



The Legal Challenges In Using Vessel Protection Detachment and Their Functional Immunity

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Abstract

On February 15th 2012, the St. Antony, an Indian fishing boat, was fired by a passing ship, MT Enrica Lexie, in the Exclusive Economic Zone (EEZ) of India. The boat was fired by Vessel Protection Detachment (VPDs), Italian trained Navy personnels that were assigned to protect Italian maritime interest against piracy. This case has been long-disputed by Indian and Italian government because the fired happened in the Indian EEZ where India declares to have criminal jurisdiction. A serious concern also raised due to the deployment of Italian VPD which Italy considered as a State organ that is granted with functional immunity, onboard commercial vessel. This article is aimed to analyze the function of VPD in protecting the ship from piracy and the existence of functional are in international law by normative legal research. The challenges of using VPDs are while they are operating onboard a commercial vessel and sailing through territorial waters of some coastal states since the embarkation of armed military personnel on privately owned and operated vessels could diminish the merchant vessels' status under the right of innocent passage. The functional immunity of Italian VPD is still questioned, based on their status as a State organ and their conduct in this case as an "official" or "private" conduct.

1. Introduction

State is the original subject of international law, the most important subject (*par excellence*) compared to the rest subject. The difference between State and other subjects is sovereignty. Based on international law, State is the only subject that has sovereignty which is the ultimate authority that is not under the control of another State.¹ As the

¹ Adolf, H. (2015). *Aspek-Aspek Negara Dalam Hukum Internasional*. Bandung: CV Keni Media, p. 1-2.

implementation of its sovereignty, the State has the authority to stipulate and enforce the provisions of its national law. It is called as jurisdiction in international law.²

Jurisdiction of a State involves its power to affect people, property and circumstances and it is all reflecting the basic principles of the state sovereignty, equality of states and non-interference in domestic affairs.¹ Jurisdiction is very vital and actually, it is the main feature of State sovereignty, which is an exercise of authority that may change or create or put to an end to legal relationships and obligations.³

According to John O'Brien, there are three types of jurisdiction of the sovereign State, *inter alia*: Legislative jurisdiction/prescriptive jurisdiction; Executive jurisdiction or enforcement jurisdiction; Judicial jurisdiction.⁴ In his book, Shaw further explains there are two more types of jurisdiction, it is civil jurisdiction and criminal jurisdiction.⁵ Under the criminal jurisdiction, there are several principles of jurisdiction, *inter alia*: The Territorial Principle; The Nationality Principle; The Passive Personality Principle; The Protective Principle; The Universality Principle. Of those five principles, universal principle or universal jurisdiction has the most distinct characteristics among the others. This principle means that each and every state has its own jurisdiction to try certain offences. The universal principle does not recognize the location of the incident, the nationality of the perpetrator or victim, or the national interest of a disadvantaged country. Basically, the crimes that involved must be regarded as specifically offensive to the international community as a whole. Universal jurisdiction has two categories that clearly belong to its sphere; piracy and war crimes.⁶

For many centuries universal jurisdiction over piracy has been accepted under international law and it constitutes a long-established principle of the world community. Every state can both arrest and punish pirates, provided that they have been seized on the high seas or within the territory of the state concerned. Whatever

² Sefriani. (2016). *Hukum Internasional: Suatu Pengantar* (Edisi Revisi). Jakarta: PT RajaGrafindo Persada, p. 219.

³ Shaw, M. N. (2003). *International Law* (5th Edition). Cambridge: Cambridge University Press, p. 572; Lowe, V. (2006). *Jurisdiction*. In : Evans, M. D. Editor. *International Law* (2nd Edition). New York: Oxford University Press, p. 335.

⁴ Sefriani. *op. cit.*, p. 221; Adolf, H. *op. cit.*, p. 156-157.

⁵ Shaw, M. N. *op. cit.*, p. 578.

⁶ Shaw, M. N. *op. cit.*, p. 579 – 592; Aust, A. (2015), *Handbook of International Law*. Cambridge: Cambridge University Press, p. 44-45.

the nationality of the offenders and wherever they happened to carry out their criminal activities are, they can be tried and punished.⁷

On February 15th 2012 around 4:30 p.m. Indian Standard Time, the St. Antony, an Indian fishing boat, engaged in fishing activity in Exclusive Economic Zone of India, about 20.5 nautical miles off the Indian coast.⁸ St. Antony was fired by a passing ship, an Italian vessel, MT Enrica Lexie. Two of 11 fishermen who were onboard the boat, Valantine Jelestine and Ajeesh Pink were killed and died on the spot. The boat shortly returned to Neendakara and its owner gave First Information Statement to the Circle Inspector of Police in Neendakara.

Immediately a comprehensive research was done by the Coast Guard and Indian Navy, found that there were six marines in the vessel, engaged for security duty. Two of them, Massimilano Latorre and Salvatore Girone were identified as the ones who fired the fishermen, alleged they were mistaken St. Antony as a pirate ship. Both of them were arrested by the police, and later put into judicial custody.⁹ They were deployed in the vessel as trained Navy personnel to protect Italian maritime interest against piracy¹⁰ as Vessel Protection Detachment (“VPD”) in accordance with Italian Law No. 130 (2011). This was to protect the vessel against piracy during its voyage from Sri Lanka to Djibouti, which required it to pass through an IMO-designated high-risk area in international waters.¹¹

Several attempts were done by both states; India processed the Italian marines before their courts; Italy asserted an exclusive jurisdiction, brought the criminal process against the marines before the Tribunal of Rome; Italy brought the case before International Tribunal for the Law of the Sea (ITLOS) and later to Permanent Court of Arbitration (PCA).

