

Analysis Of The Limits Of Criminalization Of New International Crimes Based On International Law

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Abstract: *The development of globalization and technological advances has given birth to various new forms of crime that are transnational in nature and have the potential to threaten the interests of the international community. This condition has given rise to a debate about the limits of criminalization of an act as an international crime based on international law. This study aims to analyze the limits of criminalization of new international crimes based on the principles of international law and identify the legal parameters that must be met in order for an act to be categorized as an international crime. This study uses normative legal research methods with a statutory approach, a conceptual approach, and a case approach. Legal materials are obtained through literature studies which include international regulations, conventions, the 1998 Rome Statute, books, scientific journals, and other relevant legal documents. The results of the study show that an act cannot be categorized as an international crime just because it has a broad impact or is cross-country. Criminalization must be based on the principle of legality (nullum crimen sine lege), recognition through international treaties or customary international law, protection of the fundamental interests of the international community, and the existence of individual criminal responsibility. New forms of crime, such as ecocide, cybercrime, and the abuse of artificial intelligence, still face juridical and political challenges to gain recognition as international crimes. Therefore, it is necessary to develop international criminal law that is adaptive, but still guided by the principles of legal certainty, respect for state sovereignty, and the protection of human rights.*

Keywords: *International Crime; Criminalization; International Law; International Criminal Law; Principles of Legality.*

INTRODUCTION

The development of globalization, the advancement of information technology, and the increase in interaction between countries have brought significant changes to the development of international law. On the one hand, globalization has a positive impact in the form of ease of cooperation in the fields of economy, trade, investment, and communication. However, on the other hand, these developments have also given birth to various new forms of crime that have a

cross-border character (*transnational*) and even potentially threaten the interests of the international community as a whole. This phenomenon shows that the development of crime takes place much faster than the development of international legal instruments, thus raising challenges in determining whether a new form of crime deserves to be categorized as an international crime or is still within the scope of national criminal law.¹

International criminal law basically recognizes four categories core international crimes, namely genocide, crimes against humanity, war crimes, and crimes of aggression as regulated in Statuta Roma 1998. These four types of crimes have gained international recognition because they are considered the most serious violations of peace, security, and human dignity. However, the development of the international community today shows the emergence of various new threats, such as Ecocide, cybercrime (*cybercrime*), abuse of artificial intelligence (*artificial intelligence*), to the exploitation of digital technology that has a wide impact on global stability. This development has raised a debate about the limits of criminalization of an act as an international crime based on the principles of applicable international law.²

The problem becomes increasingly complex because international law does not provide a universal definition of the parameters within which an act can be categorized as an international crime. In contrast to national criminal law whose formation is carried out by the legislative institution of a country, the establishment of international criminal norms depends on the agreement of the international community through international agreements, international customary law, general principles of law, and the development of international judicial practice. As a result, the process of criminalizing new forms of crime often faces obstacles in the form of differences in political interests between countries, respect for the principle of state sovereignty, and the application of the principle of legality (*Nullum Crimen's doctors*).³

In addition, the growing global threat also raises demands for international law to be able to adapt to various forms of contemporary crime. Various proposals have been put forward to expand the international crime category, one of which is through the recognition of Ecocide as the fifth international crime in the Rome Statute. Similarly, cyberattacks on vital infrastructure and the misuse of artificial intelligence technology are beginning to be seen as threats that have the potential to disrupt international security. However, until now there has been no international consensus on the elements of criminal acts or criminal accountability mechanisms for these various forms of crime. Therefore, a comprehensive study is needed on the limits of the criminalization of

¹ Antonio Cassese, *Cassese's International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2013), hlm. 3–18

² Rome Statute of the International Criminal Court 1998, Pasal 5–8 bis; Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge: Cambridge University Press, 2018), hlm. 15–30.

