KMI International Journal of Maritime Affairs and Fisheries • Volume 9 Issue 1 June 2017 pp.01-018 •

Expanding the Right of Hot Pursuit: Challenges for Cooperative Maritime Law Enforcement Between the Philippines and Indonesia

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ABSTRACT

Piracy and armed robbery against ships is a rising problem in the tri-border area between Indonesia, Malaysia and the Philippines. As a result, these countries have begun formal discussions on the establishment of joint patrols, and are also exploring other possible avenues for trilateral maritime security cooperation. Indonesia and the Philippines recently took their partnership one step further by affirming previous bilateral enforcement agreements and expressing willingness to exercise an "expanded" right of hot pursuit within each other's territorial borders. In a region where sensitivities concerning sovereignty and border issues run high, such an intrusive arrangement certainly warrants closer scrutiny. At the outset, this paper critically discusses the legality of an expanded right of hot pursuit and examines whether such an arrangement is permitted under international law. From a practical perspective, this paper further discusses three key pitfalls and challenges that must be addressed in implementation: (1) whether and to what extent force can be used in the exercise of the expanded right of hot pursuit, (2) whether there are any issues pertaining to the overlapping exercise of criminal jurisdiction, and (3) whether international human rights obligations apply in extraterritorial maritime law enforcement.

Keyword: Hot pursuit; maritime security cooperation; Philippines; Indonesia

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1. Introduction and Overview

On 9 September 2016, Rodrigo Duterte – President of the Philippines – and Joko Widodo – President of Indonesia – met in Jakarta, Indonesia, after the conclusion of the 2016 Association of Southeast Asian Nations (ASEAN) Summit in Vientiane, Laos. The two leaders discussed, among other issues, ways to ensure peace and security in the notorious waters located between their countries. The outcome of the discussion was interesting: the signing of a non-binding Joint Declaration expanding maritime security cooperation as a means to address piracy and lawlessness in and around the tri-border maritime area (TBA) surrounded by the Philippines, Indonesia and Malaysia (Gabacungan, 2016).

The 2016 Joint Declaration appears to have its foundations in a number of agreements between the two countries: the 1975 Revised Agreement on Border Crossing between the Republic of the Philippines and the Republic of Indonesia, the 1997 Agreement between the Government of the Republic of the Philippines and the Government of the Republic of Indonesia on Cooperative Activities in the Field of Defense and Security, the 2011 Memorandum of Understanding between the Philippine National Police (PNP) and the Indonesian National Police (INP) on Cooperation in Preventing and Combating Transnational Crime and Capacity Building, and the 2014 Memorandum of Understanding between the National Counter-Terrorism Agency of the Republic of Indonesia and the Anti-Terrorism Council of the Republic of the Philippines on Combating International Terrorism. Some of these agreements are binding and create enforceable legal obligations while others merely serve as guidelines and benchmarks for behavior. Taken all together, they paint a clear picture of how the Philippines and Indonesia intend to approach cross-border security problems. The non-binding 2016 Joint Declaration now takes its place within this existing framework by affirming the need for coordinated action in the TBA and by encouraging the mutual exercise of an expanded right of "hot pursuit".

It should also be noted that the Foreign Ministers and Defense Chiefs of the Philippines, Malaysia and Indonesia signed a non-binding 2016 trilateral Joint Declaration that outlined immediate measures to address security in the maritime areas of "common concern". The 2016 trilateral Joint Declaration recognized "the growing security challenges such as those arising from armed robbery against ships, kidnapping, transnational crimes, and terrorism in the region, particularly in reference to the maritime areas of common concern to the three countries". In light of those developments and security challenges, it was also agreed that they would: (1) conduct a patrol among the three countries using existing mechanisms as a modality; (2) render immediate assistance for the safety of people and ships in distress within the maritime areas of common concern; (3) establish a national focal point among the three countries to facilitate timely sharing of information and intelligence as well as coordination in the event of emergency and security threats; and (4) establish a hotline of communication among the three countries to better facilitate coordination

during emergency situations and security threats. The 2016 trilateral Declaration resulted in the creation of the "Sulu Sea Patrol Initiative" (SSPI), which, once Standard Operating Procedures (SOPs) are mutually agreed upon, will be the governing framework for coordinated air and naval patrols, as well as for the exchange of military intelligence. Notably, the SSPI is modelled after the Malacca Strait Sea Patrol (MSSP), which focuses mainly on cooperation. Unlike the potential cooperative arrangement encouraged by the 2016 Joint Declaration, the three SSPI countries will merely carry out coordinated patrols in their respective territories without entering into each other's waters or projecting their sovereign jurisdiction beyond their borders.