The government of Italia persisted that their marines, Massimilano Latorre and Salvatore Girone, both have immunity of the Italian Marines as State officials exercising official functions or functional immunity. It is clearly stated in the petitions

⁷ Malcolm N. Shaw, *op. cit.*, p. 593.

⁸ Indian Fishermen Case (Massimilano Latorre & Ors. v. Union of India & Ors. (WP(C).No. 4542 of 2012 (P)). Judgment. Kerala High Court India 2012, para. 1.

⁹ *Ibid.*

¹⁰ Indian Fishermen Case (Kerala High Court). *op. cit.*, para. 2.

¹¹ The “Enrica Lexie” Incident (The Italian Republic v. The Republic of India), Italy’s Notification, Permanent Court of Arbitration, 26 June 2015, para 4. (Italy’s Notification on Permanent Court of Arbitration).

that were submitted to the Kerala High Court¹² and Supreme Court of India¹³, and in their request to the ITLOS¹⁴ and PCA¹⁵.

This article with title "THE LEGAL CHALLENGES IN USING VESSEL PROTECTION DETACHMENT (VPD) AND THEIR FUNCTIONAL IMMUNITY" is aimed to analyze the legal challenges of VPD in protecting the commercial vessel from piracy and VPD's functional immunity in international law.

2. Research Method

2.1 Type of Research

The type of research used in this study is normative legal research. It is conducted by examining primary legal materials and secondary legal materials that have relevance to the object of this research.¹⁶

2.2 Type of Approach

In writing this article, the author is using Statute Approach and Conceptual Approach. Statute Approach is an approach that examines regulation or legal principles or approach that uses legislation while the Conceptual Approach is an approach to analyzing legal concepts or approaches from doctrine.¹⁷

2.3 Legal Material Sources

The legal material sources that is used in writing this article *inter alia*:

1. Primary Legal Material Source, is a legal material that has an authoritative nature, such as legislation, jurisprudences.¹⁸ Primary legal materials used are: 1982 United Nations Convention on the Law of the Sea, 2011 Articles on Responsibility of States for Internationally Wrongful Acts, Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.
2. Secondary Legal Material Source, is information that supports primary legal materials such as book references, research results from legal academics in the form of theses, dissertations, legal journals, articles, electronic books, reports on websites and also news related to the topic of this article.¹⁹

¹² Indian Fishermen Case (Kerala High Court), *op. cit.*, para. 4.

¹³ Indian Fishermen Case, (Massimilano Latorre & Ors. v. Union of India & Ors.). Judgment. Supreme Court of India 2012, para. 7.

¹⁴ *Ibid.*

¹⁵ The "Enrica Lexie" Incident (The Italian Republic v. The Republic of India). Order. Permanent Court of Arbitration (29 April 2016), para 50.

¹⁶ Amiruddin & Asikin, Z. (2004). *Pengantar Metodologi Penelitian Hukum* (Cetakan VIII). Jakarta: RajaGrafindo Persada, p.118.

¹⁷ Marzuki, P. M. (2016). *Penelitian Hukum* (Edisi Revisi). Jakarta: Prenadamedia Group, p. 132-135.

¹⁸ *Ibid*, p. 134.

¹⁹ *Op. cit.*, p. 183.

2.4 Legal Material Collection Techniques

In normative legal research, the analysis is using literature as a source of research. The stages include the formulation of legal bases, legal understanding, and legal rules (*perumusan dasar-dasar hukum, pengertian hukum, dan kaidah-kaidah hukum*).²⁰

3. Result and Analysis

3.1 Piracy and Vessel Protection Detachment (VPD)

3.3.1 Piracy in International Law

Piracy is acknowledged as a crime of universal jurisdiction, it means that any state can arrest and prosecute the pirates found on the high seas. And if the attacks of pirate take place within the 12 nautical miles territorial seas, thus the jurisdiction is considered as the criminal jurisdiction of the coastal state, not as the piracy for the purposes of universal jurisdiction.²¹ Such attacks are classified by the International Maritime Organisation (IMO) as armed robbery against ships.²² The International Maritime Bureau has released a paper to promote a more inclusive definition of piracy, which is an act of boarding (or attempted boarding) with the intent to commit theft or any other crime and with the intent or capability to use of force in furtherance of that act.²³

According to the the UNCLOS (UNCLOS), Articles 100-105 contain about the act of piracy. The Article 101 UNCLOS defined the concept of piracy:

“ Piracy 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:*
- b. on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;*
- c. against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;....”*

Article 101 UNCLOS required several principal numbers of elements to determine whether a particular activity is piracy that is consistent with international law or not. Article 101 subsections (b) and (c), here not quoted, are broadening the piracy definition to specific acts of participation, inciting or facilitating. The stipulation of an act as piracy based on Article 101 is a prerequisite for states' lawful use of UNCLOS' counter-piracy powers. Article 101 defined piracy as any illegal acts of violence,

²⁰ Amiruddin & Asikin, *Z. op. cit.*, p.174.

