

# Vessel Protection Detachments and Maritime Security: An Evaluation of Four Years of Italian Practice

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## Abstract

This article was prompted by the Italian Government's recent decision to stop embarking vessel protection detachments (VPDs) on board Italian vessels. This decision was related to the well-known *Enrica Lexie* case, which involved a dispute between Italy and India regarding two Italian marines for the alleged killing of two Indian fishermen in 2012. Since 2010, the possibility to embark VPDs on board commercial ships as a means for countering pirate attacks has been greatly discussed within international fora. Such a possibility was addressed in the 2011 IMO Best Management Practice as 'the recommended option when considering armed guards' on board. Yet, since 2011, this approach has proved to be controversial. While VPDs have proved to be effective in the Italian experience, a host of sensitive legal issues have arisen, and the present contribution aims at addressing them. This article will first provide an overview of international practice concerning VPDs. Secondly, it will focus on Italian state practice, highlighting its key points and drawbacks through a critical analysis of the thorniest issues. Lastly, some concluding remarks will be made regarding the opportunity for other countries to follow the Italian example.

## Keywords

vessel protection detachments, counter-piracy operations, international law of the sea, *Enrica Lexie* case, Italian state practice, use of lethal force

## 1. Introduction

On 19 March 2015, the Italian Minister of Defence, Ms. Pinotti, testified before the Italian Joint Senate and Lower House Foreign Affairs and Defence Committee on Italian participation in international peace operations. During her speech relating to the well-known *Enrica Lexie* case,<sup>2</sup> Ms. Pinotti stated that the:

Italian commitment in the fight against piracy will also change. Italy will continue to be part of Operation Atalanta, *but it will stop providing Vessel Protection Detachments for embarkation on Italy-flagged merchant vessels*, as well as Italy's participation in NATO Operation Ocean Shield. The decision was taken considering the recent positive trend showing a significant decrease in pirate at-

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<sup>2</sup> See Section 4, below.



tacks, as well as the finalization of merchant vessels' defense procedures. The Government acknowledged the last Parliamentary decisions, in particular as regards the request to re-assess our participation in counter-piracy activities on the basis of developments in the issue of the two Italian marines detained in India.<sup>3</sup>

From this declaration accrues that, after four years of embarking vessel protection detachments (VPD or VPDs) on board Italian-flagged private vessels,<sup>4</sup> the Italian Government has decided to stop using them, even though it has not yet amended the relevant legislative provisions.

The decision by Italy to no longer rely on VPDs is of particular relevance since it is one of the few states that comprehensively regulates the use of VPDs. Furthermore, Italy is among a handful of states that has had to deal with disputes concerning the activities of VPDs, namely in the *Enrica Lexie* case. In other words:

No country other than Italy regulated the use of both the VPD and the PCASP in organic and comprehensive form on the basis of an approach that privileges the role of the State in maintaining the public order at sea protecting also nationals. The Italian initiative represents, in conclusion, *a model for both the international institutions and the industry* that will be faced in the future with the need to adopt legislative or soft law instruments ... to avoid the 'present state of anarchy at sea'.<sup>5</sup>

Even though one may agree with the proposition that the Italian regulation of VPDs could serve as a model for other states, this should not be done without a critical assessment of the Italian normative framework, practice and legal issues relating to VPDs. This article aims at doing precisely this.

The article at hand will first provide an overview of international practice with regard to the establishment and activities of VPDs. Second, it will focus on the Italian legislation on the use of VPDs by highlighting the most relevant legal issues arising from it, which will be addressed in a subsequent section at the example of the *Enrica Lexie* case. In conclusion, it will consider whether, from a normative and practical perspective, the Italian legal framework on VPDs could be a model for other states aiming to regulate the use of VPDs.

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3 Ministry of Defence, 'International Missions: Minister Pinotti' (19 March 2015) <[www.difesa.it/EN/Primo\\_Piano/Pagine/audiz.aspx](http://www.difesa.it/EN/Primo_Piano/Pagine/audiz.aspx)> accessed 1 July 2015 (emphasis added). This statement by the Italian Minister was in response to a parliamentary inquiry on the *Enrica Lexie* case. For the Italian full text of the inquiry, see 'Legislatura 17 Atto di Sindacato Ispettivo n. 301559. Atto n. 301559' <[www.senato.it/japp/bgt/showdoc/showText?tipodoc=Sindisp&leg=17&id=845587](http://www.senato.it/japp/bgt/showdoc/showText?tipodoc=Sindisp&leg=17&id=845587)> accessed 1 July 2015.

4 The very first Italian VPD was embarked on the *M/N Montecristo* on 2 November 2011, pursuant to Italian Law no. 130/2011; see Section 3, below.

5 Fabio Caffio, 'Protecting merchant ships by means of vessel protection detachments (VPD) and privately contracted armed security personnel (PCASP): the Italian experience' in Angela del Vecchio (ed), *International Law of the Sea* (Eleven 2014) 191, 201 (footnotes omitted, emphasis added).



## 2. The use of VPDs in international practice

The international community defines VPDs as ‘military or law enforcement units embarked on a civilian ship in order to protect it against potential attacks.’<sup>6</sup> As noted by NATO, this means of protecting vessels from pirate attacks in the waters off the coast of Somalia and in the Indian Ocean has proved to be less resource demanding than others.<sup>7</sup>

Ever since the International Maritime Organisation (IMO) endorsed the use of VPDs as a preferred means for direct protection in its 2011 Best Management Practices against Somalia Based Piracy (BMP4),<sup>8</sup> a number of states have enacted legislation in order to allow this type of protective measure to be implemented on vessels flying their flag<sup>9</sup> or on World Food Programme (WFP) ships.<sup>10</sup>

The use of VPDs has sparked scholarly debate about the potential benefits and disadvantages of this practice. Some authors maintain that the international community should address the piracy threat with measures that do not continuously drain public financial resources,<sup>11</sup> and therefore support the idea of self-defence measures by seafarers. Other scholars, however, point to a number of problems arising from the use and storage of weapons on board private ships navigating through foreign territorial waters.<sup>12</sup> This issue concerning the law of the sea is among the thorniest and brings up the questions of a potential breach of the rules concerning innocent passage,<sup>13</sup> a derogation from the one

6 Thomas M Jopling, ‘The Growing Threat of Piracy to Regional and Global Security’ (5 April 2009, NATO Doc. 023 CDS 09 E) para 62, fn 24 <[www.nato-pa.int/Default.asp?SHORTCUT=1770](http://www.nato-pa.int/Default.asp?SHORTCUT=1770)> accessed 1 July 2015.