In view of the foregoing, this paper now takes a deeper dive into the concept of an expanded right of hot pursuit through an examination of two aspects: (1) the legality of an expanded right of hot pursuit in international law and (2) the possible pitfalls, challenges and other considerations in the implementation of an expanded hot pursuit doctrine in the TBA. This analysis is timely given the impending possibility of the conclusion of a more binding arrangement that will likely take into account the two countries' experiences in operationalizing the 2016 Joint Declaration.

1.1 The Abu Sayyaf Group hijacking-kidnapping incidents: piracy or armed robbery at sea? Does it matter?

The signing of the Joint Declaration was largely motivated by the recent criminal activities of the Abu Sayyaf Group (ASG), a violent Islamist militant group based in southern Philippines, in the TBA. In 2016 alone, the ASG claimed responsibility for at least nine known incidents of maritime hijacking and kidnapping, which all targeted Indonesian and Malaysian ships.

Table 1. ASG Piracy/Armed Robbery Incidents in the TBA (Espenilla, 2016)

Vessel/s	Incident Details	No. of Perpetrators	Treatment of Crew
Brahma 12 and Anand 12 (Indonesia)	*Attacked on March 26, 2016 while underway from Kalimantan, Indonesia to Batangas, Philippines *Boarded by armed perpetrators from a speedboat and a wooden-type motorized pump boat	17 alleged ASG members	All 10 Indonesian crew members were abducted but were released on May 1, 2016 following the purported payment of ransom money by Patria Maritime Lines, the sailors' private employer
MV Massive 6 (Malaysian)	*Attacked on April 1, 2016 while underway from Manila, Philippines to Tawau in Sabah, Malaysia *Boarded by armed perpetrators from a	8 (alleged to be ASG members)	4 Malaysian crew members were abducted, leaving behind 5 other crewmen from Indonesia and Myanmar

Vessel/s	Incident Details	No. of Perpetrators	Treatment of Crew
	speedboat at approx. 27 nm southeast of Semporna in Sabah, Malaysia		
TB Henry (Indonesian)	*Attacked on April 15, 2016 while underway from Cebu, Philippines to Tarakan, Indonesia *Boarded by armed perpetrators from a speedboat at approx. 25 nm off Sitangkai Island in Tawi-Tawi, Philippines	Unknown (alleged to be ASG members)	Of 10 Indonesian crew members, 1 was injured while 4 others were abducted
Unnamed tugboat (Indonesian)	*Attacked on June 22, 2016 in the Sulu Sea, while underway from the Philippines to Indonesia *Boarded by armed perpetrators from a speedboat	Unknown (alleged to be ASG members)	Of 13 crew members, 7 were abducted
Unnamed fishing vessel (Malaysian)	*Attacked on July 10, 2016, *Boarded by armed perpetrators from a speedboat off the coast of Lahad Datu, Sabah, Malaysia	5 (alleged to be members of the ASG	3 Indonesian fishermen were abducted
Unnamed tugboat and barge (Malaysian)	*Attacked on July 19, 2016 *Boarded by 5 armed perpetrators from a speedboat	Unknown (alleged to be ASG members)	5 Malaysian fishermen were abducted

International media have labelled these incidents as acts of piracy. However, it should be recalled that Article 101 of the United Nation Nations Convention on the Law of the Sea (UNCLOS) defines piracy in a very narrow way, limiting it only to 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; or
  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 subpara-

graph (a) or (b).

Many of the hijacking and kidnapping incidents described above do not fall within the strict contours of the crime as defined in the UNCLOS. The acts were mainly perpetrated in the territorial sea, the contiguous zones or the EEZs of Indonesia and Malaysia, and not, as the UNCLOS requires, in the high seas or in any place outside the jurisdiction of any State. How then are the ASG's hijacking-kidnapping incidents classified?

Under the International Maritime Organization's (IMO) Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships, these incidents would be considered as "armed robbery against ships". "Armed robbery against ships" consists of the following acts:

(a) 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;
(b) any act of inciting or of intentionally facilitating an act described above.

The distinction between piracy and armed robbery against ships has legal significance because it determines who would exercise primary criminal jurisdiction in case of interception and arrest. If the act is considered piracy under the strict UNCLOS definition, then any ship flying any flag may seize the pirate ship in the EEZ or on the high seas, arrest the persons and take the property on board (UNCLOS, Arts. 105, 58(2)). The courts of the seizing/arresting State are further authorized by the UNCLOS to decide upon the penalties to be imposed, as well as determine the action to be taken with regard to the ships or property, subject to the rights of third parties acting in good faith (ibid.). This "universal jurisdiction" over piracy in the EEZ/on the high seas is due to the nature of the perpetrators as hostis humani generis (enemies of mankind) – a designation that recognizes the far-reaching impact of their predation on the freedom of navigation and ultimately, on global trade and commerce. On the other hand, acts which are more consistent with the IMO's definition of armed robbery against ships fall within the exclusive enforcement jurisdiction of the coastal State. Thus, it is only that State that has the right to intercept and visit vessels, as well as arrest and prosecute individuals on board who are suspected of committing the said crime within its internal waters, archipelagic waters and territorial sea. This right is exclusive and cannot be exercised by any other State.