²¹ Williamson, H. (2013). Protection of Canadian Ships Against Piracy. *Canadian Naval Review* (Vol. 9 Number 2 (2013). Available from <http://www.navalreview.ca/wp-content/uploads/public/vol9num2/vol9num2art4.pdf> (accessed on 18 August 2019), p. 17.

²² Clarke, M. (2013). *Maritime Law Evolving*. Oregon: Hart Publishing, p. 6.

²³ Clarke, M. *loc. cit.*

detention or depredation of a private ship or aircraft directed to another ship or aircraft on the high seas or in a place outside the jurisdiction of any state.²⁴

Initial suspicion of piracy or a suspicion that a given ship is a 'pirate ship' (Article 103) is the starting point for the states' counter-piracy powers, meaning it is a ship that is being used for piracy activities (as defined in Article 101) or is controlled by pirates. Furthermore, the persons on board the 'pirate ship' is a 'reasonable ground for suspecting' an engagement in piracy. If these suspicions are confirmed, a number of specific law enforcement powers, such as rights to visit, inspection and boarding, and the search and seizure of items on board is granted by UNCLOS (Article 105 and 110).

The enforcement powers are expanded proportionally to an increasing confirmation of the suspicion here is part of the general principle. And there are no further law enforcement measures can be taken if the suspicion cannot be ensured in due course. But if the suspicion has clearly ensured, Article 105 grants the right of each state to "seize a pirate ship ... and arrests the persons". And even though the Convention does, however, it does not contain any further provisions on such arrest; such as the issue of legal control concerning the detention is not stated in UNCLOS. The Convention also stipulates that "The courts of the State which carried out the seizure may decide upon the penalties to be imposed...." This means that UNCLOS' provisions contain a certain right for states to arrest persons suspected of piracy and to start criminal proceedings in the state's domestic courts.²⁵

Even though UNCLOS provides provisions of counter-piracy powers, it does not explicitly deal with the inquiry of the use of force in counter-piracy operations or otherwise. However, with reference to other international legal instruments, this matter is argued particularly in non-binding UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UN Basic Principles),²⁶ moreover to the case law of the International Tribunal of the Law of the Sea (ITLOS), especially in the M/V Saiga Case No. 2,²⁷ states that Article 239 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", and when the auditory or visual signal to stop has given and it was not succeed, the use of proportional force as a last resort is permitted in the context of counter-piracy operations.

In regards to the inquiry of using force in counter-piracy operations, it is relevant to show that UNCLOS stressed that the operation in attempt to counter-piracy can only be executed by state actors and specifically by military entities. Article 107 states that,

"A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect."

²⁴ Feldtmann, B. (2018). On-board Protection of Merchant Vessels from the Perspective of International Law. *Erasmus Law Review* (No. 4). DOI: 10.5553/ELR.000128, p. 213

²⁵ *Ibid.*

²⁶ The UN Basic Principles are a 'soft law instrument', which was adopted by consensus of 127 states in 1990, see A/CONF.144/28/Rev1 (7 September 1990).

²⁷ M/V Saiga (No.2), San Vincent and the Grenadines v Guinea, ITLOS Case No. 2 (1999), Judgment, para. 155-156.

It means that only military units (in practice primarily navies) are granted by UNCLOS' to lawfully enforce the powers and consequently are permitted to operate such counter-piracy conduct. The military's duty in countering piracy, it should be noted that in using the UNCLOS' powers against piracy only happens in a law enforcement context.²⁸ Even though warship has an internationally recognized role in the seizure of piracy on the high seas (Article 107 of UNCLOS), however, they have no right to enter the territorial seas of another state (Article 100 of UNCLOS) for enforcement purposes without either UN Security Council authorization or a formal agreement with the coastal state.²⁹

The UNCLOS' counter-piracy powers are complemented by another international legal source, it is Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention).³⁰ The SUA Convention is indirectly aimed against acts of piracy, however in general to against all illegal attacks towards ships. SUA Convention's background is connected to terrorist attacks towards ships also this background is evidently seen from its preamble as well. However, it does not mean that the SUA Convention is limited in the scope of terrorist activities; it is purposed at illegal acts that is contrary to safe navigation in general.³¹ The SUA Convention and Protocol were made in order to fill gaps in international law required in countering other threats to human life, the security of navigation and commerce at sea that is not clearly specified under UNCLOS. State parties are required to pass legislation to make piratical and terroristic type acts against navigation explained in the treaty as serious criminal offences in their national law.³²

In combating piracy under SUA Convention, one issue that has been raised is whether it can be used by state actors in a counter-piracy context. It is stated in the SUA Convention in Article 2 that the Convention does not apply to warships and other state-owned ships:

"This Convention does not apply to:

- i). a warship; or
- ii). a ship owned or operated by a State when being used as a naval auxiliary or for customs or police purposes; or
- iii). a ship which has been withdrawn from navigation or laid up.
- iv). Nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes."

²⁸ Feldtmann, B. *op. cit.*, p. 214

²⁹ Williamson, H. *loc. cit.*

³⁰ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), adopted 10 March 1988 in Rome. Entered into force on 1 March 1992.

