Challenges in Determining Jurisdiction for Transnational Crimes

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***Abstract*- Globalization has brought significant changes to various aspects of society. One of its consequences is the rise of transnational crime that poses challenges in determining jurisdiction due to its involvement across multiple countries. This study addresses legal issues pertaining to the jurisdictional complexities of transnational crimes and explores potential solutions. Employing a normative legal research approach with a focus on statutory and conceptual analysis, the findings reveal that classical jurisdictional frameworks are insufficient in addressing transnational crimes, which often span the jurisdictions of multiple nations. To address this issue, an expansion of the application of territorial principles, including objective territorial principles and non-mandatory jurisdictional principles, is proposed. Under this expanded framework, the country where transnational crime victims and consequences occur would have the authority to adjudicate.**

Keywords- jurisdiction, transnational, crime

I. INTRODUCTION

The term 'globalization' emerged as a prominent topic of discussion in the late 1970s and early 1980s within fields such as Sociology, Anthropology, and Theology.[1] Globalization denotes a rapidly progressing series of activities that involve the movement across a growing number of regions worldwide, resulting in a heightened level of interconnectedness and integration among these regions. In essence, globalization represents a rapid series of processes involving widespread flows, fostering greater integration and connectivity across the globe.[2]

The impact of globalization on people's lives has been profound. It is not merely a phenomenon of western dominance, particularly by the United States, over other nations. Instead, globalization affects the lives of people in the United States and other countries alike. The evolution of communication systems has played a pivotal role in expediting the globalization process.[3] Globalization may also serve as a criminogenic factor, sparking the rise of new forms of crime. Many experts argue that the global economy's expansion makes various transnational crimes, such as human trafficking and arms smuggling, easier to perpetrate. This ease stems from advancements in transportation and information and communication technology.[4]

Information technology reinforces globalization by facilitating seamless interactions between nations,[5] eradicating spatial and temporal barriers.[6] Transnational crimes are no longer committed through traditional means; instead, they occur through sophisticated and systematic methods, such as White-Collar Crimes (WCC).[7] Presently, transnational crime significantly impacts various sectors, such as drug trafficking. In this regard, Indonesia, once just a transit nation, has now transformed into a producer.[8]

Jurisdictional issues surface in numerous transnational crimes, for example, the Lotus Case. Here, the French steamship SS Lotus collided with the Turkish steamship SS Bozkourt in the Mytilene region (Greece), leading to the drowning of at least six Turkish citizens. Turkey asserts jurisdiction due to the incident's impact on a Turkish vessel, despite occurring on a French ship.[9] Conversely, France claims jurisdiction as the act transpired on a French-flagged vessel within its territory. This case led to the establishment of the Lotus Principle, which asserts that sovereign states can act freely within explicit boundaries. Despite these instances, there are numerous similar transnational crime cases prompt contested jurisdiction claims among involved nations. Addressing this issue, this paper delves into globalization's impact on crime evolution and jurisdictional intricacies.

II. LITERATURE REVIEW

The term 'transnational' gained prominence through the work of American legal expert, Philip Jessup. Meanwhile, the concept of transnational crime itself was introduced in the United Nations Convention Against Transnational Crimes in 2000. According to Boister, the term transnational crime is not a juridical term but is recognized in criminological and sociological contexts. He defines it as "… certain criminal phenomena transcending international borders, transgressing the laws of national states having an impact on another country…"

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In simpler terms, he concludes that transnational crime refers to "conduct that has actual or potential trans-boundary effects of national and international concerns."[10]

Due to their organized nature, transnational crimes are commonly referred to as Transnational Organized Crimes (TOC). The Palermo Convention, officially named the United Nations Convention Against Transnational Organized Crime, along with its three protocols, defines the TOC as an offense that fulfills specific criteria:

1. Occurring in multiple countries, or
2. Taking place in one country with crucial elements such as preparation, planning, direction, and control orchestrated in another country, or
3. Happening in one country but involving criminal groups from multiple countries, or
4. Executed in one country but having repercussions in other nations.

According to this convention, several crimes fall under the TOC category, including money laundering (Article 7), corruption (Articles 8 and 9), human trafficking (Protocol I), migrant smuggling (Protocol II), and illegal production and trade in firearms. Based on the agreement of ASEAN countries (ASEAN Declaration on Transnational Crime, Manila, Filipina, 1997), transnational crimes encompass terrorism, drugs, human trafficking, crimes at sea, money laundering, weapons smuggling, cybercrimes, and economic crimes.[11] One of the transnational crimes that has occurred frequently in recent years is child trafficking.[12] Currently, corruption crimes are also developing into transnational crimes because many of the assets resulting from corruption are hidden abroad.[13]

Some experts argue that transnational crime constitutes a subset of international crime, though they maintain distinct characteristics. Transnational crime refers to certain criminal activities that span national borders and fall under the jurisdiction of two or more countries simultaneously. In contrast, international crimes are acts recognized by international agreements or established international customs as offenses against the global community, prosecuted and penalized based on universal principles.[10] This universal principle asserts that every state possesses the right and responsibility to pursue and punish perpetrators of international crimes, regardless of their location.