2. "Hot Pursuit" in the International Law of the Sea

The right of hot pursuit is generally defined in law of the sea parlance as "the right of the coastal State to continue, outside the territorial sea, the contiguous zone, or certain adjacent areas, the pursuit of a foreign vessel which – while within the

internal waters or the territorial sea, the contiguous zone, or certain adjacent areas of the pursuing State – has violated the laws and regulations of this State, provided, however, that the pursuit has commenced immediately after the offense and has not been interrupted" (Poulantzas, 2002:39). This definition implies that the right of hot pursuit is actually an extension of the criminal jurisdiction of the pursuing state. As such, its exercise is customarily recognized as an exception to the freedom of the high seas though it ends the moment that vessel being pursued enters into the territorial waters of another State.

2.1 Legal History and Evolution of the Right of Hot Pursuit

The right of hot pursuit was first codified in 1930, when it was introduced in Article 11 of Annex I to the Final Act of the Hague Codification Conference. Although the Final Act never achieved the status of an internationally legally binding instrument, the inclusion of Article 11 in Annex I validated the fact that the right of hot pursuit was a customarily recognized practice that even then enjoyed virtually unanimous acceptance within the League of Nations. Moreover, this early codification served as basis for the eventual inclusion of the right of hot pursuit in the binding 1958 Geneva Convention on the High Seas (CHS). Article 23 of the CHS provides:

Article 23

1) The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 24 of the Convention on the Territorial Sea and the Contiguous Zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.
2) The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.
3) Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship as a mother ship are within the limits of the territorial sea, or as the case may be within the contiguous zone. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign

ship.

4) The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorized to that effect.
5) Where hot pursuit is effected by an aircraft:
   a) The provisions of paragraphs 1 to 3 of this article shall apply mutatis mutandis;
   b) The aircraft giving the order to stop must itself actively pursue the ship until a ship or aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest on the high seas that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption.
6) The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an enquiry before the competent authorities may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the high seas, if the circumstances rendered this necessary.
7) Where a ship has been stopped or arrested on the high seas in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

When the current UNCLOS was adopted in 1982, its Article 111 substantially restated Article 23 of the CHS and formally established the following conditions for the legitimate exercise of the right:

1) The competent authorities of the coastal State must have good reason to believe that a foreign ship has violated the laws and regulations of that State.
2) The pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State.
3) The pursuit can only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted.
4) The pursuit can only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.
5) The pursuit can only be exercised by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.
6) The pursuit initially commenced by an aircraft can be transferred to pursuit by a ship providing that the foreign ship was ordered to stop and the pursuit has been carried out without interruption.

The International Tribunal for the Law of the Sea (ITLOS) ruled in one case that the above conditions are intended to be cumulative – each must be satisfied for the pursuit to be legitimate under the UNCLOS (M/V Saiga Case, para. 146).

2.2 Expanding the right of hot pursuit?

Both the CHS and the UNCLOS state that the right of hot pursuit ends the moment the pursued foreign vessel enters into the territorial sea of its own country or of a third State (UNCLOS, Art. 111(3)). Thus, the idea of continuing the hot pursuit into the territory of another state is extraordinary, especially as it tends to overlap with potentially sensitive issues relating to sovereign jurisdiction. This was clearly highlighted in UN Security Council (UNSC) Resolution 1816 and succeeding related Resolutions (UNSC Resolutions 1846(2008), 1851(2008) and 2007(2012)) relating to anti-piracy measures in Somalia. In its Resolution 1816, the UNSC authorized States cooperating with the Transitional Federal Government of Somalia (TFG) to: (1) enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and (2) use, within the territorial waters of Somalia, in a manner consistent with 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. However, the UNSC was careful to underscore the extraordinary and sui generis nature of the authorized measures by clearly limiting their ratione temporis and ratione loci (Treves, 2009:399-414). Thus, cooperating States would only be allowed to make use of such authority for a period of six months (later extended for one year by UNSC Resolution 2077) and only with respect to the situation in Somalia. Resolution 1816 further states that it "shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that it shall not be considered as establishing customary international law… (para. 9)."