³¹ Feldtmann, B. *op. cit.*, p. 214-215

³² Williams, S. O. (2014). Assessing State Jurisdiction and Industry Regulation over Private Maritime Security: An international and comparative regulatory review. *Faculty of Law, The Arctic University of Norway*. Available from <https://pdfs.semanticscholar.org/35a2/93aa798aed89f2b1a1f873c3d52eaa271de6.pdf> (accessed on 22 October 2019), p. 28

However, it is argued that this restriction is aimed at the group of vessels that are protected under the Convention and which are potentially the targets of the illegal attacks that are prescribed under the Convention. This means the SUA Convention purposes to give protection upon civilian ships – not state ships. Obligations and authorities of the law enforcement are provided under the SUA Convention are in contrary targeted at states and will in practice be used by state actors, including warships and other state ships. States' practice in the Horn of Africa region defines that many states have considered the SUA Convention as a complement to the counter-piracy powers under the UNCLOS regime, for instance, concerning the handling of suspected pirates (Article 7 SUA). It can, however, be questioned whether the SUA Convention adds anything to UNCLOS' enforcement powers, since the SUA Convention does not contain more specific law enforcement powers such as to cease and board the foreign ships.³³

3.3.2 Vessel Protection Detachment (VPD)

The regulation of various models of on-board protection specifically for merchant vessels in Germany, Denmark, the Netherlands, and Italy have been well-developed, and it is closely related to the increase of the piracy issue at the beginning of the twenty-first century in the Horn of Africa region. At the beginning of the new millennium, piracy and other forms of attacks towards ships were considered as forms of maritime crime occurring in various regions of the world (such as the waters in the Caribbean, South-East Asia (Malacca Strait), East African waters and in West). Hence, it is a risk to be considered for parties that are involved (seafarers, ship owners and insurers). However, it was specifically the Somali problem of piracy, meaning piracy activities launched from Somalia into the waters of the Horn of Africa region and spread wider to Indian Ocean region. It has put piracy on the international agenda and particularly triggered the development of various national models of protection on-board merchant vessels.³⁴

As the reaction to the violence and criminality that increased in the maritime sector, the international maritime community has produced a series of management practice for protection against piracy that consisted by suggested planning and operational practices for ship operators and masters of ships transiting the High Risk Area.³⁵

In earlier centuries, to protect the ship from piracy, merchant ships were often armed, both for self-defence and as privateers. Nowadays, international shipping community and shipping industry has gradually demanded protection that is provided by a warship as an escort³⁶ and relied on several models of Contracted Maritime Security (CMS) to protect vessels and seafarers. It has resulted the proliferation of weapons at

³³ Feldtmann, B. *op. cit.*, p. 215

³⁴ *Ibid*, p. 210

³⁵ UKMTO. (2011). *Best Management Practices for Protection Against Somali Based Piracy (BMP4)* (Version 4). Edinburgh: Witherby Publishing Group Ltd, p. i.

³⁶ Williamson, H. *op. cit.*, page 18

sea and sundry types of armed security teams operating aboard private commercial vessels.³⁷

OBP has documented several different types of CMS that are in use to protect vessels from the threat of piracy or armed robbery at sea or provide associated logistic services. However, the differences in function, applicable national jurisdiction, and types of services offered by CMS providers makes assessing the operational scope and designing uniform global policy for this sector is a challenging endeavour.³⁸ There is no universal definition of CMS and it may have different implicit meanings for the variety of stakeholders in the field of maritime security. OBP has established there are two general categories of providers: Contracted Private Services and Contracted Governmental Services.³⁹

Privately Contracted Armed Security Personnel (PCASP) is one of the Contracted Private Services, armed guards by private security companies providing armed protection for assets which are mainly owned and operated by other private entities-ship owners, charterers, cargo owners, and other companies operating vessels at sea to protect merchant vessels transiting high risk international waters.⁴⁰

Vessel Protection Detachments (VPD) is one of the Contracted Governmental Services. VPDs are uniformed military personnel embarked on a vessel with explicit approval of the Flag State. VPDs most commonly match the nationality of the Flag or are procured and regulated through a Memorandum of Understanding (e.g. World Food Program Vessels).⁴¹

The uniqueness of VPD is they are using military personnel, their equipment and activities are under control of military-specific command that is directly given to them that is working aboard private vessels. This inserts military operations of sovereign state into commercial activities. The activities that is conducted by VPD of Italian and Dutch governments are the most prominent among the other countries such as Estonia, Lithuania, Serbia, Croatia, Finland, and Ukraine that is also deployed VPDs either on their own flagged vessels or as part of coalition operations.⁴²

VPD operators, as military personnel unlike private security actors at sea, are trained to follow strict and defined rules of engagement through traditional military chain of command. However in the commercial maritime setting, VPD personnel may have to act on their own, including in circumstances that is related to the use of force. Such relationships have been codified by several governments in order to provide their operators with the needed legal latitude to respond to seaborne threats at will, yet they have gone too far. As an example, a Memorandum of Understanding were signed by

³⁷ Oceans Beyond Piracy, -, *Issue Paper: Vessel Protection Detachments*, Available from http://oceansbeyondpiracy.org/sites/default/files/attachments/Vessel_Protection_Detachments_IssuePaper.pdf (accessed on 23 June 2019), p. 1. (Oceans Beyond Piracy I)

³⁸ *Ibid.*

³⁹ Oceans Beyond Piracy, -, *Issue Paper: Defining Contracted Maritime Security*, Available from <http://oceansbeyondpiracy.org/sites/default/files/attachments/DefiningContractedSecurityIssuePaper092116.pdf> (accessed on 27 June 2019), p. 1. (Oceans Beyond Piracy II).

⁴⁰ Oceans Beyond Piracy I, *op. cit.*, p. 2.

