.

⁶⁵ *Supra* note 42 at §11.

11 Debating VPDs v. PSCs in the Dutch context: The pros and cons

Whether VPDs or PSCs are a better solution to the security needs of Dutch shipping companies and their personnel has been hotly debated for some time now but has recently seemed to be drawing new attention. The Dutch government's position on the monopoly on the use of force, and its practice of VPD deployment, has, according to the shipping industry, not provided an adequate response to the risks they are facing, in a way that corresponds with the level playing field which they need to operate. Reflagging and loss of market share, they argue, can be the result.

Whilst the cons associated with VPD deployment mainly relate to practical or technical issues such as the costs, delivery time, assessment criteria and capacity restraints (see above), those associated with PSCs are of a different kind. These relate more to issues of state responsibility, accountability & control and legitimacy, issues that are generally associated with a breach of the monopoly on force, or the abuse of the power to use force. The monopoly on the use of force has hence been central in the discussion on PSCs and has been an important reason in the past few years for the Dutch Government to resist their use. Especially issues with regard to accountability and control have been cited to be problematic. This is exacerbated by the fact that the legal framework still lacks clear binding norms to regulate their behaviour and that the body of soft law that has been created to fill this gap depends too much on self-regulation. This opacity has been a reason for some to resist their use and argue that, until clear rules on their use exist, states should not allow the use of armed PSCs. Especially in the legal field we have seen numerous authors holding such a view.

Nevertheless, others tend to argue that such a legalistic approach does not recognize the current reality and does not provide solace for the current security needs and limited naval capacity of states to protect all ships in the HRA. Instead, they argue, PSCs can fill this security gap which states cannot fill themselves. They continue to argue that states are not fully responsible to protect all vulnerable ships sailing under their flag transiting the HRA. Moreover, sticking to a legalistic approach which is too strict could even push shipping companies towards the practice of illegally hiring PSCs. An additional negative aspect that follows from this development is the fact that the certified PSCs with good reputations are not willing to take the job of sailing with ships under a flag of a country that prohibits the use of armed PSCs. As a consequence, Dutch shipping companies have to turn to smaller companies which are not certified, and which do not have a track record of good conduct, nor the extensive network to make the best security assessments of the region. The risk of abuse and unrecorded incidents is obviously much higher in this grey sector.

Furthermore, the governments of neighbouring European states which are not using VPDs have in some cases done so, because it is their political conviction that the scarce military capacities available, which are moreover under pressure due to austerity measures, should not be used for VPD deployments, when this form of protection can well be provided through the private sector. Yet, conscious of the fact that additional security is still needed to protect the commercial vessels that secure substantive (national) economic interests, and which operate in a highly competitive market, they have made an effort to legalise the use of armed PSCs taking into account a selection of criteria which need to be met before a permit is granted.

12 Policy recommendation

An assessment of the pros and cons leads us to conclude that continuing the current Dutch policy without adjustments is not desirable. In order to move ahead, three scenarios are possible:

1. The use of PSCs remains illegal. The requirements for VPD deployment should then be more flexible, the delivery time should be shorter, and the costs should be further reduced.
2. The practice of VPD deployment remains the backbone of Dutch policy, but in addition the use of PSCs (either insourced as a government task, or privately contracted) is admitted under strict criteria and oversight mechanisms.
3. The policy of VPD deployment is no longer practised. The use of PSCs (either insourced as a government task, or privately contracted) is made possible under strict criteria and oversight mechanisms.

Obviously, under option 2 or 3, in order to meet the state's human rights obligations and state responsibility requirements, strict criteria and oversight mechanisms should be in place. The key aspects of regulation and oversight that were mentioned in this report can be instructive in that process.