7 Ibid, para 80, whereby ‘[c]ompared with individual escorts, VPDs provide a simpler and less resource-intensive means of protection’; see also Kiara Neri, ‘The use of force by military vessel protection detachments’ (2012) 51 ML&LoWR 73, 74.

8 IMO, ‘Best Management Practices for Protection against Somalia Based Piracy’, annex to MSC.1/Circ.1339 (14 September 2011) 39, para 8.15 (‘BMP4’), para 8.15 stipulates: ‘The use, or not, of armed Private Maritime Security Contractors on-board merchant vessels is a matter for individual ship operators to decide following their own voyage risk assessment and approval of respective Flag States. This advice does not constitute a recommendation or an endorsement of the general use of armed Private Maritime Security Contractors. ... Subject to risk analysis, careful planning and agreements the provision of Military Vessel Protection Detachments (VPDs) deployed to protect vulnerable shipping is the recommended option when considering armed guards.’

9 Apart from Italy, whose legislation will be dealt with in the following, also France, Germany, Norway, the Netherlands and the United Kingdom, amongst others, have been using VPDs in order to protect vessels flying their flags; see Marten Zwanenburg, ‘Military vessel protection detachments: the experience of the Netherlands’ (2012) 51 ML&LoWR 97, 98, fn 4.

10 The embarkation of VPDs on World Food Programme (WFP) vessels has been endorsed by the UN Security Council in most of its resolutions concerning Somali piracy. See, *inter alia*, UNSC Res 2184 (12 November 2014) UN Doc S/RES/2184/2014, para 29. Even states not permitting VPDs on board vessels flying their flag, such as Serbia, have been providing military protection on board WFP vessels; see *EU Navfor Somalia News*, ‘Serbian autonomous vessel protection detachment ensures protection of World food programme ship’ (8 October 2014) <[www.eunavfor.eu/serbian-autonomous-vessel-protection-detachment-ensures-protection-of-world-food-programme-ship/](http://www.eunavfor.eu/serbian-autonomous-vessel-protection-detachment-ensures-protection-of-world-food-programme-ship/)> accessed 1 July 2015.

11 See, *inter alia*, Robert S Jeffrey, ‘An efficient solution in a time of economic hardship: the right to keep and bear arms in self-defense against pirates’ (2010) 41 JML&C 507, 533.

12 See, amongst others, Clive Symmons, ‘Embarking vessel protection detachments and private armed guards on board commercial vessels: international legal consequences and problems under the law of the sea’ (2012) 51 ML&LoWR 21.

13 *ibid* 61 ff. On the issue of armed personnel on board vessels and innocent passage, see, by way of analogy, Anna Petrig, ‘The use of force and firearms by private maritime security companies against suspected pirates’ (2013) 62 ICLQ 667, 679 ff.



flag-one law principle<sup>14</sup> and the degree of force authorised by the United Nations Convention on the Law of the Sea (UNCLOS) during self-defence activities.<sup>15</sup>

Even though the above issues concerning the law of the sea in general have not been comprehensively dealt with,<sup>16</sup> or solved, by legal doctrine, state practice has generally moved towards the acceptance of, or has even endorsed, the embarkation of VPDs on board commercial vessels. The UN Security Council expressed its approval in the following terms:

*Noting* the efforts of flag States for taking measures to permit vessels sailing under their flag transiting the High Risk Area (HRA) to embark vessel protection detachments and privately contracted armed security personnel (PCASP), and *encouraging* States to regulate such activities in accordance with applicable international law and permit charters to favour arrangements that make use of such measures.<sup>17</sup>

In light of this, it can be argued that the international community generally recognises the advantages of the use of VPDs on board private vessels, notwithstanding the potential legal issues arising from the reliance on this type of protective measure.

### 3. Italian legislation on VPDs

As already mentioned, a number of states and international non-governmental organisations<sup>18</sup> have highlighted the potential advantages of using VPDs on board private vessels, while the IMO and the Security Council have even endorsed such a measure.<sup>19</sup> Italy is among a number of states that have regulated the use of VPDs. Concretely, it enacted a specific provision (Article 5; later referred to as 'VPD Law') relating to VPDs and privately contracted armed security guards (PCASG) when issuing

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14 This issue occurs exclusively when a VPD is embarked on board a foreign ship, as French and Estonian domestic legislation seem to allow; see *EU Navfor Somalia News*, 'EU naval force: Estonian vessel protection detachment operating on a French vessel' (21 March 2013) <[www.eunavfor.eu/eu-naval-force-estonian-vessel-protection-detachment-operating-on-a-french-vessel/](http://www.eunavfor.eu/eu-naval-force-estonian-vessel-protection-detachment-operating-on-a-french-vessel/)> accessed 1 July 2015. On the one flag-one law principle, which is implicitly provided for in Article 92 of the United Nations Convention on the Law of the Sea (UNCLOS), see Myron H Nordquist, Satya N Nandan, Shabtai Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Vol III, Kluwer 1995) 122 ff.

15 See Neri (n 7).

16 Various scholars have analysed the topics pertaining to VPDs and the law of the sea from different perspectives, but their solutions were not taken into account by state or international organisation practices. Nonetheless, the in-depth examination of those works has to be considered as a necessary complement to the present contribution. As such, see, among others, Matteo Tondini, 'Some legal and non-legal reflections on the use of armed protection teams on board merchant vessels: an introduction to the topic' (2012) 51 *ML&LoWR* 7; Symmons (n 12); Neri (n 7); Zwanenburg (n 9).