⁴¹ Oceans Beyond Piracy II, *loc. cit.*

⁴² Oceans Beyond Piracy I, *op. cit.*, p. 1-2.

the Italian Ministry of Defense with Italian Ship Owners Association indicating that ship Masters don't have any responsibility to oversee VPD personnel.⁴³

Italy is among a number of states that have regulated the use of VPDs. Based on Italy's notification in the dispute concerning *Enrica Lexie* incident before the Permanent Court of Arbitration (PCA), the deployment of Italian VPD onboard *Enrica Lexie* was under Law No. 130 of 2 August 2011. And Italy stated that the purpose of the deployment was in line with the global effort to counter piracy, and to ensure freedom of navigation and the protection of Italian flagged vessels especially in international waters that are at a high risk of piracy.⁴⁴

Italy itself has enacted a particular provision (Article 5; subsequently refer to as 'VPD Law') that is related to the Vessel Protection Detachments (VPDs) and other Privately Contracted Armed Security Guards (PCASG) when Italy issuing Law no. 130/2011, according to EU Council Joint Actions 2008/749 and 2008/851, as later amended. Article 5 VPD Law establishes the conclusion of a Memorandum of Understanding (MoU) between the Ministry of Defence of Italy and the Italian ship-owner association (Confitarma) on the use of VPDs.

Nevertheless, the composition of a VPD, its geographical scope of the operation or its duties are not specified in the provision. 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. Furthermore, it stipulates that the costs of embarking VPDs are one 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'.⁴⁵

The Ministry of Defence of Italy issued Decree No. 212 of 1 September 2011, which defines the geographical scope of VPD operations, following the enactment of the mentioned Article 5 VPD Law. Furthermore, the Ministry recapitulated that an MoU with Confitarma on 11 October 2011, which sets the legal basis for embarking VPDs on board Italian vessels. It also stipulates a definition of a VPD as a military unit consisted of military personnel, preferably from the Navy, embarked on merchant vessels.⁴⁶

Later, the Italian Ministry of Defence and individual ship-owners on the basis of specific contracts were signed of the so-called 'Format Convention'. It particularly specifies the rules contained in the VPD Law, certainly with regard to the allocation of decision-making powers and responsibilities. Furthermore, it adds the provision that ships on which VPDs are embarked must meet with BMP4 passive-protection

⁴³ *Ibid*, p. 4.

⁴⁴ Italy's Notification on Permanent Court of Arbitration, *loc. cit.*

⁴⁵ Farnelli, G. M. (2015). Vessel Protection Detachments and Maritime Security: An Evaluation of Four Years of Italian Practice, *Maritime Safety and Security Law Journal* (1/2015). Available from http://www.marsafelawjournal.org/wp-content/uploads/2015/08/Issue1_Farnelli_Article.pdf (accessed on 22 October 2019), p. 19-20

⁴⁶ *Ibid*, p. 20-21

standards. And only those certain ships can rely on active-protection measures, such as VPDs or PCASGs.⁴⁷

3.3.3 The Concept of Innocent Passage

Warship has an internationally recognized role in the seizure of piracy on the high seas (Article 107 of UNCLOS), however, they have no right to enter the territorial seas of another state (Article 100 of UNCLOS) for enforcement purposes without either UN Security Council authorization or a formal agreement with the coastal state.⁴⁸ Beside that, the differences in function, applicable national jurisdiction, and types of services offered by CMS providers makes assessing the operational scope and designing uniform global policy for this sector is a challenging endeavour.⁴⁹

Meanwhile, the challenges of using VPDs is while they are operating aboard a commercial vessel and sailing through territorial waters of some coastal states since the embarkation of armed military personnel on privately owned and operated vessels could diminish the merchant vessels' status under the regime of innocent passage.⁵⁰

The principle of innocent passage is stipulated in Articles 17–32 UNCLOS. Pursuant to Article 17 UNCLOS, 'right of innocent passage' through the territorial sea is available for ships of all States. Innocent passage consists of two elements. 'Passage' includes "traversing the territorial sea without entering internal waters, or proceeding to or from internal waters" (Article 18 (1) UNCLOS). Such passage shall be 'continuous and expeditious'. Stopping or anchoring the ships only can be done if it's "incidental to ordinary navigation or is rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress" (Article 18 (2) UNCLOS). The right of innocent passage only applies to passage by ships but not to over flight by aircraft.

The passage of a foreign ship is considered "innocent as long as it is not prejudicial to the peace, good order, or security of the coastal State"⁵¹ based on Article 19 (2) of UNCLOS if,⁵² in the territorial sea (less than 12 nautical miles from shore), it engages in any of the following activities:

- a). *“any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;*
- b). *any exercise or practice with weapons of any kind;*

⁴⁷ *Ibid.*

⁴⁸ Williamson, H. *loc. cit.*

⁴⁹ Oceans Beyond Piracy I, *loc. cit.*

⁵⁰ *Ibid.*

⁵¹ Hakapää, K. (2013). Innocent Passage. *Oxford Public International Law*. Oxford University Press. Available from https://www.ilsa.org/Jessup/Jessup18/Second%20Batch/OPIL_Innocent_Passage.pdf (accessed on 22 October 2019), para. 5-7