³ James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford: Oxford University Press, 2019), hlm. 20–41.

new international crimes so that the development of international criminal law continues to uphold legal certainty and the protection of human rights.⁴

Based on this description, this study aims to analyze the limits of criminalization of new international crimes based on the principles of international law. The analysis focuses on the relationship between the principles of legality, the sources of international law, the protection of the fundamental interests of the international community, and the concept of individual criminal responsibility as a parameter in determining whether a new form of crime deserves to be categorized as an international crime. This research is expected to make an academic contribution to the development of international criminal law, especially in facing the challenges of global crime that continue to develop along with technological advances and changes in the dynamics of international relations.⁵

METHODOLOGY

This research is a Normative Legal Research which aims to analyze the limits of the criminalization of new international crimes based on the principles of international law. The approach used includes Statute Approach, Conceptual approach, and Case Approach. The legal materials used consist of primary, secondary, and tertiary legal materials obtained through Library Research, including international regulations, conventions, the 1998 Rome Statute, books, scientific journals, and other relevant legal documents. All legal materials are analyzed in a systematic manner Qualitative by the Prescriptive analysis to obtain legal arguments regarding the limits of the criminalization of new international crimes based on international law.

RESULTS AND DISCUSSION

A. Concepts and Characteristics of International Crimes in International Law

International criminal law is a branch of international law that developed in response to the need of the international community to provide protection for fundamental values that can no longer be guaranteed only through national law. The development of relations between countries, globalization, technological advances, and the increasing intensity of armed conflicts have shown that there are various forms of violations whose impact goes beyond the limits of a country's jurisdiction. Under such conditions, international law no longer only regulates state-oriented relations, but also begins to place individuals as legal subjects who can be held criminally directly liable for violations that are considered to threaten peace, security, and humanity.⁶

The concept of individual criminal responsibility gained real recognition through the International Military Tribunal in Nuremberg after the end of World War II. The tribunal's ruling affirmed that individuals who commit crimes under international law cannot take refuge behind official positions or

⁴ Suwita Hani Randhawa, "International Criminalization and the Historical Emergence of International Crimes," *International Theory*, Vol. 14, No. 3 (2022): 460–502.

⁵ Leila Nadya Sadat, "Crimes Against Humanity in the Modern Age," *American Journal of International Law*, Vol. 107, No. 2 (2013): 334–377.

⁶ Antonio Cassese, *Cassese's International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2013), hlm. 3–15.

reasons for carrying out orders of superiors. This principle is an important milestone in the development of international criminal law because it shifts the paradigm that only the state can be held accountable in international law. Since then, individuals have been seen as subjects of international law who have both rights and obligations to comply with international norms.⁷

This development was further strengthened through the establishment of various international criminal tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which succeeded in developing various principles of international criminal law, including the elements of international crime, forms of criminal responsibility, and evidentiary standards in international cases. The experience of the two tribunals subsequently became an important foundation in the drafting of the 1998 Rome Statute which established the International Criminal Court (ICC). The presence of the ICC shows the commitment of the international community to establish a permanent mechanism to crack down on the most serious international criminals.⁸

Conceptually, international crimes are acts that qualify as violations of the fundamental interests of the international community. These crimes not only cause harm to individual victims, but also threaten universal values such as world peace, international security, respect for human rights, and human dignity. Therefore, international crimes are seen as a concern of the international community as a whole so that all countries have an interest in preventing, taking action, and prosecuting the perpetrators in accordance with the principles of international law.⁹

In its development, the Rome Statute of 1998 recognized four categories core international crimes, namely genocide, crimes against humanity, war crimes, and crime of aggression. The four types of crimes were chosen because they have a very high level of seriousness and pose a direct threat to international peace and security. The regulation also shows that international criminal law adheres to a very selective approach in determining an act as an international crime so that not all violations of the law can be included in the jurisdiction of the International Criminal Court.¹⁰

The main characteristic of international crime lies in the violation of fundamental international legal norms. Most international crimes are closely related to the norm *jus cogens*, which is a norm that is accepted and recognized by the international community as a norm that cannot be overruled (non-derogable). The prohibition against genocide, torture, slavery, and aggression is an example of the norm of *jus cogens* that binds the entire country without the need for special consent. Violations of these norms not only give rise to state liability, but also give rise to individual criminal liability under international law.¹¹

⁷ Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge: Cambridge University Press, 2018), hlm. 21–35.