17 UNSC Res 2184 (n 10).

18 Amongst others, the maritime section of the International Chamber of Commerce, ie the International Maritime Bureau.

19 See the instruments referred to in Section 2, below.



Law no. 130/2011,<sup>20</sup> pursuant to EU Council Joint Actions 2008/749<sup>21</sup> and 2008/851<sup>22</sup> as subsequently amended.<sup>23</sup>

Article 5 VPD Law provides for the conclusion of a memorandum of understanding between the Ministry of Defence and the Italian ship-owner association (Confitarma) on the use of VPDs.<sup>24</sup> However, the provision does not define the composition of a VPD, its geographical scope of operation or its duties.<sup>25</sup> The VPD Law only provides that military personnel on VPD duty shall comply with the guidelines and rules of engagement issued by the Ministry of Defence and that they are appointed law enforcement officers and auxiliaries with regard to the crime of piracy as provided for in Articles 1135-1136 of the Italian Navigation Code.<sup>26</sup> Furthermore, it stipulates that the costs of embarking VPDs shall be borne by the private ship-owner and, generally speaking, ‘no new or additional burdens to the public budget shall stem from the implementation of [such provisions].’<sup>27</sup>

Following the enactment of the mentioned Article 5 VPD Law,<sup>28</sup> the Ministry of Defence issued De-

20 Art 5 of the Law no. 130 of 2 August 2011, on conversion and amendment of the Decree Law no. 107 of 12 July 2011, containing the extension of the participation of Italy in international operations pursuant to UNSC Res 1970 (2011) and 1973 (2011), as well as urgent counter-piracy measures (Italian title: ‘Conversione in legge, con modificazioni, del decreto-legge 12 luglio 2011, n. 107, recante proroga degli interventi di cooperazione allo sviluppo e a sostegno dei processi di pace e di stabilizzazione, nonché delle missioni internazionali delle forze armate e di polizia e disposizioni per l’attuazione delle Risoluzioni 1970 (2011) e 1973 (2011) adottate dal Consiglio di Sicurezza delle Nazioni Unite. Misure urgenti antipirateria’), *Italian official journal*, 5 August 2011 (VPD Law). For a non-official translation of the relevant paragraphs of Article 5, see Caffio (n 5) 198-99.

21 Council Joint Action 2008/749/CFSP on the European Union military coordination action in support of UN Security Council resolution 1816 (2008) (EU NAVCO) [2008] OJ L259/39.

22 Council Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast [2008] OJ L301/33, in particular Article 2(a) providing that: ‘Under the conditions set by the relevant international law and by UNSC Resolutions 1814 (2008), 1816 (2008) and 1838 (2008), Atalanta shall, as far as available capabilities allow: ... (a) provide protection to vessels chartered by the WFP, including by means of the presence on board those vessels of armed units of Atalanta, in particular when cruising in Somali territorial waters.’

23 Joint Actions 2008/749/CFSP and 2008/851/CFSP were amended through Council Joint Actions 2009/907/CFSP ([2009] OJ L322/27), 2010/437/CFSP ([2010] OJ L210/33), 2010/766/CFSP ([2010] OJ L327/49) and 2012/174/CFSP ([2012] OJ 89/69).

24 VPD Law, art 5(1).

25 VPD Law, art 5(4). The Italian legislation also provides for the residual possibility of using PCASGs on board Italian-flagged vessels for protective purposes under specific requirements. They must notably comply with BMP4 self-protection standards; furthermore, only in cases where VPD personnel are not available, they can be used, since the *ratio legis* is to maintain the state’s monopoly on the use of force. The issue of PCASGs in Italian law falls outside the scope of the current contribution, but for an analysis of the topic, see Greta Tellarini, ‘Il ricorso a personale armato come misura antipirateria: l’impiego di guardie giurate private a bordo delle navi mercantile italiane’ [2014] RdRdN 207.

26 VPD Law, art 5(2). The same is provided for in Article 4(4) of the memorandum of understanding concluded between the Ministry of Defence and the Italian ship-owner association on 11 October 2011, see n 30, below.

27 VPD Law, art 5(6-ter) (author’s own translation). The Italian passage reads as follows: ‘[d]all’attuazione del presente articolo non devono derivare nuovi o maggiori oneri a carico della finanza pubblica.’

28 VPD Law, art 5(1).



cree no. 212 of 1 September 2011, which defines the geographical scope of VPD operations.<sup>29</sup> Moreover, the Ministry concluded a memorandum of understanding with Confitarma on 11 October 2011,<sup>30</sup> which provides the legal basis for embarking VPDs on board Italian vessels. It also provides a definition of a VPD as a military unit composed of military personnel, preferentially from the Navy, embarked on trading vessels.<sup>31</sup>

Subsequently, specific contracts were signed between the Ministry of Defence and individual ship-owners on the basis of the so-called 'Format Convention', which is a model convention.<sup>32</sup> The Format Convention mainly specifies the rules contained in the VPD Law, in particular with regard to the allocation of decision-making powers and responsibilities. Moreover, it adds the requirement that ships on which VPDs are embarked must comply with BMP4 passive-protection<sup>33</sup> standards.<sup>34</sup> Only those ships can rely on active-protection measures, such as VPDs or PCASGs.

#### 4. Legal challenges arising from the use of VPDs: the *Enrica Lexie* case

VPDs have been used to protect Italian-flagged vessels ever since they were first deployed on board the *M/N Montecristo* on 2 November 2011. Up until 31 December 2013, more than 247 Italian vessels

29 Decree of the Ministry of Defence no. 212 of 1 September 2011, on the delimitation of the geographical scope of the embarkation of VPDs (Italian title: 'Individuazione degli spazi marittimi internazionali a rischio di pirateria nell'ambito dei quali può essere previsto l'imbarco dei Nuclei militari di protezione (NMP)'), *Italian official journal*, 12 September 2011. The area is delimited by Article 2(1) as follows: 'a section part of the Indian Ocean delimited by the Bab El Mandeb Strait on the north-western border, by the Hormuz Strait on the northern border, by the 12th parallel on the southern border and by the 78th meridian on the eastern border.' That area overlaps the so-called High Risk Area, which is a maritime area whose 'western border ... runs from the coastline at the border of Djibouti and Somalia to position 11 48 N, 45 E; from 12 00 N, 45 E to Mayyun Island in the Bab El Mandeb Straits. The eastern border is set at 78 E, the southern border is set at 10 S and the Northern Border set at 26 N' (International Bargaining Forum, 'Revision of the IBF High Risk Area in the Gulf of Aden and Indian Ocean' (2011) [www.ukpandi.com](http://www.ukpandi.com) > knowledge > industry issues > piracy and maritime security > Piracy - Revision of IBF High Risk Area - effective 1st April 2011, accessed 1 July 2015).

30 The full Italian text of the memorandum is available at <[http://unipd-centrodirittiumani.it/public/docs/A\\_101011\\_Protocollo\\_Difesa\\_CONFITARMA\\_UG.pdf](http://unipd-centrodirittiumani.it/public/docs/A_101011_Protocollo_Difesa_CONFITARMA_UG.pdf)> accessed 1 July 2015 (MoU).