⁵² Williams, S. O. (2014). Maritime Security: The Concept of Innocent Passage. *The Maritime Executive*. Available from <https://www.maritime-executive.com/features/Maritime-Security-Private-The-Concept-of-Innocent-Passage> (accessed on 22 October 2019) (Simon O. Williams I)

- c). *any act aimed at collecting information to the prejudice of the defence or security of the coastal State;*
- d). *any act of propaganda aimed at affecting the defence or security of the coastal State;*
- e). *the launching, landing or taking on board of any aircraft;*
- f). *the launching, landing or taking on board of any military device;*
- g). *the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;*
- h). *any act of wilful and serious pollution contrary to this Convention;*
- i). *any fishing activities;*
- j). *the carrying out of research or survey activities;*
- k). *any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;*
- l). *any other activity not having a direct bearing on passage."*

One of the most challenging enforcement activities for a coastal state is to establish, it is a ship that is in non-innocent passage. Modern interpretations of UNCLOS, particularly concerning physical and environmental security, emphasize that real damage must occur before a coastal state can declare a vessel's passage in its territorial sea is non-innocent. If wrongly accused, the ship or charterer can hold the coastal state liable for the damages. Both military and commercial vessels enjoy the right of innocent passage and self-defense while within the territorial sea of a foreign state, granted they do not carry out any activities which can be defined as a threat to the coastal state or engage in the use of force towards the coastal state, including the "launching, landing, or taking aboard any aircraft or military device," based on Article 19 (2) (f) of UNCLOS.⁵³

This provision may tribulate the matter as PCASP themselves must eventually embark, disembark, and load or offload their weapons at some port or at a floating armoury. If these activities take place in a state's territorial sea and without permission of that coastal state, it could lead to a violation of innocent passage because it may be considered as taking aboard a "military device". And this is particularly true if the weapons were taken aboard by VPDs. Embarking VPDs on a commercial vessel has complicated the innocent passage regime as it uses military personnel, equipment and directly engages government activities into the commercial maritime sector. Without the presence of VPD, the vessel remains as a commercial ship and not identified as being on government service. Based on Enrica Lexie incident, the VPDs were simply performing direct protection for the commercial vessel against piratical attacks, and it hence has aroused other suspicions or concerns.

⁵³ *Ibid.*

Thus, a globally accepted framework is needed to harmonize the embarkation and activities of VPDs, as well as standardizing the relationship between VPD and the Master of the commercial vessel.

3.2 Functional Immunity of VPD

3.2.1 State Immunity

Immunity is usually defined as the exception of the particular entity, individual, or property and acts as a barrier that is exercised by a State of its jurisdiction, mainly in respect of adjudicatory and enforcement jurisdiction.⁵⁴ State immunity derives from customary international law. The doctrine provides that states are prohibited from prosecuting one another in domestic courts.⁵⁵ There are two types of state immunities, personal immunity (*ratione personae*) and functional immunity (*ratione materiae*).⁵⁶ Both are rooted in this basic principle, *par in parem non habet imperium* (a sovereign power is not able to exercise jurisdiction over another sovereign power), and protect individuals from prosecution when they are deemed to represent the state. These immunities are able to be applied to prevent both criminal and civil liability.⁵⁷

Personal immunity is a status-based immunity that is only applicable to particular state officials in high positions (recognized by international law as “representatives of the State solely by virtue of their office”). Functional immunity is a conduct-based immunity that is only applicable to acts that are attributed to the State, thus the individual or organ may not be held accountable upon those acts or transactions. Fundamentally, personal immunity protects a type of office, while functional immunity protects a type of act. Furthermore, an individual will not necessarily benefit from immunity *ratione materiae* every time his or her conduct is attributable to the state on whose behalf the official acted. It's all for the benefit of the State; they belong to the State and can thus be waived by the State. Protection of either an office or an act that represents the State, both forms of immunity seek to protect state sovereignty, also the peaceful cooperation among sovereign nations.⁵⁸

3.2.2 Functional Immunity of VPD

⁵⁴ Asian-African Legal Consultative Organization (AALCO). (2012). *Immunity of State Officials From Foreign Criminal Jurisdiction*. Inter-Sessional Meeting of Legal Experts to Discuss Matters Relating to International Law Commission to be Held on 10th April 2012 At AALCO Secretariat, New Delhi. Available from <http://www.aalco.int/background%20paper%20ilc%2010%20april%202012.pdf> (accessed on 30 June 2019), p. 2; UN General Assembly. (2008). *Immunity of State Officials from Foreign Criminal Jurisdiction* (A/CN.4/596). International Law Commission Sixtieth Session, Geneva. Available from <http://legal.un.org/docs/?symbol=A/CN.4/596> (accessed on 1 July 2019), para. 15

⁵⁵ Chang, A. et al. (2016). *Accountability in Foreign Courts for State Officials' Serious Illegal Acts: When Do Immunities Apply?*. *Allard International Justice and Human Rights Clinic*. Peter A. Allard School of Law, Vancouver. Available from http://www.allard.ubc.ca/sites/www.allard.ubc.ca/files/uploads/IJHR/when_do_immunities_apply_final.pdf (accessed on 3 July 2019), p. 2.

⁵⁶ Wickremasinghe, C. (2006). *Immunities Enjoyed by Officials of States and International Organizations*. In : Evans, M. D. Editor. *International Law* (2nd Edition). New York: Oxford University Press, p. 397.

⁵⁷ Chang, A. et al., *op. cit.*, p. 2-3.