Although the case of Somalia is unique in that the expanded right of hot pursuit was authorized by the Security Council under its Chapter VII powers in the UN Charter, nothing in customary or conventional law prevents States, on their own, from entering into bilateral agreements or arrangements allowing hot pursuit to continue into their respective territories for maritime enforcement purposes. They can even consent to foreign or joint patrols in their waters (Petrig, 2015:854). With respect to piracy, in particular, the UNCLOS itself encourages States to cooperate "to the fullest extent" in its repression (UNCLOS, Art. 100), a directive broad enough to encompass an expanded right of hot pursuit embodied in a bilateral agreement.

Such bilateral agreements/arrangements have in fact been done before: In 2007, Australia and France entered into a cooperative agreement relating to the enforcement of fisheries laws in the maritime areas adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands. This agreement gave reciprocal

authority to continue a properly initiated hot pursuit in the territory of the other Party provided that it comply with stipulated legal and procedural requirements (Australia-France Agreement, Arts. 4-7). In 2011, Nigeria and Benin launched "Operation Prosperity", which allowed the two countries to conduct joint patrols along the coast of Benin (Kamal-Deen, 2015:102). Under the arrangement, Benin had operational command over the patrols while Nigeria exercised tactical command (ibid.).

Based on the foregoing, the cooperative arrangement implied by the 2016 Joint Declaration appears to be legally acceptable.

3. Pitfalls, Challenges and Considerations: A Legal and Practical Perspective

Although the 2016 Joint Declaration's possible expansion of the right of hot pursuit appears to not be incompatible with customary international law and with the UNCLOS, a number of potentially complex legal issues must nonetheless be considered, particularly in the event that the pursuit is successful and an intercept actually happens.

3.1 Use of force

Hours before President Duterte met with President Widodo, he addressed the Filipino community and verbalized his intention to enter into an expanded hot pursuit arrangement with Indonesia. He touched on the issue of "use of force" and expressed his preference for a more hardline Indonesian approach to the ASG problem (i.e. "blowing up" intercepted ASG vessels) (Gutierrez, 2016). While the 2016 Joint Declaration does not expressly reflect this rather draconian sentiment, it is nonetheless silent on whether and when force can be used, its limits as well as its modalities.

The UNCLOS alludes to the "use of force" concept in a very limited way. In fact, the phrase only appears in three provisions: Article 19 (2)(a), Article 39 (1)(b), and Article 301. None of these provisions have any significant bearing on the issue at hand. Fortunately, international case law sheds much needed light on the use of force in maritime enforcement actions. In the 1935 I'm Alone Case between Canada and the United States, the commissioners referred to the "necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel". In relation to this, the commissioners differentiated the "incidental sinking" from the "intentional sinking" of a vessel: the former is justifiable if done as a result of the exercise of necessary and reasonable force while the latter is prohibited by international law. In that particular case, it was found that the pursuing vessel – the United States' USCGC Dexter – intentionally

sank the I'm Alone, a Canadian ship used as an illegal rum runner during the American Prohibition. The United States was thus found liable for the excessive use of force and fined.

In the 1962 Red Crusader Case between the United Kingdom and Denmark, the Commission of Enquiry found that the arrest of the British trawler Red Crusader while it was illegally fishing within a mutually-agreed prohibited area near the Faroe Islands was attended with an excessive degree of force (Red Crusader Case, p. 537). As evidence, the Commission points out that Danish law enforcement officials opened fire on the Red Crusader without issuing proper warnings thereby creating danger to human life on board the ship (Red Crusader Case, p. 538). It was convinced that under the circumstances, the Danish officials could have used other less violent means to stop the fleeing vessel (ibid.).

Years after the *I'm Alone and Red Crusader* arbitration cases, the ITLOS revisited the use of force issue in maritime enforcement actions in the 1999 *M/V Saiga* Case. In considering the legality of the force used by Guinea in the arrest of the *M/V Saiga*, a ship flying the flag of St. Vincent and the Grenadines, the ITLOS took into account the circumstances of the arrest in the context of the applicable rules of international law (*M/V Saiga* Case, para. 155). It considered in particular that: (1) the *M/V Saiga* was an unarmed tanker, (2) The *M/V Saiga* could only travel at a maximum speed of 10 knots as it was sailing fully-loaded and sitting low in the water, (3) the Guinea officers approached it with a fast-sailing patrol boat, (4) the Guinea officers approached without issuing any of the signals or warnings required by international law and practice, (5) Guinea officers opened fire on the *M/V Saiga* before boarding, and (6) Having boarded the ship without resistance, and although there is no evidence of the use or threat of force from the crew, the Guinea officers fired indiscriminately while on the deck and used gunfire to stop the engine of the ship. As a result, two *M/V Saiga* crew members sustained injuries and considerable damage was inflicted on the ship and its equipment (*M/V Saiga* Case, para. 158). The ITLOS thus found that Guinea used an excessive degree of force and stated that: "Although the 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 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. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law" (*M/V Saiga* Case, para. 155).