31 *ibid*, art 1. The Italian version reads as follows: 'Nucleo Militare di Protezione (di seguito NMP): nuclei militari, costituiti da personale della Marina Militare o altra Forza Armata, imbarcabili su Navi mercantili ed in grado di assicurarne la protezione da atti di pirateria o depreazione armata'.

32 The full Italian text of the Format Convention is available at <[http://unipd-centrodirittiumani.it/public/docs/B\\_101011\\_Convenzione\\_Difesa\\_CONFITARMA\\_UG.pdf](http://unipd-centrodirittiumani.it/public/docs/B_101011_Convenzione_Difesa_CONFITARMA_UG.pdf)> accessed 1 July 2015 (Format Convention).

33 A passive-protection measure is a measure that does not require a human to operate it, such as fences or microwave sensors systems; on this, see Mariusz Kastek and others, 'Passive automatic anti-piracy defense system of ships' <[www.researchgate.net/publication/258521296\\_Passive\\_automatic\\_anti-piracy\\_defense\\_system\\_of\\_ships](http://www.researchgate.net/publication/258521296_Passive_automatic_anti-piracy_defense_system_of_ships)> accessed 1 July 2015. Conversely, an active protection measure is a human measure, which requires some degree of training, such as VPDs. For a general overview, see Olanipekun M Kayode, 'Active and passive security at sea: the case study of the Gulf of Guinea' <[www.academia.edu/8901668/Active\\_and\\_Passive\\_Security\\_at\\_Sea\\_Case\\_Study\\_of\\_the\\_Gulf\\_of\\_Guinea](http://www.academia.edu/8901668/Active_and_Passive_Security_at_Sea_Case_Study_of_the_Gulf_of_Guinea)> accessed 1 July 2015.

34 Format Convention (n 32) art 3(1).



relied on VPDs.<sup>35</sup> While in the vast majority of cases, no particular legal issues arose, the *Enrica Lexie* or so-called 'Italian marines' case brought up a number of such issues, which are discussed next.

The circumstances of the case are, in a nutshell, the following: on 15 February 2012, the Italian oil tanker *Enrica Lexie* was sailing towards Djibouti through the Indian Ocean. It was approached by an Indian fishing vessel, *St. Antony*, 20.5 nautical miles off the coastline of the Indian State of Kerala. Since the Indian fishing vessel was not flying any flag and was ignoring both the calls for identification and the warnings by the tanker, the Italian VPD allegedly mistook it for a pirate ship and shot at its hull. Subsequently, the *St. Antony* sailed toward to the Indian coast and the *Enrica Lexie* continued its route towards Djibouti.

The Mumbai Maritime Rescue Coordination Centre contacted the shipmaster of the *Enrica Lexie* when the tanker was 38 nautical miles off the Indian coast, asking him to sail to the Cochin port in Kerala (India) in order to participate in the investigation into an incident of piracy that had occurred near the *Enrica Lexie* position. On the basis of the ship-owner's instructions and with the consent of the VPD team leader, shipmaster Commander Vitelli set sail towards the Indian port. Upon arrival at Cochin on 16 February 2012, the shipmaster was informed by the Indian authorities that an inquiry into the murder of two Indian fishermen embarked on the *St. Antony* had begun. On 19 February 2012, the Indian authorities arrested two of the six VPD members. Domestic Indian criminal proceedings were subsequently commenced against two of the marines embarked on the *Enrica Lexie*. This prompted an international dispute between India and Italy, which remains on-going. Hence, many legal questions relating to the use of VPDs are not yet settled. In the following, three specific issues, which are not comprehensively and satisfactorily covered by the Italian regulation of VPDs, will be discussed.<sup>36</sup>

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35 See 'NMP - Nuclei Militari di Protezione' <[www.marina.difesa.it/cosa-facciamo/operazioni-in-corso/nuclei-militari-protezione/Pagine/nuclei-militari-protezione.aspx](http://www.marina.difesa.it/cosa-facciamo/operazioni-in-corso/nuclei-militari-protezione/Pagine/nuclei-militari-protezione.aspx)> accessed 1 July 2015; no newer data is available.

36 For a general overview of the case and the issues pertaining to the law of immunities and the law of the sea, see Valeria Eboli and Jean Paul Pierini, 'Coastal State jurisdiction over vessel protection detachments and immunity issues: the *Enrica Lexie* case' (2012) 51 *ML&LoWR* 117; Natalino Ronzitti, 'The *Enrica Lexie* incident: Law of the sea and immunity of State officials issues' (2012) 22 *IYIL* 3; Natalino Ronzitti, 'La difesa contro i pirati e l'imbarco di personale militare armato sui mercantile: il caso della *Enrica Lexie* e la controversia Italia-India' (2013) 96 *RDI* 1073; Gian Maria Farnelli, 'Back to Lotus? A recent decision by the Supreme Court of India on an incident of navigation in the contiguous zone' (2014) 16 *ICLR* 106.



#### 4.1 Decision-making powers and responsibilities on board ships protected by VPDs

The Italian legislation identifies three persons to whom different degrees of decision-making powers are attributed: the company,<sup>37</sup> the shipmaster and the VPD team leader. Pursuant to the Executive Decree of the Ministry of Infrastructure no. 349/2013,<sup>38</sup> the company managing the ship, as defined by the Decree itself, is responsible for the assessment of the risks connected to the embarkation of military personnel on VPD duty,<sup>39</sup> the matter of their 'familiarisation' with the crew<sup>40</sup> and the fulfilment of requirements with regard to life-saving appliances,<sup>41</sup> such as life-jackets.

As regards the allocation of responsibilities between the shipmaster and the VPD team leader while the ship is in transit, a functional criterion applies. On the one hand, the Format Convention<sup>42</sup> provides that the shipmaster will be exclusively responsible for all activities relating to navigation, namely setting the route, steering and equipping the ship, which also includes passive-protection measures, the arrangement of which should not lie within the responsibility of the VPD team leader.<sup>43</sup> In other words, the shipmaster is fully responsible for the security and safety of the ship, its crew and shipment, with regard to all measures not falling within the responsibility of the VPD team leader. On the other hand, the VPD team leader is in charge of actions taken in order to repel and gather evidence on pirate attacks.<sup>44</sup> Moreover, it is the team leader who decides on a potential surrender of the ship to alleged pirates.<sup>45</sup> A lacuna exists, however, as Italian law does not specify whether the consent of the VPD team leader is required in order to surrender the ship to foreign authorities. Indeed,

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37 Article 2(1)(d) of the Decree of the Ministry of Infrastructure 349/2013 defines a company as the ship-owner or any other natural or legal person who undertook the responsibility to verify the compliance of the ship with the IMO International Safety Management Code (IMO Res A.741(18) (4 November 1993)) (Italian version: 'Company: l'armatore della nave o qualsiasi altra organizzazione o persona, quali il gestore oppure il noleggiatore a scafo nudo, che ha assunto dall'armatore la responsabilità dell'esercizio della nave e che, nell'assumere tale responsabilità, ha convenuto di assolvere a tutti i compiti e le responsabilità imposti dal codice ISM').