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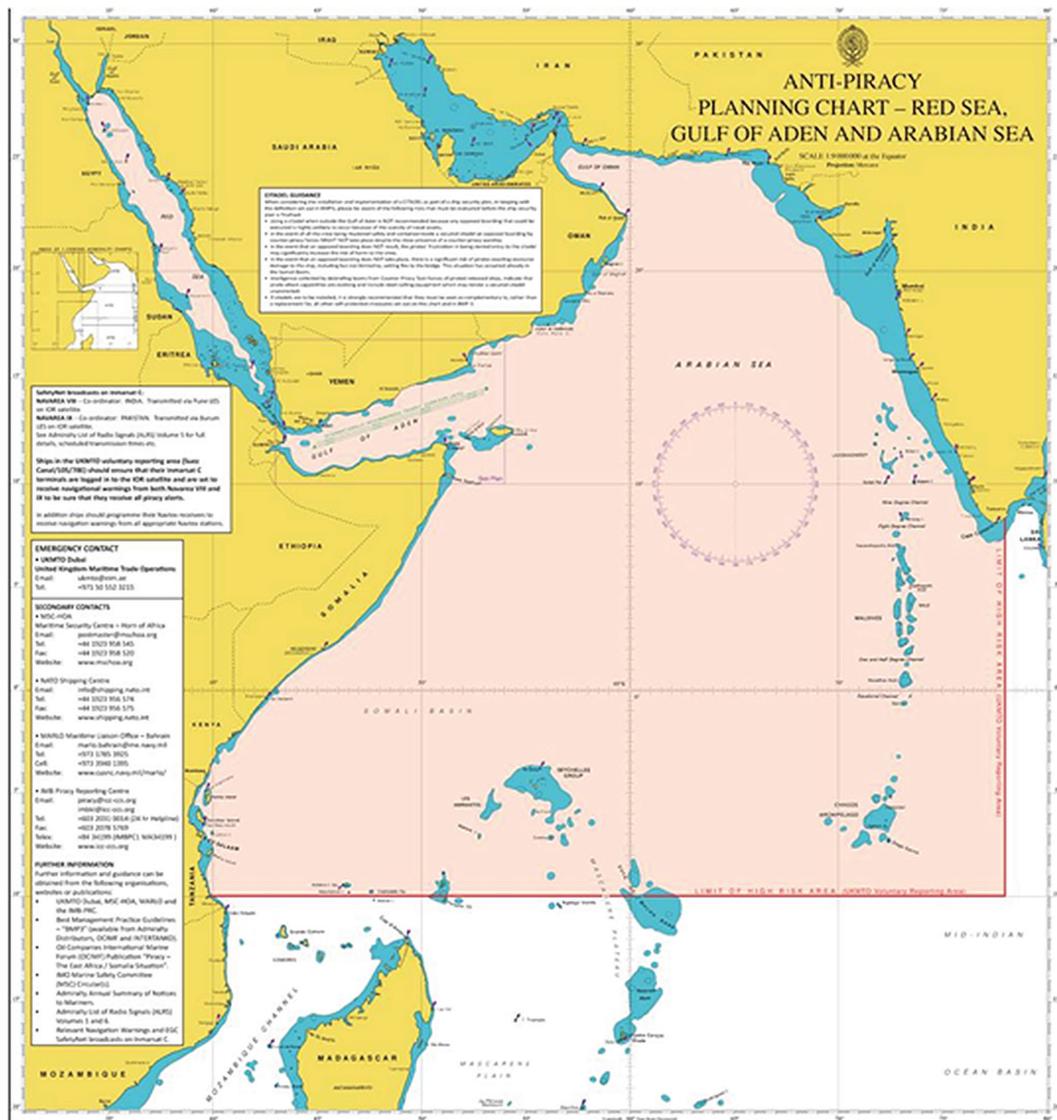
Interviews

- Interview with a representative from a PSC
- Interview with representatives from the KVNR

Appendices

Annex I

Current High Risk Area as established in BMP-4. Protection against Somalia Based Piracy. November 2011