⁸ Alexandre Skander Galand, "The Nature of the Rome Statute of the International Criminal Court," *Journal of International Criminal Justice* 17, No. 5 (2019): 933–956.

⁹ Leila Nadya Sadat, "Crimes Against Humanity in the Modern Age," *American Journal of International Law* 107, No. 2 (2013): 334–377.

¹⁰ Rome Statute of the International Criminal Court 1998, Articles 5–8 bis.

¹¹ Francisco Lobo, "Here Be Dragons: Mapping the Legal Contours of *Jus Cogens* in International Law," *Groningen Journal of International Law* 10, No. 2 (2024): 72–90.

In addition to being related to the norm of *jus cogens*, an international crime must also obtain legitimacy through international legal sources as stipulated in Article 38 paragraph (1) of the Statute of the International Court. This recognition can be formed through international treaties, customary international law, and general principles of law. Thus, the establishment of an international crime category cannot be carried out unilaterally by a country, but must be supported by the consensus of the international community through the mechanism of establishing legitimate international law.¹²

It is necessary to make a clear distinction between international crimes and transnational crimes. Transnational crime is a criminal act that has cross-border elements, such as human trafficking, narcotics smuggling, money laundering, illegal arms trafficking, and cybercrime. Although these crimes have international repercussions, their enforcement remains within the jurisdiction of the state under national criminal law. International law in this context only functions as an instrument of coordination through extradition cooperation, mutual legal assistance, and harmonization of national regulations. Therefore, not all transnational crimes can be categorized as international crimes in the sense of international criminal law.¹³

Another characteristic that distinguishes international crime is the presence of Individual **Criminal Responsibility**. This principle emphasizes that perpetrators can be held directly accountable under international law without relying on state accountability. Consequently, the elements of the criminal act must be clearly formulated in order to meet the principle of legality (*Nullum Crimen's doctors*). This clarity is the main requirement to ensure legal certainty, prevent arbitrary criminalization, and provide protection for the rights of defendants in the international judicial process.¹⁴

On the other hand, the development of globalization has given rise to various new forms of threats such as Ecocide, cyber attacks on vital infrastructure, abuse of artificial intelligence, and the exploitation of digital technology to commit crimes with global impacts. Although these forms of crime cause enormous losses, their recognition as an international crime still faces a variety of normative challenges. Until now, there has been no international consensus on the elements of criminal acts, forms of criminal responsibility, and law enforcement mechanisms. Therefore, its development must remain guided by the principles of legality, legal certainty, and norm formation mechanisms in international law so as not to cause uncertainty in its application.¹⁵

Thus, the concept of international crime is not solely determined by the extent of the impact of an act, but also by the existence of international legal norms that govern it, the recognition of the international community, the protection of the fundamental interests of humanity, and the existence of individual criminal accountability mechanisms. These characteristics are the conceptual boundaries that distinguish

¹² James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford: Oxford University Press, 2019), hlm. 20–35.

¹³ Douglas Guilfoyle, "Transnational Crimes," dalam *The Oxford Handbook of International Criminal Law*, ed. Kevin Jon Heller et al. (Oxford: Oxford University Press, 2020), hlm. 715–734.

¹⁴ Luise K. Müller, "International Crimes and the Right to Punish," *Ratio Juris* 32, No. 3 (2019): 301–319.

¹⁵ Agis Ardiansyah and Akbar Aprilia Ardiansyah, "International Criminal Court Jurisdiction of Environmental Crimes," *Perspectives* 29, No. 2 (2024): 82–88.

international crime from other forms of transnational crime, as well as the basis for assessing whether a new form of crime deserves to be criminalized as part of the development of international criminal law.