38 Decree of the Ministry of Infrastructure no. 349 of 13 April 2013 on technical and administrative procedures relating to the safety of navigation and maritime security with regard to urgent counter-piracy measures (author's translation; Italian title: 'decreto di disciplina delle procedure tecnico-amministrative afferenti alla materia della sicurezza della navigazione (safety) e la sicurezza marittima (maritime security) in relazione alle misure urgenti antipirateria') <[www.guardiacostiera.it/ACFE38/Decreto\\_Dirigenziale\\_349\\_2013.pdf](http://www.guardiacostiera.it/ACFE38/Decreto_Dirigenziale_349_2013.pdf)> accessed 1 July 2015.

39 *ibid.*, art 6; such an evaluation is required by BMP4 (n 8) as a matter of 'risk assessment and approval of respective Flag States'.

40 *ibid.*, art 8.

41 *ibid.*, art 7; article 7(2) provides that under exceptional and justified circumstances, a ship may be allowed to derogate the security and safety requirements of the International Convention for the Safety of Life at Sea ((signed 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278) in embarking a VPD. However, the notion of 'exceptional and justified circumstances' is not further clarified in the Decree, as legal literature has highlighted; see Tellarini (n 25) 219-20.

42 Format Convention (n 32) art 4.

43 *ibid.*, art 4(1)-(2).

44 *ibid.*, art 5(1).

45 *ibid.*, art 4(6).



at first glance, one could make the case that such a decision rests either with the shipmaster or the company, since it pertains to navigation in general. Nonetheless, considering the public function that the Italian legislation bestows upon VPDs, one could conversely make the case that a private entity has no power to divert a state official from his duties.

As a matter of practice, the only relevant case regarding the decision-making powers and responsibilities in this connection is, again, the *Enrica Lexie* case. The various reconstructions of the circumstances leading up to the incident itself, and in particular those that led to the decision to sail towards the Cochin port, suggest that the shipmaster discussed the issue with the ship-owner, as well as the VPD team leader, and decided to sail into Indian waters only after securing the consent of the latter. Hence, it seems that in the *Enrica Lexie* case the shipmaster deemed the consent of the team leader to be required (at least implicitly) by Italian law before he decided to surrender the ship to foreign authorities. Therefore, one could argue that the VPD Law, as applied in practice, provides the team leader with a certain decision-making role, and therefore responsibility, with regard to navigation.

However, various scholars have suggested that the VPD team leader could be obliged to give his consent in cases where foreign authorities ask a ship to head towards their territorial waters in order to cooperate in the investigation of a piracy incident.<sup>46</sup> Indeed, if the surrender of the ship, or its diversion towards a state's territorial waters, has to be envisaged as a means of cooperating in the fight against piracy, the team leader may be duty-bound to act in such a way pursuant to Article 100 UNCLOS, which requires states to cooperate in the fight against piracy.<sup>47</sup> Therefore, the decision-making role of the team leader may broaden, since he may also be obliged to make the ship follow a specific route in order to prevent it from breaching an Italian international obligation pursuant to Article 100 UNCLOS.

## 4.2 VPDs as state officials

Another relevant issue arising out of the *Enrica Lexie* incident concerns the qualification of Italian VPD members as state officials. India equates VPD personnel to private armed guards,<sup>48</sup> even though such a proposition is not supported by international law.

While international law does not provide a clear definition of state officials, it links this qualification

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46 See Eboli and Pierini (n 36).

47 Eboli and Pierini (n 36) 135, eg, state that in the *Enrica Lexie* case '[t]he Italian servicemen were apparently requested by local authorities to moor at the Port of Kochi in order to cooperate in identifying a group of pirates apprehended by the Coast Guard. This request may indeed amount to an obligation for the Italian NMP members, due to the international obligation of States to cooperate in repressing piracy, under Article 100 of UNCLOS'.

48 India has implicitly maintained this position during a recent session of the *Shared Awareness and Deconfliction* ('SHADE') Conference, whereby 'Privately Contracted Armed Security Personnel (PCASP) could pose a potential threat to maritime security, necessitating both domestic and international response. Incidents of *MV Enrica Lexie* and *MC Seaman Guard Ohio* in the Indian maritime zones are indicative of such risks' (SHADE, 'Inputs for Threat Assessment: India', on file with the author, para 19).



to a number of factual and formal criteria.<sup>49</sup> In order to allay the lingering doubts surrounding such a qualification, the International Law Commission (ILC) Special Rapporteur on immunity of state officials from foreign criminal jurisdiction, Escobar Hernández, held that:

[A] number of conclusions can be drawn for determining the criteria for identifying what constitutes an official ...:

- (a) The official has a connection with the State. This connection can take several forms (constitutional, statutory or contractual) and can be temporary or permanent. The connection can be *de jure* or *de facto*;
- (b) The official acts internationally as a representative of the State or performs official functions both internationally and internally;
- (c) The official exercises elements of governmental authority, acting on behalf of the State. The elements of governmental authority include executive, legislative and judicial functions.<sup>50</sup>

These criteria for determining who is an official are based on the assumption that the qualification whether a person qualifies as an official is a matter of domestic law.<sup>51</sup> Hence, in order to determine whether VPD personnel on board Italian-flagged ships qualify as officials, Italian law must be applied.

As mentioned earlier,<sup>52</sup> the VPD Law qualifies VPD members as law enforcement officers and auxiliaries. Therefore, pursuant to Article 55(1) of the Italian Criminal Procedure Code, they shall receive criminal offence reports, gather evidence and take every other measure necessary to ensure the prosecution of alleged offenders.<sup>53</sup> Hence, from a formal perspective, an Italian VPD carries out a public function and should therefore be considered as being composed of state officials. Moreover, during the parliamentary discussions that led to the VPD Law, a number of experts, both academics and military personnel, referred to the factual public nature of the functions carried out by VPD person-

49 See, on the matter in point, Ronzitti (n 36) 1093-100.

50 ILC, 'Third report on immunity of State officials from foreign criminal jurisdiction by Concepción Escobar Hernández, Special Rapporteur' (2 June 2014) UN Doc A/CN.4/673, 38-39, para 111.