Annex II

Aspect / Country	Norway
<p>Weapon permits and permits for armed guards</p>	<p>Section 20 1) To prevent or protect the ship against acts of terrorism and piracy, armed guards may be employed following the completion of a risk assessment and following consultation with the master.</p> <p><i>The Regulation of 22 June 2004 No. 972 concerning protective security measures on board ships and mobile offshore drilling units</i></p> <p>A company which is considering bringing armed guards on board its ships must first apply for a firearm permit pursuant to section 23 a of the Firearms Regulations. The company may apply for a permit even if no decision has been made to conclude a contract with a specific security firm for the purchase of armed guard services. The application must be made to the chief of police in the police district in which the company or the operating company has its head office, or the police district in which the local representative of the owner has its registered address. Companies may only be granted a permit for a limited time period of up to six months.</p> <p>[...]Permits granted pursuant to section 23 a of the Firearms Regulations are deemed to be firearm licenses.</p> <p>[...] Granted permits will only apply in cases in which firearms are brought on board for protection against [...] piracy Companies may be granted a general permit to hold firearms. [...] The reason why permits are not linked to individual firearms is that the permit and application systems of the Firearms Act appear to be largely impractical and unsuitable [...]</p> <p><i>Provisional guidelines – use of armed guards on board Norwegian ships</i></p>
<p>Scope of application of the permit (geographically, and type of vessel)</p>	<p>Section 1. §1 [...] these regulations shall apply to the following Norwegian ships: a) passenger ships [...] b) cargo ships [...] with a gross tonnage of 500 or more [...] c) mobile offshore drilling units. [...]</p> <p>Section 1 §3 [...] shall apply to ships sailing in, to or from an area subject to alert level 2 or 3, but only when they are sailing south of 30 degrees north latitude.</p> <p><i>The Regulation of 22 June 2004 No. 972 concerning protective security measures on board ships and mobile offshore drilling units</i></p>



	Denmark	United Kingdom
	<p>Section 1. The Minister of Justice may, upon application, grant shipping companies a general permit to use civilian, armed guards for self-defence on board cargo ships flying the Danish flag.</p> <p>Section 3. Applications for permits [...] shall be sent to the Ministry of Justice [...] shall contain the following information:</p> <ol style="list-style-type: none"> 1) Identification of the shipping company [...] as well as indication of the International Safety Management Code (ISM) responsible person. 2) If the ship's owner and ISM responsible person is not the same, both persons' accept of the application for the use of civilian, armed guards shall be available. 3) Previous weapons licenses granted to the applicant. 4) Information that the ships have especially approved security lockers on board or that one will be procured before the guards embark. 5) Confirmation that procedures are available and that measures have been taken to prevent piracy and that the shipping company is familiar with IMO 1405. 6) The reason why there is a need for civilian, armed guards on board the shipping companies' ships and why the BMPs are not considered sufficient. <p>Section 9. Permits [...] shall be issued with a validity of one year.</p> <p>Section 10. In order to ensure that the weapons act (våbenloven) and this order are complied with, additional conditions may be laid down for being granted a permit.</p> <p><i>Order no. 698 of 27 June 2012 issued by the Ministry of Justice</i></p>	<p>3.4 In the case of firearms which are subject to a general prohibition in the UK under section 5 of the Firearms Act 1968, the owner of the PSC must be able to provide a section 5 authorization from the Secretary of State, together with either evidence of being a registered firearms dealer; or separate firearms certificates for each of the armed guards.</p> <p>3.5 If the PSC is a British company, they will require valid UK export and / or UK trade licenses authorizing the lawful transit of firearms, ammunition and other military and paramilitary equipment. [...]</p> <p><i>Interim Guidance to UK flagged Shipping on the Use of Armed Guard to Defend Against the Threat of Piracy in Exceptional Circumstances. November 2011 (v. 1.1).</i></p>
	<p>Section 1.Sub 2. Permits [...] shall apply in areas presenting a risk of acts of piracy or armed robbery against ships.</p> <p>Section 2. This order shall not apply to passenger ships, fishing vessels and recreational craft.</p> <p><i>Order no. 698 of 27 June 2012 issued by the Ministry of Justice</i></p>	<p>1.5 This policy only applies to internationally trading passenger ships and cargo ships of 500 gross tonnage and above.</p> <p>1.6 The exceptional circumstances under which armed guards may be employed for use onboard UK flagged ships are:</p> <ul style="list-style-type: none"> - When the ship is transiting the high seas throughout the HRA [...] AND - The latest BMP is being followed fully but, on its own, is not deemed by the shipping company and the ship's master as sufficient - the use of armed guards is assessed to reduce the risk to the lives and well being of those onboard the ship <p><i>Interim Guidance to UK flagged Shipping on the Use of Armed Guard to Defend Against the Threat of Piracy in Exceptional Circumstances. November 2011 (v. 1.1).</i></p>