To elaborate on the disparity between international crime and transnational crime, it is essential to note that international crimes stem from: (1) established customs in international law, (2) international conventions, and (3) the historical development of conventions related to Human Rights (HAM). There are 20 types of international crimes resulting from 143 international conventions held between 1812 and 1979. These offenses include aggression, war crimes, genocide, crimes against humanity, piracy, drug offenses, and slavery.[14]

III. METHOD

This research is doctrinal legal research by exploring statutory regulations, international conventions, and doctrines that are relevant to the research topic.[15] The law will function well if it is formulated comprehensively. If the law cannot reach a phenomenon then there will be no legal consequences.[16] With this doctrinal legal research, it will be found the ability of existing law to determine the jurisdiction of transnational crime as a new phenomenon. This research uses a statutory approach and a conceptual approach. After obtaining legal material relevant to the research, it was analyzed using descriptive-qualitative techniques.

IV. RESULT AND DISCUSSION

In the contemporary context, transnational crime is on the rise, especially in the economic sector involving multiple perpetrators and necessitate the collaboration of two or more countries for resolution. These crimes encompass activities in the banking sector (banking crime), commercial field (commercial crime), environmental law violations, Intellectual Property Rights (HKI) infringements, and customs fraud, all facilitated through internet platforms.[17]

One of the most widely known instances of transnational crime involves the 'I Love You' virus, which infected 55 million computers worldwide, spreading through emails sent by Outlook users. This global spread resulted in approximately $10 billion in losses. Upon investigation, the culprit was identified as Onel de Guzman, a 23-year-old Filipino student.[18] Various countries, including those in Europe and America, were impacted. Consequently, these affected nations argued that they had the authority to enforce their laws against those responsible for the virus's dissemination.

In the realm of criminal law, there are several principles guiding state jurisdiction over criminal acts. The first principle, known as the Principle of Territoriality (*territorialiteits beginsel*), asserts that a country's criminal laws are

applicable within its own borders, regardless of whether the perpetrator is a citizen of that country or a foreign national. This principle has been universally upheld, emphasizing a nation's sovereignty in regulating its territory without external interference. The second principle, termed the Principle of Active Nationality (*actief nationaliteits beginsel*), dictates that a country's criminal laws extend to its citizens who commit crimes in another country's territory. Thus, this principle is also frequently referred to as the personal principle *(personaliteits beginsel)*.[19]–[21]

Third, there is the Principle of Passive Nationality (*pasief nationaliteits beginsel*), which states that a nation's laws can be applied to actions carried out abroad by both its own citizens and foreigners. This principle, often called the Principle of Protection (*beschermings beginsel*), aims to safeguard a country's interests from violations occurring outside its borders. These interests are not personal but rather national, pertaining to the nation and the state.[22] In Germany, it is referred to as *individualschutzprinzip* or *passives personalitatsprinzip.* The protected interests under this principle encompass not only state security but also economic concerns, especially regarding the state's financial credibility.[23]

Fourth, there is the Principle of Extraterritoriality, an exception to territoriality, recognizing the application of foreign criminal law within a country's territory. This exception, for instance, applies to foreign ambassadors and envoys who are formally welcomed by the head of the state, embassy personnel engaged in diplomatic activities *(gens d'uniforme),* service staff, ambassadorial attendants *(gens de livree),* and foreign heads of state and their families who visit officially."[19] Such figures represent state sovereignty, adhering to the *adagium* of *quia imaginem principle sui ubique circumferunt.* They are exempt from the laws of the host country in accordance with the *adagium* of *Par in parem non habet prestatem* of the Universal Principles (*universaliteits beginsel*).[24] Lastly, there is the Universality Principle, mandating all countries to apply their criminal laws to international crimes, regardless of where the crime occurred or the perpetrator's nationality. This principle is globally applicable and serves the purpose of establishing a global order and ensuring safety.[25]

Based on the explanations provided, a nation is unable to prosecute transnational criminals whose actions abroad have consequences within the prosecuting country if they implement the classical territoriality principle. Active and passive nationality principles are also limited in their application, as they have limited relevance and only pertain to specific criminal activities.

The universally embraced jurisdictional principle across nations is territoriality, intimately tied to pinpointing the *locus delicti* of a crime. Identifying the *locus delicti* serves two crucial purposes: firstly, determining the applicable law for the committed crime, and secondly, establishing the court authorized to prosecute the case. This paper specifically delves into the first aspect, focusing on which country's laws are relevant in transnational crime cases.