B. Limits on the Criminalization of New International Crimes Based on International Law

The development of globalization, the advancement of information technology, and the increase in relations between countries have given birth to various new forms of crime that were previously unknown in international criminal law. Crimes such as Ecocide, cyberattacks on vital infrastructure, abuse of artificial intelligence (*artificial intelligence*), and the exploitation of digital technology to commit human rights violations have raised demands for international law to be able to provide more effective protection for the interests of the international community. Nevertheless, not every form of global threat can be automatically categorized as an international crime. International law sets normative boundaries that must be met in order for an act to be recognized as a international crimes, so that the criminalization process is not carried out arbitrarily or solely based on international political pressure.¹⁶

The first principle that is the main limit of the criminalization of new international crimes is *asas legalitas* (*nullum crimen sine lege*). This principle means that a person cannot be convicted of an act if at the time the act is committed, there is no legal provision that clearly regulates and qualifies it as a criminal act. In international criminal law, the principle of legality has a very important position because it functions to provide legal certainty, protect human rights, and prevent the retroactive application of criminal law. Recognition of this principle is explicitly stated in Article 22 of the Rome Statute of 1998 which affirms that the International Criminal Court is only authorized to prosecute crimes that have been clearly formulated in the Statute. Therefore, the development of various new forms of crime is not enough to be a basis for the International Criminal Court to exercise its jurisdiction if there is no basis for international law to govern it.¹⁷

In addition to the principle of legality, the criminalization process must also be based on Sources of international law as stipulated in Article 38 paragraph (1) of the Statute of the International Court. The provision places international agreements (*international treaties*), international customary law (*customary international law*), and general principles of law (*general principles of law*) as the basis for the establishment of international legal norms. Thus, recognition of a new international crime is not enough only through political declarations or resolutions of international organizations, but must gain legitimacy through the mechanism of establishing legitimate international law. The existence of this legal basis is an important requirement for criminalization to have juridical legitimacy while gaining acceptance from the international community.¹⁸

In practice, most categories of international crimes are born through a lengthy process and involve the agreement of states. Genocide, for example, gained recognition through Convention on the Prevention and Punishment of the Crime of Genocide 1948, while war crimes developed through the Geneva

¹⁶ Suwita Hani Randhawa, *International Criminalization and the Historical Emergence of International Crimes*, *International Theory*, Vol. 14, No. 3 (2022), hlm. 460–502.

¹⁷ Rome Statute of the International Criminal Court 1998, Pasal 22; Rodrigo Lledó, "The Principle of Legality in International Criminal Law," *EUNOMÍA Revista en Cultura de la Legalidad*, No. 11 (2016), hlm. 246–263.

¹⁸ James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford: Oxford University Press, 2019), hlm. 20–41.

Conventions of 1949 and its Additional Protocols. Likewise, crimes against humanity and crimes of aggression were later codified in the Rome Statute of 1998. These developments show that criminalization in international law is not an instant process, but rather requires the gradual establishment of norms through state practices and international consensus.¹⁹

The next limit is the presence of State Practice and *opinio juris* as an element that forms international customary law. Not all behavior that is widely practiced by a state can develop into the norm of international law. It requires belief that the practice is carried out because of a legal obligation, not solely driven by political interests or administrative habits. Therefore, if the international community has not shown consistent practice or legal belief in a form of prohibition, it will be difficult to state that the prohibition has developed into a norm of international law that is binding on all countries²⁰.

In addition to having a clear legal basis, an international crime must also touch International Community Interests. Not all criminal acts that result in great losses can be categorized as international crimes. International law only grants such status to acts that threaten world peace, international security, the protection of human rights, and human dignity. Therefore, the main measure of criminalization is not only seen from the magnitude of economic losses and the number of victims, but also from the level of threat to the international legal order as a whole. This approach is the main differentiator between international crimes and ordinary crimes that are sufficiently resolved through the national legal system.²¹

Debate on Ecocide It is an example that shows the complexity of the process of criminalizing new international crimes. Proponents of the concept argue that the widespread and systematic environmental damage that results in long-term impacts on human life has met the characteristics of a threat to the international community. On the other hand, some countries still argue that there is no universal definition of the elements of ecocide, standards of proof, and forms of criminal liability. These differences of view show that the magnitude of the impact of an act is not enough to be the basis for criminalization if it is not supported by international legal norms that have obtained broad consensus.²²