In the *Guyana v. Suriname* arbitration, a boundary delimitation arbitration case, the arbitral tribunal acknowledged in its 2007 award that "in international law, force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary." (*Guyana v. Suriname*, para. 445). It ruled that Suriname violated the UNCLOS, the UN Charter, and customary international law when its navy vessels approached and threatened a Canadian oil rig/drill ship conducting seismic testing/exploratory drilling under a concession granted by Guyana

in the disputed maritime area. The arbitral tribunal found that the incident was "akin to a threat of military action" that threatened international peace and security since the circumstances under which Suriname's actions were done did not warrant the use of force. It further found that Suriname's actions jeopardized the possibility of reaching a final delimitation agreement between the two countries.

The four preceding cases capture some of the customary law principles for the use of force in maritime enforcement actions, which can be summarized as follows:

1) The use of force in maritime enforcement must be avoided as much as possible;
2) If such use of force cannot be avoided, its use must be necessary and reasonable under the circumstances;
3) The use of force can only be done after taking a number of "appropriate actions" (e.g. give internationally-recognized signals and warnings to stop)
4) Considerations of humanity apply in maritime enforcement actions.

Beyond the principles established by international jurisprudence, commentators have also clarified that in order to ensure the safety and security of the persons subject to the attack, the use of force in enforcement actions must be a last resort rather than a first option (Tuerk, 2015:486). Force should not even be used unless in self-defense and even then, warnings should first be issued before force is used (*ibid.;* Petrig, 2013:34). One commentator even goes so far as to say that self-defense is the sole avenue for legitimizing forcible action by states against non-state actors in the territory of other States (Lubell, 2010:74). He further notes that in any case, the force used must be commensurate with the pursuer's perception of the level of threat being posed by the pursued.

The 2016 Joint Declaration does not acknowledge or reference any of the established international legal principles regarding the use of force, nor does it contain any guidelines or rules pertaining to the use of force in possible cross-border maritime enforcement actions. More importantly, it does not address the issue of liability or state responsibility in case an inordinate degree of force is used in the course of the hot pursuit from one country's territory to the other's. The Philippines and Indonesia should thus address this ambiguity in a subsequent document containing mutually agreed Standard Operating Procedures (SOP) or Implementing Rules should they wish to move forward with the conclusion of a binding and more concrete expanded hot pursuit arrangement.

3.2 Criminal Jurisdiction

One commentator asserts that "the natural goal of every law enforcement operation is to bring the alleged offenders to justice" (Petrig, 2014:32). For this to happen in a transnational counter-piracy operation, both the policing, prosecution, and enforce-

ment aspects must be perfectly synced across all actors in all involved countries. This may prove challenging given that "as compared to a purely domestic prosecution situation, where the path from policing to criminal prosecution is paved with a comprehensive set of rules articulating the two elements and the interaction between the competent authorities, policing and prosecution in the counter-piracy context are two relatively different spheres" (*ibid.*) Although the commentator made these statements in relation to the admittedly more complex UN Security Council-backed multi-state counter-piracy operations in Somalia, they remain equally true and applicable to the possible expanded hot pursuit operations heralded by the 2016 Joint Declaration.

Based on past ASG piracy/armed robbery at sea incidents, on the broadly drawn language of the 2016 Joint Declaration, and on statements made by Philippine government officials, an enforcement scenario like this could happen: A Philippine-registered speedboat intercepts and attacks an Indonesian tugboat that has just left its home port in Kalimantan. Armed ASG members then board the tugboat, kidnap its crew and attempt to take them back to their hideaway somewhere in Sulu, Philippines. Indonesian Coast Guard vessels immediately pursues the ASG speedboat which, despite having heard warning shots, refuses to stop. The pursuit continues unbroken all the way into the Philippine territorial sea where finally, the Indonesian Coast Guard manages to intercept the ASG speedboat and apprehend its crew with the assistance of Philippine Coast Guard vessels who were earlier notified of the pursuit.

In the above hypothetical scenario, one question immediately comes to mind: Who will exercise primary criminal jurisdiction? This question in turn generates even more questions: Whose criminal laws will apply? Where will the suspects be detained pending prosecution/judgment? Who will investigate and handle evidence? Where will the trial happen? Will the suspects need to be formally extradited or transferred to Indonesia? Who will enforce the sentences? As the 2016 Joint Declaration is broadly drawn and vaguely references past cooperative arrangements, these questions will need to be clarified by the Philippine and Indonesian governments in an SOP or via Implementing Rules. Failure to address ambiguities relating to criminal jurisdiction will likely lead to ineffective or even failed prosecutions. In relation to this, the Somali piracy prosecution experience serves as a cautionary tale and demonstrates the dangers of jurisdictional ambiguity: Whenever a suspected Somali pirate is apprehended by a country acting under UNSC authorization, several prosecution options are potentially available: (1) They can be prosecuted under the laws of the flag State that apprehended them and taken to that country for trial; (2) The flag State can turn over the suspected pirates to another State in the region willing to assume the prosecution; and (3) The suspected pirates can be returned to Somalia for domestic prosecution. Due to practical difficulties and legal ambiguities concerning the correct course of action, suspects are more often than not simply disarmed and released by the apprehending ship without being subjected to any formal criminal proceeding.

