Human Rights-Based Approach to Combat Transnational Crime

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ABSTRACT

The article starts with discussing the impact of globalization on crime and with further details on challenges posed by transnational crime. The author uses the legal approach and the human rights-based approach to address the issue. He outlines the limitations of a purely legal approach to transnational crime and highlights the role of the human rights-based approach as well as the attribution of State responsibility to transnational crime as effective means to combat transnational crime. He concludes that through the human rights-based approach, State responsibility can be attributed to transnational crime for the default of the State to take reasonable measures, in order to prevent acts that cause core human rights violations, including the omission to cooperate in global efforts to combat transnational crime.

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I. A Globalized World

The 1940s witnessed the conclusion of World War II, decolonization and the birth of independent Nations, as well as the beginning of the Cold War. The period also witnessed a strive for recognizing human rights and the establishment of the United Nations Organization (UN) so as to establish peace and security across the globe. But the effort to achieve peace was retarded by mounting tensions between nations due to the arms race and the Cold War politics. It was during this time that the concept of globalization gained relevance.

Globalization is the process of integrating the local economies and societies with the global ones. Together with computerization, technological and transportation advancement, the process has increased interdependence and connectedness between people and nations. By the end of the 1970s, international human rights law matured and major human rights treaties were concluded; Concurrently the concept of "complex interdependence[1]" emerged in international relations, which propounded that "states and their fortunes are inextricably tied together". This means that the recognition of human rights and the interdependence between nations as promoted by globalization has reduced the probability of war between States. Undoubtedly globalization has played a key role in establishing peace across the globe but behind its veil transnational crime has been breeding.

II. The Globalization of Crime

Traditionally, crime is regarded as a wrong done against the State, and the State reserves the right to prosecute the offender following the penal law in force in that jurisdiction. Territorial jurisdiction, i.e. the place of commission of a crime determines the right of the State to initiate prosecution and the competence of the court to try the offence. Until the early 1970s, the concept of territorial jurisdiction was well defined. With the advent of the World Wide Web which also gave birth to the dark web and allied cyber offences as well as the concurrently growing connectedness between people, the shadow economy and transnational crime bred. The advancement of globalization undoubtedly fed the globalization of crime or transnational crime, which has weakened the concept of boundaries and territorial jurisdiction. For this reason, globalization is a shield cum sword.

According to Art. 2(a) of the United Nations Convention on Transnational Organized Crime (UNTOC),[2] transnational crime mostly involves perpetration by an intentionally formed organized group that consists of three or more persons who act in concert to commit a crime punishable by at least four years in order to obtain monetary or other material benefits. The element of trans-nationality is satisfied if the stages or consequence of such crime have effects across national borders. Human, firearms, and drug trafficking, money laundering and cybercrime transcending national boundaries are examples of transnational organized crime.

III. Challenges Posed by Transnational Crime

Due to the transnational nature of this type of crime, the major challenge is first to identify the "organized group" as it is largely invisible. Such groups largely breed on the territories of countries with weak law enforcement systems or in those areas of a national territory where the State do not have effective control. Second, this makes it equally difficult to identify and trace their victims, as they may be displaced to any part of the world. For instance, in the case of human trafficking, the victims are illegally transported from one country to another for sexual slavery, forced labour etc. The third challenge is the limitation to conducting an investigation, the collection of evidence, the extradition of offenders, and legal complexities in initiating

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prosecution. The different legal traditions, language barriers, lack of co-ordination and co-operation between States as well as disputes over determining jurisdiction are the fourth challenge and last but not the least, the victims of transnational crime are deprived of access to justice.

IV. The Legal Approach to Transnational Crime

The above-mentioned barriers can be crossed by strengthening the international co-operation to combat transnational crime through mutual legal assistance, extradition, transfer of criminal proceedings, and transfer of sentenced persons. These legal arrangements between countries reinforce the need for a globalization of law-enforcement efforts to counter the globalization of crime. The international legal instrument to counter organized crime is the UN Convention against Transnational Organized Crime supplemented by the Palermo protocols which have been signed by 147 countries. The high number of signatories is evidence that the world nations of the world recognize the need to eliminate transnational organized crime as a collective responsibility.

V. The Human Rights-Based Approach to Transnational Crime

The limitation of the legal approach to counter transnational crime is that it establishes a mechanism that comes to action after transnational crime has been committed. It has limited possibilities to eradicate it. Also, the efficiency of the UNTOC depends on the ability of the States to implement its rules at the regional level. But the human rights-based approach, which calls for the universalization of human rights, is an effective tool to eradicate this global menace because any form of transnational crime is a violation of core human rights, which are universal, inalienable and non-derogable. This enables the victims to seek protection irrespective of the local jurisdiction. Furthermore, the Convention on organized crime and the international human rights laws are interdependent. For instance, Art. 25 of the UNTOC obliges the State parties to protect victims and provide appropriate measures to safeguard their rights, and Art. 2 of the International Covenant on Civil and Political Rights recognizes the right to effective remedy of the victims whose rights or freedoms recognized therein have been violated. This interdependence reinforces the need for a human rights-based approach to transnational crime.

VI. Attaching State Responsibility to Transnational Crime

Another issue to deal with is the role of the State in preventing transnational crime and associated human rights violations. Due to its transnational nature, planning and preparation may be conducted in one State, whereas the commission or consequence occurs in another State. The question is: can the State be held responsible for non-state actors committing a transnational crime? *Prima facie*, the answer is “no” because transnational crime is perpetrated by private agents and is purely a private act, although has a transnational effect. The State's responsibility cannot be invoked when we approach it from a strictly legal perspective. On the other hand, invoking the human rights-based approach would sustain the argument of State responsibility in transnational crimes. These violate core human rights, which are *jus cogens* and cannot be derogated. Thus the State is bound to take reasonable measures to prevent the violation of core human rights. Necessarily, State is bound to adopt measures to regulate private conduct causing transnational crime. This does not mean that it can be directly held responsible for all transnational crimes committed by non-State actors. The State’s responsibility is attracted only when it has omitted to adopt “reasonable measures” to prevent

transnational crime, such as co-operation with other States in investigating, prosecuting, and punishing the offenders. The application of State responsibility would become more relevant once the international instrument on the "Responsibility of States for the Internationally Wrongful Acts" comes into force.[3] The draft Art. 1 of the instrument regards an "act or omission of the State breaching an international obligation of the State as an internationally wrongful act of the State." In the context of transnational crime, this means that the failure of the State to adopt reasonable measures to prevent a transnational crime which causes a human rights violation would be regarded as an international crime in itself even though it is perpetrated by a non-State actor.

VII. Conclusion: the Need of the Hour

Transnational crime violates core human rights with a *jus cogens* status, and hence the offence of transnational crime is a *jus cogens* crime. The international law regime provides that a *jus cogens* crime can be prosecuted and punished by any States because "offenders are the common enemies of mankind and all nations have equal interest in their apprehension and prosecution."[4] In order to deal with crimes of globalization, building a global response is essential. Furthermore, strengthening the human rights regime and applying State responsibility to transnational crime would eventually eradicate this global menace.

1. Keohane Robert and Nye Joseph, Power and interdependence: World politics in transition, 1977.↩
2. <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>.↩
3. <https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf>. The draft instrument recognizes the principle of State responsibility and holds the State accountable for the internationally wrongful acts or omissions arising out of breach of international obligation of the State.↩
4. International Court of Justice in the matter of Demjanjuk v. Petrovsky (1985) 603F Supp. 1468;776F.2d.571.↩

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