Similar issues also arise in the arrangement International Cybercrime. Attacks on the power grid, hospitals, financial systems, nuclear facilities, and national defense infrastructure can result in enormous losses and even cause casualties. However, until now the international community has not reached an agreement on the boundaries between cybercrime as a national crime, transnational crime, or international crime that is within the jurisdiction of the International Criminal Court. Most international instruments still place cybercrime as a transnational crime whose settlement is carried out through cooperation between countries based on their respective national laws.²³

¹⁹ Antonio Cassese, *Cassese's International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2013), hlm. 93–124.

²⁰ James Crawford, *Brownlie's Principles of Public International Law*, hlm. 23–35.

²¹ Francisco Lobo, "Here Be Dragons: Mapping the Legal Contours of *Jus Cogens* in International Law," *Groningen Journal of International Law*, Vol. 10, No. 2 (2024), hlm. 72–90.

²² Agis Ardhiansyah and Akbar Aprilia Ardhiansyah, "International Criminal Court's Jurisdiction of Environmental Crimes," *Perspectives*, Vol. 29, No. 2 (2024), pp. 82–88.

²³ Marco Roscini, "Gravity in the Statute of the International Criminal Court and Cyber Conduct That Constitutes, Instigates or Facilitates International Crimes," *Criminal Law Forum*, Vol. 30, No. 3 (2019), hlm. 247–272.

Another important parameter is the presence of Individual Criminal Responsibility. One of the main characteristics of international crimes is that the perpetrators can be held directly accountable under international law without relying on state accountability. Therefore, the criminalization of a new form of crime must be accompanied by the formulation of the elements of the criminal act (*elements of crimes*) that are clear, so that it allows the application of the mechanism of proof and the imposition of criminal sanctions consistently. If these elements have not been formulated firmly, then criminalization has the potential to contradict the principle of legal certainty and open up opportunities for different interpretations by each country.²⁴

Thus, the limits of the criminalization of new international crimes are not only determined by technological developments and increasing global threats, but must meet the parameters of international law that have developed so far. The principle of legality, the existence of a clear basis for international law, the establishment of customary international law, the protection of the fundamental interests of the international community, and the existence of an individual criminal accountability mechanism are conditions that must be met before a form of crime can be recognized as a crime. international crimes. This approach is important to maintain a balance between the needs of the international community in dealing with new forms of crime with the principles of legal certainty, respect for state sovereignty, and the protection of human rights. Thus, the development of international criminal law must be carried out gradually, based on international consensus, and still based on the fundamental principles of international law in order to be able to respond to global challenges effectively and fairly.²⁵

CONCLUSIONS

Based on the results of the research, it can be concluded that the criminalization of new international crimes cannot be carried out just because an act has a broad impact or is transnational. An act can only be categorized as an international crime if it meets the parameters of international law, which is based on the principle of legality (*Nullum Crimen's doctors*), has a clear legal basis through international treaties and customary international law, protects the fundamental interests of the international community, and allows for the application of individual criminal liability. This parameter is the main differentiator between international crimes (*international crimes*) with transnational crimes (*transnational crimes*).

Technological developments and globalization have given birth to various new forms of threats, such as *ecocide*, cybercrime, and the abuse of artificial intelligence, which demand reforms in international criminal law. However, the recognition of these crimes as international crimes still requires the consensus of the international community and the establishment of clear legal norms in order to ensure legal certainty, respect for state sovereignty, and provide protection for human rights. Therefore, the development of international criminal law must be carried out gradually, adaptively, and based on the principles of international law that have been recognized.

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²⁴ Douglas Guilfoyle, "Transnational Crimes," dalam *The Oxford Handbook of International Criminal Law*, ed. Kevin Jon Heller et al. (Oxford: Oxford University Press, 2020), hlm. 715–734.

²⁵ Hendro Valence Luhulima, "The Identification and Validity of *Jus Cogens* Norms in International Law," *Justitia et Pax*, Vol. 34, No. 1 (2018).

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