It should also be remembered that the Philippines and Indonesia are parties to the 2004 Mutual Legal Assistance Treaty (MLAT). Under the MLAT, State parties

are required to "render to one another the widest possible of mutual legal assistance in criminal matters, namely investigations, prosecutions and resulting proceedings" (MLAT, Art. 1.1). "Mutual legal assistance" can take any of the following forms: (a) taking of evidence or obtaining voluntary statements from persons; (b) making arrangements for persons to give evidence or to assist in criminal matters; (c) effecting service of judicial documents; (d) executing searches and seizures; (e) examining objects and sites; (f) providing original or certified copies of relevant documents, records and items of evidence; (g) identifying or tracing property derived from the commission of an offence and instrumentalities of crime; (h) the restraining of dealings in property or the freezing of property derived from the commission of an offence that may be recovered, forfeited or confiscated; (i) the recovery, forfeiture or confiscation of property derived from the commission of an offence; (j) locating and identifying witnesses and suspects; and (k) the provision of such other assistance as may be agreed and which is consistent with the objects of this Treaty and the laws of the Requested Party (MLAT, Art. 1.2). Notably, MLAT only pertains to assistance that can be done by the Requested State within its own territory and in accordance with its own laws. It does not apply to requests to cede jurisdiction to another State, as in the case of requests for extradition, the transfer of criminal proceedings, and the enforcement of criminal judgments imposed by the Requesting Party beyond what is allowed by the laws of the Requested Party (MLAT, Art. 2.1). Moreover, the MLAT explicitly provides that States are not entitled to exercise jurisdiction or perform functions that are reserved exclusively for the authorities of another State as required by that State's domestic laws (MLAT, Art. 2.2). Both countries should thus consider what role, if any, that the MLAT might play in terms of facilitating prosecutions effected as a result of the operationalization of the 2016 Joint Declaration.

Finally, it should also be pointed out that under the 2005 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention), the Philippines as a State party is obliged to establish its jurisdiction over any of the covered offenses (e.g. seizure of ships by force, acts of violence against persons on board ships, etc.) when, among others, they are committed by its nationals or by individuals on board ships flying its flag (SUA Convention, Art. 6). Under the principle of *aut dedere aut judicare (SUA Convention, Art. 10)*, the Philippines is further obliged to either take suspected criminals into custody and immediately prosecute them in accordance with its national laws or extradite them to a requesting SUA State party with whom it has an existing extradition treaty.

The Philippines's extensive responsibilities under the SUA Convention should be carefully considered in view of the fact that Indonesia is not a State party to the same. Further study is needed to determine whether and to what extent SUA Convention provisions can be incorporated into future cross-border maritime enforcement agreements between the Philippines and Indonesia or, at the very least, in the SOP or Implementing Rules of the 2016 Joint Declaration.

3.3. Human Rights

The 2016 Joint Declaration potentially establishes a situation where both Indonesia and the Philippines mutually bestow on each other the right to conclude a lawful hot pursuit with the interception, arrest, or detention of pirates/armed robbers in each other's territorial waters. Given the situation, would either State be bound by human rights law? Do the obligations in international human rights law even extend to situations involving extraterritorial law enforcement? As in the issue of the use of force, the 2016 Joint Declaration is silent on the matter. The UNCLOS likewise makes no mention whatsoever of the application of human rights to such types of enforcement actions (Petrig, 2013:35). Fortunately, international case law provides useful guidance. The International Court of Justice (ICJ) in fact answered these questions in the affirmative on at least three occasions (L*egal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004; *Armed Activities on the Territory of the Congo, 2005; and Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, 2008), where it unequivocally asserted that States are bound by their respective human rights obligations (such as those found in, for example, the International Covenant on Civil and Political Rights of which both Indonesia and the Philippines are State parties) in relation to extraterritorial activities. Of course, such obligations only apply to the present situation if the State acting beyond its territory exercises either *de jure jurisdiction* (as the flag state or the state in whose territory an element of the crime is committed) *or de facto jurisdiction* (as the State exercising effective physical control) over the pirates/armed robbers (Petrig, 2014:139-40). In relation to this, the UN Human Rights Committee also stated in its General Comment No. 31 that "a State party must respect and ensure rights laid down in the [ICCPR] to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party" (para. 10).