⁵⁸ *Ibid.*, p. 3.; Wickremasinghe, C. *loc. cit.s*

Functional immunity covers official acts only, where the conduct is adopted by a State official in discharging of his or her functions⁵⁹ is to be attributed to the State⁶⁰. Subsequently, to consider Italian VPD onboard *Enrica Lexie* has functional immunity upon the case, we should take a look at the criterion of functional immunity itself:

1. State Official

Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001 stipulated that, after having attributed to the State the conduct of its organs (paragraph 1), affirms in paragraph 2 that “an organ includes any person or entity which has that status in accordance with the internal law of the State”.⁶¹ Thus, it is undisputed that the status of organ is determined by the internal law of the State. The commentary of Article 4, paragraph 2, stated that “Certain acts of individuals or entities which do not have the status of organs of the State may be attributed to the State in international law, ... But the rule is nonetheless a point of departure. It defines the core cases of attribution, and it is a starting point for other cases. For example, under article 8 conduct which is authorized by the State, so as to be attributable to it, must have been authorized by an organ of the State, either directly or indirectly.”⁶²

2. Official Conduct

Identification of the criterion for distinguishing between a State organ’s “official” and “private” conduct that is considered as the performed in the discharge of the official functions of that organ, is not explicitly provided by the 2011 Articles on Responsibility of States for Internationally Wrongful Acts. Article 7 which deals with *ultra vires* acts simply states this requirement by providing that “the organ, person or entity” must act “in that capacity”⁶³. However, some clarification on this issue is found in the Commission’s commentary to Article 4 (paragraph 13). On this point, the commentary specifies that the determinative consideration is the “apparent authority” of the individual and not the motives inspiring his or her conduct or the abusive character that such conduct might assume:

“It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State.”

⁵⁹ Asian-African Legal Consultative Organization (AALCO). *op. cit.*, p. 13.

⁶⁰ UN General Assembly. *op. cit.*, para. 156.

⁶¹ International Law Commission. (2005). *Articles on Responsibility of States for Internationally Wrongful Acts 2001*. United Nations. Available from http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf (accessed on 5 July 2019), Article 4.

⁶² International Law Commission. (2008). *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001*. United Nations. Available from http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed on 10 October 2019), p. 40.

⁶³ United Nations. (2008). *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001*. Commentaries on Article 7, para. 8, p. 46, This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State.

[...] *The case of purely private conduct should not be confused with that of an organ functioning as such but acting ultra vires or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State: this principle is affirmed in article 7. In applying this test, of course, each case will have to be dealt with on the basis of its own facts and circumstances.*"⁶⁴

"Apparent authority" refers to a situation where a reasonable third party would understand that an agent had authority to act.⁶⁵ A principal is bound by the agent's actions, although the agent had no actual authority, whether express or implied. The act of state officials 'purportedly or apparently carrying out their official functions' (or capacity⁶⁶) remain acts performed in an official capacity.⁶⁷

Moreover, ILC Rapporteur Escobar Hernández has analyzed case law and practice in determining whether it is possible to set out criteria to identify state officials for immunity purposes and to determine when state officials are in fact carrying out official activities. She concluded that the inquiries into whether an individual is a state official and whether his or her acts were carried out in an official capacity should be conducted on a case-by-case basis, both conditions have to be fulfilled for any rule on functional immunity to apply.⁶⁸

Thus, if we see through Italy's notification before PCA and make it in line with the analysis in this section, we can simply consider that functional immunity could be applied upon the Italian VPD. However, we need to do deeper analysis on this case, take a look from various aspects that may be applied in this case, as the previous chapter has analyzed.

4. Conclusion

Italy deployed their VPD onboard private vessel *Enrica Lexie* on purpose that is in line with the global effort to counter piracy. The challenges of using VPDs is while they are operating aboard a commercial vessel and sailing through territorial waters of some coastal states since the embarkation of armed military personnel on privately owned and operated vessels could diminish the merchant vessels' status under the regime of

⁶⁴ UN General Assembly. *op. cit.*, para. 157.

⁶⁵ Garner, B. A. (2009). *Black's Law Dictionary* (9th Edition). USA: West Publishing Co. p. 152., "apparent authority" refers to a situation where a reasonable third party would understand that an agent had authority to act. This means a principal is bound by the agent's actions, even if the agent had no actual authority, whether express or implied.

⁶⁶ Hornby, A. S. (1995). *Oxford advanced learner's dictionary of current English*. Editor: Jonathan Crowther. Oxford, England: Oxford University Press. (URL: <https://www.oxfordlearnersdictionaries.com/>)

Based on Oxford Learner's Dictionary, "capacity" means "role": the official position or function that somebody has.

⁶⁷ O'Keefe, R. (2015). *International Criminal Law*. Oxford, England: Oxford University Press. p. 435.

⁶⁸ Frulli, M. (2016). On The Existence Of A Customary Rule Granting Functional Immunity To State Officials And Its Exceptions: Back To Square One (Vol 26:479). *Duke Journal of Comparative & International Law*. University of Florence. Available from <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1488&context=djcil> (accessed on 5 July 2019), p. 493.

innocent passage. Moreover, the functional immunity of Italian VPD were questioned, whether they are part of the State organ and were exercising official conduct.

A globally accepted framework is needed to harmonize the embarkation and activities of VPDs, as well as standardizing the relationship between VPD and the Master of the commercial vessel. Deeper analysis is also needed to determine the functional immunity of the VPD in this case.