Aspect / Country	Norway
Certification or vetting procedure	<p>Section 20</p> <p>2) Before armed guards are taken on board [...] the company shall send the following documents to the Norwegian Maritime Directorate for briefing purposes:</p> <ul style="list-style-type: none">a) A statement of reasons stating why the industry's guideline preventive measures are deemed insufficient and that there is a need for armed guards.b) An assessment of the suitability of the security firm and the guards, including the security firm's own documentary evidence:<ul style="list-style-type: none">1. of satisfactory procedures for the recruitment and training of personnel;2. of satisfactory procedures for the procurement, use, maintenance, storage and transportation of equipment, including firearms and ammunition, relevant to the assignment in question;3. that the guards hold the necessary qualifications and have completed necessary training, including firearms training, for the assignment in question; and4. that the guards are at least 18 years of age, can identify themselves and can submit a recently issued certificate of good conduct. If a certificate of good conduct cannot be obtained, an alternate, similar confirmation or reference should be procured. [...] <p>3) When selecting and using security firms, the company shall take account of guidelines developed by the IMO.</p> <p>If the Norwegian Maritime Directorate becomes aware that a specific security company cannot be regarded as suitable for use on Norwegian-registered ships, the Norwegian Maritime Directorate shall be permitted to decide that companies are not permitted to use the company in question.</p> <p><i>The Regulation of 22 June 2004 No. 972 concerning protective security measures on board ships and mobile offshore drilling units</i></p>



	Denmark	United Kingdom
	<p>Section 7. The shipping company shall approve the suitability of the guards or ensure that the security company can document that it has procedures for the approval of the suitability of the guards. The suitability of a guard shall, as a minimum, presuppose that the following is ensured:</p> <ol style="list-style-type: none">1) The guard can identify himself and document to have turned 20 years of age.2) The guard shall present an extract from the police record dated within the last three months.3) It shall not appear from the extract from the police record that the person concerned has been punished for a violation that makes the person concerned unsuited to possess and use weapons and that this is checked at least once a year through the presentation of a new extract from the police record.4) The guard shall document relevant experience with weapons.5) The guard shall have the necessary knowledge of the regulations on self-defence and necessity.6) The guard's personal matters do not otherwise make it inadvisable to approve the guard. <p><i>Order no. 698 of 27 June 2012 issued by the Ministry of Justice</i> For more information see: http://www.dma.dk/SiteCollectionDocuments/CMR/Piracy/pirateri-JM%20vejledning.pdf</p>	<p>1.8 The Government does not currently recognize an accreditation process for PSCs operating in the maritime sector. Shipping companies must, therefore, be extra vigilant in selecting an appropriate PSC to provide armed security onboard their ships [...]</p> <p>3.1 As with any other type of contractor, it is important to undertake appropriate due diligence which normally includes investigation and [...]</p> <ul style="list-style-type: none">- Company structure and place of registration;- Company ownership;- Financial position [...]- Extent of insurance cover (in particular covering third-party risks);- Senior management experience; and- Quality management indicators – e.g. ISO accreditation. <p>3.2 To assess the suitability and capability of the PSC to provide the specialised service of protecting a ship from pirate attack, the shipping company should satisfy itself that that the PSC has:</p> <ul style="list-style-type: none">- Relevant and recent maritime (as opposed to land-based) experience;- Testimonials/references from previous clients in the maritime industry;- An accurate understanding of the local piracy threat and means to maintain it [...]- A full understanding of BMP and ship protection measures;- Written procedures on management [...]- A system in place to ensure continued suitability of their personnel for employment as armed guards [...]- Access to competent maritime legal advice on a 24/7 basis, [...]- Appropriate insurance cover;- An understanding of port State and coastal State laws [...]- An understanding of the UK's laws and requirements [...]- An understanding of post incident procedures [...] <p>3.6 [...] the shipping company should be able to satisfy itself that the PSC they select has a system in place to ensure continued suitability of their personnel for employment as armed guards. [...]</p> <p><i>Interim Guidance to UK flagged Shipping on the Use of Armed Guard to Defend Against the Threat of Piracy in Exceptional Circumstances. November 2011 (v. 1.1).</i></p>