Having established that international human rights extends to extraterritorial law enforcement actions (Tanaka, 2004:384; Petrig, 2013:32), attention necessarily turns to what specific principles and provisions might apply to the enforcement actions potentially sanctioned by the 2016 Joint Declaration. According to one commentator, these might include: (i) the right to be brought promptly before a judge, (ii) *non-refoulement,* (iii) fair trial guarantees, and (iv) the right to an effective remedy. Possible legal complications might also arise, however, in situations where one State subscribes to or observes a particular rule or principle of international human rights law while the other does not.

For Indonesia and the Philippines, one sticking point might be the application of Art. 6 of the ICCPR. One possible scenario relating to this provision concerns the post-conviction sentencing of pirates/armed robbers apprehended by Indonesian navy *(Tentara Nasional Indonesia-Angkatan Laut or TNI-AL)* or coast guard forces (Badan Keamanan Laut or BAKAMLA) in Philippine territorial waters. Under the Penal Code of Indonesia, acts of piracy or terrorism-related offenses (including piracy,

hijackings or violence against persons aboard vessels) resulting in death are considered crimes punishable by death. This is in stark contrast to Philippine laws, which currently prohibit the imposition of the death penalty for any crime (1987 Constitution of the Philippines, Art.III, Sec. 19(1); R.A. No. 9346), including those committed on board a Philippine ship (Revised Penal Code of the Philippines, Art. 2). In fact, Philippine criminal laws only impose the maximum penalty of *reclusion perpetua* in cases of piracy, armed robbery or kidnapping (Revised Penal Code of the Philippines, Arts. 122-123, 267, 296).

Another possible sticking point could be the application of the human rights-related safeguards found in Articles 7 and 8 of the SUA Convention. As pointed out in the preceding section, the problem lies in the fact that while the Philippines is a State party to the Convention, Indonesia is not. The provisions of the SUA Convention will only apply if both countries are States parties. This might mean that both countries will likely have different views on what would constitute an appropriate penalty.

3.4 Conclusion

The ASG presents a common threat to both the Philippines and Indonesia. As such, enhanced cooperative action between the two countries (and Malaysia) seems to be the best option for curbing criminality in the TBA. In relation to this, the Philippines-Indonesia 2016 Joint Declaration appears to pave the way for a legally acceptable modality for such enhanced cooperation even though its future operationalization would necessarily mean the relaxation of previous hard line convictions on sovereign jurisdiction. Accordingly, this paper has proceeded from that premise and instead, focused on a range of attendant legal and practical concerns.

Three broad concerns were addressed: the limits of the use of force, possible conflicts in criminal jurisdiction, and potential human rights issues. The bottom line analysis is that many pitfalls and challenges await both governments in the course of cooperative enforcement. At the minimum, these can more or less be addressed by having a thorough awareness of relevant issues and plugging any implementation gaps in subsequent SOPs or Implementing Rules. Ultimately, the Philippines and Indonesia should consider the merits of opening discussions on a binding cross-border maritime enforcement agreement that comprehensively addresses and clarifies the issues relating to an expanded right of hot pursuit.

References

Espenilla, Jacqueline (2016), "Abductions at Sea: A Three-way Security Threat for Indonesia, Malaysia and the Philippines, *The Diplomat,* available at http://thediplomat.com/2016/05/abductions-at-sea-a-3-way-security-challenge-for-indonesia-malaysia-and-the-philippines/ (accessed at 09.13.2016).

Gabacungan, Gil C. (2016), "PH, Indonesia Team Up vs piracy, kidnapping", *Inquirer* News, available at http://globalnation.inquirer.net/144567/ph-indonesia-team-up-vs-piracy-kidnappings (accessed 09.23.2016).

Gutierrez, Natashya (2016) "Duterte wants Abu Sayyaf kidnappers 'blown up at sea', *Rappler,* available at http://www.rappler.com/world/regions/asia-pacific/indonesia/bahasa/englishedition/145747-maritime-cooperation-abu-sayyaf-kidnappings (accessed 09.13.2016).

Kamal-Deen, Ali (2015), "The Anatomy of Gulf of Guinea Policy", *Naval War College Review* 68:1, 93-118, 102.

Lubell, Noam (2010), *Extraterritorial Use of Force Against Non-State Actors,* Oxford: Oxford University Press.

Petrig, Anna (2015), "Piracy", in Donald R. Rothwell, Alex G. Oude Elfernik, Karen N. Scott, and Tim Stephens (eds.), *The Oxford Handbook on the Law of the Sea,* Oxford: Oxford University Press.