List of Reference

Book

- Adolf, H. (2015). *Aspek-Aspek Negara Dalam Hukum Internasional*. Bandung: CV Keni Media.
- Amiruddin & Asikin, Z. (2004). *Pengantar Metodologi Penelitian Hukum* (Cetakan VIII). Jakarta: RajaGrafindo Persada.
- Aust, A. (2015). *Handbook of International Law*. Cambridge: Cambridge University Press.
- Clarke, M. (2013). *Maritime Law Evolving*. Oregon: Hart Publishing.
- Garner, B. A. (2009). *Black's Law Dictionary* (9th Edition). USA: West Publishing Co.
- Hornby, A. S. (1995). *Oxford advanced learner's dictionary of current English*. Editor: Jonathan Crowther. Oxford, England: Oxford University Press.
- Lowe, V. (2006). *Jurisdiction*. In : Malcolm, D. E. Editor. *International Law*. 2nd Edition. New York: Oxford University Press.
- Marzuki, P. M. (2016). *Penelitian Hukum*. Edisi Revisi. Jakarta: Prenadamedia Group.
- O'Keefe, R. (2015). *International Criminal Law*. Oxford, England: Oxford University Press.
- Sefriani. (2016). *Hukum Internasional: Suatu Pengantar* (Edisi Revisi). Jakarta: PT RajaGrafindo Persada.
- Shaw, M. N. (2003). *International Law* (5th Edition). Cambridge: Cambridge University Press.
- Soekanto, S. (1986). *Pengantar Penelitian Hukum* (Cet. III). Jakarta: Penerbit Universitas Indonesia (UI-Press).
- Wickremasinghe, C. (2006). *Immunities Enjoyed by Officials of States and International Organizations*. In : Evans, M. D. Editor. *International Law*. 2nd Edition. New York: Oxford University Press.

Journal

- Birgit Feldtmann. (2018). On-board Protection of Merchant Vessels from the Perspective of International Law. *Erasmus Law Review*, No. 4 - DOI: 10.5553/ELR.000128
- Chang, A. et al. (2016). Accountability in Foreign Courts for State Officials' Serious Illegal Acts: When Do Immunities Apply?, *Allard International Justice and Human Rights Clinic*, Peter A. Allard School of Law, Vancouver, (URL:http://www.allard.ubc.ca/sites/www.allard.ubc.ca/files/uploads/IJHR/when_do_immunities_apply_final.pdf accessed on 3 July 2019)
- Farnelli, G. M. (2015). Vessel Protection Detachments and Maritime Security: An Evaluation of Four Years of Italian Practice. *Maritime Safety and Security Law Journal*, (1/2015). (URL: <http://www.marsafelawjournal.org/wp->

- content/uploads/2015/08/Issue1_Farnelli_Article.pdf accessed on 22 October 2019)
- Frulli, M. (2016). On The Existence Of A Customary Rule Granting Functional Immunity To State Officials And Its Exceptions: Back To Square One, *Duke Journal of Comparative & International Law*, Vol 26:479, University of Florence (URL: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1488&context=djcil> accessed on 5 July 2019)
- Hakapää, K. (2015). Innocent Passage. *Oxford Public International Law*. Oxford University Press (URL: https://www.ilsa.org/Jessup/Jessup18/Second%20Batch/OPIL_Innocent_Passage.pdf accessed on 22 October 2019)
- Williams, S. O. (2014). Assessing State Jurisdiction and Industry Regulation over Private Maritime Security: An international and comparative regulatory review. *Faculty of Law, The Arctic University of Norway* (URL: <https://pdfs.semanticscholar.org/35a2/93aa798aed89f2b1a1f873c3d52eaa271de6.pdf> accessed on 22 October 2019)
- Williamson, H. (2013). Protection of Canadian Ships Against Piracy. *Canadian Naval Review*, Vol. 9 Number 2 (2013), (URL: <http://www.navalreview.ca/wp-content/uploads/public/vol9num2/vol9num2art4.pdf> accessed on 18 August 2019)

Online/World Wide Web:

- Oceans Beyond Piracy (-). Issue Paper: Defining Contracted Maritime Security. Retrived from <http://oceansbeyondpiracy.org/sites/default/files/attachments/DefiningContractedSecurityIssuePaper092116.pdf> accessed on 27 June 2019.
- Oceans Beyond Piracy. (-). Issue Paper: Vessel Protection Detachments. Retrived from http://oceansbeyondpiracy.org/sites/default/files/attachments/Vessel_Protection_Detachments_IssuePaper.pdf accessed on 23 June 2019.
- UKMTO. (2011). Best Management Practices for Protection Against Somali Based Piracy (BMP4), Version 4, Witherby Publishing Group Ltd, Edinburgh. Retrived from https://eunavfor.eu/wp-content/uploads/2013/01/bmp4-low-res_sept_5_20111.pdf accessed on 22 June 2019.
- Williams, S. O. (2014). Maritime Security: The Concept of Innocent Passage. The Maritime Executive. Retrived from <https://www.maritime-executive.com/features/Maritime-Security-Private-The-Concept-of-Innocent-Passage> accessed on 22 October 2019.

Convention/International Legal Instrument

- 1982 United Nations Covention on the Law of the Sea
 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
 2011 Articles on Responsibility of States for Internationally Wrongful Acts