Aspect / Country	Norway	
Threshold for the use of force	<p>Section 17</p> <ol style="list-style-type: none">1) When necessary to prevent or protect against acts of terrorism and piracy, the master shall be permitted to decide to employ force subject to the limitations laid down by international law. [...]2) The use of force shall only be permitted against a threat which is direct, immediate, significant and otherwise unavoidable. The use of force shall be avoided wherever possible, and when it is necessary, it shall be reasonably proportionate in view of the scope of the threat and the conditions otherwise. [...] <p>Section 24</p> <ol style="list-style-type: none">2) Before firearms are used, consideration shall be given to the dangers or damage to which those on board may be exposed as a result of such use.3) If the circumstances permit, the attacker(s) shall be warned by means of light and sound signals and the firing of warning shots.4) The firing of aimed shots with the objective of rendering a person harmless shall only occur as a last resort and after other, gentler means have been tried unsuccessfully, or in situations in which alternative means clearly have no chance of success. <p><i>The Regulation of 22 June 2004 No. 972 concerning protective security measures on board ships and mobile offshore drilling units</i></p>	



	Denmark	United Kingdom
	<p><i>International guidelines (IMO MSCs etc.)</i></p> <p>See: http://www.dma.dk/Policy/Sider/Piracy.aspx</p>	<p>8.2 If, with BMP ship protection measures in place, the threat persists, the use of reasonable force may be considered [...]</p> <p>8.4 The PSC must have in place, and agree with the shipping company upon, rules on the use of force that the armed security personnel will operate within. These rules must be based upon the applicable laws governing the use of force. [...]</p> <p>8.9 Under the law in England and Wales, a person may use force which is reasonable in the circumstances as they genuinely believed them to be for the purposes of, for example:</p> <ul style="list-style-type: none">a. self-defence;b. defence of another;c. defence of propertyd. prevention of crime <p>8.10 The law does not preclude the use of lethal force – including through the use of legally held firearms – when acting in self defence or protecting the lives of other people, but a person can only use force that is proportionate and reasonable in the circumstances as they genuinely believed them to be. Care should be taken to minimize injury and to respect and preserve human life. [...]</p> <p>8.12 If a person believes a threat is imminent, it is not necessary for them to wait for the aggressor to strike the first blow before using reasonable and proportionate force to defend themselves and / or others.</p> <p>8.13 Reasonable and proportionate force may be used in the prevention of a crime which includes piracy [...]</p> <p><i>Interim Guidance to UK flagged Shipping on the Use of Armed Guard to Defend Against the Threat of Piracy in Exceptional Circumstances.</i> November 2011 (v. 1.1).</p>



Aspect / Country	Norway	
Role of the master	<p>Section 17 1) When necessary to prevent or protect against acts of terrorism and piracy, the master shall be permitted to decide to employ force subject to the limitations laid down by international law. [...]</p> <p>Section 22 2) The procedures shall state that guards on board are under the master's command.</p> <p>Section 23 2) The company or the master shall ensure that a register is kept of the firearms and ammunition loaded onto and unloaded from the ship, and shall report such loading and unloading to the Norwegian Maritime Directorate immediately. [...]</p> <p>Section 24 1) Arming and the implementation of procedures for the use of firearms shall be approved by the master in each individual case. Individuals shall always be responsible for ensuring that their use of firearms complies with sections 17 and 22.</p> <p><i>The Regulation of 22 June 2004 No. 972 concerning protective security measures on board ships and mobile offshore drilling units</i></p>	