51 Amongst others, see the ILC Draft articles on State responsibility, whereby '[a]n organ includes any person or entity which has that status in accordance with the internal law of the State' (ILC, 'Articles on responsibility of States for internationally wrongful acts' (2001) 2 YbILC 31, 40). Special Rapporteur Escobar Hernández analysed those elements in her third report. See ILC (n 50) paras 50-110.

52 See Section 3, above.

53 Italian Criminal Procedure Code, art 55(1). The Italian version reads as follows: '[l]a polizia giudiziaria deve, anche di propria iniziativa, prendere notizia dei reati, impedire che vengano portati a conseguenze ulteriori, ricercarne gli autori, compiere gli atti necessari per assicurare le fonti di prova e raccogliere quant'altro possa servire per l'applicazione della legge penale.'



nel<sup>54</sup> and pointed out that they act under the direct guidance and orders of the Ministry of Defence,<sup>55</sup> i.e. within the Italian institutional framework. Lastly, in its diplomatic actions following the *Enrica Lexie* incident, Italy maintained:

The Italian Navy Military Department that operated in international waters on board of the ship *Enrica Lexie* must be considered as an organ of the Italian State. ... Their conduct has been carried out in the fulfilment of their official duties in accordance with national regulations (Italian Act nr. 107/2011), directives, instructions and orders, as well as the pertinent rules on piracy contained in the 1982 UN Convention on the Law of the Sea and in the relevant UN Security Council Resolutions on the Piracy off the Horn of Africa.<sup>56</sup>

Therefore, as a matter of domestic law, which is the applicable law according to international law, one can argue that there is no doubt whatsoever that Italian law bestows to VPD personnel a formal, as well as factual, official qualification.

However, one may argue as India did, that the private nature of the financial resources utilised to cover the costs of such a *sui generis* kind of operation shifts its role from a public to a private one, akin to that of PCASGs. However, this argument is not backed up by international law. As two Italian scholars maintain, 'the fact that ship-owners are requested to contribute to the mission's costs does not affect the intrinsically public and sovereign nature of the functions performed by NMP/VPDs.'<sup>57</sup> The ILC's definition of the 'governmental', and therefore public, nature of a function confirms the latter view:

Beyond a certain limit, what is regarded as 'governmental' depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise.<sup>58</sup>

From this follows that the ILC did not consider the nature of the financial resources utilised to carry out a specific function as being relevant for defining its public or private nature. Moreover, a solution similar to the one implemented by Italy was also considered by other states, namely the United King-

54 See, eg, Angela del Vecchio, 'Operazioni di contrasto della pirateria in acque internazionali. Audizione della Prof. Angela del Vecchio' <[www.senato.it/documenti/repository/commissioni/comm04/documenti\\_acquisiti/InterventoDel%20Vecchio.pdf](http://www.senato.it/documenti/repository/commissioni/comm04/documenti_acquisiti/InterventoDel%20Vecchio.pdf)> accessed 1 July 2015, who maintained that servicemen are state organs and therefore every conduct or unlawful use of armed force they carry out will entail the international responsibility of Italy.

55 See Bruno Branciforte, 'Operazioni di contrasto della pirateria. Impiego di Vessels Protection Detachment (VPD)/Nuclei Militari di Protezione (NMP). Audizione del Capo di Stato Maggiore della Marina Militare, Ammiraglio di Squadra Bruno Branciforte' <[www.senato.it/documenti/repository/commissioni/comm04/documenti\\_acquisiti/Intervento%20amm.%20sq.%20Branciforte.pdf](http://www.senato.it/documenti/repository/commissioni/comm04/documenti_acquisiti/Intervento%20amm.%20sq.%20Branciforte.pdf)> accessed 1 July 2015, who maintained that the deployment of VPDs serves the purpose of safeguarding Italian vessels and their shipments, as well as the safety of Italian maritime lanes without attributing military functions to the shipmaster.

56 *Republic of Italy thr. Ambassador & Ors. v. Union of India & Ors.* (2013) SCoI 1 (Supreme Court of India), para 44 (citing *Italian Note Verbale 95/533*, 29 February 2012).

57 Eboli and Pierini (n 36) 123.

58 ILC (n 51) 43.



dom. The UK Foreign Affairs Commission stated that:

[V]essel protection detachments are an attractive option, but we acknowledge that resources are extremely limited at present. We conclude that the Government should engage with the shipping industry to explore options for the industry to pay for vessel protection detachments of British naval or military personnel on board commercial shipping.<sup>59</sup>

Overall, state practice arguably points to the fact that even though VPD services are paid for by private entities, namely ship-owners, their official nature is not affected in any way.

Summing up the above considerations, notwithstanding some doubts on the matter in point, Italian military personnel on VPD duty should be qualified as state officials.

#### 4.3 VPDs as law enforcement officers

A last issue relating to the Italian VPD Law, which was brought up by the *Enrica Lexie* case, concerns the qualification of military personnel on VPD duty as law enforcement officers and auxiliaries. Such a qualification implies that VPD members are authorised to receive criminal complaints and to take all necessary measures aimed at facilitating criminal prosecutions. The latter activities are carried out pursuant to the specific regime laid down for Italian participation in international missions.<sup>60</sup> Such a qualification brings up two distinct issues: whether VPD personnel are allowed to apprehend piracy suspects and the potential use of lethal force by VPD personnel.

As to the first issue, one may argue that Italian law is in potential breach of UNCLOS, which provides that only warships and other ships 'clearly marked and identifiable as being on government service'<sup>61</sup> may seize pirate ships and apprehend alleged pirates.<sup>62</sup> Hence, UNCLOS does not empower VPDs to carry out seizures of piracy suspects as an exception to the generally applicable exclusive flag state jurisdiction.<sup>63</sup> The BMP4 are in line with this when stating that '[m]ilitary Vessel Protection Detachments (VPDs) *deployed to protect vulnerable shipping* is the recommended option when considering armed guards',<sup>64</sup> i.e. stressing the exclusive protective role of VPDs. The authority to seize pirate ships may not be derived from UN Security Council resolutions either; Resolution 2184 (2014)

59 Foreign Affairs Commission, 'Piracy off the coast of Somalia. Tenth report of session 2010-12' HC (2012-01) 1318 (40).