Petrig, Anna (2014), *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects,* Netherlands:Brill Nijhoff.

Petrig, Anna (2013), "Human Rights in Counter Piracy Operations: No Legal Vacuum But Legal Uncertainty", Maximo Q. Mejia Jr., Chie Kojima and Mark Sawyer (eds.), Piracy at Sea, Heidelberg: Springer.

Poulantzas, Nicholas M. (2002), *The Right of Hot Pursuit in International Law,* The Hague: Martinus Nijhoff Publishers.

Tanaka, Yoshifumi (2012), *The International Law of the Sea (2nd ed.),* Cambridge: Cambridge University Press.

Tarling, Nicholas (ed.)(2000), *The Cambridge History of Southeast Asia: Volume 2, Part 2, From World War II to the Present,* Cambridge: Cambridge University Press.

Treves, Tullio, "Introductory Note to the 1958 Geneva Conventions on the Law of the Sea", available at http://legal.un.org/avl/ha/gclos/gclos.html (accessed 09.17.2016).

Treves, Tullio (2009), "Piracy, Law of the Sea and Use of Force: Developments Off the Coast of Somalia", *European Journal of International Law* 20:2, 399-414.

Tuerk, Helmut (2015), "Combating Piracy: New Approaches to an Ancient Issue", Lilian del Castillo (ed.), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea,* Netherlands: Brill Nijhoff.

National Laws, International Agreements, Bilateral/Multilateral Treaties/Conventions, and UN Documents:

Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands, [2011] ATS. 1 (Austl.).

An Act Prohibiting the Imposition of the Death Penalty, Rep. Act. No. 9346 (24 June 2006)(Phil.).

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, London, 14 October 2005, United Nations Treaty Series, Vol. 1678, No. 201.

Const. (1987), Art. III, Sec. 19(1)(Phil.).

General Assembly Resolution 2750(XXV)/1970, Reservation Exclusively for Peaceful Purposes of the Sea-bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas Beyond the Limits of Present National Jurisdiction and Use of their Resources in the Interests of Mankind, and Convening of a Conference on the Law of the Sea, A/RES/2750(XXV) (17 December 1970).

International Covenant on Civil and Political Rights, New York, 16 December 1966, United Nations Treaty Series, Vol. 999, No. 171, available from https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en.

International Maritime Organization Assembly Resolution 545/84, Measures to Prevent Acts of Piracy and Armed Robbery Against Ships, A13/Res.545 (29 February 1984).

International Maritime Organization Assembly, Annex, Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships, A22/Res.922 (22 December 2002).

International Maritime Organization Assembly Resolution 1025/09, Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships, A26/Res.1025 (2 December 2009)

Joint Declaration of Foreign Ministers and Chiefs of Defense Forces of Indonesia-Malaysia-Philippines, Yogyakarta, 5 May 2016, available from http://www.kemlu.go.id/id/berita/Pages/Joint-Declaration-Foreign-Ministers-and-Chiefs-of-Defence-Forces-of-Indonesia-Malaysia-Philippines.aspx

Penal Code of Indonesia, Art. 44 (Indon.)

Revised Penal Code, Act No. 3815, as amended, arts. 2, 122, 123, 267, 295 (Phil.)

Security Council Resolution 1816/08, On the situation in Somalia, S/RES/1816 (2 June 2008), available from http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1816(2008).

Security Council Resolution 1846/08, On the situation in Somalia, S/RES/1856 (2 December 2008), available from http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1846(2008).

Security Council Resolution 2077/12, On the situation in Somalia, S/RES/2077 (21 November 2012), available from http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2077(2012).

Treaty on Mutual Legal Assistance on Criminal Matters, 29 November 2004, available from http://www.aseansec.org/17363.pdf.

United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, United

Nations Treaty Series Vol. 1833, No. 3, available from http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

United Nations Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (29 March 2004), para. 10, available from http://www.unhcr.org/4963237716.pdf

Cases:

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russ.), Order on Provisional Measures, 2008 I.C.J. Rep. 353 (15 October).

Armed Activities on the Territory of the Congo (Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, paras. 219-20 (19 December).

Guy. v. Surin., 47 I.LM. 66, para. 445 (Perm. Ct. Arb. 2008).

I'm Alone Case (Can. v. U.S.), 3 U.N.R.I.A.A. 1609 (1935).

Investigation of Certain Incidents Affecting the British Trawler Red Crusader (U.K. v. Den.), Report (Commission of Enquiry), http://legal.un.org/riaa/cases/vol_XXIX/521-539.pdf

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, paras. 107-13 (9 July).

M/V Saiga (No.2) (St. Vincent v. Guinea), Case No.2, Order of 20 January 1998, 2 ITLOS Rep. 4.