	Denmark	United Kingdom
	<p><i>International guidelines (IMO MSCs etc.)</i></p> <p>See: http://www.dma.dk/Policy/Sider/Piracy.aspx</p>	<p>5.1 [...] The ship's Master has the authority to ultimately decide whether or not armed guards are used on a particular voyage.</p> <p>5.2 [...] the contractual agreement between the shipping company and the PSC should include a clearly defined command and control structure which confirms the Master's authority over the operation of the ship and the safety and security of its passengers, cargoes and crew.</p> <p>5.3 The security team should be headed up by a security team leader who reports directly to the ship's Master and is responsible for the operational control, deployment and discipline of the armed guards. [...]</p> <p>5.4 In the event of situations which affect the security or safety of the ship, or the lives of the crew, the security team leader should be responsible for advising the ship's Master on the responses available to counter the threats in accordance with the principles of using force. [...]</p> <p>The Master will be responsible for determining and exhausting all available options before recommending potential armed intervention to overcome a piracy threat. The Master has the authority to decide when the security team are armed [...]</p> <p>5.5 The Master should provide approval of the course of action to be adopted by the security team leader who must in turn communicate this to the members of the security team. [...] if there is insufficient time for the security team leader to seek approval from the Master before a course of action is taken, they should inform the Master as soon as possible afterwards [...]</p> <p>5.6 [...] The decision to use force must lie with the person using force [...]</p> <p>Neither the Master nor the security team leader can command a member of the security team against that person's own judgment to use force or to not use force.</p> <p>8.1 Where a potential pirate threat is identified, the ship's Master must first follow the advice included in BMP and take appropriate and reasonable steps to reduce the potential for a situation where it may be necessary to use force, for example by maintaining maximum speed to get away from the pirates. The ship's Master must also alert UKMTO immediately by phone.</p> <p><i>Interim Guidance to UK flagged Shipping on the Use of Armed Guard to Defend Against the Threat of Piracy in Exceptional Circumstances. November 2011 (v. 1.1).</i></p>



Aspect / Country	Norway	
Third party insurance	<p>Section 21 Before using armed guards, the company shall give reasonable notice to the insurers covering its liability, losses, expenses or expenditure resulting from piracy, and provide any information required by an individual insurer in order to clarify matters relating to its insurance policy.</p> <p><i>The Regulation of 22 June 2004 No. 972 concerning protective security measures on board ships and mobile offshore drilling units</i></p>	



	Denmark	United Kingdom
	<p><i>International guidelines (IMO etc.)</i></p> <p>See: http://www.dma.dk/Policy/Sider/Piracy.aspx</p>	<p>3.1 As with any other type of contractor, it is important to undertake appropriate due diligence which normally includes investigation and [...]</p> <ul style="list-style-type: none">- Extent of insurance cover (in particular covering third-party risks); <p>3.12 [...] Shipping companies are strongly recommended to consult with their insurers prior to contracting with and embarking private armed security to assess the potential impact on their insurance cover, particularly as it relates to armed engagements and liability insurance held by the PSC. The ship owner should be confident that the agreed rules of use of force do not prejudice or potentially prejudice the ship owners' insurance cover.</p> <p>3.13 The ship owner should verify that the PSC holds suitable insurance cover for themselves, their personnel and third-party liability cover. The PSC should provide evidence that they hold and will maintain for the duration of the contract:</p> <ul style="list-style-type: none">- public and employers liability insurance cover to an appropriate level and as required by the ship owner;- personal accident, medical expenses, hospitalization and repatriation insurance. <p><i>Interim Guidance to UK flagged Shipping on the Use of Armed Guard to Defend Against the Threat of Piracy in Exceptional Circumstances. November 2011 (v. 1.1).</i></p>



Aspect / Country	Norway	
Oversight and control in relation to responsibility and accountability	<p>Section 17</p> <p>3) The unlawful use of force may result in criminal liability pursuant to the Act of 22 May 1902 No. 10 relating to the general civil penal code (the General Civil Penal Code).</p> <p>Section 18</p> <p>1) If the ship has been subjected to an attack and the ship has employed force, the incident shall be reported to the Norwegian Maritime Directorate within 72 hours. The report shall describe the incident and detail the persons involved and the use of force, including firearms. If the circumstances permit it, the situation should be documented by means of sound and video recordings, to the extent that this is possible.</p> <p>2) If there is reason to believe that the use of force has resulted in personal injury or death, a report shall immediately be made to the Norwegian National Criminal Investigation Service (Kripos).</p> <p>Section 22</p> <p>1) The company shall establish procedures for the use of armed guards, and for the use and storage of firearms [...] The procedures shall be notified to the master, the crew and guards accompanying the ship.</p> <p>4) The procedures shall not be subject to verification and certification [...]</p> <p><i>The Regulation of 22 June 2004 No. 972 concerning protective security measures on board ships and mobile offshore drilling units</i></p>	