60 VPD Law, art 5(2). This article refers to Law no. 12 of 24 February 2009 on the extension of the Italian participation in international missions (Italian title: 'proroga della partecipazione italiana a missioni internazionali') and Law no. 197 of 29 December 2009 on urgent measures for the extension of development cooperation interventions, peace-keeping operations, as well as international military and police operations (Italian title: 'disposizioni urgenti per la proroga degli interventi di cooperazione allo sviluppo e a sostegno dei processi di pace e di stabilizzazione, nonché delle missioni internazionali delle Forze armate e di polizia').

61 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 107.

62 UNCLOS, art 105.

63 UNCLOS, art 92.

64 BMP4 (n 8) 39 (emphasis added).



on Somali piracy, for example, reads as follows:

*Noting* the efforts of flag States for taking measures to permit vessels sailing under their flag transiting the High Risk Area (HRA) to embark vessel protection detachments and privately contracted armed security personnel (PCASP), and *encouraging* States to regulate such activities in accordance with applicable international law and permit charters to favour arrangements that make use of such measures, ...

Notes the importance of securing the safe delivery of WFP assistance by sea, and welcomes the on-going work by the WFP, EU operation ATALANTA, and flag States with regard to Vessel Protection Detachments on WFP vessels.<sup>65</sup>

These paragraphs from Resolution 2184 stress the protective role of VPDs, in particular with regard to securing the safe delivery of humanitarian aid. Moreover, Resolution 2184, like its predecessors,<sup>66</sup> highlights the fact that any counter-piracy measure must be in accordance with applicable international law, namely UNCLOS.<sup>67</sup> Therefore, international law does not seem to recognise an active counter-piracy role on the part of VPDs, namely interception measures, or the power to carry out police enforcement operations against piracy suspects.<sup>68</sup>

However, if one was to maintain that the UN Security Council resolutions authorise VPDs to carry out counter-piracy operations under Chapter VII and the 'all necessary means' formula,<sup>69</sup> one should consider that Italian military personnel on VPD duty are entitled to investigate exclusively any circumstances amounting to piracy as defined by Italian law. The Italian Code of Navigation defines piracy as an act of pillaging against a ship, or against its cargo, or an act of violence against a person on board a ship.<sup>70</sup> As will be demonstrated in the following, this definition is different from the international definition codified in Article 101 UNCLOS.

65 UNSC Res 2184 (n 10) 13 and o.p. 29.

66 In particular, see UNSC Res 2077 (2012) UN Doc S/RES/2077/2012, 10 and o.p. 31, and UNSC Res 2125 (2013) UN Doc S/RES/2125/2013, 15 and o.p. 28.

67 See, among others, UNSC Res 2184 (n 10) 7 and o.p. 14.

68 Nonetheless, VPDs may retain a counter-piracy role with regard to the detention of pirates captured during self-defence operations; see Natalino Ronzitti, 'The Use of Private Contractors in the Fight against Piracy: Policy Options' in Francesco Francioni, Natalino Ronzitti (eds), *War by Contract. Human Rights, Humanitarian Law and Private Contractors* (OUP 2011); Petrig (n 13).

69 The Security Council authorised the '[u]se, within the territorial waters of Somalia, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery at sea' (UNSC Res 1846 (2008) UN Doc S/RES/1846/2008, o.p. 10); from the wording follows that the authorisation has a limited *ratione loci* scope of application.

70 See Italian Code of Navigation, art 1135. The original version of this article reads as follows: '[i]l comandante o l'ufficiale di nave nazionale o straniera, che commette atti di depredazione in danno di una nave nazionale o straniera o del carico, ovvero a scopo di depredazione commette violenza in danno di persona imbarcata su una nave nazionale o straniera, è punito con la reclusione da dieci a venti anni. ... Per gli altri componenti dell'equipaggio la pena è diminuita in misura non eccedente un terzo; per gli estranei la pena è ridotta fino alla metà'.



Article 101 UNCLOS defines piracy as an illegal act of violence carried out by a private person for private ends from a private ship against another vessel on the high seas.<sup>71</sup> Considering the above, a particular crime, for example mutiny, an act of maritime terrorism<sup>72</sup> or an act of armed robbery at sea,<sup>73</sup> may be qualified as piracy under Italian law, while it does not necessarily fulfil the definition of piracy under international law. In such a case, a member of a VPD is entitled, or even obliged, to carry out non-protective law enforcement activities pursuant to Italian law, even though this will most probably violate the provisions pertaining to the exclusive jurisdiction of the flag state under international law. Hence, the recognition of law enforcement functions to VPD personnel may amount to a breach of international law, since it potentially obliges Italian state officials to violate UNCLOS, notwithstanding the possible implicit authorisation given to VPDs to seize alleged pirate ships provided by the UN Security Council.

Turning to the issue of the use of force, one has to consider whether VPDs may resort to lethal force if the circumstances so require. Under the Italian VPD Law, military personnel are seemingly empowered to do so when it is necessary to protect the vessel itself, their own lives or the lives of the crew. Such a proposition stems from the amendment that the last sentence of Article 5(2) VPD Law made to Law no. 197/2009, which provides that VPDs carry out their duties pursuant to Italian Law no. 197 of 29 December 2009, whereas military necessity is substituted by the necessity to protect the vessel.<sup>74</sup> Further, Article 4(1-sexies) of Italian Law no. 197/2009 provides that military personnel who

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71 The relevant UNCLOS provision reads as follows: '[p]iracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: ... (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; ... (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; ... (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; ... (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)'. There is a wide range of literature on the definition of piracy. For an overview of the matter in point see, among others, Yoram Dinstein, 'Piracy jure gentium' in Holger Hestermeyer and others (eds), *Coexistence, Cooperation and Solidarity* (Brill-Martinus Nijhoff 2012).

72 Some authors maintain that maritime terrorism and piracy are being progressively subsumed in the general category of maritime violence; see, eg, Scott Davidson, 'International law and the suppression of maritime violence' in Richard Burchill, Nigel D White, Justin Morris (eds), *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (CUP 2005); Gian Maria Farnelli, 'Terrorists under the Jolly Roger? Recent Trend on Piracy and Maritime Terrorism' in Gemma Andreone, Giorgia Bevilacqua, Giuseppe Cataldi and Claudia Cinelli (eds), *Insecurity at Sea: Piracy and Other Risks of Navigation* (Giannini 2013).