There exist at least four doctrines guiding the determination of *locus delicti*:[26]

1. The doctrine based on the location of the act *(leer van de lichamelijke daad).* According to this doctrine, the *locus delicti* of a crime is where the crime was committed.
2. The doctrine based on the instruments used *(leer van het instrument).* According to this doctrine, the *locus delicti* is where the weapon was employed, leading to the crime's consequences.
3. The doctrine based on the outcomes *(leer van het gevolg).* According to this doctrine, the *locus delicti* of a crime is where the consequences of the crime transpire.
4. The doctrine applicable when an action occurs in multiple places *(leer van de meervoudig plaats)*. In this case, the *locus delicti* encompasses several locations where the crime was committed if it did not occur in a single place.

In line with the *locus delicti* doctrine and in anticipation of various crimes occurring beyond a country's borders, criminal law recognizes the technical expansion of territorial jurisdiction. This expansion involves subjective and objective territorial principles. The subjective principle enables a state to prosecute acts originating within its borders but causing impacts or concluding in another state. On the other hand, the objective principle permits a state to prosecute acts initiated in another country but culminating or resulting in its territory.[10] Both principles are implemented in Article 2 of the Information and Electronic Transactions Law.

Considering this technical expansion of jurisdiction, as outlined in the United Nations Convention Against Transnational Crimes, state jurisdiction in addressing transnational crimes can be either mandatory or non-mandatory. Mandatory jurisdiction applies to crimes occurring within the concerned country's territory. Non-mandatory jurisdiction, however, encompasses three scenarios: first, crimes involving victims from the concerned country, second, crimes committed by its citizens or stateless individuals, and third, crimes taking place beyond its borders but deemed to occur within its territory.[10] In Indonesia, these jurisdictional features are incorporated in the Anti-Terrorism Law.

Drawing from the teachings mentioned earlier, the concept of *locus delicti* in transnational crimes extends to jurisdiction determination techniques. Jurisdiction can be based on the location of the crime, the usage of tools for the crime, the site of the crime's consequences, or the country where the victim is situated. The most appropriate jurisdictional principles to employ are objective territorial and non-mandatory jurisdiction. This implies that the authority to adjudicate lies with the country where the victim or the crime's consequences are, even if the crime was committed in another country's territory.

However, implementing expanded jurisdiction determination techniques in practice remains challenging due to the involvement of multiple countries' legal jurisdictions. To address these challenges, nations commonly establish extradition agreements. These agreements involve the transfer of a suspect, defendant, or convict from the country where they are located to another country seeking to prosecute them in its court or enforce a court decision.[23] For countries lacking such agreements, Mutual Legal Assistance (MLA) or mutual assistance agreements in criminal matters offer alternative solutions. MLA operates on the principle of reciprocity enabling the transfer of criminals to the requesting country, where each nation cooperatively assists in extraditing transnational crime perpetrators for mutual benefit.[27]

An additional hurdle to extradition lies in the differences between legal systems across involved countries. Common law nations, relying solely on territorial jurisdiction, are reluctant to penalize their citizens for crimes committed abroad. Conversely, they are also unwilling to extradite foreign citizens who commit crimes within their borders. Meanwhile, civil law countries like Indonesia base their jurisdiction on both territorial and national principles. Consequently, these countries are more inclined to extradite foreign citizens who commit crimes within their territories, whether through extradition agreements or MLA.[17]

In the context of transnational cybercrimes, particularly concerning jurisdiction and *locus delicti*, the Draft Convention on Cyber Crime among Council of Europe countries serves as valuable material for study. It can aid in harmonizing jurisdictional rules with other nations. Article 2 2(1) of the Draft specifies that each party state must enact legislative measures and other necessary steps to establish jurisdiction over any crime committed:[28]

1. Within its territorial boundaries,
2. Aboard a ship flying the country's flag,
3. Aboard an aircraft registered under the country's laws, or
4. Committed by a citizen of that country, punishable either according to the local criminal law or if the crime occurs beyond the country's territorial jurisdiction.

Certain highly dangerous transnational crimes that pose threats to international security should be classified as international crimes. This categorization implies that universal principles should apply, obliging all countries worldwide to enforce their criminal laws regardless of where the act took place or who the perpetrator was. According to international law, each nation possesses the authority to prosecute individuals involved in international crimes.[10]

V. CONCLUSION

The rise of transnational crime has posed challenges in determining jurisdiction. Under the classical territoriality principle, countries like Indonesia face difficulties prosecuting transnational criminals who commit offenses abroad but have consequences within their borders. Applying the active and passive nationality principles universally for all transnational crimes is not feasible, as only specific crimes permit their use.

The globally prevalent principle for jurisdiction determination is the territoriality principles, with evolving techniques based on several *locus delicti* doctrines. These doctrines consider the location of the act, the tools used, the crime's consequences, or the victimized country.

In transnational crimes, objective territorial and non-mandatory jurisdiction emerge as suitable principles. These principles empower the country where the victim or the crime's consequences occur to exercise jurisdiction, even if the offense was committed in another country's territory. Despite these principles, implementation hurdles persist due to differing national laws of each country. Hence, the key is to enhance the effectiveness of extradition agreements or mutual legal assistance (MLA) along with harmonizing laws across nations, particularly those related to transnational crimes.

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