	Denmark	United Kingdom
	<p>Section 6 A shipping company [...] shall be obliged to keep a weapons record book when there are firearms, etc. on board to be used by civilian, armed guards. [...]</p> <p>Subsection 5. Upon request, the weapons record book shall immediately be presented to the Ministry of Justice or the police.</p> <p>Subsection 6. At any time, the police shall on due proof of identity and without a court order have access to control pursuant to section 3(3) (iii) of the weapons act (våbenloven).</p> <p>Section 8. If a Danish cargo ship the responsible shipping company of which holds a permit [...] has been subject to an attack and if force has been employed on the ship's side, the incident shall be reported in writing to the Ministry of Justice within 72 hours.</p> <p>Subsection 2. The report [...] shall describe the incident, inform about those involved and the use of force, including for example which firearms have been used. The report shall be accompanied by a copy or an extract of the information given in the shipping company's weapons record book as regards the ship concerned at the relevant point in time.</p> <p>Subsection 3. If there is reason to believe that the use of force has led to personal injury or death, the police in the district in which the shipping company is established shall immediately be informed hereof.</p> <p>Subsection 4. If circumstances permit, the situation should furthermore insofar as is possible be documented by means of sound and picture recordings.</p> <p>Section 11. Subsection 3. Companies, etc. (legal persons) may be liable to punishment in accordance with the provisions of chapter 5 of the penal code (straffeloven).</p> <p><i>Order no. 698 of 27 June 2012 issued by the Ministry of Justice</i></p>	<p>9.1 Following any pirate attack, the ship's master and the security team leader should complete a detailed written report of the incident, [...] in accordance with BMP. UKMTO requires this report to be submitted as soon as possible after the incident but certainly within 6 hours.</p> <p>9.2 When sending the report to UKMTO and MSCHOA, it should also be copied to DfT. This will assist DfT to maintain a complete understanding of the threat that UK flagged ships are under, and the effectiveness of different self-protection measures (including armed guards) in preventing acts of piracy.</p> <p>9.3 The master and security team leader should complete a formal written record (firearms incident report) of every incident where firearms are discharged, [...] Where a crime is committed, this report may serve as evidence, and must therefore be accurate and complete [...]</p> <p>9.4 The firearms incident report should record, as a minimum:</p> <ul style="list-style-type: none"> - Time and location of the incident; - Details of events leading up to the incident; - Details of the incident; - The identity and details of personnel involved in the incident, and witnesses; - Written statements from those involved in the incident and witnesses; - Photographs - Video surveillance [...] - Details of injuries and/or material damage sustained during the incident; and - Lessons learned from the incident and, where applicable, recommended procedures to prevent a recurrence of the incident. [...] <p>9.7 Where a serious crime has occurred onboard a UK ship, MRCC Falmouth must be notified immediately [...]</p> <p>9.8 Post-incident evidence gathering should be in accordance with the guidance contained in the Crime Manual for Ships Security Officers produced by the Association of Chief Police Officers (ACPO). [...]</p> <p>9.9 The UK Police will advise the ship as to the most appropriate post incident practice [...]</p> <p><i>Interim Guidance to UK flagged Shipping on the Use of Armed Guard to Defend Against the Threat of Piracy in Exceptional Circumstances. November 2011 (v. 1.1).</i></p>

State or Private Protection against Maritime Piracy?

A Dutch Perspective

This report is intended to contribute to the debate in the Netherlands on how to organise the protection of commercial shipping against piracy at sea. A major question is whether or not the use of armed private security companies to protect commercial shipping should be allowed. While Dutch ships may apply for on board protection by military vessel protection detachments, the use of armed private security companies is not allowed by the Dutch government. In order to better assess the factors relevant to balancing the pros and cons of allowing private security companies to provide protection to ships passing through high risk areas, this report provides an overview of the challenges related to military vessel protection detachments, the existing legal framework for private security companies, and key regulatory aspects. It concludes that continuing the current Dutch policy without adjustments is not desirable. In order to move ahead, three main options are: 1) to uphold the prohibition on the use of private security firms, but to make the availability of military protection detachments more flexible, quicker, and cheaper; 2) to maintain military protection detachments as the backbone of Dutch policy, but to allow the use of private firms under strict criteria and oversight mechanisms; 3) to end the deployment of military protection detachments, and to make the use of private firms possible under strict criteria and oversight mechanisms.

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