73 IMO, 'Code of practice for investigation of the crimes of piracy and armed robbery against ships', annex to A.26/Res.1025 (10 January 2010) 4, defines an act of armed robbery at sea as '(1) any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea; ... (2) any act of inciting or of intentionally facilitating an act described above'. A comprehensive discussion of this definition falls outside the scope of the present contribution; for a specific overview, see Robin Geiß and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011).

74 VPD Law, art 5(2) (author's translation). The Italian passage reads as follows: 'all'articolo 4, commi 1-sexies e 1-septies [...della] legge 29 dicembre 2009, n. 197, intendendosi sostituita alla necessità delle operazioni militari la necessità di proteggere il naviglio'.



use lethal force in compliance with the rules of engagement are not punishable.<sup>75</sup>

As is apparent, the Italian legal framework on VPDs does not lay down any specific rule with regards to the use of lethal force. Lacking such a specific prohibition on the use of lethal force, and considering the general entitlement of law enforcement officials to use proportionate force in carrying out their duties,<sup>76</sup> one could maintain that – under Italian law – Italian VPDs are entitled to use lethal force in a number of situations, notably in cases of an imminent threat to their own lives or the lives of the crew, or where the security of the vessel is endangered.

However, when using potentially lethal force, military personnel on VPD duty should follow international standards relating to the use of force in law enforcement operations irrespective of their national rules of engagement, in order to avoid incurring international responsibility.

Even though no treaty exists on the matter in point, the UN elaborated a set of principles on the use of force by law enforcement officials,<sup>77</sup> the importance of which is recognised by the international community.<sup>78</sup> Specifically, Principle 9 provides:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are

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75 Law no. 197 of 29 December 2009, art 4(1-sexies). The Italian passage reads as follows: '[n]on è punibile il militare che, nel corso delle missioni di cui all'articolo 2, in conformità alle direttive, alle regole di ingaggio ovvero agli ordini legittimamente impartiti, fa uso ovvero ordina di fare uso delle armi, della forza o di altro mezzo di coazione fisica, per le necessità delle operazioni militari.'

76 It is undebatable that a law enforcement official may use lethal force in counter-piracy operations. Indeed, the International Tribunal for the Law of the Sea maintained that '[a]lthough the [LOS] Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances ... These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force' (*M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v Guinea)* (Merit, Judgment of 1 July 1999) ITLOS Reports 1999, paras 155-56). According to Douglas Guilfoyle, 'Written Evidence to the HC Foreign Affairs Committee by Prof. Guilfoyle' (2011-07) HC 1318-Ev.2, cited in Foreign Affairs Commission (n 59) 35, '[t]here is no absolute requirement that one exhaust all non-lethal methods before turning to potentially lethal force; warning shots are expected where possible but are not (and could not be) an absolute requirement. In some situations an imminent and serious threat will make the use of lethal force as a first recourse unavoidable, reasonable and necessary ... In practice, many navies have lawfully targeted and killed suspect pirates on precisely this basis, especially in situations of hostage rescue or where piracy suspects present an imminent threat but have not yet fired a weapon.'

77 'UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials' (7 September 1990) UN Doc A/CONF.144/Rev.1.

78 See UN High Commissioner for Human Rights, 'Human Rights Standards and Practice for the Police' (2004) UN Doc HR/P/PT/5/Add.3. The language utilized by the High Commissioner implies that, in his opinion, those standards are part of general international law.



insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.<sup>79</sup>

Moreover, if law enforcement officials must resort to lethal force, it should be done in such a way that minimizes damage and injury, respects and preserves human life<sup>80</sup> and only ‘in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm.’<sup>81</sup> Lastly, they are prohibited from using ‘those firearms and ammunition that cause unwarranted injury or present an unwarranted risk.’<sup>82</sup> In other words, the UN principles generally require that lethal force is used *ultima ratio* and pursuant to a careful proportionality assessment.

Considering the above, we can conclude that VPD members may resort to lethal force in order to protect their own lives and the lives of the crew. However, they are arguably in breach of international law when using lethal force to protect the ship when there is no life at stake because this is deemed to be disproportionate, even though Italian law arguably empowers them to do so.

## 5. Concluding remarks

This article highlighted the most important elements of the regulation concerning VPDs, at both the international and Italian levels. We first sketched a ‘silhouette’ of international practice on the use of VPDs, with specific regard given to IMO recommendations and UN Security Council resolutions. Subsequently, the Italian regulations were analysed and discussed in the context of the *Enrica Lexie* case.

From this analysis follows that Italian practice implicitly endorsed a decision-making role for the VPD team leader in relation to navigation, namely with regard to the surrender of a vessel to pirates or foreign authorities, even though the Italian VPD Law foresees that the shipmaster has ultimate authority and control over the vessel. Moreover, it was demonstrated that Italian military personnel on VPD duty should be considered state officials, and therefore enjoy all the relevant immunities, even though the financial resources used to cover the costs of the operation are private in nature. Lastly, the issue of VPD members as law enforcement officers and auxiliaries was addressed, showing the relevant issues with regard to the protective role that international law grants military personnel on VPD duty, as opposed to the law enforcement role that the Italian law bestows upon them.

The last issue is probably the thorniest one. It was shown that Italian law breaches its international obligations under the UNCLOS, in so far as it empowers and obliges VPD personnel to carry out law enforcement operations outside the legal framework of the law of the sea. In particular, the apprehension of piracy suspects by military personnel embarked on a private ship as a VPD may amount

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79 UN Basic Principles (n 77) Principle 9; for an in-depth analysis of this issue, see Neri (n 7).

80 UN Basic Principles (n 77) Principle 5(b).

81 *ibid*, Principle 11(b).

82 *ibid*, Principle 11(c).



to a breach of Articles 92, 105 and 107 UNCLOS, since only governmental ships are authorised to exercise universal enforcement jurisdiction against pirates and pirate ships as an exception to the exclusive jurisdiction of the flag state.

In sum, one may agree that the Italian experience has been a 'role model' with regard to VPD regulation.<sup>83</sup> However, states that are considering this model should be aware of its weak points, especially with regard to the role and powers of VPDs, which may trigger liability issues.

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83 Caffio (n 5).